

# PREPAID DEATH

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## I. INTRODUCTION

Imagine if it were the norm for every car-shopping consumer to allocate only four hours of shopping time towards purchase, refuse to price compare with other dealerships, and rely entirely upon the advice of one car salesperson. Imagine further that this consumer is almost always inexperienced in car purchasing and is vulnerable because of mental and/or physical trauma. This scenario closely tracks the approach of many death care consumers in

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the United States, with few adults doing any lifetime planning for cremation, composting, funeral, burial, and/or any memorial that may follow. In fact, it has become the norm for all death care planning to be shifted to the (often) inexperienced survivor to engage in time-consuming and complicated planning for the third largest category of expense incurred over a lifetime<sup>1</sup> while subject to time constraints and vulnerable due to grief.<sup>2</sup>

In the United States, the median cost of an adult funeral exceeds \$9,000 for a viewing and burial.<sup>3</sup> The business of death is managed by a death care industrial complex with revenues projected to exceed \$68 billion by 2023.<sup>4</sup> It is a marketplace of inevitable consumption because everyone, to date, eventually dies.<sup>5</sup> We have the luxury of being extraordinarily distanced from dying and neurotic about death, and often rely heavily upon the guidance of industry experts with a profit-seeking motive in making decisions perceived by the consumer as irreversible.<sup>6</sup> The industry benefits both from information asymmetry and etiquette uncertainty.<sup>7</sup>

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<sup>1</sup> The third largest expense after home and automobile purchase. *Funerals and Related Services*, AARP POLICY BOOK 2020–2021, <https://policybook.aarp.org/policy-book/consumer-rights-and-protection/other-consumer-protections/funerals-and-related-services> [<https://perma.cc/H2UN-GMTE>]. The price for funerals and burials in the United States has risen 227.1% from 1986–2017, as compared to 123.4% for all consumer items. *The Rising Cost of Dying, 1986–2017*, Bureau of Labor Statistics, U.S. Dep’t of Labor: The Economics Daily (2017), <https://www.bls.gov/opub/ted/2017/the-rising-cost-of-dying-1986-2017.htm>? [<https://perma.cc/XBM5-2YVB>].

<sup>2</sup> “It does not do to leave a live dragon out of your calculations, if you live near one.” J.R.R. TOLKIEN, *THE HOBBIT, OR THERE AND BACK AGAIN*, 207 (Ballentine Books rev. ed. 1985) (1938).

<sup>3</sup> *2019 NFDA General Price List Study Shows Funeral Costs Not Rising as Fast as Rate of Inflation*, NAT’L FUNERAL DIRS. ASS’N (Dec. 19, 2020), <https://www.nfda.org/news/media-center/nfda-news-releases/id/4797/2019-nfda-general-price-list-study-shows-funeral-costs-not-rising-as-fast-as-rate-of-inflation> [<https://perma.cc/GD7P-N9Z4>]. Cemetery costs vary dramatically based upon location. It is estimated that the average cost of American funeral with burial exceeds \$9,000. CYNTHIA WILLIAMS RESOR, *DISCOVERING QUACKS, UTOPIAS, AND CEMETERIES: MODERN LESSONS FROM HISTORICAL THEMES* 106–07 (2019); see also Lisa Dingman, *Rest in Peace: 10 Expensive Locations to Lay Down the Dead*, *THE RICHEST* (Jan. 4, 2014), <http://www.therichest.com/most-expensive/rest-in-peace-10-expensive-locations-to-lay-down-the-dead/> [<https://perma.cc/G57X-76ZU>] (noting that in 2009, Westwood Village Memorial Park in Los Angeles sold a crypt on eBay for \$4,602,100).

<sup>4</sup> See Caroline Capponi, *Digitization in Deathcare*, *FORBES: COLUM. BUS. SCH.* (Apr. 29, 2021, 3:00 PM), <http://www.forbes.com/sites/columbiabusinessschool/2021/04/29/digitization-in-deathcare/?sh=7ba3318d464c> [<https://perma.cc/K3LH-VLBB>].

<sup>5</sup> Almost every person in the United States will purchase death care services for themselves or on behalf of another. Steven W. Kopp & Elyria Kemp, *The Death Care Industry: A Review of Regulatory and Consumer Issues*, 41 *J. CONSUMER AFF.* 150, 150 (2007).

<sup>6</sup> BUREAU OF CONSUMER PROT., *FUNERAL INDUSTRY PRACTICES: FINAL STAFF REPORT TO THE FTC AND RECOMMENDED TRADE REGULATION RULE* (16 CFR PART 453) 4 (1978) (“While the ‘traditional’ funeral may be beneficial to some, its widespread advocacy by funeral directors has served to restrict unreasonably consumers’ choices in arranging for disposition of the dead. In many instances, funeral ‘counseling’ is really thinly-disguised salesmanship designed to persuade consumers to purchase additional and costlier funeral merchandise and services.”).

<sup>7</sup> In a 1995 study, the top three reasons a funeral home was selected were that the consumer had used the funeral home in the past (45%), geographic convenience (33%), and ethnic or religious affiliation (11%). Joshua L. Slocum, *The Funeral Rule: Where It Came from, Why It Matters, and How to Bring It to the 21st Century*, 8 *WAKE FOREST J.L. & POL’Y* 89, 109 n.47

And yet, the death care industry is as inescapable for most American families as death itself. The financial challenge to consumers is universal and in many cases devastating, and the fact that this has not appeared on the political radar until very recently is surprising given its scale and impact. Fewer than 4 in 10 Americans are able to pay an unexpected \$1,000 expense out of savings,<sup>8</sup> and the substantial number of withdrawals from retirement accounts as a COVID-19 emergency measure under the CARES Act has signaled to some lawmakers the importance of emergency savings.<sup>9</sup> Research suggests that 60% of adults will live for at least one year below the official poverty line,<sup>10</sup> and when we consider economic well-being across the span of a lifetime, unplanned or cascading deaths or tragedies are more likely to cause a spiral into poverty.<sup>11</sup> This becomes even more problematic in the context of funerary expense<sup>12</sup> because lower-income families spend far more than higher-income families, relative to total expenditures.<sup>13</sup>

An important path by which the vulnerable consumer may become less vulnerable is through planning and prepayment before death (“pre-need”) rather than purchasing after death (“at-need”). The pre-need consumer is cost-sensitive and far less likely to make decisions that are time-pressured or driven by guilt. Although decisions may be unfamiliar, there is time to research and familiarize oneself with options and providers—including new and innovative death care technologies that may not be on the menu of choices offered at one’s local funeral home. This also allows the low- and middle-income consumer to explore financing options for an inevitable expense, because it is well-established that reliable and accessible credit and

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(2018). Josh Slocum notes “how strikingly different these answers are to what the average consumer would say if asked how they choose a college or university, an auto dealer, or any other major service provider.” *Id.*

<sup>8</sup> Lorie Konish, *Many Americans Can’t Afford an Emergency Expense. Some Are Calling for Employers to Help with That*, CNBC (May 14, 2021, 3:00 PM), <https://www.cnbc.com/2021/05/14/many-americans-dont-have-emergency-savings-how-employers-may-help.html> [<https://perma.cc/YH2U-2ZYT>].

<sup>9</sup> *Id.*

<sup>10</sup> MARK ROBERT RANK, LAWRENCE M. EPPARD & HEATHER E. BULLOCK, *POORLY UNDERSTOOD: WHAT AMERICA GETS WRONG ABOUT POVERTY* 10 (2021).

<sup>11</sup> The hardship of the COVID-19 pandemic illuminates this issue. It has been reported that more than one in three children living in rental housing dealt with food and/or housing hardship; thirty-eight percent of all the adults in the United States reported it was “somewhat or very difficult” to cover usual household expenses in December 2020; twelve percent of adults living with children reported that their households did not have enough to eat. *Tracking the COVID-19 Economy’s Effects on Food, Housing, and Employment Hardships*, CBPP (July 1, 2021), <https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-economy-effects-on-food-housing-and> [<https://perma.cc/TLL8-57WS>].

<sup>12</sup> “Funerary expense” refers to cremations, funerals, memorials, burials, and all associated death care expenses.

<sup>13</sup> In every year that has been studied since 1996. *See* RESOR, *supra* note 3, at 106; *see also* ELIZABETH CURRID-HALKETT, *THE SUM OF SMALL THINGS: A THEORY OF THE ASPIRATIONAL CLASS* 33 (2017).

financial tools are meaningful for poverty reduction and disproportionately assist the poor.<sup>14</sup>

Unfortunately, the consumer will discover a market failure: available pre-need prepayment options are so deeply flawed that conventional wisdom recommends strongly against pre-need prepayment.<sup>15</sup> The consumer must, ineluctably, contend with expense that is shaped by the structure, the excesses, and the current regulatory environment of the industry itself. Pre-need prepayment for death care services is entirely regulated at the state level by an industry that often has excessive influence over its regulators (referred to as regulatory capture)<sup>16</sup> and apparently lacks the will to design flexible, reliable, and consumer-safe, pre-need instruments.<sup>17</sup> A proposal for

<sup>14</sup> Shawna-Gay White, *Access to Credit: A Viable Means of Poverty Alleviation* (June 2, 2010) (M.A. thesis, Stanford University) (on file with author).

