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Death in a Pandemic: Funeral Practices and Industry Disruption

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ABSTRACT

The COVID-19 death toll is staggering and has impacted the funeral industry more than any other event in recent memory. Funeral service providers have been on the frontlines of this pandemic doing the work of the dead—transporting, storing, and disposing our dead. They have performed a critical service during uncertain times. Even before the COVID-19 pandemic, the funeral industry was beginning to adapt to the changing personal preferences about death care and increasing concerns about sustainability, technology, and cost. The COVID-19 pandemic has drawn attention to the changing norms and practices in American funerals and succession law and accelerated a shift toward digital funeral practices and digital testamentary instruments to meet the demands of a quarantined public.

This Article is the first to provide a comprehensive analysis of the impact of COVID-19 on funeral practices and the funeral industry. It explores how funeral practices have shifted and adapted to pressing events in the past, tracing how the system we know today is an outgrowth of practices developed during the Civil War and the twentieth-century transition from home care to hospitalized care. This Article argues that COVID-19 gives us an opportunity to reevaluate our practices, laws, and regulations concerning the work of the dead. It explores how death practices have evolved with the desires of each generation. Our current funeral and cemetery laws and regulations are built on outdated assumptions that most Americans want to be embalmed and buried. Many Americans today, however, want a more environmentally friendly and less expensive disposition and are using technology in unprecedented ways to dispose and memorialize loved ones. This Article proposes that the industry disruption caused by COVID-19 provides an opportunity for state and federal lawmakers to promote more sustainable burial practices while still maintaining individual choice in bodily disposition.

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INTRODUCTION

America has death on its mind. The year 2020 has been called the “deadliest year” in United States history.¹ Preliminary reports forecast that 2021 was even deadlier than 2020.² As of May 2022, more than one million COVID-19 deaths were reported in the United States.³ The 2020 death rate was higher than average.⁴ Although that increase is not solely attributable to COVID-19, COVID-19 is estimated to be the third leading cause of death in 2020 after heart disease and cancer.⁵ The death rate in 2020 was higher for nearly every age group.⁶ Data shows that more than 3.384 million Americans died in 2020,⁷ and that the age-adjusted death rate increased by 15.9 percent in 2020.⁸ After two years of living in a pandemic world—shutting down, staying home, distancing, developing and administering vaccines—as of January 2022, hospitalization

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1. Adam Cancryn, *The Deadliest Year in U.S. History*, POLITICO (Mar. 11, 2021, 10:00 AM), <https://www.politico.com/newsletters/politico-pulse/2021/03/11/the-deadliest-year-in-us-history-793933> [<https://perma.cc/5N6L-HS64>].
 2. See Mike Stobbe, *2021 Likely to Eclipse Last Year as Nation’s Deadliest*, CDC SAYS, PBS NEWS HOUR (Dec. 22, 2021, 10:31 AM), <https://www.pbs.org/newshour/health/2021-likely-to-eclipse-last-year-as-nations-deadliest-cdc-says> [<https://perma.cc/DDW2-EKXW>].
 3. See Centers for Disease Control and Prevention, *Trends in Number of Covid-19 Cases and Deaths in the US Reported To the CDC, by State/Territory*, https://covid.cdc.gov/covid-data-tracker/#trends_totaldeaths [<https://perma.cc/G77K-GYHP>].
 4. See Denise Lu, *How Covid Upended a Century of Patterns in U.S. Deaths*, N.Y. TIMES (Apr. 23, 2021), <https://www.nytimes.com/interactive/2021/04/23/us/covid-19-death-toll.html?smid=nytcore-ios-share> [<https://perma.cc/YT5M-JYJV>].
 5. See Denise Lu, *2020 Was Especially Deadly. Covid Wasn’t the Only Culprit*, N.Y. TIMES (Dec. 13, 2020), <https://www.nytimes.com/interactive/2020/12/13/us/deaths-covid-other-causes.html> [<https://perma.cc/YY5F-6XJS>]; *2020 US Death Statistics Show 20% More Deaths than in 2019*, USA FACTS (Dec. 15, 2020, 11:45 AM), <https://usafacts.org/articles/preliminary-us-death-statistics-more-deaths-in-2020-than-2019-coronavirus-age-flu/> [<https://perma.cc/3HU3-XXAG>].
 6. Interestingly, the average death rate for people under twenty-five was lower than average. The leading cause of death for people under age twenty-five is accidents, which may have been reduced in the lockdown. USA FACTS, *supra* note 5.
 7. See Stobbe, *supra* note 2; USA FACTS, *supra* note 5. Preliminary U.S. death statistics show over 3.1 million total deaths in 2020—at least twelve percent more deaths than in 2019. USA FACTS, *supra* note 5.
 8. See Farida B. Ahmad, Jodi A. Cisewski, Arialdi Miniño & Dr. Robert N. Anderson, *Provisional Mortality Data—United States, 2020*, CTRS. DISEASE CONTROL & PREVENTION (Apr. 9, 2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7014e1.htm?s_cid=mm7014e1_x. [<https://perma.cc/79BY-VELX>].

rates were at an all-time high,⁹ with the United States averaging 750,000 new cases every day.¹⁰

COVID-19 is causing us all to consider our mortality in these deadly years of United States history and has the potential to reshape our funeral practices and regulations. The increased death rate tells one tragic part of the pandemic death story in America and around the world. Consider, for instance, the increase in the work required to properly dispose of the dead in the midst of a pandemic. Broadcasted images of caskets and convoys of trucks carrying caskets reveal that the immediate problem of disposing bodily remains of COVID-19 victims is just as much a part of dealing with the crisis of the pandemic as treating patients and containing spread.¹¹ Such an onslaught of death has reminded Americans of the labor that goes into caring for the dead—including transporting, storing, mourning, and burying or cremating. The funeral industry, like many industries during the pandemic, has been disrupted and has begun to adapt.

Concerns about modern disposition of bodily remains has been at the forefront of succession law and the COVID-19 pandemic has brought these issues into sharp relief during the past two years. Technology and sustainability concerns are challenging and disrupting our traditional notions of burial in America. Although burial has long been the norm in the United States, Americans are now interested in other ways to dispose of the bodies of their loved ones.

Part I of this Article considers the history of disposition of bodies in America. Burial customs are and have always been cultural expressions of love, loss, grief, and faith. American burial has been influenced by ancient Roman and English customs but has also taken its own path and developed its own common law. Part I traces how the rituals of death have changed over time and how specific events have the capacity to significantly change the funeral industry. Although the

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9. See Will Stone & Carrie Feibel, *U.S. Covid Hospitalizations Hit New Record High, Raising Risks for Patients*, NPR (Jan. 11, 2022, 8:35 AM), <https://www.npr.org/sections/health-shots/2022/01/11/1071568846/u-s-covid-hospitalizations-hit-new-record-high-raising-risks-for-patients> [https://perma.cc/4EBE-G88E].
 10. See Robert Hart, *U.S. Reports Record 1.48 Million New Covid Cases As Hospitalizations Near All Time High*, FORBES (Jan. 11 2022, 7:13 AM), <https://www.forbes.com/sites/roberthart/2022/01/11/us-reports-record-148-million-new-covid-cases-as-hospitalizations-near-all-time-high/?sh=50d200a036c7> [https://perma.cc/6L9K-G9BW].
 11. See Sofia Bettiza, *Coronavirus: How Covid-19 is Denying Dignity to the Dead in Italy*, BBC (Mar. 25, 2020), <https://www.bbc.com/news/health-52031539> [https://perma.cc/2NXU-ST22]; Jonathan Blitzer, *The Body Collectors of the Coronavirus Pandemic*, NEW YORKER (Apr. 22, 2020), <https://www.newyorker.com/news/our-local-correspondents/the-body-collectors-of-the-coronavirus-pandemic> [https://perma.cc/7RY3-LCGA].

funeral industry has a strong influence on burial practices in America, Americans' tastes in burial practices have shifted in recent years. While developing technology and concerns about sustainability are already influencing the funeral industry, the COVID-19 pandemic has expedited such change to meet the urgent demands of a quarantined public.

Part II considers the specific laws and practices that have been implemented to deal with pandemics and discusses how pandemics have previously shaped the funeral industry. Part II also explores how COVID-19 has impacted the funeral industry over the short-term and how reforms might last long-term. Part II then discusses how the pandemic has brought into sharp relief an area of succession law that has long been criticized—the rigid formality of requiring attestation and physical presence by two or more witnesses in order to have a valid will. While cases challenging public health emergency orders to limit funerals and other religious gatherings have sprung up throughout the nation,¹² the legal challenges have largely been dismissed and the funeral industry has adapted to increased temporary regulation. Some states have even enacted interim emergency provisions to allow more flexibility in the presence requirement for a validly attested will, pushing forward the movement of widespread allowance of electronic wills.

Part III addresses how the regulations regarding death need to be changed to promote choice and transparency while simultaneously encouraging sustainable methods of disposition. State probate codes and other regulations should also contribute to encouraging sustainable burial practices, both in the sense of economic sustainability and environmental sustainability. State laws regarding burial should always balance health and safety concerns with an individual's intent as to how her body should be disposed but should refrain from requiring certain traditional disposition methods. Federal and state governments could contribute to incentivizing more sustainable options with some form of tax credit to the estate if a certain method was chosen to incentivize sustainable options.

Part IV discusses how succession law is well placed to play a pivotal role in enabling individuals to decide how their bodies should be disposed. Estate attorneys should include bodily disposition plans in every will or other estate planning documents. Following traditional principles in succession law, a decedent's intent regarding bodily remains should be honored just as intent

12. See *Antietam Battlefield KOA v. Hogan*, 461 F. Supp. 3d 214 (D. Md. 2020) (plaintiff challenging Maryland's governor's Executive Order limiting gatherings of more than ten people for funerals or weddings); *Luke's Catering Service, LLC v. Cuomo*, 485 F. Supp. 3d 369 (W.D.N.Y. 2020); *DiMartile v. Cuomo*, 478 F. Supp. 3d 372 (N.D.N.Y. 2020); *Cassell v. Snyders*, 458 F. Supp. 3d 981 (N.D. Ill. 2020); *Cross Culture Christian Ctr. v. Newsom*, 445 F. Supp. 3d 758 (E.D. Cal. 2020).

controls the disposition of personal and real property. As the pandemic has shown us, however, personal choice cannot always be honored if there are compelling state interests or public health emergencies that dictate a different response.

In the last 150 years, American burial practices have drastically changed, and the regulations that uphold an outmoded system of burial needs to be reconsidered. COVID-19 has presented a unique opportunity to reevaluate funeral practices and regulations. This Article examines where the succession law falls short and the principles that should guide future reform.

I. DISPOSITION OF BODIES IN AMERICA

The law of bodily disposition in America is derived from a variety of religious, cultural, and legal practices of England and the ancient world. This Part traces how American bodily disposition was influenced by the English system but took its own path and developed its own common law. As the rituals of death changed over time, the law adapted to account for how people wanted to dispose of bodies. As this Part explores, the current funeral industry developed from our concept of a good death in the 1800s. The Civil War and advancements in preservation of bodily remains created a uniquely American embalming ritual that is still part of many death traditions in America today. This Part describes how cremation gained favor as a cheaper alternative to embalming and is the preferred method of disposition today. Finally, this Part discusses how bodily disposition practices in America are ever-evolving, and COVID-19 is the latest force to spur substantial change in these practices and rituals as they relate to the culture of death in this country.

A. The Development of American Burial Common Law

The oldest known intentional burial site is in Israel, which dates back almost 100,000 years.¹³ Cremation was widely practiced in the ancient world as a way to dispose of bodies.¹⁴ Pre-Christian customs emphasized proper burial rites

13. See *Qafzeh: Oldest Intentional Burial*, SMITHSONIAN INST. (June 29, 2022) <https://humanorigins.si.edu/evidence/behavior/burial/qafzeh-oldest-intentional-burial> [https://perma.cc/2DZ9-UH5R]. The remains of fifteen homo sapiens were found in a cave and surrounded by personal tools.

14. See STEPHEN PROTHERO, *PURIFIED BY FIRE: A HISTORY OF CREMATION IN AMERICA* 5 (2001) (explaining that “[w]ith the notable exceptions of the Egyptians, the Chinese, and the Hebrews, cremation seems to have been the standard practice of the ancients”).

in order to aid the deceased in the afterlife.¹⁵ The Greeks and Romans designated a place apart from the living for the dead to be buried or cremated.¹⁶ Roman funerary rites included washing, anointing, dressing, and displaying the body for family and friends to see.¹⁷ A Roman funeral consisted of a procession, cremation, burial, eulogy, feast, and commemoration.¹⁸ Romans primarily cremated their dead from the formation of Rome to the mid-second century A.D., in which burial became more common.¹⁹ The introduction of Christianity into the Roman Empire contributed to the increase of burials as opposed to cremation, based on the Christian belief that bodies would be resurrected.²⁰ Christianity also reduced the segregation between the living and the dead as Christians preferred to bury their dead in or near churches, a practice that was formally approved in 813 A.D.²¹

From the time of William the Conqueror, English law recognized the Church of England as having jurisdiction over cadavers and burials.²² The Church of England, not the state, governed rules regarding human remains and ecclesiastical bodies heard disputes.²³ The Church owned burial grounds in fee simple.²⁴ Neither the deceased nor their family had any legal right to burial grounds at the Church; the Church saw itself as a trustee of human remains.²⁵ According to their beliefs, any Church member had a right to be buried on Church land, and their bodily remains would be held by the Church until the resurrection, where presumably the deceased parishioners would reclaim their bodies.²⁶ No fee was paid for burial in the churchyard.²⁷ The Church had control over burial until Parliament passed the Burial Acts of 1852, which

15. See PERCIVAL E. JACKSON, *THE LAW OF CADAVERS AND OF BURIAL AND BURIAL PLACES* 6 (2d ed. 1950); TANYA MARSH, *THE LAW OF HUMAN REMAINS* 4 (2016).

16. See MARSH, *supra* note 15, at 4.

17. See MARSH, *supra* note 15, at 4.

18. See Steven Fife, *The Roman Funeral*, in *WORLD HIST. ENCYCLOPEDIA* (Jan. 18, 2012), <https://www.worldhistory.org/article/96/the-roman-funeral> [<https://perma.cc/7T5K-L795>].

19. See *id.*

20. See MARSH, *supra* note 15.

21. See MARSH, *supra* note 15, at 5.

22. See JACKSON, *supra* note 15, at 22, (stating, “By an ordinance of William the Conqueror, the temporal and spiritual jurisdictions were severed and control of churchyards and burials was absorbed by the ecclesiastical authorities.”); MARSH, *supra* note 15, at 5.

23. See JACKSON, *supra* note 15, at 22.

24. See MARSH, *supra* note 15, at 5.

25. See MARSH, *supra* note 15, at 5.

26. See MARSH, *supra* note 15, at 5; JACKSON, *supra* note 15, at 27 (discussing how “[e]very person except the felon, the heretic, and the suicide was entitled to be buried in the consecrated ground of the Parish churchyard”).