<sup>15</sup> Today, the consumer may and should engage in pre-need planning. The problem addressed in this article is pre-need planning and prepayment. Prepayment becomes problematic unless it is done for purposes of Medicaid spend-down. See Leanne Potts, *8 Tips for Funeral Planning*, AARP (July 7, 2021), <https://www.aarp.org/home-family/friends-family/info-2020/funeral-planning-tips.html> [https://perma.cc/55KH-AFHE] (sharing the advice of Joshua Slocum, executive director of industry non-profit watchdog group Funeral Consumers Alliance, that “[F]uneral homes sell plans that promise better rates if you buy a package now, years before you die. Don’t do it.”); Helen Simon, *3 Reasons You Should Never Prepay Funeral Expenses*, MOTLEY FOOL (Jan. 5, 2016, 1:06 PM), <http://www.fool.com/investing/general/2016/01/05/3-reasons-you-should-never-prepay-funeral-expenses.aspx> [https://perma.cc/PE8K-RD8D] (noting that funeral homes go out of business, and there are often no provisions allowing for transfer in the event of relocation); Jack Suntrup, *Prepaid Funeral Plans on Rise in Missouri, Offer Peace of Mind*, MISSOURIAN (June 1, 2015), [http://www.columbiainmissourian.com/news/local/prepaid-funeral-plans-on-rise-in-missouri-offer-peace-of-mind/article\\_9ec9064c-fd66-11e4-8a54-9fe74856b81a.html](http://www.columbiainmissourian.com/news/local/prepaid-funeral-plans-on-rise-in-missouri-offer-peace-of-mind/article_9ec9064c-fd66-11e4-8a54-9fe74856b81a.html) [https://perma.cc/7BKT-UQB4] (“We always recommend preplanning, but not prepaying,” according to the treasurer of the Funeral Consumers Alliance of Greater Kansas City.); Pat McKeough, *Hidden Risks of Prepaid Funerals*, TSI NETWORK (July 2, 2020), <http://www.tsinetwork.ca/daily-advice/wealth-management/hidden-risks-investing-money-prepaid-funerals/> [https://perma.cc/9GGW-MM5F] (listing drawbacks of prepaid funerals, including the fact that prepaid funerals limit options and they “may not rise as much as” anticipated); Robert Patrick, *Father, Son Plead Guilty in St. Louis Prepaid Funeral Scam Case*, ST. LOUIS TODAY (July 4, 2013), [http://www.stltoday.com/news/local/crime-and-courts/father-son-plead-guilty-in-st-louis-prepaid-funeralscam-case/article\\_64cc95bc-a953-5881-a5b5-fe55c3741b65.html](http://www.stltoday.com/news/local/crime-and-courts/father-son-plead-guilty-in-st-louis-prepaid-funeralscam-case/article_64cc95bc-a953-5881-a5b5-fe55c3741b65.html) [https://perma.cc/GC8M-RNEB] (detailing the father and son prepaid funeral Ponzi scheme that “affected up to 150,000 customers who paid up to \$10,000”); *Prepaid Funeral Scam: Fitting End to Multi-State Fraud Scheme*, FBI NEWS (Jan. 17, 2014), <http://www.fbi.gov/news/stories/prepaid-funeral-scam> [https://perma.cc/Z9DE-53EL] (describing a prepaid funeral scam that involved “[s]camming nuns . . . [t]aking advantage of the mentally disabled . . . [s]tealing from the elderly”).

<sup>16</sup> The topic of regulatory capture has been discussed since at least the 1950s. There is, however, some academic skepticism over the idea of regulatory capture. Some scholars, acknowledging that business often has an outsized voice in the regulatory process but that there have nonetheless been few empirical studies, have shown de facto control over agency decisions. Newer capture scholarship acknowledges that capture does indeed exist but may be addressed through institutional design. For more on this scholarship, see Daniel Walters, *Capturing the Regulatory Agenda: An Empirical Study of Agency Responsiveness to Rulemaking Petitions*, 43 HARV. ENVTL. L. REV. 175 (2019); Dorit Rubinstein Reiss, *The Benefits of Capture*, 47 WAKE FOREST L. REV. 569, 570–71, 580 (2012).

<sup>17</sup> It is often difficult to detect regulatory capture within an industry, if for no other reason that excessive influence against public interest is not an issue that lurks in the light. There are,

change may amount to a Sisyphean task<sup>18</sup> unless the realities of state-level regulatory capture are meaningfully addressed.<sup>19</sup>

This Article borrows from nudge theory<sup>20</sup> to shape an intervention (in this case, an incentive or carrot)<sup>21</sup> that will correct unfairness and inefficiency in an imperfect market, in a way that deftly sidesteps an all-out attack on the industry itself.<sup>22</sup> The proposed paradigm shapes an incentive that allows the consumer to pay for pre-need death care service with pre-tax earnings through Internal Revenue Code section 125 (“section 125”) and flexible spending account principles.<sup>23</sup> The significance of this one incentive is several-fold. Untangling regulatory capture becomes unnecessary: federal tax-sheltering of pre-need prepayment dollars will generate consumer de-

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however, blatant examples within the death care marketplace that demonstrate that regulatory oversight is often little more than a puppet of the industry itself. A recent example involves the monks of Saint Joseph Abbe of Saint Benedict in Louisiana who violated a rent-seeking state criminal statute when they sold cypress caskets handmade from local fallen trees without a funeral director’s license. *See* George F. Will, *George Will: Will the Supreme Court Answer Monks’ Prayers?* WASH. POST (Nov. 14, 2012), [https://www.washingtonpost.com/opinions/george-will-will-the-supreme-court-answer-monks-prayers/2012/11/14/ec6a30c8-2dc8-11e2-beb2-4b4cf5087636\\_story.html](https://www.washingtonpost.com/opinions/george-will-will-the-supreme-court-answer-monks-prayers/2012/11/14/ec6a30c8-2dc8-11e2-beb2-4b4cf5087636_story.html) [<https://perma.cc/5X2W-TKMP>]. A second example involves a successful lawsuit brought against the Pennsylvania State Board of Funeral Directors alleging that “the relationship between the state board and [the Pennsylvania Funeral Directors Association] has developed to such an extent that the relationship is the quintessential example of a trade association’s regulatory capture of its state regulatory agency.” Chris Mondics, *Judge Overturns Pa. Funeral Regulations*, PHILA. INQUIRER (May 15, 2012), [http://www.inquirer.com/philly/business/20120515\\_Judge\\_overturns\\_Pa\\_funeral\\_regulations.html](http://www.inquirer.com/philly/business/20120515_Judge_overturns_Pa_funeral_regulations.html) [<https://perma.cc/6ANV-X7F5>]. A third recent example involves the Florida funeral industry in 1999. “Direct disposers” (with direct disposal licenses) handled twenty percent of the state cremations until the law was changed (to eliminate competition) and direct disposers were required to have a licensed funeral director supervise all facilities. This change dramatically increased costs for the consumer. Roger V. Abbott, *Is Economic Protectionism a Legitimate Governmental Interest Under Rational Basis Review?*, 62 CATH. U. L. REV. 475, 500–01 (2013).

<sup>18</sup> A task that is impossible to complete, derived from Greek mythology and the punishment of Sisyphus. *Sisyphean, Promethean or Herculean*, GRAMMARIST, <https://grammarist.com/usage/sisyphean-promethean-or-herculean/> [<https://perma.cc/FRS7-N9B9>].

<sup>19</sup> Lorelei Laird, *Consumer Activists Seek to Challenge ‘Protectionist’ Funeral Laws*, ABAJOURNAL (Aug. 1, 2014, 9:30 AM), [http://www.abajournal.com/magazine/article/consumer\\_activists\\_seek\\_to\\_challenge\\_protectionist\\_funeral\\_laws/](http://www.abajournal.com/magazine/article/consumer_activists_seek_to_challenge_protectionist_funeral_laws/) [<https://perma.cc/QY6R-WYN4>].

<sup>20</sup> The term “nudge” is meant to describe some form of intervention that directs behavior “in a predictable way without forbidding any options or significantly changing their economic incentives.” RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 6 (2d ed. 2009).

<sup>21</sup> “Borrows from” nudge theory is used to mean going slightly beyond the traditional use of the term “nudge” to embedding behavioral insights into a paradigm that shapes a solution that does not implicitly reduce human freedom—for either the consumer or the death care industry itself—but instead routes the consumer towards a more desirable path.

<sup>22</sup> “To code, nudge, or notice? That is the question today’s regulators face—at least the growing number who would influence citizen or firm behavior without passing new laws against conduct.” Ryan Calo, *Code, Nudge, or Notice?*, 99 IOWA L. REV. 773, 775 (2014).

<sup>23</sup> “[T]he people for whom nudges are most effective are exactly those who are the least forward-looking—they aren’t the kind of people who weigh the future heavily in their present decisions.” Brian Galle, *Tax, Command . . . or Nudge?: Evaluating the New Regulation*, 92 TEX. L. REV. 837, 878 (2014).

mand for reliable and qualified pre-need prepayment financial instruments.<sup>24</sup> An increased demand for pre-need instruments will, in turn, provide an incentive for funeral providers to offer the attractive terms necessary to compete for this new base.

This Article is as much about leveraging a tax expenditure to protect as much as incentivize. The economics of shuffling off this mortal coil are considered in Section II, with an overview of the professionalization of the death care industry, modern funeral custom in the United States, exploration of both the unique structural features of the marketplace, and idiosyncratic behavior of the bereaved, at-need consumer.<sup>25</sup> Behavioral strategists agree that precommitment strategies are effective at shifting undesirable behavior and Section III considers the need for “pay now—die later” arrangements as a beneficial consumer precommitment strategy.<sup>26</sup> The deficiencies of available pre-need prepayment options and the obstacles that stand in the way of implementing solutions are also discussed. Section IV provides an overview of Internal Revenue Code section 125 flexible spending plans, which allow participants the opportunity to receive qualified benefits on a pretax basis. Section V leverages the existing section 125 framework to propose a model meant to nudge the consumer towards pre-need prepayment, while also setting forth consumer protections required for any pre-need prepayment instrument to be eligible for tax-favored, pre-tax spending.

## II. MODERN DEATH

The death industrial complex in the United States is estimated to reach revenues of \$68 billion annually by 2023.<sup>27</sup> After the cost of buying a house

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<sup>24</sup> The issue of state-level regulatory capture will never be comprehensively addressed with one proposal in one article. In the context of funerary expenses, this will be the subject of further examination in future publications.

<sup>25</sup> WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1, ll. 65–70 (“Devoutly to be wish’d. To die, to sleep; // To sleep, perchance to dream. . . . For in that sleep of death what dreams may come // When we have shuffled off this mortal coil // Must give us pause. There’s the respect // That makes calamity of so long life.”).

<sup>26</sup> The classic example of a precommitment strategy in action comes from the story of Ulysses (or Odysseus) and the Sirens of Homer’s *Odyssey*. As you no doubt recall, Odysseus knew that if he heard the Siren’s son, he would fall under their spell. In other words, he would enter a state of abnormal agency that had a certain level of risk associated with it. To enable him to hear their song, without realizing the associated level of risk, he forced his shipmates to put wax in their ears and to bind him to the mast of the ship. This way, he was unable to do any harm to the ship.

COGNITIVE ENHANCEMENT: AN INTERDISCIPLINARY PERSPECTIVE 297 (Elisabeth Hildt & Andreas G. Franke eds., 2013).

<sup>27</sup> Based upon a market analysis that studied market size and growth rate for the forecast period 2018–2023. *United States Death Care Market Report 2018–2023: Market Is Estimated to Reach Revenues of Around \$68 Billion*, CISION PR NEWSWIRE (Nov. 27, 2018, 9:30 AM), <http://www.prnewswire.com/news-releases/united-states-death-care-market-report-2018-2023-market-is-estimated-to-reach-revenues-of-around-68-billion-300755813.html> [http://perma.cc/Q6NJ-9KWH]. A global market study incorporated slower growth projections because of COVID setbacks, increasing from \$102.4 billion in 2020 to \$124.8 billion in 2023. *Insights*

and a car, paying for death care is reportedly the third largest consumer expense.<sup>28</sup> This category of household expense often arises as a result of life's most stressful event: the loss of a loved other. The bereaved consumer may suffer from guilt, sadness, and/or anger, and one-third of survivors are impacted by adverse mental or physical health following a major loss.<sup>29</sup> Cultural attitudes toward death, psychological obstacles, bereavement of the consumer, and a marketplace of inevitable consumption coalesce to create challenges and obstacles that differentiate death care from other types of consumer spending. Section II of this Article provides an overview of modern funeral practice in the United States and considers the idiosyncratic nature of this consumer household expense, along with unique marketplace obstacles and challenges.

### A. An Overview

Death has become a large, lucrative, bureaucratic, corporate business over the span of five generations.<sup>30</sup> Prior to the Civil War, it was an organic transition that was woven into the fabric of everyday life—with infant mortality rates exceeding 100 per 1,000 live births and adult life expectancy in one's late 30s.<sup>31</sup> Home funerals were traditional practice,<sup>32</sup> with groups of women supporting one another through the preparation of the deceased and the menfolk responsible for digging graves.<sup>33</sup> For affluent families, the parlor became the part of the home in which finery was displayed and visitation of

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into the Worldwide Death Care Services Industry to 2030, BUSINESSWIRE (Apr. 28, 2020, 12:32 PM), <http://www.businesswire.com/news/home/20200428005812/en/Insights-into-the-Worldwide-Death-Care-Services-Industry-to-2030---Understand-how-the-Market-is-Being-Affected-by-the-Coronavirus---ResearchAndMarkets.com> [<http://perma.cc/QH42-F52F>].

<sup>28</sup> FTC, REPORT TO THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS 19 (2009).

<sup>29</sup> Colin Murray Parkes, *Bereavement in Adult Life*, 316 BRIT. MED. J. 856, 856 (1998). One study found that death following termination of life support induced stress levels on par with survivors of construction and ferry disasters, and more than twice as high as those who have lost their personal residence to fire. *OHSU Researchers Discover Powerful Role of Advance Directives in Relieving Family Stress*, OR. HEALTH SCI. UNIV. (Mar. 15, 2001), <https://news.ohsu.edu/2001/03/15/ohsu-researchers-discover-powerful-role-of-advance-directives-in-relieving-family-stress> [<http://perma.cc/R7Y7H-N4SN>].

<sup>30</sup> For purposes of this Article, a generation is a rough unit of measurement approximating thirty years. See Donn Devine, *How Long Is a Generation? Science Proves an Answer*, INT'L SOC'Y GENETIC GENEALOGY (Nov. 16, 2016), [https://isogg.org/wiki/How\\_long\\_is\\_a\\_generation%3F\\_Science\\_provides\\_an\\_answer](https://isogg.org/wiki/How_long_is_a_generation%3F_Science_provides_an_answer) [<http://perma.cc/CS6H-DZG8>].

<sup>31</sup> See generally Clayne L. Pope, *Adult Mortality in America Before 1900: A View from Family Histories*, in STRATEGIC FACTORS IN NINETEENTH CENTURY AMERICAN ECONOMIC HISTORY 267, 267, 276–77 (Claudia Goldin & Hugh Rockoff eds., 1992).

<sup>32</sup> Paul K. Williams, *Your Old House Had Dead Bones in It—Almost Guaranteed*, THE HOUSE HISTORY MAN (Apr. 11, 2012), <http://househistoryman.blogspot.com/2012/04/your-old-house-had-dead-bodies-in-it.html> [<https://perma.cc/89LS-B8WF>] (noting that “[m]ost D.C. residents held their funeral at home, especially before modern funeral homes were licensed beginning in the 1930s”).

<sup>33</sup> Maggie Jones, *The Movement to Bring Death Closer*, N.Y. TIMES MAG. (Dec. 19, 2019), <http://www.nytimes.com/2019/12/19/magazine/home-funeral.html> [<http://perma.cc/2VUG-SCPA>].

the deceased took place.<sup>34</sup> A death door was built into the finer nineteenth-century homes so that the deceased was never removed from the home through the same door as that used by the living—and also never feet first.<sup>35</sup>

With the Civil War came a funerary cultural shift.<sup>36</sup> Embalming<sup>37</sup> became normalized, and though increased use was initially driven out by the need to return remains of soldiers from the battlefield,<sup>38</sup> the preservative process swiftly became cloaked in the mantle of public health necessity.<sup>39</sup> Increased urbanization and the rise of the funeral industrial complex resulted in families ceding control over the dead and wholly outsourcing the process to a funeral director,<sup>40</sup> with attendant increases in costs.<sup>41</sup> Modern funerary custom generally involves a menu of options that is made available by a

<sup>34</sup> “Living Room” What We Call Today, Was Actually Called “Death Room” in the 19th Century!, VINTAGE EVERYDAY (Jan. 10, 2018), <http://www.vintag.es/2018/01/living-room-what-we-call-today-was.html> [https://perma.cc/ZGB8-AG33].

<sup>35</sup> *North American Funeral, History of U.S. Traditions*, FUNERAL SOURCE, <http://thefuneral-source.org/hi0301.html> [https://perma.cc/AJD6-HDW5] (last visited Mar. 8, 2022).

<sup>36</sup> Some wealthy northern families were willing to pay to have the bodies of deceased soldiers returned to them. But before the invention of refrigeration, this often became a mess, as the heat and humidity would cause the body to decompose in a matter of a couple of days . . . . [O]ppportunistic Americans began performing rudimentary embalmings on the corpses of northern soldiers to preserve them for the train ride home. The most common technique involved replacing the body’s blood with arsenic and mercury . . . . While we do not have statistics on the increase in embalmings during this time, there is ample evidence that the Civil War had a profound effect on how Americans treated death. Victorian mourning traditions gave way to funeral homes and hearses.

Brian Walsh, *When You Die, You’ll Probably Be Embalmed. Thank Abraham Lincoln for That*, SMITHSONIAN MAG. (Nov. 1, 2017), <http://www.smithsonianmag.com/science-nature/how-lincolns-embrace-embalming-birthered-american-funeral-industry-180967038/> [https://perma.cc/ZS43-LMGY].

<sup>37</sup> Arterial embalming was developed by a French chemist in 1838 through the injection of arsenic into the carotid artery. Tracy L. Hineman, *The Influence of the Civil War on the American Funeral*, RICHMOND TIMES DISPATCH (Aug. 15, 2018), [http://richmond.com/sponsored/morrisett/the-influence-of-the-civil-war-on-the-american-funeral/article\\_73426bb6-a08e-11e8-b065-5348a5dbce49.html](http://richmond.com/sponsored/morrisett/the-influence-of-the-civil-war-on-the-american-funeral/article_73426bb6-a08e-11e8-b065-5348a5dbce49.html) [https://perma.cc/PF3U-EF8N].

<sup>38</sup> *Id.*

<sup>39</sup> *See What Is Embalming?*, FUNERAL CONSUMER ALL. STANISLAUS & MERCED CNTYS., <http://www.fcasmc.org/copy-of-conventional-burial> [https://perma.cc/6WKX-DCGG] (last visited Mar. 8, 2022) (“Embalming provides no public health benefit, according to the U.S. Centers for Disease Control . . . .”); *Embalming Toxins*, ENV’T. MAG. (July 20, 2004), <http://emagazine.com/embalming-toxins/> [https://perma.cc/YA35-9NYF] (“Embalming is by no means the public health necessity the funeral industry implies.”); *Embalming: What You Should Know*, FUNERAL CONSUMER ALL. (Nov. 26, 2007), <http://funerals.org/what-you-should-know-about-embalming/> [https://perma.cc/5RES-BJTA] (arguing the perception of embalming as a necessity was created by the funeral industry).

<sup>40</sup> There may be no other rite of passage around which we have become more passive. We carefully vet the doctors or midwives who will deliver our babies. We pore over options for wedding venues and officiants. But often we don’t plan for death. So when it arrives, we take what’s easily available . . . . If death practices reveal a culture’s values, we choose convenience, outsourcing, an aversion to knowing and seeing too much.

Jones, *supra* note 33.

<sup>41</sup> Walsh, *supra* note 36.



funeral director, with some details that may be selected to personalize the experience. The death industrial complex is structured around a system that routes the deceased through one of three customary paths: casket, crematorium, or medical donation.<sup>42</sup>

Death care varies dramatically from decedent to decedent often based upon whether the individual was churched or unchurched. For the churched, religious affiliation often dictates customs and practices.<sup>43</sup> And though format varies significantly, a reference to a traditional American funeral generally means cosmetized, adorned, and embalmed remains are viewed prior to a funeral (stage one), memorialized in some type of funeral ceremony (stage two), and then interred in a cemetery plot or mausoleum (stage three). Visitation or viewing of the deceased takes place shortly before the funeral and is called either a “viewing” or a “wake.” Although state law does not require embalming for a viewing (with the exception of Minnesota, in limited circumstances),<sup>44</sup> funeral directors may insist that embalming is necessary for reasons that are wholly unsupported by science (e.g., mental health, sanitation, or hygiene).<sup>45</sup> This is an important business development strategy. Removing the viewing for a traditional funeral renders the corpse itself less central to the event, thereby reducing the expense that accompanies presenting aesthetically pleasing remains (as opposed to remains that may be bloated or discolored), including embalming and silk-lined casket.<sup>46</sup>

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<sup>42</sup> Brendan Kiley, *The Architect Who Wants to Redesign Being Dead*, INSURANCENEWSNET (Apr. 1, 2015), <http://insurancenewsnet.com/oarticle/The-Architect-Who-Wants-to-Redesign-Being-Dead-a-609801#.Xt8DvBNKhQI> [<https://perma.cc/6XEH-P4GQ>].

The American dead, like American voters, fall roughly into two camps. In this . . . analogy, the conventional burial industry is like the Republican Party: a lot of suits, a lot of money, lobbyists to protect their interests, and a general acceptance that cutting down trees (for caskets), pouring concrete (for vaults), and putting toxic chemicals underground (embalming fluids) are simply part of the American way. Cremationists are more like the Democratic Party: slightly looser dress code, still interested in profit margins but perhaps not as fanatically (there is a lot less money to be made from a \$400 urn than a \$3000 casket), and a belief that they are on the progressive side of history.

*Id.*

<sup>43</sup> Roughly 22.8% of people surveyed identify as religiously unaffiliated or religious “nones” in the United States. *Religious Landscape Study*, PEW RSCH. CTR., <http://www.pewforum.org/religious-landscape-study> [<http://perma.cc/228A-QYFQ>].

<sup>44</sup> Minnesota requires embalming if “a body will be transported by public transportation . . . if final disposition will not be accomplished within 72 hours after death, . . . if the body will be publicly viewed, . . . [and] if so ordered by the commissioner of health . . .” MINN. STAT. § 149A.91(3)(1-4) (Current with legis. Effective through Mar. 19, 2022 from the 2022 Reg. Sess.).

<sup>45</sup> See JESSICA MITFORD, *THE AMERICAN WAY OF DEATH REVISITED* 70 (Vintage Books, 2000).