27. See JACKSON, *supra* note 15, at 25.

granted heirs the right to bury deceased relatives in private or public cemeteries and enlisted private parties to protect bodily remains.²⁸

American burial practices were heavily influenced by English burial practices in the seventeenth century.²⁹ The United States adopted English common law, but the English common law did not control burials as this was the purview of ecclesiastical courts before the Burial Acts of 1852.³⁰ State courts refused to adopt ecclesiastical precedent and American common law developed to address disputes about human remains.³¹ One of the main sources of common law in America concerning bodily remains arose out of a New York case in the 1850s, in which a court ordered an attorney to provide a summary of the law of burial.³² The Ruggles Report, as it became known, has been widely cited in state courts and contains maxims of the law of burial and bodily disposition—which establishes that the right to bury a corpse belongs to the family of the decedent, absent testamentary intent, and rejects the notion that ecclesiastical courts have any control over bodily disposition.³³ Tanya Marsh eloquently explained the foundations of American common law concerning burial:

At its core, are the doctrines of English common and ecclesiastical law, as well as seventeenth and eighteenth century Protestant views of death and resurrection. American jurists often describe the principles of the common law in floral language that relied heavily on ‘universal sentiments,’ the Old Testament, and William Blackstone. At the same time, there is a strongly utilitarian flavor to the American law of human remains that is not as apparent in English law.³⁴

The English practice of free burials in churchyards did not transfer to America at first. Early colonists could not be buried in church burial grounds because they did not yet exist.³⁵ The tradition remained, however, when churches were established, many chose to be buried in their local churchyards.³⁶ Private, family, and public burying grounds, however, were more common in the United States than in England.³⁷ Even into the twentieth century, most Americans died at

28. See JACKSON, *supra* note 15, at 25.

29. See JACKSON, *supra* note 15, at 14.

30. See JACKSON, *supra* note 15, at 25.

31. See MARSH, *supra* note 15, at 5–6.

32. See MARSH, *supra* note 15, at 7.

33. See MARSH, *supra* note 15, at 7.

34. MARSH, *supra* note 15, at 8.

35. See MARSH, *supra* note 15, at 5.

36. See JACKSON, *supra* note 15, at 14.

37. See JACKSON, *supra* note 15, at 14.

home—fewer than fifteen percent of Americans died away from home.³⁸ In the eighteenth century, a good death occurred at home with family assembled around the deathbed to hear a dying person's last words, which were highly valued.³⁹ The task of caring for a corpse belonged to the families of the deceased,⁴⁰ who took on the responsibility of washing, dressing, and placing the body in a coffin, and burying it nearby.⁴¹ Death for respectable Americans was a domestic task best done at home.⁴² Those who died in the hospital were indigent and without family to care for them.⁴³

B. The Civil War and the Rise of Embalming

The American Civil War played a profound role in changing the culture of burial practices in America. Americans were distressed that for the first time, many young men were dying away from home and far from family and friends.⁴⁴ Deprived of the last words of their sons, fathers, husbands, and brothers, Americans on both sides of the battle mourned the loss of the rituals of death for their loved ones.⁴⁵ At the beginning of the War, the Union was determined to send every killed soldier home to their family and for those corpses that could not be transferred, both the Union and the Confederacy attempted to give fallen soldiers a traditional burial in a coffin.⁴⁶ As the number of deaths skyrocketed, it became impossible to send bodies home or give individual coffin burials, yet soldiers still expressed their distaste of putting a body directly in the earth.⁴⁷ Families were especially distraught at the lack of information about their kins' deaths. They started traveling to battlefields shortly after the conclusion of the battle to reclaim the bodies of loved ones and to be sure that their loved ones died and were not misidentified.⁴⁸ On the Confederate side, enslaved people were enlisted to search and return the bodies of Confederate officers.⁴⁹

38. See DREW GILPIN FAUST, *THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR*, 9 (2008).

39. See *id.* at 10.

40. See MARILYN YALOM, *THE AMERICAN RESTING PLACE*, 48 (2008).

41. *Id.* at 48.

42. See FAUST, *supra* note 38, at 9.

43. See FAUST, *supra* note 38, at 9.

44. See FAUST, *supra* note 38, at 9.

45. See FAUST, *supra* note 38, at 11.

46. See FAUST, *supra* note 38, at 77, 86.

47. See FAUST, *supra* note 38, at 77.

48. See FAUST, *supra* note 38, at 85.

49. See FAUST, *supra* note 38, at 90.

There was so much interest in returning fallen soldiers home that a business of transporting deceased soldiers was created.⁵⁰ Undertakers and private agents physically followed the armies and battles with the aim of profiting by helping families acquire the bodies of their loved ones after a battle.⁵¹ Coffins were innovated to serve as coolers and primitive forms of refrigeration to keep bodies from decaying before they arrived home.⁵²

The real change in the funeral industry, however, came from the development of embalming.⁵³ Embalming had been used to prepare bodies for scientific endeavors in the 1850s and had become more prevalent in the years immediately preceding the Civil War.⁵⁴ The War gave embalming a new purpose—to allow families to see the body of their loved one before burial in a restful state and recapture the culture of death rituals Americans had known before the War.⁵⁵ Embalming was a privilege of the wealthy and did not spread as quickly in the Confederacy.⁵⁶ A well-known embalmer in Washington, D.C. charged one hundred dollars for each embalming service,⁵⁷ and business boomed for embalmers after battles.⁵⁸

Embalming was not accepted by the public immediately. Many were uncomfortable with the process of injecting a body with chemicals, which seemed like a mutilation of the corpse.⁵⁹ Others were uncomfortable with the commodification of death, especially profiting off of dead soldiers in a war.⁶⁰ There are accounts of embalmers advertising their services by embalming and displaying the remains of unknown soldiers taken from the battlefield.⁶¹ Famously, Abraham Lincoln was embalmed after his assassination and his body was displayed in Washington, D.C., Baltimore, Harrisburg, Philadelphia, New York, Albany, Buffalo, Cleveland, Columbus, Indianapolis, and Chicago before reaching Springfield, Illinois, where he was ultimately buried.⁶² His funeral

50. See FAUST, *supra* note 38, at 89.

51. See FAUST, *supra* note 38, at 89.

52. See FAUST, *supra* note 38, at 92.

53. See FAUST, *supra* note 38, at 92.

54. See FAUST, *supra* note 38, at 92.

55. See FAUST, *supra* note 38, at 92–93.

56. See FAUST, *supra* note 38, at 94.

57. See FAUST, *supra* note 38, at 94.

58. See FAUST, *supra* note 38, at 95.

59. See MARSH, *supra* note 15, at 58; GARY LADERMAN, *REST IN PEACE: A CULTURAL HISTORY OF DEATH AND THE FUNERAL HOME IN TWENTIETH-CENTURY AMERICA* 6 (2003).

60. See FAUST, *supra* note 38, at 96.

61. See FAUST, *supra* note 38, at 95.

62. See FAUST, *supra* note 38, at 95.

procession was widely discussed and contributed to the eventual acceptance of embalming.⁶³

C. The Rise of the Funeral Industry

Funeral and cemetery industries in America emerged in the 1900s as death moved out of the home and into hospitals and private service industries that called themselves “funeral homes” to capture that sense of a good death at home.⁶⁴ The 1900s brought a shift in the cause of death in America.⁶⁵ As pandemics due to infectious diseases like dysentery, influenza, tuberculosis, and typhoid were controlled by vaccines, degenerative diseases, accidents, suicides, and homicides caused more deaths in America than ever before.⁶⁶ When individuals became sick, they no longer stayed at home attended by a town doctor. Instead, they went to the hospital where they were cared for by medical healthcare professionals.

Death occurred more often in hospitals than at home, and the extension of death care by the funeral industry instead of by the family was an organic development.⁶⁷ Embalming increased in popularity, allowing Americans more time to take a final look at the deceased before burial.⁶⁸ Embalming schools and programs opened in order to legitimize the profession and teach the skill of embalming techniques.⁶⁹ As Professor Gary Laderman explains:

Embalming was the lifeblood of the American funeral industry from the beginning of the twentieth century. Without this procedure, funeral directors would have had a difficult time claiming that they were part of a professional guild, and therefore justified as the primary mediators between the living and the dead from the moment of death to the final disposition. Their increasing authority over the corpse, and the simultaneous rise to dominance of the funeral home—a confusing space of business, religious activity, corpse-preparation, and family living—forever changed the social and cultural landscape of death in the United States.⁷⁰

63. See MARSH, *supra* note 15, at 58.

64. See LADERMAN, *supra* note 59, at 4, 8.

65. See LADERMAN, *supra* note 59, at 3.

66. See LADERMAN, *supra* note 59, at 3.

67. See LADERMAN, *supra* note 59, at 4, 8.

68. See LADERMAN, *supra* note 59, at 6.

69. See LADERMAN, *supra* note 59, at 7.

70. LADERMAN, *supra* note 59, at 8.

Embalming grew in popularity and became a uniquely American way of disposing of bodily remains.⁷¹ By World War II, the majority of Americans who died in urban areas were embalmed.⁷² Funeral homes took care of most of the logistics of death, and the funeral industry boomed.⁷³

Cremation also became a service offered and provided by the funeral industry. The first recorded cremation in America was of Baron De Palm in 1876.⁷⁴ A handful of cremations followed. By the turn of the century, twenty-four crematories existed in the nation and around 10,000 Americans had chosen to be cremated.⁷⁵ Facilities continued to increase in number in the early 1900s.⁷⁶ Private entrepreneurs ran their businesses without government regulation, but the number of Americans who chose cremation was still small.⁷⁷ At the end of World War II, only 3.7 percent of Americans chose to be cremated.⁷⁸ In the 1960s, cremation's popularity began to rise. The Roman Catholic Church no longer condemned cremation as a method of bodily disposition, despite its urging for members to continue to be buried.⁷⁹ A movement for simpler, cheaper burials encouraged people to consider cremation.⁸⁰ By the end of 1979, the cremation rate had increased to 9.4 percent.⁸¹ By 1999, twenty-five percent of Americans chose to be cremated.⁸² In 2015, the cremation rate surpassed the burial rate in America for the first time.⁸³ Today, the cremation rate is estimated to be 57.5 percent as well over half of Americans choose to be cremated rather than buried.⁸⁴ Cremation has been a tool for families to personalize death rituals and remember

71. See LADERMAN, *supra* note 59, at 815.

72. See MARSH, *supra* note 15, at 58.

73. See Gale B. Robinson, Jr., *Regulating Death: Occupational Licensing and Efficiency in the Deathcare Industry*, 29 LOY. CONSUMER L. REV. 343, 348–49 (2017).

74. See PROTHERO, *supra* note 14, at 15.

75. See PROTHERO, *supra* note 14, at 106.

76. See PROTHERO, *supra* note 14, at 106.

77. See PROTHERO, *supra* note 14, at 130.

78. See PROTHERO, *supra* note 14, at 163.

79. See PROTHERO, *supra* note 14, at 165.

80. See PROTHERO, *supra* note 14, at 166.

81. See PROTHERO, *supra* note 14, at 177.

82. See PROTHERO, *supra* note 14, at 189.

83. See National Funeral Directors Association, *2020 Cremation & Burial Projects Cremation Rate of 87% by 2040*, NFDA NEWS (July 6, 2020), <https://nfda.org/news/in-the-news/nfda-news/id/5223/2020-cremation-burial-projects-cremation-rate-of-87-by-2040> [<https://perma.cc/CY2V-8WVJ>].

84. See National Funeral Directors Association, *Statistics* (Apr. 15, 2022), <https://nfda.org/news/statistics> [<https://perma.cc/G5S4-5SGU>].

the dead by preserving their ashes in their home, burying them in their yard or in the favorite place of the deceased.⁸⁵

D. Regulation of the Funeral Industry

The funeral industry originally advocated for occupational licenses in order to advance their own professionalism and exclude rivals from the industry.⁸⁶ States considered laws to bolster the health and safety of the industry.⁸⁷ The chemicals used for embalming were (and remain) dangerous to the embalmers and the belief that embalmed bodies were more sanitary than un-embalmed bodies led to a push for regulation.⁸⁸ By 1900, twenty-five states had enacted legislation requiring occupational licenses by funeral directors or regulating health and safety concerns of embalming.⁸⁹

The funeral industry was unregulated as a federal matter until 1982, when the Federal Trade Commission (FTC) issued regulations to protect consumers of funeral services.⁹⁰ This regulatory framework was ushered in twenty years earlier when Jessica Mitford wrote a scathing report on the funeral industry called *The American Way of Death* in 1963. Her book reached the New York Times Best Seller list and reinforced the stereotype of smarmy funeral directors greedily profiting off the death of a loved one.⁹¹ The public became more concerned about the cost of bodily disposition, desired to protect consumers at such a vulnerable time, and wanted more information about alternative disposition arrangements to the traditional burial.⁹² In 1974, the FTC began investigating the funeral industry in response to public sentiment. Eight years later, the FTC issued regulations that went into effect in 1984.⁹³

The FTC regulations that went into effect in 1984 are the only federal regulations concerning the funeral industry and they have not been revised since. The main requirement on funeral homes is that they give customers an itemized price list upon request and avoid tacking on unwanted services or goods to the

85. See PROTHERO, *supra* note 14, at 12.

86. See Robinson, *supra* note 73, at 347.

87. See MARSH, *supra* note 15, at 69.

88. See Robinson, *supra* note 73, at 347–48.

89. See Robinson, *supra* note 73, at 347.

90. See Robinson, *supra* note 73, at 350.

91. See LADERMAN, *supra* note 59, at 99.

92. See LADERMAN, *supra* note 59, at 119.

93. See Robinson, *supra* note 73, at 350.

goods and services the customer wants.⁹⁴ This regulation is aiming to increase transparency in the process. The second focus of the regulation is to ensure that funeral directors do not misrepresent state law concerning embalming, caskets for direct cremation, burial containers, cemetery requirements, preservatives used to stave off decomposition, and cash advance purchases.⁹⁵ The FTC inspects funeral homes to ensure the homes are honoring federal law. Consumers are free to file complaints with the FTC against funeral homes that are not following the FTC regulations.

Most regulation concerning bodily disposition occurs at the state level. States regulate the availability of licenses for funeral directors, embalmers, and to operate funeral homes.⁹⁶ States also regulate the transportation of human remains, prepaid funeral contracts, and disposition requirements.⁹⁷ State common law or statutes protect against abuse of a corpse, disinterment, grave desecration, and possession of human remains.⁹⁸ Prepaid funeral contracts are growing in popularity, allowing individuals to pay ahead of time for the kind of disposition and ceremony they want.⁹⁹ Historically in America, caring for a dead body was an expression of love and care. Death was much more present in the everyday life of early Americans. In today's world, death has in large measure been institutionalized. As soon as an individual dies, someone calls a funeral home to whisk the body away to another location for storage and disposal. The traditional American funeral of a viewing of an embalmed body followed by burial has started to lose favor. More people choose to be cremated than buried.¹⁰⁰ Cremation can be significantly cheaper than burial, especially an embalmed burial. There seems to be a general trend of Americans wanting less expensive funerals. The COVID-19 pandemic may have quickened the pace of an acceptance of simpler, cheaper funerals. Death in America continues to evolve as diverse religious beliefs, technological developments, and environmental concerns reshape the market for the funeral industry. The next Part looks more specifically at how COVID-19 has

94. See 16 C.F.R. § 453.2(a) (stating that “it is an unfair or deceptive act or practice for a funeral provider to fail to furnish accurate price information disclosing the cost to the purchaser for each of the specific funeral goods and funeral services . . .”); 16 C.F.R. § 453.4 (further detailing unfair business practices for funeral service providers, as well as providing specific language for providers to ensure they comply with federal law).

95. See 16 C.F.R. § 453.3.

96. See MARSH, *supra* note 15, at 67–85 (listing state regulations).

97. See MARSH, *supra* note 15, at 67–85.

98. See MARSH, *supra* note 15, at 67–85.

99. See LADERMAN, *supra* note 59, at 184.

100. See Sunny Sone, *How to Die in Texas*, TEX. OBSERVER (Nov. 30, 2020, 9:05 AM), <https://www.texasobserver.org/funeral-industry-texas> [<https://perma.cc/9YF7-UPF2>].

impacted the funeral industry and explores how this could be a pivotal moment for reshaping the industry now and in the future.

II. COVID-19 DISRUPTIONS

COVID-19 has disrupted almost every industry in one way or another over the past two years and the funeral industry is no exception. This Part explores how pandemics have historically changed funeral practices, especially by promoting the popularity of cremations and increasing safety regulations. This Part then analyzes the particular impacts of COVID-19 on funerals, the work of the dead, and testamentary dispositions, and how these temporary adaptations have more potential to permanently change future practices for the better.

A. Pandemics and the Funeral Industry

Pandemics are part of human history. Although the legal questions and controversies surrounding COVID-19 seem relatively new, they are actually familiar issues that have been discussed and debated throughout our nation's history. During the outbreaks of yellow fever and cholera in the nineteenth century, New York officials quickly buried unclaimed corpses in local parks in an attempt to reduce contagion.¹⁰¹ During the 1918 flu pandemic, bodies were often buried in mass graves.¹⁰² Coffins and burial plots were in short supply. Gravediggers would dump corpses out of caskets into graves so the caskets could be used again.¹⁰³ Funerals were banned in many cities and services that went forward often required closed caskets.¹⁰⁴ In 1920 during a diphtheria outbreak, state officials in California directed the quarantine of individuals who had come into contact with an infected person.¹⁰⁵ The quarantined individual challenged the

101. See Vicki Daniel, *Mass Graves for Coronavirus Victims Shouldn't Come as a Shock—It's How the Poor Have Been Buried for Centuries*, CONVERSATION (Apr. 24, 2020, 8:22 AM), <https://theconversation.com/mass-graves-for-coronavirus-victims-shouldnt-come-as-a-shock-its-how-the-poor-have-been-buried-for-centuries-136655> [<https://perma.cc/QU55-WNLR>].