<sup>46</sup> Embalming is a violent multi-step preservation step where, for lack of a better description, we pickle our loved ones. Massage is used to alleviate rigor mortis. There is also the process of “setting the face,” which involves stitching the lips and wiring the jaw closed. For more information, see Stephen E. Nash, *The Weird, Wild World of Mortuary Customs*, SAPIENS (Mar. 8, 2018), <http://www.sapiens.org/column/curiosities/embalming-culture-mortuary-cus-toms/> [<https://perma.cc/P3LL-TCQ7>].

The funeral service may take place at a church, religious center, or home. It may involve clergy, prayers, and/or eulogies. The stage two service may be the last time that the body of the deceased is viewed. Often, chosen pallbearers carry the casket from the service to the awaiting vehicle that will transport the casket to its end destination (cemetery or crematorium). The burial site (e.g., a grave, tomb, or mausoleum) may be prepared in advance and a procession of mourners will follow the casket from funeral service to burial site for a final ceremony of some form. It is relatively common for stage three to conclude with a less formal (sometimes festive) event or gathering that involves consumption of food and beverages—from light cocktail fare to a full banquet. In some cultures, this burial “after party” is treated as an informal way to toast and honor the deceased.

American funeral custom may find itself on the precipice of another major funerary cultural shift. Some reports suggest that the somber formal funeral<sup>47</sup> is gradually being supplanted by more personalized approaches.<sup>48</sup> Any number of unrelated factors are likely coming to bear on this shift. Over the past decade, the alt-death or death positive movement has sought to bring empowerment around freely discussing all aspects of death.<sup>49</sup> There is declining interest in organized religion (only thirty-six percent regularly attend religious services),<sup>50</sup> which coincides with less of an interest in visiting cemeteries.<sup>51</sup> More consumers are concerned with the environment,<sup>52</sup> and green death care alternatives are highlighting the extraordinary toxicity and waste

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<sup>47</sup> The luxury funeral business is thriving in many parts of the world, with \$100,000 gold plated caskets and seven figure burial plots. Razak Ahmad & Angie Teo, *Lavish Funerals in Vogue as Rich Asians Go Out in Style*, REUTERS (Sept. 24, 2010, 1:07 AM), <http://www.reuters.com/article/us-malaysia-funerals/lavish-funerals-in-vogue-as-rich-asians-go-out-in-style-idUSTRE68N0OX20100924> [https://perma.cc/Z6AJ-3E26].

<sup>48</sup> “Somber, embalmed-body funerals, with their \$9,000 industry average price tag, are, for many families, a relic. Instead, end-of-life ceremonies are being personalized: golf-course cocktail send-offs, backyard potluck memorials, more Sinatra and Clapton, less ‘Ave Maria,’ more Hawaiian shirts, fewer dark suits. Families want to put the ‘fun’ in funerals.” Karen Heller, *The Funeral as We Know It Is Becoming a Relic – Just in Time for a Death Boom*, WASH. POST (Apr. 15, 2019, 2:00 AM), [http://www.washingtonpost.com/lifestyle/style/the-funeral-as-we-know-it-is-becoming-a-relic—just-in-time-for-a-death-boom/2019/04/14/a49003c4-50c2-11e9-8d28-f5149e5a2fda\\_story.html](http://www.washingtonpost.com/lifestyle/style/the-funeral-as-we-know-it-is-becoming-a-relic—just-in-time-for-a-death-boom/2019/04/14/a49003c4-50c2-11e9-8d28-f5149e5a2fda_story.html) [https://perma.cc/XM2H-H9YL].

<sup>49</sup> Mortician and best-selling author Caitlin Doughty has popularized the use of the phrase “death positive movement.” Tai Gooden, *The Death Positive Movement Encourages Us to Face Death Directly*, NERDIST (Nov. 25, 2020, 7:41 AM) <https://nerdist.com/article/death-positive-movement/> [https://perma.cc/L6PC-RFAK].

<sup>50</sup> *Id.*

<sup>51</sup> At least one study confirms that individual religiosity is a predictor of cemetery visits. Asher D. Colombo & Eleonora Vlach, *Why Do We Go to the Cemetery? Religion, Civicness and the Cult of the Dead in Twenty-First Century Italy*, 63 REV. RELIGIOUS RSCH. 217, 239 (2021).

<sup>52</sup> These consumers see cemeteries as toxic, expensive, golf-course-landfills for the dead. Cary Funk & Brian Kennedy, *How Americans See Climate Change and the Environment in 7 Charts*, PEW RSCH. CTR. (Apr. 21, 2020), <http://www.pewresearch.org/fact-tank/2020/04/21/how-americans-see-climate-change-and-the-environment-in-7-charts> [https://perma.cc/UULL3-DL3Y].

of traditional funeral practice.<sup>53</sup> Rising costs in three fundamental areas (health care, housing, and education) may be creating pressure for lower cost alternatives. And though the inevitability of death renders demand for services intact, rising demand for fire-based cremation has finally surpassed traditional burial in the U.S.: 5% in 1970, 55% in 2016, and projected 71% by 2030.<sup>54</sup>

### B. Funeral Poverty

It is estimated that 40% of Americans would have great difficulty contending with an unexpected \$400 expense<sup>55</sup> and fewer than 40% could afford to pay the surprise \$1,000 expense out of savings.<sup>56</sup> Death of a cherished loved one may be emotionally devastating for the living, but it may also be economically shattering. These transactional, economic realities are rarely discussed. The term “funeral poverty” has recently been coined to facilitate conversation about the unaffordability of the transitioning of human remains.<sup>57</sup> And though the term “poverty” is generally used to reference an inability to meet one’s basic needs,<sup>58</sup> the reality of poverty is far more sweeping than this deceptively simple definition. A failure to provide for oneself or one’s dependents is stigmatized and often accompanied by feelings of shame, inadequacy, and inferiority.<sup>59</sup> Bereavement compounds this sense of

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<sup>53</sup> See Victoria Haneman, *Tax Incentives for Green Burial*, 21 NEV. L.J. 491, 492 (2021) (noting that an “estimated 5.3 million gallons of embalming chemicals are buried annually in what are essentially luxury landfills-slash-golf-courses, with landscaping and grass to maintain and mow, in coffins that are typically constructed of nonbiodegradable chipboard”).

<sup>54</sup> Leanne Pott, *6 Funeral Trends That Are Changing Death Rituals*, AARP (Nov. 20, 2017), <http://www.aarp.org/home-family/friends-family/info-2017/funeral-ceremony-trends-fd.html> [<https://perma.cc/HKM4-D329>].

<sup>55</sup> BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018 21 (2019) [hereinafter FED REPORT] <https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf> [<https://perma.cc/YC8R-YA8V>] (noting four in ten adults, if faced with an unexpected expense of \$400, would either not be able to cover it or would cover it by selling something or borrowing money).

<sup>56</sup> Konish, *supra* note 8.

<sup>57</sup> The concept of “funeral poverty” is thus used in a number of contexts encompassing poverty and financial hardship, indebtedness, welfare reform, use of food banks, constraints on and challenges for the funeral industry, the experience of grief, and provision of bereavement services and support. Within these various contexts are different perspectives and emphases. But there is no definition of “funeral poverty” or general agreement on what it means.

Anne Corden & Michael Hirst, *The Meaning of Funeral Poverty: An Exploratory Study* 3–4 (Univ. of York Soc. Pol’y Rsch. Unit, Working Paper No. 2668, 2015), <http://www.mariecurie.org.uk/globalassets/media/documents/policy/policy-publications/march-2016/meaning-of-funeral-poverty-exploratory-study.pdf> [<https://perma.cc/TEW9-H9SG>].

<sup>58</sup> Brian Fikkert, *The Crisis of Global Poverty*, SHARED JUST. (Aug. 24, 2016), <http://www.sharedjustice.org/international-justice/2016/8/24/the-crisis-of-global-poverty> [<https://perma.cc/CCP3-JT3E>] (“For a poor person everything is terrible—illness, humiliation, shame. We are crippled; we are afraid of everything; we depend on everyone.”).

<sup>59</sup> *Id.*

failure—when not being able to afford to pay for ritualization and memorialization that reflect societal and cultural beliefs and values may translate to dishonoring or disrespecting the dead or their memory.<sup>60</sup> Death of a loved one is not viewed by most as the appropriate time to bargain shop or select “cheap” alternatives.

Interestingly, lower-income families in the United States spend far more on death care services than higher-income families (relative to total household expenditures) in every year studied since 1996.<sup>61</sup> And in an era where conspicuous goods have become broadly available, expensive watches and boats are status items for the wealthy, while the American funeral is the notable expenditure among lower-income families.<sup>62</sup> In 2014, the top 1% spent less on funerals than everyone else—in share of total expenditures, but also (and more surprisingly), in absolute dollars.<sup>63</sup> Conversely, the poor spent a “26% greater share of total expenditures than the national average.”<sup>64</sup> This trend is not without historical precedent, with one historian noting that funerals were an important display of status for the working class in Edwardian and Victorian England: opportunities for bourgeois conspicuous consumption were few and far between for the common man of the day, and perhaps these working class and poor communities rely more upon social capital generated by performative displays of grief.<sup>65</sup> Or the simpler explanation may be that the richer and more educated are more likely to opt for considerably less expensive cremation services versus more traditional funerals and burials.<sup>66</sup>

The state plays a dominant role in imposing economic burden upon customers of the death care services industry through the laws that are passed, and the way in which these laws drive costs is particularly relevant to any discussion of funeral poverty.<sup>67</sup> What does one do to pay for death care services when they simply do not have the money?

<sup>60</sup> Kelli Swazey, *Life That Doesn't End with Death*, TEDMED (Apr. 2013), [http://www.ted.com/talks/kelli\\_swazey\\_life\\_that\\_doesn\\_t\\_end\\_with\\_death](http://www.ted.com/talks/kelli_swazey_life_that_doesn_t_end_with_death) [<https://perma.cc/4HRF-J62V>].

<sup>61</sup> Death care services consumption is an area in which there is not a treasure trove of empirical data to parse by socioeconomics or race, though there is some data available. *See* RESOR, *supra* note 3, at 106; *see also* CURRID-HALKETT, *supra* note 13, at 33.

<sup>62</sup> CURRID-HALKETT, *supra* note 13, at 32–34.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Nine states require families to become customers of a funeral director: Connecticut, Illinois, Iowa, Indiana, Louisiana, New York, Michigan, Nebraska, and New Jersey. *See, e.g.*, TANYA MARSH, *THE LAW OF HUMAN REMAINS* 74 (2016); *cf.* Brandon Heffinger, *Only Nine States Require the Use of Funeral Directors*, FUNERAL LAW BLOG (Mar. 3, 2014), <http://funerallow.typepad.com/blog/2014/03/only-nine-states-require-the-use-of-funeral-directors.html> [<https://perma.cc/4KTD-YS27>] (describing process differences absent a funeral director requirement, noting, “[i]n states like North Carolina, citizens can bury their recently deceased loved ones without much oversight or regulation”).

When researching, publishing, and presenting on the topic of funeral poverty, all roads of inquiry lead back to this one question. It is an enduring myth that medical donation is available to all, although the COVID-19 pandemic has driven home the reality of the encompassing list of disqualifications that preclude donation to a nonprofit, including donors: (1) who have died because of an infectious disease; (2) suffering from trauma (e.g., car accident, limb amputation, etc.); and (3) exceeding designated height, weight, or BMI (e.g., BMI over 35, over six feet tall, over 200 pounds).<sup>68</sup> Setting aside the possibility of medical donation, there are few reliable options remaining.<sup>69</sup>

The consumer purchasing “at-need” death care services who has exhausted all other potential resources must beg, borrow, or surrender the decedent. Crowdfunding is serving the functional role of a social safety net for unexpected death or funeral insurance for a modern age.<sup>70</sup> Leaning upon crowdfunding Internet sites such as GoFundMe,<sup>71</sup> YouCaring, MyCause, Pozible, or FuneralFund<sup>72</sup> to solicit donations from friends, family, and strangers is now accepted as appropriate and not wholly undignified.<sup>73</sup> The Chief Executive Officer of GoFundMe has admitted that his staff coaches funeral organizers to maximize the chances that a memorial campaign will

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<sup>68</sup> Victoria Haneman, *Funeral Poverty*, 55 U. RICHMOND L. REV. 387, 397–98 (2021).

<sup>69</sup> See *id.* for a more exhaustive list of options. Also, note the discussion of FEMA reimbursement in cases of national disaster, discussed at the end of this section.

<sup>70</sup> The fact that paying my dad’s cremation costs came down to luck and privilege isn’t lost on me. On average, only 22.4 percent of crowdfunding projects are successful and meet their goal, and 24 percent of Americans don’t have a credit card. There isn’t much support out there for young or low-income people shouldering the cost of a loved one’s end-of-life costs alone, aside from crowdfunding and asking for help from friends and family, if that’s even an option.

Alaina Leary, *1 in 6 Millennials Have Crowdfunded a Funeral. I’m One of Them.*, TALK POVERTY (Mar. 10, 2021), <http://talkpoverty.org/2021/03/10/crowdfunding-funeral-expenses-father/> [<https://perma.cc/F44L-WQSH>].

<sup>71</sup> GoFundMe, one of the largest fund-raising sites, says that 13 percent of its campaigns created in 2017 were described as memorials, which include funerals and are one of the company’s fastest growing categories. That follows on a 2015 study by the Funeral and Memorial Information Council, which reported that 17 percent of adults aged 20 to 39 had used the internet to solicit or donate money for funeral-related arrangements.

Laura M. Holson, *As Funeral Crowdfunding Grows, So Do the Risks*, N.Y. TIMES (June 5, 2018), <http://www.nytimes.com/2018/06/05/business/funerals-crowdsourcing-crowdfunding-scams.html> [<https://perma.cc/9GJC-CYEF>].

<sup>72</sup> Julie Power, *Fears over GoFundMe Boom in Fundraising for Funerals*, SYDNEY MORNING HERALD (Aug. 13, 2016, 1:50 PM), <http://www.smh.com.au/national/fears-over-go-fundme-boom-in-fundraising-for-funerals-20160803-gqjunv.html> [<https://perma.cc/T62Q-YRSW>].

<sup>73</sup> It would cost about \$10,000 to bury your dead ass right now . . . . If you die penniless, your family could and should consider going the crowdfunding route . . . . [But] if I were a crooked funeral director, I would see directing customers to these new fundraising opportunities as an alternative to letting them glimpse the last page in my “menu of services” marked in fancy cursive “For the Bereaved of Humbler Means.” Why show a customer the cheaper option if I can direct them to a source of money instead?

go viral: “If a picture is worth 1,000 words, a video is worth 10,000 words . . . . The bereaved, too, are advised to contact reporters and refresh pages with comments to maintain interest.”<sup>74</sup> For those without resources who must resort to borrowing, funeral homes in the United States generally accept credit cards.<sup>75</sup> Of course, this provides little assistance to the nearly thirty percent of Americans who do not have credit cards.<sup>76</sup> For those with bad or nonexistent credit, a subprime loan industry has developed to offer financing for funerary expenses with interest rates advertised as high as 35.99%.<sup>77</sup> The remaining option for those without means to pay for funerary expenses is to surrender the remains of their loved one.<sup>78</sup> Unclaimed remains become the responsibility of the state or municipality.<sup>79</sup> Cremation seems to be the most common method of disposition, likely because it is cost effective and storage of ashes takes little space.<sup>80</sup>

The “pre-need” consumer (or the consumer shopping prior to death) will have the time to research availability time and affordability. The “at-need” death services consumer feels constrained and options seem limited. Perhaps the most broadly available and accessible option, if affordability is a consideration, is incineration cremation, and rising interest in cremation may signal the consumer interest in more affordable alternatives. According to the National Funeral Directors Association, the average cost of a funeral with viewing and burial is \$7,640 (or \$9,135 with added cemetery costs) as compared to \$6,645 for a funeral with viewing and cremation.<sup>81</sup> This cost

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Mike Pearl, *People Are Now Crowdfunding Their Funerals Online*, VICE (Sept. 19, 2013) <http://www.vice.com/el/article/9bz5wa/people-are-now-crowdfunding-their-funerals-online> [https://perma.cc/8F8K-68UJ].

<sup>74</sup> Holson, *supra* note 71.

<sup>75</sup> *Payment Options*, FUNERAL HELP PROGRAM, <http://www.funeral-help.com/funeral-topics/payment-options/> [https://perma.cc/2Z47-2VZY] (noting lower interest rates of credit cards compared to carrying a balance at a funeral home and that use of credit cards to pay for funerals “is also a good way to keep your insurance benefits out of the hands of the death industry”).

<sup>76</sup> See Trent Earl, *Merchant Restraints in Ohio v. American Express—Why the Supreme Court Got It Wrong*, 34 BYU J. PUB. L. 277, 277 (2020) (“Today, over 70% of Americans have at least one credit card in their wallets . . .”).

<sup>77</sup> Eric Bank, *4 Bad-Credit Funeral Loans*, BADCREDIT.ORG (Jan. 3, 2020), <https://www.badcredit.org/how-to/bad-credit-funeral-loans/> [https://perma.cc/65G6-ENWM].

<sup>78</sup> See Jonah Kaplan, *As Unclaimed Bodies Mount in North Carolina, Funeral Homes Urge Pre-planning*, ABC NEWS (May 7, 2021), <http://abc11.com/funeral-cost-virtual-unclaimed-bodies-service/10594256/> [https://perma.cc/MS4E-E7PC] (noting that there are any number of reasons that remains are unclaimed, but “an emerging rationale . . . [is that] families [are] unable or unwilling to pay for the rising cost of a funeral . . . for families, the stress of paying for a funeral quickly overshadows the feelings of grief”).

<sup>79</sup> See *This Is What Happens to Unclaimed Bodies in America*, TALK DEATH (June 30, 2020), <http://www.talkdeath.com/this-is-what-happens-to-unclaimed-bodies-in-america/> [https://perma.cc/JG49-Z4CJ].

<sup>80</sup> “Governments don’t have an emotional interest in the unclaimed dead. That’s not mean or uncaring, it’s just a fact. Governments need to take care of getting the body buried, but they don’t have any family sentiment toward the unclaimed dead.” *Id.*

<sup>81</sup> These are 2019 averages. *2019 NFDA General Price List Study Shows Funeral Costs Not Rising as Fast as Rate of Inflation*, NAT’L FUNERAL DIRS. ASS’N (Dec. 19, 2020), <http://nfda.org/news/media-center/nfda-news-releases/id/4797/2019-nfda-general-price-list-study->

may be pared down to \$5,595 if an “alternative cremation container”<sup>82</sup> is purchased instead of a “cremation casket.”<sup>83</sup> This cost may be reduced further by transporting the deceased directly to a crematorium, eliminating the use of a funeral home entirely, and opting for a direct cremation<sup>84</sup> with an average cost of \$1,100.<sup>85</sup> The direct to cremation (“D2C”)<sup>86</sup> model eliminates funeral home involvement and lowers expense (sometimes dramatically) when a crematorium provides all necessary services for the consumer: transporting the deceased, preparing death certificates, and delivering ashes.<sup>87</sup> The important performative celebration or memorial to honor the deceased may still take place at a later time and without the involvement or expense of a funeral director. Ideally, the consumer interested in D2C would take steps during lifetime to ensure that loved ones do not pick up the phone in a moment of grief to call the neighborhood funeral home—but it is possible to arrange for D2C with little notice by calling a local crematorium immediately after the passing of a loved one.

If the death of a loved one is the result of a national disaster, the Federal Emergency Management Agency (“FEMA”) may be authorized to provide reimbursement for costs associated with death care services.<sup>88</sup> Although COVID-19 was declared a national disaster, FEMA was not authorized to reimburse death care expenses under President Donald Trump.<sup>89</sup> Federal relief legislation was enacted in March 2021 that authorized FEMA to reimburse up to \$9,000 per decedent for death care service costs incurred for any U.S. citizen, non-citizen national, or qualified alien who died on or after

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shows-funeral-costs-not-rising-as-fast-as-rate-of-inflation [https://perma.cc/GD7P-N9Z4] (hereinafter 2019 NFDA General Price List).

<sup>82</sup> A crematorium or funeral home is prohibited from representing to the consumer that they are required to purchase a casket. 16 C.F.R. § 453.3 (2020).

<sup>83</sup> 2019 NFDA General Price List, *supra* note 81.

<sup>84</sup> Most funeral homes do not have their own crematoriums, which means that a transportation fee will likely be charged to transfer the remains, unless the services of the crematory are engaged directly after death. The crematory staff are usually able to handle administrative issues such as attending to the death certificate and arranging transportation of the deceased directly to the crematory, often at considerably less expense than if a funeral director was involved.

Haneman, *supra* note 68, at 429–30.

<sup>85</sup> See *What Is the Cost of Human Cremation?*, CREMATION RES., <https://www.cremationresource.org/cremation/what-is-the-cost-of-human-cremation.html> [https://perma.cc/M84R-JAQM].

<sup>86</sup> “The pandemic has fueled a surge in cremations carried out without funerals . . . Such direct cremations, as they are known by the funeral industry, were once widely seen as a form of ‘pauper’s funeral,’ with no ceremony or mourners at the time of cremation.” Tom Belger, *Basic Cremations Soar as COVID-19 and David Bowie Erode ‘Pauper’s Funeral’ Stigma*, YAHOO! (Feb. 12, 2021), <https://ca.movies.yahoo.com/direct-cremation-uk-coronavirus-rise-david-bowie-funeral-costs-060039997.html> [https://perma.cc/Z5AW-52H5].

<sup>87</sup> See Capponi, *supra* note 4.