102. See *id.*

103. See Christopher Klein, *How America Struggled to Bury the Dead During the 1918 Flu Pandemic*, HIST. (Feb. 12, 2020), <https://www.history.com/news/spanish-flu-pandemic-dead> [<https://perma.cc/L8T5-DQF9>].

104. See *id.*; Simon Davis, *How Bodies Were Buried During History's Worst Epidemics*, VICE (Mar. 24, 2015), <https://www.vice.com/da/article/xd5ebw/a-history-of-burial-rituals-during-the-worlds-worst-epidemics-324> [<https://perma.cc/WXK7-DRDY>].

105. See *Ex Parte Culver*, 187 Cal. 437 (Cal. 1921).

regulation, and the court upheld broad state powers to order quarantine in situations involving contagious diseases.¹⁰⁶

Cremation was more popular during epidemics, especially in the nineteenth century. Medical experts thought cremation was necessary in order to cut off the disease from spreading.¹⁰⁷ In some cases, doctors believed that contagious diseases could live for years in the corpse.¹⁰⁸ The prevalent opinion among doctors at the turn of the century was that cremation was more sanitary and promoted public health.¹⁰⁹ During the cholera epidemic of 1892, Massachusetts was the first state to pass a law to permit cremations and two other states failed in their efforts to outlaw cremations.¹¹⁰

In more modern times, court cases were also brought against state regulations that required quarantine during the Ebola outbreak.¹¹¹ Courts upheld state quarantine measures. At the height of the AIDS epidemic, courts were confronted with issues such as whether the state could require individuals to undergo HIV testing,¹¹² prohibit prisoners with AIDS from receiving conjugal visits,¹¹³ or close a bathhouse to prevent the spread of the disease.¹¹⁴

The funeral industry changed in response to the AIDS pandemic as well. The fear of contracting the disease from the blood of the deceased caused many funeral homes to refuse embalming and viewing services for those who had died from AIDS.¹¹⁵ The industry encouraged cremations for AIDS victims.¹¹⁶ The funeral industry has been the subject of many regulations in times of pandemics. The AIDS epidemic in the 1980s led to more federal regulation.¹¹⁷ The Occupational Safety and Health Administration (OSHA) required employers to identify dangerous chemicals like formaldehyde and phenol that funeral homes

106. *See id.*

107. *See* PROTHERO, *supra* note 14, at 56.

108. *See* PROTHERO, *supra* note 14, at 56.

109. *See* PROTHERO, *supra* note 14, at 58.

110. *See* PROTHERO, *supra* note 14, at 106.

111. *See* Liberian Cmty. Ass'n of Conn. v. Lamont, 970 F.3d 174 (2d Cir. 2020); Hickox v. Christie, 205 F. Supp. 3d 579 (D. N.J. 2016).

112. *See* Anonymous Fireman v. City of Willoughby, 779 F. Supp. 402 (N.D. Ohio 1991); People v. Adams, 149 N.E. 2d 331 (Ill. 1992).

113. *See* Doe v. Coughlin, 518 N.E. 2d 536 (N.Y. 1987).

114. *See* City of N. Y. v. New St. Mark's Baths, 497 N.Y.S. 2d 979 (N.Y. Sup. Ct. 1986).

115. *See* LADERMAN, *supra* note 59, at 143.

116. *See* LADERMAN, *supra* note 59, at 143 (discussing how “[u]p until this historical moment, the vast majority of America’s funeral directors would rarely under any circumstances recommend cremation. The advent of AIDS, however, led to greater interaction between funeral homes and crematoria facilities in most metropolitan areas by the late 1980s.”).

117. *See* LADERMAN, *supra* note 59, at 140.

used in embalming, increase protections against contact with the blood and bodily fluids of the deceased, establish training programs about using these chemicals, and enact procedures to protect employees.¹¹⁸ Evidently, pandemics have a role in shaping the funeral industry in unexpected ways.

B. The Impact of COVID-19 on Funerals

In response to the COVID-19 pandemic, limitations on gatherings and viewings and restrictions on the treatment of the body after death have been widely adopted. These regulations, in hand with changing societal views, have caused a disruption to the funeral industry that may open the window for more sustainable and less expensive funeral practices in the future.

One of the early news stories about the spread of COVID-19 in the United States came from Albany, Georgia, where almost 200 mourners attended the funeral of a retired janitor who was one of ten siblings.¹¹⁹ After the funeral, twenty-four relatives were sick, including six of the decedent's siblings.¹²⁰ The sickness spread throughout the town and the county in Georgia became one of the early hotspots for COVID-19 transmissions.¹²¹ States responded by limiting the number of guests at a funeral service to try to curb infection in communities. In some states, funeral services were banned altogether, allowing only mortuary workers at the burial.¹²² In many jurisdictions, funeral services were limited to ten people.¹²³

118. See LADERMAN, *supra* note 59, at 141–42.

119. See Ellen Barry, *Days After a Funeral in a Georgia Town, Coronavirus 'Hit Like a Bomb'*, N.Y. TIMES, (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/us/coronavirus-funeral-albany-georgia.html> [<https://perma.cc/5QRV-4G2D>].

120. *See id.*

121. *See id.*

122. See Cheryl W. Thompson, *Funeral Homes Change Their Practices in Response To Coronavirus*, NPR (Mar. 20, 2020, 7:49 PM), <https://www.npr.org/2020/03/20/819356845/funeral-homes-change-their-practices-in-reponse-to-coronavirus> [<https://perma.cc/77FE-9WDY>].

123. See LA. DEP'T OF HEALTH, COVID-19: FUNERALS AND HANDLING OF BODIES (Apr. 1, 2020), https://ldh.la.gov/assets/oph/Coronavirus/resources/COVID-19_FuneralGuidance.pdf [<https://perma.cc/DWZ9-RBFC>] (ten people in Louisiana); OFF. OF THE DEL. GOVERNOR JOHN CARNEY, TWENTY-SEVENTH MODIFICATION: STATE OF EMERGENCY DECLARATION (Jan. 8, 2021), <https://governor.delaware.gov/health-soe/twenty-seventh-modification-state-of-emergency-declaration> [<https://perma.cc/84KY-KALM>] (limited to 50 percent of fire occupancy or twenty-five people); *Gov. Reynolds Signs New Proclamation Modifying Public Health Measures*, OFF. OF THE GOVERNOR OF IOWA (Jan. 7, 2021), <https://web.archive.org/web/20220717185319/https://governor.iowa.gov/press-release/gov->

Months into the pandemic, the funeral industry was forced to change in a variety of ways.¹²⁴ With states limiting gatherings, funerals were relegated to the virtual sphere. More than half of the National Funeral Directors Association affiliated funeral homes offered livestreamed services.¹²⁵ Some even became “drive by” funerals where participants could listen to the service in their cars on radio broadcasts.¹²⁶ A survey conducted in May of 2020 found that forty percent of consumers thought online live-streaming of funeral services would continue after the pandemic, and only twenty-six percent felt strongly that it was important to attend a funeral service in person during the pandemic.¹²⁷ Another surprising industry change spurred on by the pandemic is an increase in people that are preplanning funerals and paying for burying or cremation services ahead of their deaths. One cemetery found that purchase of their preplanning packages jumped from fifty percent to sixty-three percent in the early months of the pandemic.¹²⁸

Another interesting result of the coronavirus pandemic is that cremation rates increased.¹²⁹ More than half of funeral directors indicated they had seen a rise in cremation.¹³⁰ The 2020 projected burial rate by the National Funeral Directors Association is 37.5 percent and the projected cremation rate is fifty-six percent.¹³¹ Thus, more than half of Americans that die are now being cremated. When cremationists advocated for a different method of bodily disposition in 1874, they lauded it as a more sanitary and hygienic disposition than burial.¹³² Burial, they argued, did not protect the living from the death—it polluted the air and water with the diseased emissions from the body.¹³³ Cremation was the sanitary solution in

reynolds-signs-new-proclamation-modifying-public-health-measures-2

[<https://perma.cc/M2ME-VZ42>] (limited to ten people in Iowa).

124. See Jane Wells, *Coronavirus Pandemic Forces the Funeral Industry Online*, CNBC (May 27, 2020, 6:14 PM), <https://www.cnbc.com/2020/05/27/coronavirus-pandemic-forces-the-funeral-industry-online.html> [<https://perma.cc/V46S-WREL>].

125. See Nat’l Funeral Dirs. Ass’n, *The Future of Funerals: Covid-19 Restrictions Force Funeral Directors to Adapt, Propelling Profession Forward*, PR NEWSWIRE (July 7, 2020), <https://www.prnewswire.com/news-releases/the-future-of-funerals-covid-19-restrictions-force-funeral-directors-to-adapt-propelling-industry-forward-301089256.html> [<https://perma.cc/L4BZ-KLJ4>].

126. See Wells, *supra* note 124.

127. See Wells, *supra* note 124.

128. See Wells, *supra* note 124.

129. See Nat’l Funeral Dirs. Ass’n, *supra* note 125.

130. See Nat’l Funeral Dirs. Ass’n, *supra* note 125.

131. See Nat’l Funeral Dirs. Ass’n, *supra* note 125.

132. See PROTHERO, *supra* note 14, at 17.

133. See PROTHERO, *supra* note 14, at 17.

the face of disease and pandemics.¹³⁴ Similar thoughts may have led to an increase in cremations during the COVID-19 pandemic.

Increased cremations have also allowed families to delay memorialization events and gatherings until a time when it is safe to gather. Funeral workers have worked with families who have been able to plan a unique service for their loved ones.¹³⁵ More than half of the National Funeral Director Association funeral homes reported that families decided to postpone a service entirely because of the pandemic and hold the service at a later time.¹³⁶ Perhaps this time delay will also be a lasting change in the funeral industry as people take more time to plan their final goodbyes to their loved ones.

Despite more death and more work, the funeral industry has lost money during the pandemic.¹³⁷ Limits on gatherings ended big, expensive funerals. One of the largest United States providers of funerals, Service Corporation International, has seen a plunge in the company's stock price.¹³⁸ Without public mourning, the demand for viewings, floral displays, luxury caskets and urns, and land plots has greatly diminished. This might be the beginning of a disruption that has already taken hold of the younger generation who want simpler and more ecofriendly burials.

On the other hand, many grieving families were unhappy with the limitations placed upon them by the state and the funeral industry in the wake of COVID-19. Some brought unsuccessful lawsuits against the state's limitations on gathering as a violation of their Constitutional right to assemble.¹³⁹ Friends and extended family were often not allowed to attend a funeral, which made grieving families feel even more alone.¹⁴⁰ Families were upset that people could still shop, eat indoors, and go to the salon, but could not attend funerals or had to attend from a parking lot.¹⁴¹ Families struggled with the limitation of having only five to ten

134. See PROTHERO, *supra* note 14, at 17.

135. See Lisa De Bode, *Funerals Might Be Different Forever After the Pandemic*, VICE (June 16, 2020, 1:35 PM), <https://www.vice.com/en/article/889q75/how-we-manage-death-funerals-changing-fast> [<https://perma.cc/4A78-DFVG>].

136. See Nat'l Funeral Dirs. Ass'n, *supra* note 125.

137. See Jef Feeley, *Funeral Homes Thriving? Anything But*, BLOOMBERG NEWS (May 30, 2020, 1:57 AM), <https://www.arkansasonline.com/news/2020/may/30/funeral-homes-thriving-anything-but-fun> [<https://perma.cc/9N3F-B3RZ>].

138. See *id.*

139. See *Antietam Battlefield KOA v. Hogan*, 461 F. Supp. 3d 214 (D. Md. 2020).

140. See Ryan Faircloth, *Funeral Services, Family Grief Disrupted by COVID-19 in Minnesota*, STAR TRIBUNE (Mar. 31, 2020, 9:47 PM), <https://www.startribune.com/funeral-services-and-family-grief-disrupted-by-covid-19-in-minnesota/569225022> [<https://perma.cc/TL9J-4WEW>].

141. See Brady Wakayama, *Family of Fallen Veteran Frustrated with Funeral Guidelines Amid Pandemic*, KRQE (Jun. 15, 2020, 5:34 AM), <https://www.krqe.com/news/new->

people at outdoor ceremonies.¹⁴² In addition, regulations prohibited families from having traditional viewings and open casket services.¹⁴³ Funeral services remain a very intimate and personal family decision. While many people may seek a traditional funeral after COVID-19 regulations are lifted, it is important to recognize the changes in the funeral industry that were established during the pandemic, which will have enduring ramifications.

Already, nontraditional funerals have become more popular. In many circles, funerals are no longer a formal religious service but a personalized event to celebrate an individual's life. Families or decedents have asked guests to wear colorful clothing instead of traditional darker hues. Coffins have been decorated and happy music has been played as a celebration of life rather than just a grieving ceremony. One other development that is gaining attention is the ability for people to create a three-dimensional hologram recording their personal eulogy or last goodbyes to be played at their funeral.¹⁴⁴ The entertainment industry has already begun using holographic images in a variety of ways. It is just a matter of time before it becomes more affordable for Americans to create holographic recordings to be played at their funerals. It is likely that the digital imprint of funerals will continue with livestream options, holographic messages, and digital programs.

C. The Impact of COVID-19 on Disposing a Corpse

COVID-19 victims present unique challenges in caring for a corpse. Oftentimes, COVID-19 victims' bodies are much heavier due to edema and long periods of respirator use.¹⁴⁵ At the beginning of the pandemic, family members

mexico/family-of-fallen-veteran-frustrated-with-funeral-guidelines-amid-pandemic [https://perma.cc/MH2B-GZK9].

142. See *id.*; Linda Borg, 'People Can Shop at Target' but Grandchildren Can't Attend a Funeral?: Rhode Island Woman Battles COVID-19 Restrictions, USA TODAY (Dec. 3, 2020, 5:53 AM), <https://www.usatoday.com/story/news/nation/2020/12/03/rhode-island-daughter-fights-for-mother-funeral-amid-virus-restrictions/3796331001> [https://perma.cc/RD4M-XAQQ]; Jake Allen, *Naples Family Struggles With Funeral Logistics After Loved One Dies in New York City Amid COVID-19 Pandemic*, NAPLES DAILY NEWS (Apr. 16, 2020, 3:16 PM), <https://www.naplesnews.com/story/news/local/2020/04/16/covid-19-funeral-arrangements-former-naples-man-challenge-family/2987920001> [https://perma.cc/V7H6-9ZKF].
143. See Brittany Callan, 'It's Heartbreaking' – For Grieving Families and Funeral Workers, the Pandemic Has Changed Everything, KAN. CITY BEACON (Dec. 14, 2020), <https://thebeacon.media/stories/2020/12/14/covid-19-changes-funerals> [https://perma.cc/NKE3-VMTR].
144. See Johnny Diaz, *West Palm Company Wants Your Hologram to Speak at Your Funeral*, S. FLA. SUN SENTINEL (July 17, 2015, 3:45 PM) <https://www.sun-sentinel.com/features/fl-hologram-eulogies-businessman-20150717-story.html> [https://perma.cc/N53M-JYEU].
145. See Blitzer, *supra* note 11.

were not allowed to see the body due to fears of contagion.¹⁴⁶ Storage space for bodies ran low as loved ones scrambled to decide how to hold a service in light of the restrictions placed upon gatherings and fears of contagion.¹⁴⁷ In Los Angeles County, the county's environmental regulator temporarily lifted limits on the number of cremations that could be conducted each month.¹⁴⁸ The official stated that the current rate of death in the county was more than double that of past years.¹⁴⁹ Generally, cremation limits are in place to protect air quality in the area, but the public emergency brought on by the COVID-19 pandemic increased concerns about an excess of 2700 corpses waiting for cremation as a threat to public health.¹⁵⁰ Corpses are being stored in hospitals and the coroner's office as well as "mobile mortuaries" set up outside the hospital.¹⁵¹ The Center for Disease Control and Prevention (CDC) stated that individuals who died due to COVID-19 could be buried or cremated as long as state requirements were met.¹⁵² The CDC reminded embalmers to use standard precautions during the embalming procedure like wearing masks, gloves, and disposable gowns, and taking care not to splash fluids.¹⁵³

Perhaps the COVID-19 pandemic has spurred change in the funeral industry faster than any other cultural movement based on concerns about sustainability, cost, or simplicity. The funeral industry is estimated to be a twenty-billion-dollar industry that does not have the most positive reputation.¹⁵⁴ In the pandemic, however, funeral directors have been an invaluable part of the response to a virus

146. See Blitzer, *supra* note 11.

147. See Blitzer, *supra* note 11.

148. See Rachel Treisman, *Cremation Limits Lifted in LA Due To 'Backlog' as COVID-19 Deaths Skyrocket*, NPR (Jan. 19, 2021, 2:30 PM), <https://www.npr.org/sections/coronavirus-live-updates/2021/01/19/958354466/cremation-limits-lifted-in-la-due-to-backlog-as-covid-19-deaths-skyrocket> [<https://perma.cc/3U6F-3GYC>].

149. See *id.*

150. See *id.*

151. See *Backlog of Bodies Caused by COVID-19 Forces California Air Quality Agency to Suspend Cremation Limits*, CBS NEWS (Jan. 18, 2021, 9:35 PM), <https://www.cbsnews.com/news/covid-19-backlog-bodies-cremation-limits-suspended-california-air-quality-agency> [<https://perma.cc/SS6P-SB9T>].

152. See *What Do Funeral Home Workers Need To Know About Handling Decedents Who Had COVID-19?*, COVID-19 N.J. (Mar. 18, 2020), <https://covid19.nj.gov/faqs/coronavirus-information/about-the-virus/what-do-funeral-home-workers-need-to-know-about-handling-decedents-who-had-covid-19> [<https://perma.cc/N3GK-48VR>].

153. See *Technical Information*, NAT'L FUNERAL DIRS. ASS'N: COVID-19 (Nov. 5, 2020), <https://nfda.org/covid-19/technical-information> [<https://perma.cc/2GDV-LYHP>].

154. See Sara Marsden-Ille, *The US Funeral Industry Today*, US FUNERALS ONLINE (Apr. 22, 2023), <https://www.us-funerals.com/the-us-funeral-industry-today/#.Yc6llc9KhFw> [<https://perma.cc/69Y9-U9ED>].

that has killed more than one million Americans.¹⁵⁵ The Department of Homeland Security labeled mortuary workers as “critical infrastructure workers.”¹⁵⁶ Wearing surgical masks, protective gowns, and gloves, funeral workers have worked to retrieve bodies, while trying to ensure minimized transmission of pathogens.¹⁵⁷ In hard hit areas like New York City, funeral homes filled up and ran out of refrigeration units for storage of bodies. Improvising, funeral homes turned on the air conditioning and stored bodies throughout the facility—in the lobby, the chapel, etc.¹⁵⁸ At one point in the disaster, there were not enough funeral directors to retrieve bodies, and the city called for voluntary veterinarians and laboratory technicians to help collect bodies.¹⁵⁹ Funeral directors have played a pivotal role in responding to the pandemic and in doing the work of the dead largely outside of the public eye.

The COVID-19 pandemic has highlighted the important role that funeral directors play in modern society where families rely on funeral homes to dispose of the dead.¹⁶⁰ Funeral directors and workers were the first in line to respond to the crisis of the increased volume of deaths during the pandemic.¹⁶¹ Their role as critical workers in a nation that relies on them to respectfully care for the dead was strengthened during the pandemic.

In the era of COVID-19, more families decided to hold a funeral at their own homes instead of at a funeral home. These funerals are known as “home funerals” and are legal in all fifty states. The National Home Funeral Alliance reported that

155. See *Trends in Number of COVID-19 Cases and Deaths in the US Reported To the CDC, by State/Territory*, CTRS. DISEASE CONTROL AND PREVENTION, https://covid.cdc.gov/covid-data-tracker/#trends_totaldeaths [https://perma.cc/Q2WW-GF5G].

156. See CHRISTOPHER C. KREBS, DIR. CYBERSEC. INFRASTRUCTURE SEC. AGENCY, U.S. DEP’T HOMELAND SEC., ADVISORY MEMORANDUM ON ENSURING ESSENTIAL CRITICAL INFRASTRUCTURE WORKERS ABILITY TO WORK DURING THE COVID-19 RESPONSE (Aug. 18, 2020), https://www.cisa.gov/sites/default/files/publications/Version_4.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_FINAL%20AUG%2018v3.pdf [https://perma.cc/Q8FW-73WG].

157. See Blitzer, *supra* note 11; *FAQs for Medicolegal Death Investigators*, CTR. DISEASE CONTROL AND PREVENTION (Nov. 2, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/medicolegal-faq.html> [https://perma.cc/6CAM-3J8F].

158. See Blitzer, *supra* note 11.

159. See Blitzer, *supra* note 11.

160. See *The Future of Funerals: COVID-19 Restrictions Force Funeral Directors to Adapt, Propelling the Profession Forward*, NAT’L FUNERAL DIRECTORS ASS’N (July 7, 2020), <https://nfda.org/news/media-center/nfda-news-releases/id/5230/the-future-of-funerals-covid-19-restrictions-force-funeral-directors-to-adapt-propelling-the-profession-forward> [https://perma.cc/E8G5-B6EL].

161. See Kat Eschner, *How Covid Has Transformed the Death Care Industry for ‘Last Responders,’* FORTUNE (Aug. 7, 2021, 10:00 AM), <https://fortune.com/2021/08/07/covid-funerals-death-care-industry-burial-cremation-pandemic> [https://perma.cc/QD74-YHPP].

calls inquiring about home funerals increased during the COVID-19 pandemic.¹⁶² Online resources popped up informing individuals how to hold home funeral services during the pandemic.¹⁶³ Families were advised to take precautions and socially distance. They were guided on how to file paperwork and were directed to funeral directors to electronically file for a death certificate. Families were encouraged to use online platforms to gather and mourn.

For those that cannot afford burials, the state has been involved in finding appropriate graves for victims of COVID-19.¹⁶⁴ As discussed below, the average cost of burial is around \$7000 and the average cost of cremation is \$3000.¹⁶⁵ When families cannot afford these costs or no family comes forward, states and counties provide programs to aid in the disposal of a body.¹⁶⁶ In some places, aid is provided at a state level and in others it is left to the municipality. This is not a new practice. When a corpse is unclaimed or a family has no means to dispose of it, the state or community takes care of disposing of the body. In Sullivan County, Tennessee, for example, the county officials donate the bodies to science or cremate them.¹⁶⁷ In Chicago, the city buries the remains of unclaimed bodies in a plot donated by the Catholic Archdiocese.¹⁶⁸ In San Francisco, the city contracts with a private cemetery to cremate unclaimed corpses and to dispose of their ashes at sea.¹⁶⁹

162. See Christina Leimer, *Covid-19 Led to a Rise of Home Funerals—This is What They're Like*, MARKETWATCH (Mar. 30, 2021, 3:26 PM), <https://www.marketwatch.com/story/covid-19-led-to-a-rise-of-home-funerals-this-is-what-theyre-like-11616783313> [<https://perma.cc/A4GH-JA3G>].

163. See, e.g., Lee Webster, *HFG Covid19 Webinar*, VIMEO (Mar. 24, 2020), <https://vimeo.com/400666632> [<https://perma.cc/EJ8E-MHS4>]; *A Path Home, Funeral Changes During Covid-19*, NAT'L HOME FUNERAL ALL. (Apr. 3, 2020), <https://www.buzzsprout.com/627256/3228604-funeral-changes-during-covid-19>; *COVID-19 and the Dead: Facts Not Fear*, FUNERAL CONSUMERS ALL. (Apr. 2, 2020), <https://funerals.org/2020/04/02/covid19-and-the-dead-facts-not-fear> [<https://perma.cc/6JS9-WTCH>].

164. See Annie Nova, *Some States Offer Assistance to Families Unable to Afford Funeral Costs*, CNBC (Jan. 19, 2022, 1:56 PM), <https://www.cnbc.com/2022/01/19/some-states-offer-assistance-to-families-unable-to-afford-funeral-costs-.html> [<https://perma.cc/Y7XX-8B8L>].

165. See *id.*

166. See Mary Ann Barton, *Undertakers of Last Resort: Indigent Burials on the Rise, Denting County Budgets*, NAT'L ASS'N COUNTIES (Dec. 10, 2018), <https://www.naco.org/articles/undertakers-last-resort-indigent-burials-rise-denting-county-budgets> [<https://perma.cc/GB2D-YW97>].

167. See *id.*

168. See Daniel, *supra* note 101.

169. See William Love and Nick Miroff, *Unclaimed Dead Get Burial at Sea*, E. BAY TIMES (Aug. 17, 2016, 8:34 AM), <https://www.eastbaytimes.com/2004/12/13/unclaimed-dead-get-burial-at-sea> [<https://perma.cc/L7YL-6BNU>].

In New York, Hart Island is the final resting place for unidentified or unclaimed corpses.¹⁷⁰ At the height of the pandemic in New York, people were buried on Hart Island before officials could locate their next of kin. Although New York City could not verify how many of the burials were due to the pandemic, a spokesman for the City said that burials on the island had increased by five times.¹⁷¹ More than 2000 have been buried on Hart Island through the end of October 2020, which is double the number of people buried on Hart Island in 2019.¹⁷² The number of people buried in October 2020 was four times as many as were buried in October 2019.¹⁷³

New York City has struggled to find enough people to do the work of grave digging and burying. Inmates at a correctional facility are usually tasked with burying unclaimed corpses on Hart Island, but the City stopped that practice with concerns about outbreaks in correctional facilities.¹⁷⁴ The City then tasked other City employees with burying the dead, but they refused.¹⁷⁵ Subsequently, the City hired contract laborers. Forty workers arrived on the first day unaware that they had been hired to bury unclaimed corpses that could have been infected with COVID-19.¹⁷⁶ Twenty-eight people left when they found out what they had been hired to do.¹⁷⁷ The rest of the workers stayed to do the hard labor of digging trenches and filling the space with pine caskets.¹⁷⁸

Unclaimed corpses also brought an additional task to the public administrator's office. Local officials must track down the next of kin in order to distribute any funds remaining in the estate of the deceased.¹⁷⁹

Companies that perform deep freeze procedures—known as cryopreservation—also had to adjust to the pandemic. In efforts to mitigate the spread of COVID-19, cryopreservation companies limited which body

170. See W.J. Hennigan, *Lost in the Pandemic: Inside New York City's Mass Graveyard on Hart Island*, TIME (Nov. 18, 2020, 9:11 PM), <https://time.com/5913151/hart-island-covid> [<https://perma.cc/D7N5-SZDZ>].

171. See Meg Anderson, *Burials on New York Island Are Not New, But Are Increasing During Pandemic*, NPR (Apr. 10, 2020, 3:36 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/10/831875297/burials-on-new-york-island-are-not-new-but-are-increasing-during-pandemic> [<https://perma.cc/A9SZ-QWE7>].

172. See Hennigan, *supra* note 170.

173. See Hennigan, *supra* note 170.

174. See Hennigan, *supra* note 170; Anderson, *supra* note 171.

175. See Hennigan, *supra* note 170.

176. See Hennigan, *supra* note 170.

177. See Hennigan, *supra* note 170.

178. See Hennigan, *supra* note 170.

179. See Hennigan, *supra* note 170.

parts could be pumped full of antifreeze chemicals.¹⁸⁰ Hospital regulations and travel restrictions made it more difficult for cryopreservation teams to be on site at the moment an individual died, which delayed the deep freeze process.¹⁸¹ Although some American cryopreservation companies obtained extra chemicals before the pandemic, need for their services was lower than expected.¹⁸² Nevertheless, during the pandemic, cryopreservation companies noted an increase in the number of people who signed up for the procedure as people around the world contemplated their mortality.¹⁸³

Like many other industries during the pandemic, the funeral industry has had to make adjustments to traditional practices and meet state and local regulations. These changes may be the chance to further evaluate America's death practices and open the door to substantive change, promoting more ecological and less expensive practices.

D. The Impact of COVID-19 on Testamentary Dispositions

The pandemic has also significantly impacted estate planning and testamentary dispositions. The pandemic posed challenges to those seeking to execute a valid will. In order to have a valid will, it must be in writing, signed by the testator (or at the direction of the testator and in her presence), and witnessed and signed by two or more disinterested witnesses in the presence of the testator.¹⁸⁴ Because part of the execution formalities required in order to have a valid will require presence, social distancing and stay-at-home orders issued around the nation during the pandemic made it more difficult for people to execute a valid will. Not only do two witnesses need to be in the room watching the testator sign her will as well as potentially a lawyer, the witnesses must be disinterested, usually meaning that they are not receiving anything from the will and are not related to the testator. As our social circles have tightened and social distancing has become the norm, it has been more difficult and seen as less desirable to gather for a will execution ceremony with strangers. Before the pandemic and under the common law definition of presence, witnesses were required to be physically with the person

180. See Peter Wilson, *The Cryonics Industry Would Like to Give You the Past Year, and Many More, Back*, N.Y. TIMES (June 26, 2021), <https://www.nytimes.com/2021/06/26/style/cryonics-freezing-bodies.html> [https://perma.cc/AX87-L5HG].

181. See *id.*

182. See *id.*

183. See *id.*

184. See UNIF. PROB. CODE § 2–502.

in order to attest to a will. Witnessing done over the telephone,¹⁸⁵ using a video call,¹⁸⁶ or through a window,¹⁸⁷ were all found to be invalid forms of presence. Strict interpretations of presence by courts around the nation prohibited electronic attestation, despite criticism,¹⁸⁸ and have been further challenged following the pandemic.

When stay-at-home orders and social distancing regulations were issued, state governors issued executive orders that temporarily allowed witnesses to appear by audiovisual equipment instead of requiring physical presence.¹⁸⁹ As the pandemic lingered, almost half of the states enacted some sort of respite to ease the challenges of attestation.¹⁹⁰ Some implemented emergency measures permitting remote witnessing of wills, others have allowed remote notarization in jurisdictions that only require notarization for a will to be valid, and yet others had more lenient rules already in place, such as, allowing for holographic wills (which do not need attesting witnesses)¹⁹¹ or have already applied the harmless error doctrine (which excuses defects of attestation if there is clear and convincing evidence of intent).¹⁹²

Allowing remote notarization was also an important step forward in the pandemic as people considered their mortality and created a health care directive called a health care durable power of attorney, living will, or advance directive. These instruments, no matter what specific term a state uses, allow an agent to make decisions about an individual's health care if that individual is unable to do so. They are managed on a state level and every state has a specific procedure or form to use in order to create the legal authority for another person to manage one's health care.¹⁹³ During the pandemic, doctors, financial advisors, and lawyers joined forces in encouraging Americans to think about who they would want to

185. See *In re Estate of McGurrin*, 743 P. 2d 994, 1002 (Idaho Ct. App. 1987); *In re Will of Jefferson*, 349 So. 2d 1032, 1036 (Miss. 1977).

186. See *Whitacre v. Crowe*, 972 N.E. 2d 659 (Ohio Ct. App. 2012).

187. See *In re Estate of Weber*, 387 P.2d 165 (Kan. 1963).

188. See Natalie Banta, *Electronic Wills and Digital Assets: Reassessing Formality in the Digital Age*, 71 BAYLOR L. REV. 547, 590–91 (2019).

189. See Lauren Wolven & Erin Mayer, *Emergency Remote Notarization and Remote Witnessing Orders*, AM. COLL. OF TRUST AND EST. COUNS. (Dec. 23, 2020), <https://www.actec.org/resources/emergency-remote-notarization-and-witnessing-orders> [<https://perma.cc/9EBX-2X8D>].

190. See *id.*

191. About half of the states allow holographic wills to be valid. See ROBERT H. SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS AND ESTATES* 198 (10th ed. 2017).