<sup>88</sup> See *Disaster Funeral Assistance*, FEMA, <http://www.fema.gov/disaster-funeral-assistance> [https://perma.cc/6A5W-W46D] (last updated Dec. 7, 2021).

<sup>89</sup> Lisa Song & Yeganah Torbati, *Grieving Families Need Help Paying for COVID-19 Burials, but Trump Hasn’t Released the Money*, PROPUBLICA (Apr. 29, 2020, 2:51 PM), <http://www.propublica.org/article/fema-burial-relief-coronavirus> [https://perma.cc/6SWE-5AUA].

January 20, 2020 with COVID-19 listed as cause of death on a death certificate.<sup>90</sup> The FEMA hotline was inundated with over one million phone calls when the program opened on April 12, 2021.<sup>91</sup>

The scope of this \$9,000 reimbursement is historically unprecedented<sup>92</sup> in the United States.<sup>93</sup> By way of comparison, with three 2017 hurricanes, FEMA covered an average of \$2,700 for the death care expenses of 976 approved applicants.<sup>94</sup> Although there are few good options for those who find themselves suffering from funeral poverty and with COVID-attributed deaths exceeding half a million people in the United States alone, questions remain as to whether the scope of this reimbursement is appropriate. When a large-scale disaster strikes, the federal government often feels pressure to provide victim relief—but the resulting action (or overreaction) may produce inefficient and/or unsound long-term action.<sup>95</sup>

The \$9,000 reimbursement for funerary services resulting from a COVID-19 death is the largest scale reimbursement program that FEMA has ever managed, and it is problematic for a number of reasons. First and foremost is the practical difficulty that reimbursement depends upon a death certificate stating death “may have been caused by” or “was likely a result of” COVID-19 or COVID-19 symptoms.<sup>96</sup> This is an impossible hurdle for

<sup>90</sup> Kenneth Terrell, *FEMA to Help Cover Funeral Costs for COVID Victims*, AARP (Apr. 7, 2021) <http://www.aarp.org/politics-society/government-elections/info-2021/fema-covid-funeral-assistance.html> [https://perma.cc/RZU8-4RN8].

<sup>91</sup> Nicole Sganga, *FEMA Funeral Program Inundated by 1 Million Calls at Launch*, CBS NEWS (Apr. 14, 2021, 7:34 PM), <http://www.cbsnews.com/news/fema-covid-funeral-assistance-inundated> [https://perma.cc/566R-JTT3].

<sup>92</sup> Families wanting to bring home Katrina victims who had died outside of the city faced additional financial and logistical obstacles. The expense of bringing a loved one home for burial added several hundred dollars to the cost of a funeral. FEMA and the Red Cross frequently refused to pay or subsidize the expense of shipping a coffin home from evacuation sites. The number of cremations skyrocketed as people modified the burial plans of relatives and friends in order to make sure the dead were laid to rest at home.

Sarah Tomkins, *Priam's Lament: The Intersection of Law and Morality in the Right to Burial and Its Need for Recognition in Post-Katrina New Orleans*, 12 UDC L. REV. 93, 99 (2009).

<sup>93</sup> Sganga, *supra* note 91.

<sup>94</sup> Song & Torbati, *supra* note 89.

<sup>95</sup> For more on government post-disaster overreaction through the Internal Revenue Code, see Ellen P. Aprill and Richard Schmalbeck, *Post-Disaster Tax Legislation: A Series of Unfortunate Events*, 56 DUKE L.J. 51, 86 (2006) (“A flavor of sympathy and condolence surrounds the reaction to these recent disasters. . . . Americans, wherever they lived, whatever their economic status, identified with the victims of these disasters, who themselves came from all income levels. Even the very rich were vulnerable. All of us, rather than being simply witnesses, became interested persons, and Congress responded with a startling number and variety of tax benefits, including benefits to the wealthy. But such sympathy fits uncomfortably within the tax code.”).

<sup>96</sup> Erin Banco, *Death-certificate Omissions Stymie FEMA Funeral Assistance Program*, POLITICO (May 24, 2021, 5:58 PM), <http://www.politico.com/news/2021/05/24/covid-19-funerals-fema-490635> [https://perma.cc/59VB-S2N8] (quoting a forensic pathologist: “It’s not like I can go back and test them now. I wouldn’t amend it unless I had proof. Covid is another medical diagnosis that needs to be proven, not assumed. I also wouldn’t want to help people make a false claim, either. It should go to the people who qualify.”).



some families: early in the pandemic, testing was widely unavailable to confirm diagnosis and doctors had little knowledge of all possible symptoms; the size of the reimbursement is such that people are now forced to go through the arduous process of amending death certificates to list COVID-19 as cause of death and deal with administrator hesitancy to make amendments. Second, reimbursement is unavailable if funds for death care services were set aside by the decedent in some ways (by contract or burial/funeral insurance) but not other ways (by payable-on-death account or life insurance policy).<sup>97</sup>

Reimbursement should not hinge upon the good fortune of using a “winning” (and allowable) source of financing to prepay funerary expense. Third, eligibility for this benefit is not means-tested. And thus, “distorting sympathy” is spurring action that is staggeringly overinclusive in its delivery.<sup>98</sup> Fourth, the \$9,000 reimbursement cap is excessive given that more than 50% of Americans are cremated (a number that increased during COVID-19 due to an overwhelmed funeral industry)<sup>99</sup> and the average cost of a direct cremation is \$1,100.<sup>100</sup> Fifth, this type of excessive reimbursement available to so many prospective consumers creates a favored category of consumer that has the potential to create upward pressure on the pricing of death care services.<sup>101</sup> Finally, traditional funeral practice in the United States is extraordinarily toxic to the environment and all government policy subsidizing death care services should be structured around encouraging (not discouraging) environmentally favorable practices—or, at a minimum, environmentally neutral practices.

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<sup>97</sup> See *FEMA Policy: COVID-19 Funeral Assistance Individuals and Households Program Policy*, FEMA POLICY No. 104-21-0001 2 (2021), [http://www.fema.gov/sites/default/files/documents/fema\\_covid-19-funeral-assistance-interim-policy-version-2\\_06-29-2021.pdf](http://www.fema.gov/sites/default/files/documents/fema_covid-19-funeral-assistance-interim-policy-version-2_06-29-2021.pdf) [https://perma.cc/22E9-9MHZ].

<sup>98</sup> Aprill and Schmalbeck, *supra* note 95, at 99.

<sup>99</sup> See Mary Jordan, *Ashes in the Mail: Dealing with the Loss of a Loved One Has Changed in the COVID Era*, WASH. POST (Mar. 3, 2021, 5:00 AM), [http://www.washingtonpost.com/national/covid-pandemic-cremation-burial-ashes-post-office-mail-usps/2021/03/02/3c646054-723c-11eb-93be-c10813e358a2\\_story.html](http://www.washingtonpost.com/national/covid-pandemic-cremation-burial-ashes-post-office-mail-usps/2021/03/02/3c646054-723c-11eb-93be-c10813e358a2_story.html) [https://perma.cc/JU3M-GWCR].

<sup>100</sup> *What Is the Cost of Human Cremation?*, CREMATION RES., <http://www.cremationresource.org/cremation/what-is-the-cost-of-human-cremation.html> [https://perma.cc/6VRA-UU3G] (citing the Cremation Resource Council).

<sup>101</sup> Illinois has instituted a program that pays for \$7,500 in funerary expenses for victims of homicide. Susan Johnson, executive director of Chicago Survivors, is quoted as saying, “Every funeral home in the state knows that victims get \$7,500 for a funeral and it’s their goal to charge the entire amount because it’s easy money.” Barnini Chakraborty, *Chicago’s Predatory Funeral Homes Target Homicide Victims, Cash In on Taxpayer-Funded Expenses*, FOX NEWS (Aug. 13, 2018), <http://www.foxnews.com/us/chicagos-predatory-funeral-homes-target-homicide-victims-cash-in-on-taxpayer-funded-expenses> [https://perma.cc/TSL4-PMXW].

### C. Inevitable Consumption in a Unique Marketplace

Grief has a profound impact upon the consumer, and its bearing upon purchase decisions should not be underestimated. A bereaved consumer may struggle to make logical and rational decisions—preferring to delay decision making, preserve the status quo, and/or rely on the authority of another (“What would you do here?”).<sup>102</sup> Death care service consumers are generally inexperienced<sup>103</sup> and vulnerable to being upsold through a variety of funeral home tactics that may include fictional representations (“your loved one will be preserved *forever*”), grief exploitation (“I would want my *own* mother or father to only have the best”), manipulation of death fears (“This casket will prevent any bugs or worms from getting in”), religious misdirection (“If Jesus had been cremated, He would not have risen on the third day”), and patent bullying (“No one’s husband would want to be buried in a plain wood casket”).<sup>104</sup>

Information asymmetry also stands as an important obstacle for reasoned consumer spending within the death care services marketplace. Logical decision-making is supported by clear and comprehensive information, and the at-need consumer is generally dependent upon the often limited menu of choices offered by the one and only funeral home that they use. In a 2019 study done by the National Funeral Director Association, only 16.8% of consumers visited or even called more than one funeral home.<sup>105</sup> Funeral homes owned by Wall Street firm Service Corporation International, the largest funeral home chain in the United States, are charging forty to seventy-five percent more than independently owned funeral homes in the same metropolitan area.<sup>106</sup> Only a substantial minority of death care providers disclose pricing online, though informal studies have found that those companies with online pricing transparency are as much as thirty percent less

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<sup>102</sup> See KAREN WILDLE, SOKRATIS DINOS, ALEXANDER MARTIN, FRANCES SHIPSEY & IMOGEN MARTIN, EXPLORING CONSUMER VULNERABILITY IN THE FUNERAL MARKET, NATCEN SOCIAL RSCH. 27 (2020), [http://assets.publishing.service.gov.uk/media/5f33c66ae90e0732e2d7ca2b/Funerals\\_NatCen\\_rapid\\_evidence\\_assessment\\_120820.pdf](http://assets.publishing.service.gov.uk/media/5f33c66ae90e0732e2d7ca2b/Funerals_NatCen_rapid_evidence_assessment_120820.pdf) [<https://perma.cc/3H8Y-QXNK>].

<sup>103</sup> According to Federal Trade Commission data, more than fifty percent of Americans have never planned a funeral. Roughly twenty-five percent have arranged one funeral. Mary N. Harrison, *Pyramids to Urns: Funeral Costs and Opinions*, DEPT. OF FAM. YOUTH AND COMM. SCIENCES, UNIV. OF FLA. (Dec. 17, 2018), <http://edis.ifas.ufl.edu/publication/fy023> [<https://perma.cc/SZVF-QH3N>].

<sup>104</sup> Funeral directors provide an important service, and it is likely that most are empathetic and kind. For more on negative approaches to death care, see Caleb Wilde, *Five Ways Funeral Directors Can Bully Their Clients*, CONFESSIONS OF A FUNERAL DIRECTOR (2016), <http://www.calebwilde.com/category/death/funeral-directing/consumer-rights/> [<https://perma.cc/DWM9-L6TB>].

<sup>105</sup> NAT’L FUNERAL DIRS. ASS’N, 2019 CONSUMER AWARENESS AND PREFERENCES STUDY 5 (Apr. 2019), <https://qhi7a3oj76cn9awl3ccqrh3o-wpengine.netdna-ssl.com/wp-content/uploads/2020/02/Funeral-Directors-survey.pdf> [<https://perma.cc/3BC5-BKRA>].

<sup>106</sup> Haneman, *supra* note 68, at 419.

expensive.<sup>107</sup> The infirmities of bounded rationality are obvious here, with choice of funeral home based almost entirely upon consumer convenience<sup>108</sup>—geographically desirable and/or familiar (through referral or past dealings).<sup>109</sup> And yet, the selection of a funeral director or industry professional is a decision with important economic consequences.<sup>110</sup> Death care is an extraordinary purchase usually arising only a handful of times in a consumer's lifetime, combining the purchase of a product and a service. The consumer relies upon advice of industry professionals who almost always have a profit-seeking objective,<sup>111</sup> and, in doing so, leans upon an implicitly-biased source for expertise that drives decision-making. Further, the consumer is dealing with etiquette uncertainty—or a lack of knowledge concerning norms and expected behavior—and is unlikely to push back on advice offered by the industry professional.<sup>112</sup>

Avoidant decision-making may also arise from the consumer within this space because of a disconnect from the decedent's presumed intent—specifically, the survivors are unclear as to what the decedent would have wanted had they planned their own death care.<sup>113</sup> Research indicates that a strategy used by the living to cope with negative emotions surrounding death is to simply reduce the amount of time spent thinking about death-related choices.<sup>114</sup> To that end, the at-need consumer is often decision-avoidant and heavily reliant upon mental shortcuts to avoid having to navigate a complicated planning process. These shortcuts may result in disordered or costly decision-making.

An interesting impetus for bereaved consumers, many of whom may be operating with asymmetrical information and a truncated reasoning process, is the need to keep the deceased “safe.”<sup>115</sup> Safety in the context of death care services means protecting the “integrity and wholeness” of the remains, giv-

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<sup>107</sup> *Id.*

<sup>108</sup> “The most common source of information consumers would use if they needed to plan a funeral or memorial service was either a local funeral home or seek the advice/recommendation of a friend or family member.” NAT'L FUNERAL DIRS. ASS'N, *supra* note 105, at 6.

<sup>109</sup> FEMA POLICY No. 104-21-0001, *supra* note 97.

<sup>110</sup> For further discussion on possible economic consequences associated with funeral arrangement decisions, see Byron D. Sher, *Funeral Prearrangement: Mitigating the Undertaker's Bargaining Advantage*, 15 STAN. L. REV. 415 (1963).

<sup>111</sup> See Dwayne A. Banks, *The Economics of Death? A Descriptive Study of the Impact of Funeral and Cremation Costs in U.S. Households*, 22 DEATH STUD. 269, 274–75 (1998) (noting funeral directors have no incentive to nudge consumers toward more affordable alternatives).

<sup>112</sup> See Mercedes Bern-Klug, *The Decision Labyrinth: Helping Families Find Their Way through Funeral Options*, 28 GENERATIONS: J. AM. SOC'Y ON AGING 31, 32 (2004).

<sup>113</sup> “It is not unheard of for families of a decedent to engage in an informal vote or an impromptu round of ‘rock, paper, scissors’ to determine the specific casket in which their loved one is to be buried or the hymn to be sung at the memorial service.” Shawn Irwin Walker, *Over My Dead Body: Preventing and Resolving Disputes Regarding the Disposition of the Dead*, 43 ACTEC L.J. 385, 406 (2018).

<sup>114</sup> See Wilde et al., *Exploring Consumer Vulnerability*, *supra* note 102, at 16.

<sup>115</sup> *Id.* at 18.

ing rise to approaches designed to stave off decomposition.<sup>116</sup> In fact, our modern preservation process of embalming has many varied historical antecedents, including: (1) mummification of the Ancient Egyptians; (2) mellification (or steeping in honey) of the Ancient Arabians; (3) crushed cinnabar used in Palencia, Spain roughly 5,000 years ago; and (4) plastination from the 1970s.<sup>117</sup> And though decomposition is inevitable, the desire to keep the deceased safe and preserved is exploited in various ways by the death care services industry. Most obvious is the marketing of premium caskets designed to prevent air and moisture intrusion, referred to as “sealer,” “protective,” or “gasketed” caskets.<sup>118</sup> These caskets are common because of the aversion to decomposition and the public seems largely unaware of the rare but notably gruesome failures of these receptacles.<sup>119</sup>

The death care consumer is cost-insensitive for layered reasons. For some, investment into death care is meant to reflect the value and/or the status of the decedent. Controlling costs or bargain shopping may be viewed as insulting to the memory of the deceased. This ceremony is viewed by many as the last thing that can be done for their loved one, and to that end, they want the decedent to have “only the best.”<sup>120</sup> Some may experience at-need death care purchasing as “distress purchasing,” with the bereaved feeling time pressured and unable to behave like an informed consumer.<sup>121</sup> Further, the irreversibility of decision-making often weighs upon the consumer. Decisions are perceived as being final: cremation is absolute, with all genetic material destroyed; obituaries are rarely revised and reprinted; caskets cannot be returned or exchanged; embalmed remains cannot be interred in a green cemetery; the special moment of the funeral cannot be redone;<sup>122</sup> and there is no way to fix a ritual that “does not feel right.”<sup>123</sup>

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<sup>116</sup> *Id.*

<sup>117</sup> See Christopher McFadden, *9 Impressive Ways Humans Have Attempted to Preserve the Dead*, INTERESTING ENG'G (Mar. 11, 2020), <http://interestingengineering.com/9-impressive-ways-humans-have-attempted-to-preserve-the-dead> [https://perma.cc/NN7Y-9CEF].

<sup>118</sup> These features are designed to prevent the penetration of the casket by air and moisture, but the federal Funeral Rule prohibits any claims from being made that these caskets will protect the deceased indefinitely. *Funeral Costs and Pricing Checklist*, FTC, <http://www.consumer.ftc.gov/articles/0301-funeral-costs-and-pricing-checklist> [https://perma.cc/7GR9-G43H].

<sup>119</sup> [Y]ou can't protect a corpse from itself. While you're insulating grandma from the outside air, she could be stewing in her own fluids, turning into a slurry from the work of anaerobic bacteria. When the weather turns warm, in some cases, that sealed casket becomes a pressure cooker and bursts from accumulated gases and fluids of the decomposing body. The next time relatives visit grandma, they could find her rotting remains oozing from her tomb in the form of a nauseating thick fluid.

Josh Slocum, *What You Should Know About Exploding Caskets*, WASH. POST (Aug. 11, 2014), <http://www.washingtonpost.com/posteverything/wp/2014/08/11/what-you-should-know-about-exploding-caskets/> [https://perma.cc/F78H-L2C4].

<sup>120</sup> See Wildle et al., *Exploring Consumer Vulnerability*, *supra* note 102, at 19.

<sup>121</sup> *Id.*

<sup>122</sup> Bern-Klug, *supra* note 112, at 32.

<sup>123</sup> JELTJE GORDON-LENNOX & MARGARET HOLLOWAY, CRAFTING MEANINGFUL FUNERAL RITUALS: A PRACTICAL GUIDE 141 (2020).

The two most effective interventions to support reasoned purchasing within the death care space are: (1) access to accurate information; and (2) advance pre-need planning and prepayment.<sup>124</sup> Accurate information is most accessible when one is not grief-stricken or time-pressured, which bears upon the importance of pre-need planning. Incentivizing pre-need planning is necessary to bridge cognitive dissonance<sup>125</sup> in a modern society that has had the luxury of distancing themselves daily from death. Our lives have been structured so as to allow as little time as possible to be spent contemplating death<sup>126</sup> and death-adjacent choices,<sup>127</sup> from the attempted erasure of aging, the obsolescence of the elderly in nursing homes, and the institutionalization of death to render it sequestered and invisible.<sup>128</sup> Available evidence suggests that a death care consumer who is not bereaved (such as the consumer planning on a pre-need basis) engages in very little shared decision-making between the consumer and the funeral home—supporting this idea that factors such as etiquette uncertainty, grief, and time constraints create cost insensitivity and render the consumer uniquely vulnerable in this marketplace.<sup>129</sup> The pre-need consumer also has the time to search for and

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<sup>124</sup> See Wildle et al., *Exploring Consumer Vulnerability*, *supra* note 102, at 24.

<sup>125</sup> [T]o function as a conscious being, it's imperative that you be in denial about your impending death. How else would you go about the mundane aspects of your daily life — cleaning the gutters, paying the bills, sitting in traffic — if you were constantly aware of the inevitability of your own death? “You would be overwhelmed with potentially debilitating existential terror,” Solomon said. The logical outcome is a kind of cognitive dissonance. You know all humans die, you know that you are human, and yet somehow you don't believe that you yourself are going to die.

Emma Pattee, *Covid-19 Makes Us Think About Our Mortality. Our Brains Aren't Designed for That.*, WASH. POST (Oct. 7, 2020, 8:23 AM), [http://www.washingtonpost.com/health/covid-thinking-about-death/2020/10/02/1dc0f7e4-c520-11ea-8ffe-372be8d82298\\_story.html](http://www.washingtonpost.com/health/covid-thinking-about-death/2020/10/02/1dc0f7e4-c520-11ea-8ffe-372be8d82298_story.html) [https://perma.cc/SX2U-VGFQ].

<sup>126</sup> [F]or most of human history, we have had to live with this knowledge as nothing could be really done about death—it could not be hidden away, it could not be postponed, and any hope for immortality rested almost exclusively on beliefs in life after death (even though one will also find references to more earthly pathways to immortality—for example in the ancient Gilgamesh Epic through a prickly plant that would help retrieve one's lost youth) . . . However, with the coming of modern society and modern medicine, death increasingly became an enemy to be fought from all flanks—death became the arch enemy of life.

Michael Hviid Jacobsen & Anders Petersen, *The Return of Death in Times of Uncertainty—A Sketchy Diagnosis of Death in the Contemporary 'Corona Crisis.'* AALBORG UNIV., MDPI 2 (July 27, 2020), <http://ideas.repec.org/a/gam/jscscx/v9y2020i8p131-d390318.html> [https://perma.cc/36RF-QQEQ].

<sup>127</sup> See Wildle et al., *Exploring Consumer Vulnerability*, *supra* note 102, at 18–19.