192. See *id.* Eleven states have adopted the Harmless Error Doctrine.

193. See *id.* at 513.

make their medical decisions if they became incapacitated.¹⁹⁴ In 2020, about six percent of Americans had a form of health care directive in a study done by Caring.com.¹⁹⁵ Likely due to the concerted effort of doctors, lawyers, financial advisors, and the media, Caring.com reports that lawyers have seen an increase in people seeking estate planning services.¹⁹⁶

One of the common explanations for why half of Americans die without a will is that people do not want to contemplate their mortality and fear death.¹⁹⁷ Americans' responses to surveys during the pandemic, however, impliedly refuted this view. As people contemplated their mortality and experienced the fear of contracting COVID-19 and perhaps dying, more individuals engaged in estate planning.¹⁹⁸ The fear of death did not result in a decrease of business for estate planners—quite the opposite, in fact. Many estate planners anecdotally saw an increase in clients seeking their services to execute wills and trusts. A survey conducted for LegalZoom.com revealed that more people engaged in estate planning because of the pandemic.¹⁹⁹ A 2021 survey by Caring.com found that thirty-five percent of respondents found a greater need to have an estate plan during the pandemic.²⁰⁰ Interestingly, younger adults were sixty-three percent more likely to have a will in 2021 than they were before the pandemic and people ages twenty-eight to thirty-four were sixteen percent more likely to have a will than those in the thirty-five to fifty-four age group.²⁰¹ Although Americans saw the need for having a will during the pandemic, the Caring.com survey found that the

194. See Sharon Epperson, *As Coronavirus Continues to Spread, Doctors Urge Americans to Get a Living Will*, CNBC (Apr. 28, 2020, 11:42 AM), <https://www.cnbc.com/2020/04/27/as-coronavirus-continues-doctors-urge-consumers-to-get-living-will.html> [https://perma.cc/5HT6-5XA9].

195. See Daniel Cobb, *For the First Time, Caring.com's Wills Survey Finds that Younger Adults Are More Likely to Have a Will than Middle-Aged Adults*, CARING.COM, <https://www.caring.com/caregivers/estate-planning/wills-survey/2021-survey> [https://perma.cc/92K8-7YGT].

196. See *id.*

197. See SITKOFF & DUKEMINIER, *supra* note 191, at 64.

198. See Veronica Dagher, *Millennials, Feeling Their Mortality During Covid-19, Start Writing Their Wills*, WALL ST. J. (Dec. 6, 2021, 9:00 AM), https://www.wsj.com/articles/millennials-feeling-their-mortality-during-covid-19-start-writing-their-wills-11638799200?cx_testId=3&cx_testVariant=cx_2&cx_artPos=0&mod=WTRN#cxrecs_s [https://perma.cc/7W2L-PZNS].

199. See Stacy Francis, *Opinion, More People Are Creating Wills Amid the Pandemic*, CNBC (Oct. 5, 2020, 8:30 AM), <https://www.cnbc.com/2020/10/05/op-ed-more-people-are-creating-wills-amid-the-pandemic.html> [https://perma.cc/LW7U-9CH3].

200. Cobb, *supra* note 195.

201. Cobb, *supra* note 195.

overall numbers of Americans who have a will have remained relatively the same as 2020.²⁰²

There was some movement in the law right before the pandemic hit to allow more forms of electronic wills. In the last couple of years, a handful of jurisdictions authorized a form of electronic wills²⁰³ and the Uniform Law Commission began the process of drafting and proposing elements of electronic execution for a valid will.²⁰⁴ The disruption of the pandemic, however, should be the incentive state legislatures need to adopt more accessible execution requirements for a valid will. The nation has conducted business, education, law, and health care online for over a year, and hopefully state legislatures will be more willing to adjust state requirements for executing a valid will in light of our new virtual reality. The pandemic could be the push that states need to reevaluate execution requirements that have been unchanged since 1837.

The legislature is the best forum to consider the important question of more flexible will execution requirements. The COVID-19 pandemic gives us an opportunity to consider two important factors in reducing will-execution formalities. First, we need to consider whether more flexible execution requirements increased the number of people who engaged in estate planning, and second, we need to know whether remote witnesses felt confident that they could discern whether the testator had capacity and was voluntarily executing the decedent's will. The ultimate goal is to enable people to exercise their testamentary freedom in a way that is an authentic, voluntary expression of their last wishes. Allowing remote attestation can serve these policy interests in making wills accessible and authentic.

Pandemics have changed dying and funeral practices throughout history and COVID-19 is no exception. Safety regulations have increased, cremation rates have increased, funerals have been offered virtually, funeral workers have shown their critical role during a time of death, and people have been more interested in returning to home funerals. The pandemic has forced people to grapple with their inevitable mortality and has increased estate planning, especially among those under the age of fifty-five. It has also caused states to reconsider the strict formalities required to execute a will. The industry disruption ushered in by the pandemic could be the tipping point in transitioning from traditional burials and funeral services to more sustainable, cheaper, and unique burials. The next Part

202. Cobb, *supra* note 195.

203. See ARIZ. REV. STAT. ANN. § 14–2518 (West 2020); FLA. STAT. ANN. § 732.522 (West 2020); IND. CODE ANN. § 29–1–21–4 (West 2020); NEV. REV. STAT. ANN. § 133.085 (LexisNexis 2019).

204. See Banta, *supra* note 188.

discusses how law and practice can change to encourage different kinds of funerals.

III. SUSTAINABLE CHOICES AND REFORM

Concern over traditional, non-ecofriendly methods of disposition and interest in alternative forms of disposition has been a kind of social movement for many years now.²⁰⁵ Consumers are interested in ecofriendly methods of bodily disposition and the industry is racing to accommodate greener, more sustainable deaths.²⁰⁶ Traditional burial has been losing favor and has been further challenged in the COVID-19 pandemic as cremation costs have increased and traditional funerals were prohibited.²⁰⁷ Federal and state law can encourage and remove barriers to more sustainable practices.

A. Criticism of Traditional Methods of Disposition

Criticism of traditional burial comes on three fronts: first, the expense of transporting, embalming, and burying a body; second, the environmental and health concerns of such practices; and third, the advancement of technology giving individuals more options than ever in bodily disposition. Each is discussed in turn below.

1. Funeral Expense

In 2019, the median cost of a funeral with a viewing, burial, and vault was \$9135 in the United States—this number still does not include cemetery, headstone, flowers, or obituary costs.²⁰⁸ Meanwhile, in 2018, the Federal Reserve System reported that four in ten Americans would have difficulty covering an unexpected expense of \$400 and twenty-four percent of American adults went without some form of medical care because they could not afford the expense.²⁰⁹

205. The first conservation cemetery in the United States was created in 1998, and the Green Burial Council was established in 2005. See *A History of the GBC*, GREEN BURIAL COUNCIL, <https://www.greenburialcouncil.org/history.html> [<https://perma.cc/YP5K-DGLQ>].

206. See, e.g., *Cremation*, <http://www.agreenerfuneral.org/greener-funerals/earth-friendly-cremations>. [<https://perma.cc/NC79-JHFD>].

207. In 2020, the estimated burial rate was 37.5 percent and the estimated cremation rate was 56 percent. National Funeral Directors Association, *supra* note 84.

208. See National Funeral Directors Association, *supra* note 84.

209. BD. OF GOVERNORS OF THE FED. RESRV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018 (May 28, 2019), <https://www.federalreserve.gov/publications/>

Thus, the high cost of traditional burials may be one reason why they are declining in popularity. Although a cremation is still cheaper than a traditional burial, the costs for extra services can add up. In 2019, the national median cost of a funeral with a viewing and cremation was \$5150.²¹⁰

COVID-19 revealed an interest in public funding to help families pay for the costs of burial. Funeral assistance programs are offered on a state and county basis, but eligibility may be limited, and the strength of the programs vary widely.²¹¹ With limited help from Social Security (approximately \$225 as a one-time death settlement payment), many are left without any reliable funding for funerals. Charities might aid, but resources to pay for funeral costs are limited. The COVID-19 pandemic, however, prompted federal grants to support families to pay for funeral costs if an individual died from COVID-19 and incurred funeral costs after January 20, 2020.²¹² The Federal Emergency Management Agency (FEMA) was authorized to pay up to \$9000 for an individual funeral if the death was attributed to COVID-19.²¹³ No cap or time limit was placed on the funds.²¹⁴ FEMA reported that it received one million calls concerning the program within the first ninety minutes of the program accepting calls.²¹⁵

The COVID-19 pandemic has shown that there is public support to fund funeral costs in certain circumstances. Perhaps this political goodwill could expand the program to aid people in paying for the funeral of a loved one. If outright grants are not palatable, then the Internal Revenue Code (IRS) could be amended to provide tax relief due to burial expenses. The IRS already allows a deduction for medical and dental expenses.²¹⁶ Providing a tax incentive to relieve the financial burden of disposing of a body is a reform that could shape more sustainable and cost-effective choices.

2019-economic-well-being-of-us-households-in-2018-dealing-with-unexpected-expenses.htm [https://perma.cc/5DJK-Y7DQ].

210. See National Funeral Directors Association, *supra* note 84.

211. See Victoria Haneman, *Funeral Poverty*, 55 U. RICH. L. REV. 387, 399–400 (2021).

212. See *Covid-19 Funeral Assistance*, FEMA, <https://www.fema.gov/disasters/coronavirus/economic/funeral-assistance> [https://perma.cc/VHE6-V3FE].

213. *See id.*

214. *See id.*

215. See Minnah Arshad, *FEMA's Covid-19 Funeral Assistance Program Runs Into Huge Demand, Scam Attempts*, DET. FREE PRESS (May 1, 2021, 5:24 PM), <https://www.freep.com/story/news/local/michigan/2021/04/30/fema-covid-19-funeral-assistance-program/4892117001> [https://perma.cc/8ZLL-Y6PV].

216. See I.R.C. § 213.

2. Environmental Concerns

As an environmental matter, critics of traditional burial point to the amount of wood, steel, and toxic embalming fluid used to embalm and bury the dead.²¹⁷ Embalming is also criticized as it is not a measure done for health or safety, but rather for the aesthetics of viewing a dead body. Embalming is not required in any jurisdiction, but many funeral homes require embalming to occur before a viewing.²¹⁸ The World Health Organization has stated that in general, dead bodies do not pose a health risk because most pathogens do not survive long in a dead body.²¹⁹ Meanwhile, there are health risks to the funeral home embalmers who are routinely exposed to formaldehyde.²²⁰ Formaldehyde is a potential carcinogen and can be lethal in large amounts.²²¹ In the pandemic, there were fears about embalming diseased bodies. Early in the pandemic, New Jersey's governor strongly discouraged embalming in order to limit the spread of the disease to mortuary workers.²²² Nevada initially required cremation of those who died of COVID-19, but then reversed the order.²²³

Annually, conventional burials in the United States use 2700 tons of copper and bronze, 104,272 tons of steel, and 1,636,000 tons of concrete in encasing dead bodies in the ground.²²⁴ Each year, the amount of wood used in building caskets uses almost four million acres of forest that could build up to 4.5 million homes.²²⁵

217. See ELIZABETH FOURNIER, *THE GREEN BURIAL GUIDEBOOK* 21 (2018).

218. See Nicole Archer, *Funerals are Expensive, Broken and Exploitative. They Have to Change*, CNET (May 25, 2020, 8:39 PM), <https://www.cnet.com/features/funerals-are-expensive-broken-exploitative-they-have-to-change> [https://perma.cc/RN2S-MKH2].

219. *Risks Posed by Dead Bodies After Disasters*, WORLD HEALTH ORG. (Feb. 6, 2013), <https://www.who.int/publications/m/item/risks-posed-by-dead-bodies-after-disasters> [https://perma.cc/46BG-LBCX] (discussing how “[h]uman remains only pose a substantial risk to health in a few special cases, such as deaths from cholera or hemorrhagic fevers”).

220. See Lee Webster, *Why Caring for Our Own Dead is an Act of Social Justice*, 8 WAKE FOREST J.L. & POL’Y 125, 129–30 (2018).

221. See Julia Calderone, *Burying Dead Bodies Takes a Surprising Toll on the Environment*, BUSINESS INSIDER (Nov. 4, 2015, 3:23 PM), <https://www.businessinsider.com/burying-dead-bodies-environment-funeral-conservation-2015-10> [https://perma.cc/E4V6-QN6Z].

222. See Lisa De Bode, *Funerals Might be Different Forever After the Pandemic*, VICE (June 16, 2020, 1:35 PM), <https://www.vice.com/en/article/889q75/how-we-manage-death-funerals-changing-fast> [https://perma.cc/4A78-DFVG].

223. See *Cremation & Burial*, NAT’L FUNERAL DIRS. ASS’N (Nov. 5, 2020), <https://nfda.org/covid-19/cremation-burial> [https://perma.cc/3W22-7LE9].

224. See Calderone, *supra* note 221; Shannon Palus, *How to Be Eco-Friendly When You’re Dead*, ATLANTIC (Oct. 30, 2014), <https://www.theatlantic.com/technology/archive/2014/10/how-to-be-eco-friendly-when-youre-dead/382120> [https://perma.cc/GT5F-WL85].

225. See Calderone, *supra* note 221.

Burials in America result in using 4.3 million gallons of embalming fluid annually—which could fill eight Olympic-sized swimming pools—1.6 tons of concrete, and twenty million feet of hardwood for caskets.²²⁶ In addition to the materials used for burial, critics also point to the land used for burials, which some see as “landfills for dead bodies” that take up valuable real estate.²²⁷ Critics also object to the resources used to keep cemetery lawns watered, mowed, green, and weeded.²²⁸

Cremation was previously viewed as the cheaper, environmentally friendly dispositive choice, but recently has been criticized for its negative impact on the environment. Critics are concerned with the amount of energy it takes to cremate a body, toxic mercury that is released from dental fillings of a deceased body, fine soot, sulfur dioxide, heavy metals, and the added carbon dioxide emissions.²²⁹ A cremation oven uses fossil fuels that maintain a temperature of 1800 degrees Fahrenheit for more than two hours.²³⁰ A single cremation requires about two SUV tanks worth of fuel.²³¹ In addition, cremation emits mercury and carbon dioxide into the air, among other elements.²³² Although cremation only contributes to 0.2 percent of annual global emissions of greenhouse gasses, it does add air-polluting metal particulates.²³³ Cremation releases more than 360,000 metric tons of carbon dioxide emissions each year.²³⁴ Mercury pollution is a concern of cremation.²³⁵ The United States Environmental Protection Agency (EPA) significantly regulates mercury emissions but focuses on industrial uses.²³⁶ Crematories are not regulated because they are seen as releasing fewer pounds of mercury into the environment.²³⁷ As cremation becomes a more popular choice

226. See FOURNIER, *supra* note 217, at 24.

227. See Palus, *supra* note 224.

228. See FOURNIER, *supra* note 217, at 23.

229. See Calderone, *supra* note 221; Becky Little, *The Environmental Toll of Cremating the Dead*, NAT'L GEOGRAPHIC (Nov. 5, 2019) <https://www.nationalgeographic.com/science/article/is-cremation-environmentally-friendly-heres-the-science> [<https://perma.cc/EA3R-PFKG>] (articulating that “cremation requires a lot of fuel, and it results in millions of tons of carbon dioxide emissions per year—enough that some environmentalists are trying to rethink the process”).

230. See FOURNIER, *supra* note 217, at 25.

231. See Palus, *supra* note 224.

232. See FOURNIER, *supra* note 217, at 25.

233. See FOURNIER, *supra* note 217, at 25.

234. See Sone, *supra* note 100.

235. See generally Philip Donald Batchelder, Comment, *Dust in the Wind? The Bell Tolls for Crematory Mercury*, 2 GOLDEN GATE UNIV. ENV'T. L.J., 118 (2008).

236. See *id.* at 131.

237. See *id.*

for disposition, concerns about the energy used and the waste produced will increase.

Cremated remains or ashes can also be a form of pollutant.²³⁸ Usable nutrients from the body such as carbon and nitrogen have been consumed and the ashes of the body are not suitable to fertilize plant growth.²³⁹ Moreover, the ashes remain visible long after they have been scattered and if the bone fragments have not been pulverized, can take even longer to naturally biodegrade.²⁴⁰ It can also be disruptive to scatter ashes in a delicate ecosystem.²⁴¹ Spreading human ashes has become a business as well, as service providers offer to take ashes to popular tourist destinations.²⁴²

Because dying is primarily a religious domain awash with cultural beliefs and practices about the nature of a person, the law is in some ways unfit to regulate. The law can, however, promote individual choice and ensure that it does not erect barriers to change. In time, American society's customs and individual desires for more ecofriendly burial options will spur several new options for disposing bodies at death.

3. Technological Advances Shaping Disposition of Bodily Remains

Technological advances are also shaping the options for bodily disposition after death. These forms of disposition are less environmentally friendly than traditional burial or cremation but offer consolation and hope for the future.

In 1977, for example, cremation took an extraterrestrial turn when a private Houston-based company sent the cremated remains of Timothy Leary and Gene Roddenberry into space.²⁴³ Twenty-two others followed in subsequent years.²⁴⁴

Cryopreservation is also available as a method of disposition of the human body. The first cryonically preserved human was Dr. James Bedford in 1967, who

238. See FOURNIER, *supra* note 217, at 25.

239. See FOURNIER, *supra* note 217, at 25.

240. See FOURNIER, *supra* note 217, at 26.

241. See Sonya Vatomsky, *Thinking About Having a 'Green' Funeral? Here's What to Know*, N.Y. TIMES (Mar. 22, 2018), https://www.nytimes.com/2018/03/22/smarter-living/green-funeral-burial-environment.html?.mc=aud_dev&ad-keywords=auddevgate&gclid=Cj0KCCQjw4eaJBhDMARIsANhrQACRelX1FH6byengjEo8UOWysxq0clOJBhNLgU18aAXrN22aRhK3uekaApTCEALw_wcB&gclid=aw.ds [https://perma.cc/R6HF-VV9T].

242. See PROTHERO, *supra* note 14, at 198–99.

243. See PROTHERO, *supra* note 14, at 188.

244. See PROTHERO, *supra* note 14, at 188.

died of renal cancer.²⁴⁵ The hope of cryopreservation is that technology will evolve to the point where bodies can be revived.²⁴⁶ There are about 300 bodies preserved in cryonics facilities and about 3000 people who have arranged to have their bodies cryonically preserved at death.²⁴⁷ Some individuals choose to only have their head cryonically preserved for the future.²⁴⁸ The process of preserving the body is called “vitrification” and uses antifreezing chemicals and nitrogen to bring the body below freezing.²⁴⁹ This process has been used to successfully preserve blood, stem cells, and semen, but has not been successfully used to revive a human organ.²⁵⁰ Some argue that cryonically preserving a human body is an unethical practice because it is so far beyond our technological capacity.²⁵¹ Nonetheless, it remains an option that appeals to several thousand people.

Donating a body to science is another popular form of disposal of a body. Under the Uniform Anatomical Gift Act (UAGA), which is adopted in fifty states, individuals have the right to donate their bodies and body parts after death for transplantation, therapy, research, or education.²⁵² Before a body is used for research, it is usually embalmed and preserved.²⁵³ When a body has been used for research, most programs cremate the body and either scatter the ashes or return them to the family.²⁵⁴ Bodies need to meet certain criteria in order to be accepted by certain hospitals and programs. These criteria differ depending on the program, but usually exclude donors who have a body mass index above thirty-five, who died from an infectious disease, or who incurred some sort of serious injury to the body

245. See Corinne Purtill, *Fifty Years Frozen: The World's First Cryonically Preserved Human's Disturbing Journey to Immortality*, QUARTZ (Jan. 12, 2017), <https://qz.com/883524/fifty-years-frozen-the-worlds-first-cryonically-preserved-humans-disturbing-journey-to-immortality> [<https://perma.cc/7S7N-9ZT9>].

246. See *id.*

247. See *id.*

248. At Alcor, an Arizona based company, it costs \$220,000 to preserve a full body and \$80,000 to preserve a human head. Claire Reilly, *Cryonics, Brain Preservation and the Weird Science of Cheating Death*, CNET (July 9, 2020), <https://www.cnet.com/features/cryonics-brain-preservation-and-the-weird-science-of-cheating-death-alcor> [<https://perma.cc/NN6U-LXEG>].

249. See Purtill, *supra* note 245.

250. See Purtill, *supra* note 245.

251. See Purtill, *supra* note 245; Reilly, *supra* note 248.

252. See UNIF. ANATOMICAL GIFT ACT §§ 2(a), 3 (1968). “An anatomical gift that is not revoked by the donor before death is irrevocable and does not require the consent or concurrence of any person after the donor’s death.” UNIF. ANATOMICAL GIFT ACT § 2(h) (1987).

253. See Stephanie Booth, *What Happens To Your Body When It's Donated to Science?*, HEALTHLINE (Sept. 23, 2018), <https://www.healthline.com/health-news/what-happens-to-your-body-when-its-donated-to-science#So,-what-exactly-happens-when-you-donate-your-body-to-science?> [<https://perma.cc/8ZW4-Z8XE>].

254. See *id.*

before death.²⁵⁵ Other programs have more specific height and weight requirements.²⁵⁶

Another unique program that has inspired people to donate their bodies takes place at anthropology research facilities or “body farms.”²⁵⁷ At these research centers, anthropologists, law enforcement professionals, students, and academics study the various stages of decay of a human body.²⁵⁸ This information becomes critical in solving crimes and determining the time since death.²⁵⁹

Those who are able to donate their bodies to science pay nothing for their disposition and individuals or families who decide to donate feel like their death could be useful in advancing science.²⁶⁰ Nevertheless, only about one percent of Americans donate their body to science each year.²⁶¹ Bodies can be donated by the decedent in a devise in the will or by the decedent’s family.

B. Environmentally Conscious Forms of Disposition

Green burial, a cheaper and more ecofriendly option for bodily disposition, is gaining popularity in America. In a green burial, no chemicals are used to preserve the body; it is a form of burial where the body returns to the natural environment without metal or embellished coffins, burial vaults, or grave liners.²⁶² A body is buried in a biodegradable casket or cloth. The cost ranges between \$1000 and \$4000.²⁶³ It is aimed at disposing the dead with the “least environmental impact.”²⁶⁴ Green burial sites come in many varieties but aim to promote and protect the environment.²⁶⁵ Green burial sites permit some form of grave marker or natural vegetation and require biodegradable shrouds or coffins.²⁶⁶ Green

255. See Jeanne Sager, *Most Americans Are Too Fat to Donate Their Bodies to Science*, VICE (Mar. 14, 2017, 7:00 AM), <https://www.vice.com/en/article/vvjz3d/most-americans-are-too-fat-to-donate-their-bodies-to-science> [<https://perma.cc/8ZBC-KKLC>].

256. See *id.*

257. Emily Petsko, *Everything You’ve Ever Wanted to Know About Donating Your Body to Science*, MENTAL FLOSS (May 31, 2019), <https://www.mentalfloss.com/article/557341/donating-your-body-science> [<https://perma.cc/2QQU-2KRD>].

258. *Id.*

259. *Id.*

260. See *id.*

261. See *id.*

262. See FOURNIER, *supra* note 217, at 17–19; see generally, MARK HARRIS, GRAVE MATTERS: A JOURNEY THROUGH THE MODERN FUNERAL INDUSTRY TO A NATURAL WAY OF BURIAL (Scribner 2007) (examining natural options for disposing of the dead).

263. See Sone, *supra* note 100.

264. FOURNIER, *supra* note 217, at 3.

265. See FOURNIER, *supra* note 217, at 3.

266. See HARRIS, *supra* note 262 at 173.

burial sites opened in the United States in 1996.²⁶⁷ Today there are over 150 official green burial sites in the nation.²⁶⁸ A 2019 survey by the National Funeral Directors Association found that fifty-two percent of Americans were interested in green burial options both for environmental reasons and lower costs.²⁶⁹

Greener approaches are used in traditional burials as well. Some funeral homes agree to use essential oils instead of formaldehyde as they embalm a body with the idea that the nontoxic embalming materials will be safer for all involved.²⁷⁰ Manufacturers also offer “Green Burial Council-certified biodegradable cedar caskets” that will not leave behind toxic residue as they decompose in the ground.²⁷¹ Businesses are offering willow baskets, cardboard containers, traditional pine boxes, and silk or linen wrappings for burial in order to respond to a desire for greener burials.²⁷²

Technology continues to shape the evolution of green burials. Future burial options may contemplate burying individuals vertically instead of horizontally to conserve space.²⁷³ A Swedish company called Promessa places a body in liquid nitrogen to freeze dry it, remove its water, and then disintegrate the body into compost to form fertile soil.²⁷⁴ An Italian company called Capsula Mundi is attempting to plant trees on an organic, egg-shaped pod that contains human remains.²⁷⁵ A company in Seattle is attempting to create a system where human bodies will decompose into nutrient-rich soil to be used by farmers.²⁷⁶ Another company named Coeio has created an “infinity burial suit” which uses the body to breed mushroom and fungi.²⁷⁷ The fungi increases the decomposition rate of the human body and leaves behind fertile soil.²⁷⁸

Cremation also has a “green” counterpart called alkaline hydrolysis. Alkaline hydrolysis is a method of disposition akin to cremation which uses heat, lye, and

267. See FOURNIER, *supra* note 217, at 32.

268. See FOURNIER, *supra* note 217, at 32.

269. See Alex Brown, *More People Want a Green Burial, but Cemetery Law Hasn't Caught Up*, PHYS.ORG (Nov. 22, 2019), <https://phys.org/news/2019-11-people-green-burial-cemetery-law.html> [<https://perma.cc/RYQ8-MKBE>].

270. See Palus, *supra* note 224.

271. Palus, *supra* note 224.

272. See Natalie C. Seagall, *Innovations in Funerals, Burials, and Cremation*, 34 UTAH BAR J. 38, 39 (2021).

273. See FOURNIER, *supra* note 217, at 38.

274. See FOURNIER, *supra* note 217, at 38.

275. See FOURNIER, *supra* note 217, at 38–39.

276. See FOURNIER, *supra* note 217, at 39.

277. See FOURNIER, *supra* note 217, at 99.

278. See FOURNIER, *supra* note 217, at 99.

water to dissolve a human body and break down bone.²⁷⁹ The body is dissolved into a liquid that can be flushed into the sewage system of a given locality.²⁸⁰ The emissions of alkaline hydrolysis are ten to fifteen percent of the emissions traditional cremation produces.²⁸¹ Although alkaline hydrolysis uses ninety percent less energy than traditional cremation, it requires almost 300 gallons of water.²⁸² The body becomes a liquid during this process and the bones are pulverized and given to the family like a traditional cremation.²⁸³ Twelve states permit this kind of disposition.²⁸⁴ Perception plays a role, and people have preferred the pleasant thought of a warm bath instead of a fire chamber for the disposition of a loved one's body.²⁸⁵

People are also reconsidering what to do with the cremated remains of their loved ones. Instead of trying to scatter remains at a favorite golf course or amusement park, people are repurposing the remains or disposing of them in a more ecofriendly way. Human ashes have been memorialized in blown art, jewelry, stained glass windows, firework displays, ink for a comic book, commemorative plates, coral reefs, and in lunar probes.²⁸⁶ Another practice growing in popularity is creating a concrete structure with cremated remains known as a "memorial reef," and sending this reef to a specific location on the ocean floor to become a living coral reef and habitat for marine life.²⁸⁷ Memorial reefs are advertised as an ecofriendly method of disposition of human remains that preserves and promotes marine life.²⁸⁸

It is also possible to scatter cremated remains at sea or bury a body in the ocean.²⁸⁹ Federal regulation administered by the EPA requires people to report the date and location of scattering. To bury a body in the water, the EPA requires that the act be done three miles from the shoreline and in water at least six hundred feet deep in a manner that ensures that the remains will sink to the

279. See FOURNIER, *supra* note 217, at 132.

280. See Palus, *supra* note 224.

281. See FOURNIER, *supra* note 217, at 132.

282. See Palus, *supra* note 224.

283. See FOURNIER, *supra* note 217, at 132.

284. See FOURNIER, *supra* note 217, at 133 (California, Colorado, Florida, Georgia, Idaho, Illinois, Kansas, Maine, Maryland, Minnesota, Oregon, and Wyoming).

285. See Palus, *supra* note 224.

286. See PROTHERO, *supra* note 14, at 198, 202.

287. See HARRIS, *supra* note 262, at 102; Sara Marsden-Ille, *Memorial Reef: Creating a New Life in the Afterlife!*, U.S. FUNERALS ONLINE (Feb. 18, 2020), <https://www.us-funerals.com/underwater-memorial-reefs> [<https://perma.cc/P8KY-TCZR>].

288. See ETERNAL REEFS, <https://www.eternalreefs.com> [<https://perma.cc/ML4V-JLTB>].

289. See HARRIS, *supra* note 262, at 83.

bottom of the ocean and that any memorial flowers be biodegradable.²⁹⁰ Military service members may be buried at sea at their request.²⁹¹

In sum, the funeral industry has responded to the desire for more environmentally friendly disposition options. Federal and state legislation can continue to encourage sustainable options for disposition of bodies as discussed below.

C. Revisiting Federal and State Regulation

1. Federal Law

Funerals and cemeteries are the domain of state law, but federal regulation through the Federal Trade Commission's Funeral Rule has important implications for the funeral industry. The Funeral Rule went into effect in 1984 and requires funeral providers to give consumers accurate information about pricing and disclose specific information about funeral goods and services.²⁹² This Subpart gives an overview of the requirements of the Funeral Rule and argues that the Funeral Rule should be expanded to include digital practices and to require truthful discussions of green burial options that may be less expensive and therefore less profitable for the funeral industry.

The tension for the funeral industry is that it is a money-making venture profiting from a critically needed service rendered during a time of extreme distress and grief. Current federal regulations are focused on protecting consumers that have lost a loved one during such a difficult and vulnerable time. The Funeral Rule combats unfair practices like the right to buy itemized funeral goods and services and not full packages of goods and services they may not want nor need, the right to receive price information in a written, itemized list, the right to use alternative containers instead of expensive caskets, and the right to continue making funeral arrangements without embalming.²⁹³ The Funeral Rule requires funeral homes to agree to use a casket that a customer has purchased from another

290. See HARRIS, *supra* note 262, at 83.

291. See HARRIS, *supra* note 262, at 84.

292. See *Complying with the Funeral Rule*, FED. TRADE COMM'N (Aug. 2012), <https://www.ftc.gov/business-guidance/resources/complying-funeral-rule> [<https://perma.cc/G2U4-KJFX>].

293. See *The FTC Funeral Rule*, FED. TRADE COMM'N (July 2012), <https://www.consumer.ftc.gov/articles/0300-ftc-funeral-rule> [<https://perma.cc/SP47-KY45>].

source and prohibits the funeral home for assessing a fee for the use of a coffin from another party.²⁹⁴

As discussed above, these regulations were instituted nearly forty years ago and continue to provide the framework to protect consumers from unfair practices. Although the FTC attempts to review the Funeral Rule every ten years, the last review was in 2008 and did not yield any changes.²⁹⁵ The FTC sought public comment for the Funeral Rule review in 2020, but has not announced any changes or process of review.²⁹⁶ Consumer coalitions are promoting a rule change to require funeral homes to disclose prices online as well as in person.²⁹⁷ The National Funeral Directors Association has responded that about twenty percent of its members post prices online and that occurs in competitive markets.²⁹⁸ Most funeral homes do not post online prices and rely on other methods of obtaining business from consumers.²⁹⁹

Additionally, the FTC conducts undercover inspections to review whether funeral homes are abiding by the Funeral Rule.³⁰⁰ Funeral homes that are found in violation of the federal regulations are subject to mandatory training programs, civil penalties, and other administrative fees.³⁰¹ Civil penalties can be as high as \$40,000 per infraction.³⁰² In 2020, the FTC stated that it had inspected ninety funeral homes in five states and found violations in seventeen of the funeral homes they visited since 2018.³⁰³

As the FTC considers the regulations in the current review, it should be mindful of the age of the regulations and adapt them to the digital age. In order to promote competition and fair prices, the regulations should at least require price lists to be posted online or sent to a consumer directly via email if the funeral home

294. See *Funeral Costs and Pricing Checklist*, FED. TRADE COMM'N (July 2012), <https://www.consumer.ftc.gov/articles/0301-funeral-costs-and-pricing-checklist> [<https://perma.cc/4T39-LAB7>].

295. See Ann Carrns, *With Funeral Home Rules Due for an Update, There's a Push for Online Prices*, N.Y. TIMES (Mar. 29, 2019), <https://www.nytimes.com/2019/03/29/your-money/funeral-homes-pricing.html> [<https://perma.cc/7W4Y-H5G5>].

296. See *The FTC's Funeral Rule: Helping Consumers Make Informed Decisions During Difficult Times*, FED. TRADE COMM'N, (Feb. 2, 2022), <https://www.ftc.gov/news-events/media-resources/truth-advertising/funeral-rule> [<https://perma.cc/2QVS-QMPE>].

297. See Carrns, *supra* note 295.

298. See Carrns, *supra* note 295.

299. See Carrns, *supra* note 295.

300. See *FTC Releases Funeral Home Compliance Results, Offers New Business Guidance on Funeral Rule Requirements*, FED. TRADE COMM'N (June 8, 2020), <https://www.ftc.gov/news-events/press-releases/2020/06/ftc-releases-funeral-home-compliance-results-offers-new-business> [<https://perma.cc/4TQW-ZSNR>].

301. See *id.*

302. See *id.*

303. See *id.*

maintains a website. Transparency of prices will encourage competition and make it more difficult to take advantage of grieving families. Requiring online price lists or easily accessible digital price lists if requested would make enforcement easier as the FTC can only visit a very small percentage of the 22,000 funeral homes in the country. Lastly, requiring online price lists or emailed price lists would fulfill the purpose of the Funeral Rule to protect vulnerable people at a time of loss. Currently, individuals are required to go to multiple funeral homes to compare prices in person, which creates undue stress at a time of loss. Requiring price lists to be available online or via email would also protect consumers with disabilities and consumers who are aged, infirm, or unable to travel physically to multiple funeral homes. Technology has changed from when the regulations were passed in the 1980s and it is time to update the Funeral Rule to accommodate the digital reality of the 2020s.

As green burials become more popular, it is important that funeral homes give accurate information about state law to enable consumers to make unencumbered decisions. For example, no state law requires embalming for every death, and it would be a violation of the Funeral Rule for a funeral home to misstate the law on this point.³⁰⁴ Although funeral homes may have a policy requiring embalming if the family decides to have a viewing, the law does not require this step.³⁰⁵ The Funeral Rule requires funeral homes to present a price list that includes immediate burial or direct cremation.³⁰⁶ The FTC has also published Green Guides to help companies use ecofriendly terms that do not deceive consumers.³⁰⁷ The FTC should publish a Green Guide that specifically covers green burials. As the FTC reconsiders its rules, it should also evaluate the role of green burial in American society and ensure that funeral homes do not require amenities, services, or goods above what state law requires. The Funeral Rule requires that a funeral home must tell customers that a casket is not required for cremation.³⁰⁸ It should also require funeral homes to inform customers that state law does not require a casket or burial vault for burial. Many funeral homes require some sort of casket or vault as a matter of policy to make caring for the cemetery grounds easier. The funeral home should be required to disclose this funeral home

304. See *Complying with the Funeral Rule*, FED. TRADE COMM'N, *supra* note 292.

305. See *Complying with the Funeral Rule*, FED. TRADE COMM'N, *supra* note 292.

306. See *Complying with the Funeral Rule*, FED. TRADE COMM'N, *supra* note 292.

307. See *Environmentally Friendly Products FTC's Green Guides*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/media-resources/truth-advertising/green-guides> [<https://perma.cc/FU4M-NU58>].

308. See *Complying with the Funeral Rule*, FED. TRADE COMM'N, *supra* note 292.

specific requirement to the customers on the price list, so customers know what is required by that particular funeral home. Because a casket or value is not required by law, the customer can choose another location that has greener options.

As mentioned above, the federal government could also encourage more sustainable death practices through tax law. The government already does so in a variety of other areas such as incentivizing green energy through wind power, solar energy, and carbon capture.³⁰⁹ Congress has been subsidizing other ecofriendly industries for a long time. For example, the first Production Tax Credit or (PTC) for wind power was passed in 1992 and has been expanded many times since then.³¹⁰ Tax credits are a popular way of incentivizing more sustainable practices and could be expanded to include sustainable dispositions of human remains. Providing incentives instead of mandates or assessing additional tax on disfavored forms of disposition allows for the growth of innovation and competition in the funeral industry. As a practical matter, the lobbyists for sustainable energy are much more numerous and powerful than the lobbyists for sustainable burial,³¹¹ but as the public continues to seek greener options for disposition and the need for more sustainable disposition increases, it is likely that a federal tax incentive could encourage more environmentally conscious methods of disposition. Federal legislation in this area will encourage similar legislation and programs on the state level to promote sustainable disposition.

2. State Regulation to Improve Options for Dispositions

The substantive regulation concerning dispositions of bodies is dependent on state regulation. States pass regulations to license funeral establishments, control the location of cemeteries, and control way individuals can dispose of dead bodies.³¹² State law regulates the contracts concerning disposition of death and rules requiring autopsies, exhumation, and claims of mishandling bodies.³¹³

309. See 26 U.S.C. §§ 169, 291, 168, 48C, 25C.

310. See JAMES T. BENNETT, UNSUSTAINABLE: THE HISTORY AND POLITICS OF GREEN ENERGY 73 (2021).

311. See *id.* at 86–88. The American Wind Energy Association (AWEA) has 1000 members and has representatives from banking, investment, technology, and electricity firms. It is poised to merge with the American Clean Power Association, bringing together wind and solar industries to lobby for their interests. The Green Burial Council's mission is to inspire and advocate through education and certification but is not as well funded as other lobbies. See also GREEN BURIAL COUNCIL (2022), https://www.greenburialcouncil.org/our_mission.html [<https://perma.cc/39AC-XNXD>].

312. See 22A AM. JUR. 2D, *Dead Bodies*, § 1 (2022).

313. See *id.*

Although burial without chemicals and imperishable caskets existed in America for much of its past, embalming and cremation took hold of burial practices in America at the turn of the century and have become the main way to dispose bodies. States passed regulations and legislation that contemplated embalming and cremation as the main ways to dispose of a body. With a returning interest in burying a body without embalming and in an unmarked wilderness setting, state funeral regulation and legislation need to be reevaluated. According to a survey released by the National Funeral Directors Association, fifty-four percent of Americans are considering green burial and seventy-two percent of cemeteries have reported an increased desire for green burial.³¹⁴

Outdated regulation has made it more difficult for green burials and cemeteries to grow and spread in the nation, despite their apparent popularity.³¹⁵ The law should not hinder but should rather encourage more ecofriendly ways to dispose of the dead. The first barrier to green burials that may not have a legal remedy is state law that requires refrigeration or embalming within a short period after death, usually only twenty-four hours.³¹⁶ If a family wants to bury the dead without embalming or refrigeration, it needs to gather, travel, plan a funeral, and pay any last respects within a twenty-four-hour period after time of death. For many, this time period is too short to take care of all necessary funeral arrangements. Because most states allow refrigeration after twenty-four hours in lieu of embalming, families can organize a green burial without embalming the deceased, but they will need to secure a refrigeration service that will keep the body at appropriate temperatures to delay decomposition.

A few states, however, do not include an exception for refrigeration and require embalming after a twenty-four-hour period.³¹⁷ In those states, green burial becomes substantially more difficult. Yet, the race against the clock is in large measure biologically driven. Twenty-four to seventy-two hours after death, the body's internal organs decompose and three to five days after death, the body bloats and begins to leak fluid.³¹⁸ The nature of green burial requires families to quickly bury their dead before the body begins to visibly decompose.

314. See Vatomsky, *supra* note 241.

315. See Brown, *supra* note 269.

316. See ARIZ. ADMIN. CODE § R4-12-303 (1985); ALA. CODE § 34-13-117 (1975); CAL. HEALTH & SAFETY CODE § 8378 (West 2020); 16 DEL. ADMIN. CODE § 4204-3.0 (2002); FLA. STAT. ANN. § 497.386 (West 2005); IDAHO ADMIN. CODE R. 24.08.01.452 (2021); MO. CODE REGS. ANN. tit. 20, § 2120-2.070 (2020).

317. See KAN. ADMIN. REGS. § 63-3-11 (1993); N.H. REV. STAT. ANN. § 324:40 (1971).

318. See *The Stages of Human Decomposition*, AFTERMATH, <https://www.aftermath.com/content/human-decomposition> [<https://perma.cc/3EDD-QFL5>].

There are several laws regarding traditional cemeteries and funerals that can be easily remedied to prevent hindering green burial expansion by exempting green burials from the regulations. First, some states require access to burial grounds by paved roads, which directly contradicts the notion of green burials in the wilderness.³¹⁹ By making exceptions to the paved road rules for green burial, states and municipalities would not hinder the expansion of green burial settings in the wilderness. Second, some states and municipalities require fences to be built around a cemetery.³²⁰ Again, this is counter to the objective of green burials, which is to return the body to a natural setting. If states and municipalities make an exception to the fence rules for green burial areas, this impediment could be easily removed. Third, laws that require cemeteries to have a large endowment fund for future maintenance should be amended to exempt this requirement for green burial lots that are intended not to be maintained in the traditional sense. Fourth, states that require a licensed funeral director to handle transportation of a deceased person also should not be applied to green burials.³²¹ There is no expertise needed from a licensed funeral director to bury a body in the ground. Lastly, zoning regulations should be reevaluated to exempt green burials when appropriate. For example, zoning laws prohibit green burials in certain places because of a requirement to have a leak-proof casket—a requirement that should only apply to embalmed bodies.³²² These regulations stunt the growth of green burials and thus merit reconsideration. The law should not serve as a barrier to changing preferences of individuals who desire more ecofriendly burial options.

State legislatures and zoning commissions need to take a hard look at how regulations can hinder the development of green burials. Only five states specifically prohibit home burials, or burials on private family land. Most states, however, have zoning regulations that require set back requirements that prevent most people from burying their dead in suburban yards. Zoning boards will be at the forefront of allowing space in municipalities to accommodate the desire for

319. See ARK. CODE ANN. § 14–14–812 (1995); Va. Code Ann. § 57.27.1 (2011); Vt. Stat. Ann. tit. 18, § 5322 (West 1989); MO. REV. STAT. § 214.132 (West 1987); Ind. Code Ann. § 6-1.1-6.8-15 (West) (repealed 2012); Ariz. Rev. Stat. Ann. § 32-2194.12 (1986) (“No cemetery may be sold without provision for permanent access.”).

320. See WESTMINSTER, CA., ORDINANCES ch. 17 § 240 (2010); GREENVILLE, ILL., ORDINANCES ch. 92 § 01 (2000); ME. REV. STAT. ANN. tit. 13, § 1142 (West 2021); VT. STAT. ANN. tit. 18, § 5323 (West 2015).

321. See, e.g., MICH. COMP. LAWS § 700.3206 (West 2021); NEB. REV. STAT. § 71–605 (West 2021).

322. See 16 DEL. ADMIN. CODE § 4204–6.0 (2021); FLA. STAT. ANN. § 497.386 (West 2005); 25 TEX. ADMIN. CODE § 181.3 (2003); UTAH ADMIN. CODE r.436–8-2 (West 2021).

natural cemeteries that abide by the green burial definitions.³²³ As the desire for green burials increases, zoning boards have to consider whether naturally decomposing containers can be placed with graves with concrete vaults, what makes a burial green, whether the green burial spaces pose any danger to water sources, how deep a body needs to be buried to prevent animal predation and offensive odors, and how to maintain an environmentally sound burial ground.³²⁴ Zoning commissions throughout the country are working on these issues as the demand for natural burial increases. But the process is slow. In at least one case, an individual who wanted to start a green cemetery had to work for three years to ensure that all the zoning requirements and required licenses were obtained.³²⁵ In order to allay fears about green burials and increase the efficiency of creating new natural burial grounds, municipalities could pass general regulations and requirements focused on the specific needs and concerns of green burial, instead of forcing green burial companies to comply with regulations meant for embalmed and cremated remains.

Another path to promote green burials is to allow natural burials to occur in cemeteries that are over one hundred years old. Bodies buried in these old cemeteries were not embalmed, encased in cement vaults, or buried in lavish coffins. Natural burials in old cemeteries will open the door to more green burial spaces without engaging in the laborious process of opening a new cemetery. At least one company has realized that there is an opportunity to reclaim historic cemeteries in this country and has begun trying to assert ownership over abandoned cemeteries to reinitiate natural burials on that land.³²⁶ Counties have

323. Roberta Baumann, *City of Middleton Plan Commission Neutral on 'Green Cemetery'*, WAUNAKEE TRIBUNE (Oct. 3, 2021), https://www.hngnews.com/waunakee_tribune/news/government/article_464cb04c-ca07-5e42-b28b-a81428be2373.html [<https://perma.cc/2EQR-BJK5>].

324. The Independent, *How Green is Green?*, PROVINCETOWN INDEP. (Sept. 15, 2021), <https://provincetownindependent.org/news/2021/09/15/how-green-is-green> [<https://perma.cc/Q8EE-4U36>]; Kristi King, *Montgomery Co. Considers Plans for a Green Cemetery for Natural Burials*, WTOP NEWS (July 8, 2021), <https://wtop.com/montgomery-county/2021/07/montgomery-co-considers-plans-for-green-natural-burials-in-silver-spring> [<https://perma.cc/H9G5-4BQ7>]; Amanda Gokee, *People Who Love the Land are Getting Interested in Green Burials*, VT DIGGER (Jan. 10, 2021), <https://vtdigger.org/2021/01/10/people-who-love-the-land-are-getting-interested-in-green-burials> [<https://perma.cc/67ZT-BDDH>].

325. Nick Wooten, *'Put Me in a Wooden Box:' Cemetery Connects Bodies to Nature*, ASSOCIATED PRESS (Apr. 24, 2021), <https://www.usnews.com/news/best-states/georgia/articles/2021-04-24/put-me-in-a-wooden-box-cemetery-connects-bodies-to-nature> [<https://perma.cc/CQ8D-VHD5>].

326. Catharine Richert, *In SE Minn. Legal Dispute Over an Old Cemetery Raises Questions About Who Owns the Past*, MPR NEWS (May 24, 2021), <https://www.mprnews.org/story/>

begun the legal battle to protect their ownership of abandoned cemeteries. Many of these decisions come down to the local level of zoning officials and county officers.

As zoning officials and state legislators consider the impediments to green burial, they should also consider the benefits of green burials. Instead of increasing the size of traditional cemeteries, allowing for green burial will preserve wilderness and forested areas. Green burials are also substantially less expensive than other forms of disposition and will be more accessible to more people. Lastly, green burial allows Americans to reclaim the process of dying and mourning. They can choose an environmentally friendly and meaningful way to dispose of their bodies and take comfort in returning to nourish the earth. State and federal legislation can implement these policy choices by ensuring that the law accommodates green burials. The COVID-19 pandemic has given state and federal legislatures a chance to update funeral and cemetery law in a way that encourages innovation and change, allowing for more ecologically friendly and less expensive disposition. The current laws and regulations are built on assumptions about death and burial that are fading in significance. The expense of funerals, the growing desire for sustainable options, and the availability of different forms of disposition are forcing the law to be reconsidered. The COVID-19 pandemic shines a bright light on our need to reevaluate our laws concerning bodily disposition and generates the political interest to do so.

IV. TESTAMENTARY INTENT CONTROLLING BODILY DISPOSITION

In the last fifty years, the options for bodily disposition have expanded dramatically. Burial or cremation was the standard for years, but now individuals have a multitude of choices to dispose of their bodies. As technology and environmental concerns continue to shape people's choices about bodily disposition, expressing this testamentary intent deserves to be a central focus of estate planning. By ensuring that testamentary intent controls bodily disposition, these environmental and technological concerns may dictate significant changes in the future as the funeral industry adapts to market forces.

A decedent has long had the right to control her remains under the common law in America but increasing choices in bodily disposition and recent statutory

law passed in several states has challenged this common law right.³²⁷ If the decedent has not planned or expressed her wishes for bodily disposition, the question of who gets to decide what happens to bodily remains is still one that is disputed in certain situations. This Part explores how well-intentioned changes in state law threaten testamentary intent and how preneed contracts can play a role in preserving an individual's ability to make decisions about his or her bodily remains.

Common law tradition in America supports the long-established right of a decedent to determine what should happen to her bodily remains. This right is not absolute, and if challenged, a court examines whether the decedent's directions are reasonable and appropriate. But even if the next of kin objects, courts often uphold the wishes of the decedent with regards to bodily disposition. For example, in *In Re Henderson's Estate*,³²⁸ the court held "the great weight of authority in this country is to the effect that so far as burial purposes are concerned, a person does possess certain elements of proprietary interest in his body, sufficient to enable him to make a valid direction as to the place and manner of internment, which directions, if they be reasonable and appropriate, may be judicially enforced."³²⁹ Here, the court upheld the request of the decedent over the objection of her sole-surviving sister.³³⁰ Similarly, in *In re Johnson's Estate*,³³¹ a New York court upheld the decedent's testamentary documents which expressed a desire to donate a body to science and then to be cremated instead of a traditional funeral. More contemporary cases also have upheld a decedent's burial choices over the next of kin's desires.³³² For example, in a 2010 case in Iowa, the court directed

327. See Tanya D. Marsh, *You Can't Always Get What You Want: Inconsistent State Statutes Frustrate Decedent Control Over Funeral Planning*, 55 REAL PROP., TR. & EST. L.J. 147, 160 (2020).

328. 57 P. 2d 212 (Cal. Dist. Ct. App. 1936).

329. *Id.* at 214.

330. *Id.* at 215.

331. 7 N.Y.S. 2d 81 (N.Y. Surrog. Ct. 1938); *but see* Enos v. Snyder, 131 Cal. 68, 63 P. 170 (upholding power of next of kin to make burial decisions for decedent over the express wishes in his will to allow the person he was living with to make the determination instead of his wife and daughter).

332. See *Stewart v. Schwartz Brothers-Jeffers Mem'l Chapel, Inc.*, 606 N.Y.S.2d 965, 968 (N.Y. Sup. Ct. 1993) (finding "[w]here the directions are expressed in a will they are usually paramount to all other considerations, including the objections of the next of kin"); *Briggs v. Hemstreet-Briggs*, 681 N.Y.S.2d 853 (N.Y. Sup. Ct. 1998) (ordering a hearing to determine decedent's wishes where decedent's will stated he wished to be buried with his first wife, but his second wife buried him elsewhere); *Pittman v. Magic City Mem'l Co., Inc.*, 985 So.2d 156 (Ct. App. La. 2008) (allowing a body to be exhumed and relocated according to decedent's testamentary intent).

disinterment of a decedent who wished to have his head cryogenically preserved but whose relatives chose to bury him instead.³³³ Relying on, in part, “our historic deference to the testator’s wishes regarding the method and location of burial,” the Iowa Supreme Court upheld the decedent’s wish for his head to be cryogenically preserved despite objections from his family.³³⁴

Even though common law has long protected an individual’s right to make decisions about the disposition of their bodies, it can be a thorny process. Litigation about the common law rights of a decedent takes time and bereaved family members can drag on the litigation if they cannot agree on a final resting place for their loved one.³³⁵ Disputes often concern who has the authority to make the decision about the decedent’s disposition. Litigation concerning bodily remains prompted many states to enact statutory reform to allow a decedent to provide binding written directions for how she prefers her body to be disposed.³³⁶ State statutes regarding disposition at death come in a variety of forms. States have passed legislation to protect the right of individuals to make decisions about the disposition of their own body.³³⁷ Some regulations allow an individual to choose a representative who will have the legal power after the individual dies to make decisions about funeral arrangements and the handling and disposition of the decedent’s body.³³⁸ Others allow an individual to make specific requests concerning the funeral and bodily disposition in addition to appointing an agent to ensure that it happens.³³⁹ Many state statutes expressly refer to funeral service contracts, which allow an individual to purchase a funeral and burial plan before he dies and provide details about funeral arrangements and disposition that the funeral director will be contractually obligated to fulfill.³⁴⁰

Statutory reform has faced several issues and has raised the question of whether statutes bolster the already existing common law right to determine

333. *Alcor Life Extension Found. v. Richardson*, 785 N.W.2d 717 (Iowa Ct. App. 2010).

334. *Id.* at 732.

335. *See e.g., Tkaczyk v. Gallager*, 222 A.2d 226, 227 (Conn. Super. Ct. 1965) (discussing a dispute between a decedent’s husband and parents concerning whether decedent’s body should be cremated. It was not resolved for five years).

336. *See* MARSH, *supra* note 15 (appendix listing state statutes).

65 (West 2019); IND. CODE ANN. § 29-2-19-8 to 29-2-19-13 (West 2020); KY. REV. STAT. ANN. § 367.93103 (West 2020).

338. *See* MICH. COMP. LAWS ANN. §§ 700.1104(j) (West 2016); 700.3206(1) (West 2016).

339. *See* KY. REV. STAT. § 367.93103.

340. *See* IND. CODE ANN. § 30-2-9-1 to 10-10 (West 2015); KAN. STAT. ANN. § 16–301 (West 2021); N.J. STAT. ANN. § 45:7–82 to 94 (West 2021); N.C. GEN. STAT. § 90–210.60 to .72 (West 2010); TENN. CODE ANN. § 62-5-401 to 408 (West 2008); WIS. STAT. ANN. § 445.125 to .13 (West 2014).

disposition of bodily remains or whether the statutory right stands alone in requiring a testator to comply with the formalities the statute requires to control bodily disposition. In *In Re Estate of Whalen*,³⁴¹ for example, the Supreme Court of Iowa held that Iowa's Final Disposition Act trumped the decedent's well-established wishes to be buried in Montana as articulated in her properly executed will. Because the decedent had not properly identified her sister as her "designated agent" in a written instrument contained in or attached to a durable power of attorney for health care, witnessed by two people or notarized (as required by statute), the law did not honor her clearly expressed intent for her bodily remains in her will. Instead, the Iowa statute gave her husband the right to determine where her remains should be interred, and he kept her remains in Iowa instead of sending them to Montana.³⁴² The formalistic requirements of the statute abrogated the common law right to have one's last wishes about bodily remains to be honored. Other states have adopted statutory reforms that expressly allow decedents to control the disposition of their bodily remains after death, thereby bolstering the common law right.³⁴³ If the decedent in *Whalen* had died in Montana or New Mexico (where she executed her will), it is likely that her statement regarding the desired location of her burial in her will would have been honored.

The *Whalen* case highlights the policy choice inherent in statutory reform regarding bodily disposition—namely, whether the law should favor upholding the wishes of the dead or whether the law should clarify the priority of the living to determine what should happen to the bodily remains of a loved one. In passing designated agent laws that allow an individual to choose who has the legal right to make funeral decisions, the law protects the interests of the funeral industry by minimizing liability for a wrongful disposition. The statutory reform protects the funeral industry from liability if funeral directors rely on a statement of intent by the decedent that complies with state law.³⁴⁴ Funeral directors are therefore able to

341. 827 N.W. 2d 184 (Iowa 2013).

342. *Id.*

343. See COLO. REV. STAT. ANN. § 15-19-101 to 109 (West 2017) (guaranteeing that "[a] competent adult individual has the right and power to direct the disposition of his or her remains after death and should be protected from interested persons who may try to impose their wishes regarding such disposition contrary to the deceased's desires"); DEL. CODE ANN. Tit. 12, § 260-70 (West 2010) ("the directions of a declarant . . . shall be binding"); MINN. STAT. ANN. § 149A.80 (West 2010) (requiring the executor to follow the wishes of the decedent); MONT. CODE ANN. § 37-19-903(3)(b) (West 2009) (permitting written instructions by the decedent to control bodily remains); N.M. STAT. ANN. § 24-12A-2A (West 2011) (same).

344. See MARSH, *supra* note 15, at 327 (citing state provisions to absolve funeral directors from liability for relying on the document).

stay out of the fray of angry family litigation by relying on the certainty of the designated agent form sanctioned by statutory law.

The funeral industry is subject to liability if they mistreat bodily remains. The next of kin can bring a cause of action against a funeral home for the way the body was disposed. For example, in *Siver v. Rockingham Memorial Hospital*,³⁴⁵ a morgue left the decedent's body in an unrefrigerated area, causing it to decompose to the point where it could not be restored. The next of kin sued for negligent handling of a corpse, and the court affirmed the quasi-property right in the next of kin to bring a cause of action.³⁴⁶ A New York court upheld a negligence claim of action for parents who sued a hospital for losing the body of their stillborn child.³⁴⁷ A West Virginia court upheld actions brought by individuals seeking damages after allegations of mishandling and loss of several bodies during exhumation caused by relocating a cemetery to build a highway.³⁴⁸

In order to reduce liability for mishandling a corpse, the funeral industry supported statutory reform regarding bodily disposition in several states. Because some statutes seem to prioritize absolving funeral directors from liability with a strict interpretation of the requirements of the law at the cost of not honoring decedent intent, concerns have been raised about the degree of control the funeral industry should have over statutory reform in this area. At any rate, the statutory reform has been a significant shift from the common law approach, which prioritizes the decedent's final wishes over the wishes of the living. It formalizes the approach above and beyond the formalities for a valid will and therefore makes it more difficult to implement intent. At the same time, however, individuals can be more confident that if they follow the formalities prescribed by the statute, their last wishes concerning their bodily remains will be honored.

As technology and environmental concerns continue to shape bodily disposition, decisions about bodily remains need to be a priority in estate planning. The law has recognized this and should continue to uphold an individual's wishes concerning bodily disposition, even if it is expensive for the estate. Statutory law that was intended to uphold an individual's wishes now risks overturning those wishes because of the lack of formalities in complying with statutory requirements. This can be avoided by rigorously following state statutes to implement testamentary intent and by including a clear statement of intent regarding bodily

345. 48 F. Supp. 2d 608 (W.D. Va. 1999).

346. *Id.*

347. *Correa v. Maimonides Medical Center*, 629 N.Y.S. 2d 673 (N.Y. Sup. Ct. 1995) (explaining how the "same right to possession of remains for the purpose of burial exists with respect to the remains of a stillborn child as exists with respect to the remains of a child born alive").

348. *Whitehair v. Highland Memory Gardens, Inc.*, 327 S.E. 2d 438 (W. Va. 1985).

remains. Including a statement regarding bodily remains is a critical element of modern estate planning.

As options for bodily disposition have increased, people have begun to turn to prearranged, preneed, or preplanned funeral packages in larger numbers. Preneed contracts are one way that individuals can ensure their wishes regarding their disposition are fulfilled. Preneed contracts can be entered into when an individual is engaged in estate planning, contemplating death but not faced with the immediacy of mortality, which reduces the threat of undue influence and exploitation of the contract. Preneed contracts can also be powerful tools to combat changing statutory norms that may challenge an individual's last wishes.

As discussed above, many state statutes specifically refer to preneed contracts as a way to implement testamentary intent regarding bodily remains and protect decedents and their estates from fraudulent plans. These plans have been available since the 1950s and have gained popularity in the last thirty years. In 1999, the American Association of Retired Persons (AARP) estimated that preneed arrangements exceeded \$25 billion.³⁴⁹ According to one survey, almost a quarter of adults have purchased some sort of prearranged disposition arrangement.³⁵⁰ As a private contract between the funeral home and the individual purchasing the plan, state contract law applies. Terms of the contract and state response vary widely. Because there is a threat of exploitative, unfair practices, or deceptive practices, most states have passed laws that directly address preneed funeral sales contracts.³⁵¹ The main concern is the security of the funds once an individual has paid for funeral services and goods in the future. Many states require funding of the contract through a trust, where a trustee can ensure that fiduciary obligations are met.³⁵² Other states require some sort of escrow account or special account for the funds of a preneed contract.³⁵³ Insurance or annuity plans are also available for preneed contracts and many states allow insurance law to regulate preneed funeral contracts funded in this way.³⁵⁴

349. See Sharon Hermanson, *Preneed Funeral and Burial Arrangements*, AARP PUB. POL'Y INST. (June 1, 1999), <https://www.aarp.org/money/estate-planning/info-1999/aresearch-import-195-FS76.html> [<https://perma.cc/5MEZ-NNFT>].

350. See Dawn Jimenez, *Funeral Homes/Funeral Services*, SBDCNET (May 1, 2009), <http://www.sbdcnet.org/small-business-research-reports/funeral-homes-funeral-services> [<https://perma.cc/D5LU-UVCB>].

351. See Judith A. Frank, *Preneed Funeral Plans: The Case for Uniformity*, 4 ELDER L. J. 1 (1996).

352. See *id.* at 7–8.

353. See *id.*

354. See *id.*

In the 2008 FTC review of the Funeral Rule regulations, the Commission found that there was no evidence of deceptive or unfair practices widespread in the preneed industry that would support new regulation.³⁵⁵ It conceded that some deceptive conduct may occur, but that it was anecdotal and could be challenged under the current rules.³⁵⁶

By individually contracting with a funeral home, consumers can ensure that they have the funeral and bodily disposition that they want. A family may not be as easily able to dismiss the decedent's wishes once those wishes are expressed in a valid contract which has been paid for in advance. Preneed contracts become especially important when people want to treat their bodily remains outside the norm, perhaps by choosing to be planted under a tree, to be flung into space, or to be made into a coral reef. When there were so few choices regarding bodily disposition, planning for this part of a funeral was obviously less important. Yet, as American burial norms evolve, preneed contracts play an increasingly important role in ensuring that a decedent's wishes are fulfilled. Even if such wishes seem frivolous, wasteful, or absurd to their families, the contract entered into by the decedent and the funeral home will likely be enforced—just as the individual's wish to have his head cryogenically preserved was honored in *Alcor Life Extension Foundation v. Richardson*, even after his family had buried him.³⁵⁷ Contracts can be powerful enforcement mechanisms of testamentary intent because the business is incentivized to follow the decedent's intent.

Of course, many individuals plan their funeral but do not put down any money or enter into a contract with a funeral home. These prearranged funeral plans are distinct from preneed funeral contracts, where a consumer has purchased the services and goods they desire for their own funeral. They are also more questionable as to whether those plans will be honored. Without a formal contract or a writing that meets the requirement of state statute, testamentary intent may no longer be enough to protect the interests of decedents. As we have seen, statutory reform has threatened the freedom of disposition. It may make the funeral industry and practitioners more comfortable with bright line rules to follow when there is a dispute about bodily disposition, but the tradeoff is that it threatens the common law protection of the right to do with your body as you please as was demonstrated in the *Whalen* case. Because of this, making decisions about bodily remains needs to be a more significant part of estate planning. Statutes have imposed more formality, and it is a huge omission for practitioners

355. See FTC Regulatory Review of the Trade Regulation Rule on Funeral Industry Practices, 16 C.F.R. § 453 (2008).

356. *Id.*

357. See *Alcor Life Extension Found. v. Richardson*, 785 N.W.2d 717 (Iowa Ct. App. 2010).

to not discuss funeral plans and desires with clients. Good estate planning can prevent protracted litigation of bereaved family members who have different ideas of what to do with the body.

CONCLUSION

American burial and funeral practices are unique. Although influenced by western civilization, American funeral practices took its own path outside of the purview of any specific religion. The rituals of death have changed with the times, and we are on the cusp of another significant change in customs as more Americans want a more environmentally friendly, less expensive, and even digitized funeral and disposition. The COVID-19 pandemic has disrupted the funeral industry in a variety of ways and opened the door to a new kind of funeral. As cultural practices and desires change the funeral industry, the industry has also been recognized as a critical service to do the work of the dead, especially during a pandemic. Funeral workers have been on the frontlines transporting, storing, and disposing of dead bodies. As temporary laws prohibited gatherings at funerals around the nation, the funeral industry adapted, offered digital options, and continued to meet the demands of the market. This could push people to seek less expensive and more immediate funerals which would diminish the need for embalming. Our funeral and cemetery laws and regulations are built on old assumptions that most Americans want to be embalmed and buried. Today, however, the majority of Americans are cremated. In addition, more and more people are considering green burials or some other form of disposition that was not available a decade ago. This Article has suggested various ways the law can change in order to encourage, or at least not impede, more sustainable burial options, including: (1) implementing regulations that ensure funeral homes accurately represent disposition options, (2) promoting transparency, (3) offering tax incentives, (4) removing requirements for roads, fences, leak-proof caskets, or licensed funeral directors to bury the dead, and (5) following the testamentary intent of decedents. In the next ten to fifteen years, the American funeral industry is going to continue to see a drop in the number of people who seek embalming and an increase in people who seek alternative forms of disposition. The law should encourage sustainable burial choices as the industry adapts to the needs of a pressing future.