<sup>128</sup> See Jen Ortiz, *The Women Who Love Death*, MARIE CLAIRE (Oct. 31, 2016), <http://www.marieclaire.com/culture/a22236/women-in-death-positivity-movement/> [https://perma.cc/JHV7-M9FB] (“Without a regular face-to-face relationship with death, we've developed an aversion to the subject entirely.”).

<sup>129</sup> See Wildle et al., *Exploring Consumer Vulnerability*, *supra* note 102, at 18–20.

compare costs<sup>130</sup> in a marketplace that does not have a reputation for transparency in pricing.<sup>131</sup>

Pre-need planning and prepayment are important for another reason that is not often considered: the death care industry may stand on the brink of disruption as new and innovative death technologies are introduced to the market.<sup>132</sup> New technologies have the potential to revolutionize the market and reduce price: ecobalming in lieu of traditional embalming, to avoid use of toxic chemicals in preparation of the deceased;<sup>133</sup> the Infinity Mushroom Suit by Coeio, with mushroom-infused fabric that allegedly facilitates decomposition;<sup>134</sup> Recompose, the first facility to offer human composting in the United States;<sup>135</sup> green or liquid cremation (alkaline hydrolysis), which reduces the decedent to a sterile fluid;<sup>136</sup> the theoretical burial pod that turns your body into nourishment for the sapling planted above it, in development by Capsula Mundi;<sup>137</sup> and the yet untested,<sup>138</sup> environmentally-friendly tech-

<sup>130</sup> The Funeral Consumers Alliance partnered with the Consumer Federation of America and conducted a study in 2015. They selected ten metropolitan areas and randomly chose fifteen funeral homes in each. Costs varied wildly: direct cremation ranged from \$495 to \$7,595; direct burial ranged from \$640 to \$6,800 (without casket); full-service funeral (without casket) ranged from \$2,580 to \$13,800. This study emphasizes the importance of advance planning to bring down price. See Slocum, *supra* note 7, at 107.

<sup>131</sup> Consider the following *Wall Street Journal* headline, “Death-Care Stocks Have Made a Killing for Investors. Now It’s Time to Say Goodbye. Funeral Firms Like Service Corp. Have Surged Over the Past Decade, But Competition and Greater Price Transparency Threaten Their Bull Run.” Price transparency seems to run contrary to driving profits in this market. Spencer Jakab, *Death-Care Stocks Have Made a Killing for Investors. Now It’s Time to Say Goodbye.*, WALL ST. J. (Mar. 29, 2019, 5:46 AM), <http://www.wsj.com/articles/death-care-stocks-have-made-a-killing-for-investors-now-its-time-to-say-goodbye-11553851811> [<https://perma.cc/9M2V-NAM5>].

<sup>132</sup> “The American death industry hasn’t exactly been a hotbed of innovation.” Michael Waters, *The Future of Death Tech Has No Rules—Yet*, WIRED (Jan. 24, 2020, 8:00 AM), <http://www.wired.com/story/the-future-of-death-tech-has-no-rules-yet/> [<https://perma.cc/J3HK-ZXR6>].

<sup>133</sup> ENIGMA Ecobalming offers chemicals approved by the Green Burial Council. See *Enigma Ecobalming*, CHAMPION, <http://www.thechampioncompany.com/product-catalog/enigma-ecobalming.html> [<https://perma.cc/SD8Z-9GST>].

<sup>134</sup> See *The Story of a Green Burial*, COEIO, <http://coeio.com/coeio-story/> [<https://perma.cc/F5MD-TFTT>].

<sup>135</sup> “Picture the forest floor. Rich earth continually replenished by fallen trees, dry leaves, and bright moss. New roots reach through each layer, drawing nutrients into branches high above. Recompose uses the principles of nature to transform our dead into soil.” RECOMPOSE, <http://recompose.life> [<https://perma.cc/K88Z-CM94>].

<sup>136</sup> “California rewrote its cremation law in 2017 at the urging of the alkaline hydrolysis startup Qico, then offered the new company \$1.6 million in tax credits.” Waters, *supra* note 132.

<sup>137</sup> See Melian Solly, *Envisioning the Future at the Smithsonian*, SMITHSONIAN MAG. (Feb. 24, 2021, 10:02 AM), <https://www.smithsonianmag.com/smithsonian-institution/floating-cities-biodegradable-burial-pods-and-flying-cars-smithsonian-envisions-multitude-futures-180977085/> [<https://perma.cc/Z9BD-W33J>]; Paula Erizanu, *The Biodegradable Burial Pod that Turns Your Body into a Tree*, CNN (last updated Jan. 11, 2018, 4:29 AM), <https://edition.cnn.com/2017/05/03/world/eco-solutions-capsula-mundi/index.html> [<https://perma.cc/BPA4-QP8F>].

<sup>138</sup> In the last few years, state officials across the country have been forced to map a range of futuristic death technologies onto the creaky regulations of a prior age.

nology meant to mimic natural decomposition by essentially freeze-drying the decedent,<sup>139</sup> which may be on the market by 2025.<sup>140</sup> Further, the digitization of society means intangibles of sentimental or economic value are increasingly created and/or stored online, and pre-need planning may be needed to provide survivors with access.<sup>141</sup>

The average funeral director or mortician in the United States is a white (77.6%), middle-aged (51.8 years old) man (69.1%)<sup>142</sup> offering products and services in line with what has been offered for at least half a century.<sup>143</sup> Without advanced contemplation and planning, the consumer may be limited to the menu of options and prices offered by the local funeral home. Consumers interested in new products and processes must do research and engage in pre-need death care planning, and as with anything else, the demand of educated consumers may eventually shift funerary norms.<sup>144</sup> Further, pre-need investment of capital into the marketplace signals consumer interest and will drive further investment into and interest in death tech.

### III. PAY NOW, DIE LATER PREPAYMENT ARRANGEMENT

The expense to transition human remains represents so much more than the disposal of organic waste. The need for consumer protection exists in this space because the unique way in which the at-need consumer is situated has the potential to increase cost. Consumer spending is driven by noneconomic and sometimes objectively irrational considerations, including sentimentality, that arguably benefit the living far more than the deceased.<sup>145</sup>

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Most state disposition laws are antiquated, premised on narrow definitions of “cremation” and “burial” that leave new technologies like promession without the legal grounds to establish themselves.

Waters, *supra* note 132.

<sup>139</sup> *Ecological Burial*, PROMESSA, <https://www.promessa.se/> [<https://perma.cc/F28F-5NWA>].

<sup>140</sup> Waters, *supra* note 132.

<sup>141</sup> See Capponi, *supra* note 4.

<sup>142</sup> *Morticians, Undertakers, & Funeral Directors*, DATA USA, <https://datausa.io/profile/soc/morticians-undertakers-funeral-directors> [<https://perma.cc/3KX6-P982>].

<sup>143</sup> “The consumer stands firmly in 1951, because that seems to be the technological level and the transparency level that the majority of American funeral homes are stuck at.” Vanessa Quirk, “*We’ve Mastered Weddings—But the Funeral Needs a Lot of Work*”: *Inside the New Death Industry*, QUARTZ (Apr. 4, 2017), <https://qz.com/948857/funeral-homes-and-the-death-industry-are-undergoing-radical-shifts-toward-diy-death/> [<https://perma.cc/2AAQ-GDR4>] (quoting Josh Slocum).

<sup>144</sup> See Quirk, *supra* note 143.

<sup>145</sup> [E]specially among educated middle and upper class whites, the typical funeral today is simpler, smaller in scale, and less well attended (that is to say, less important to the wider community) than a generation ago . . . the real energy in a funeral often lies elsewhere, frequently in the anecdotes about the deceased by friends and relatives. There is no “viewing” of the body (indeed, the trend is to insist on the absence of the body), no tramping through the mud to the cemetery, no table full of casseroles waiting for the family back at home, and there are no prolonged communal rituals of mourning, storytelling, and eating so prevalent in previous generations.

There are many layers undergirding the need for showy, costly, public ceremonies: spending to satisfy community expectations, honor cultural traditions, or avoid peer judgment; conspicuous consumption designed to signal the prestige of the family or decedent; spending at a level deemed respectable to honor the deceased or to avoid peer judgment; or a fear of what others in the community will think if spending is limited.<sup>146</sup> Unnecessary expense is almost certain to be incurred without pre-need planning, and Section III of this Article considers the importance of disrupting cognitive dissonance and engaging in pre-need planning, prepayment, and saving.

### A. *Shopping for Options*

Research shows that most people understand the importance of death care preplanning, and yet few consumers even communicate their last wishes to others.<sup>147</sup> Pre-need planning may refer to some form of inter vivos action to make clear last wishes for disposition at death and/or prepayment of expenses related to last wishes for disposition at death.<sup>148</sup> While the focus of this Article is on the latter (prepayment of expenses), it is worth considering the many misconceptions that exist around the former (lifetime planning of death care).<sup>149</sup> Although it is possible to include a clause in one's will setting forth detailed death care instructions; it is not best practice to do so for several reasons, primary among them is the simple issue of timing. Planning for death care starts no more than a few hours to a few days after death. In fact, the planning and purchase of at-need death care service may conclude before any interested parties review the decedent's will or other estate planning documents. Further, it is not necessarily appropriate to include death care instructions in a will because remains are not considered property that is part

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Thomas G. Long, *Why Jessica Mitford Was Wrong*, 55 THEOLOGY TODAY 496, 502 (1999).

<sup>146</sup> Even in death, famed muckraker Jessica Mitford has managed to cause a ruckus in mortuary circles. . . . Mitford made arrangements last month for a simple, no-frills cremation for \$475 . . . There will be no hermetically sealed casket, no special wood — none of that fancy stuff that Mitford railed against in her book. The irreverent Mitford once joked that when she died, she wanted a proper funeral that included a “horse-drawn carriage with six black horses with white plumes.” In jest, she also wanted to be embalmed so that she could look 20 years younger.

Henry K. Lee, *Mitford Cremation – Last Snub to Funeral Industry* (July 25, 1996), SFGATE, <http://www.sfgate.com/news/article/Mitford-Cremation-Last-Snub-to-Funeral-Industry-2972761.php> [<https://perma.cc/W6MM-MC8R>].

<sup>147</sup> A majority of respondents (62.5%) in a 2017 study felt that death care preplanning was important, but less than 22% had expressed their wishes to others. *NFDA Consumer Survey: Funeral Planning Not a Priority for Americans*, ARIZ. FUNERAL, CEMETERY AND CREMATION ASS'N (June 23, 2017), <https://azfcca.org/nfda-consumer-survey-funeral-planning-not-priority-americans/> [<https://perma.cc/9Q2P-DAN2>].

<sup>148</sup> By way of contrast, the “at-need” consumer is one who is making arrangements on behalf of deceased friend or family member who failed to make “pre-need” (or lifetime) arrangements for themselves. See MARSH, *supra* note 67, at 74.

<sup>149</sup> This is a topic that will, of course, be visited in more detail in a future piece.



of the decedent's estate.<sup>150</sup> In most states, a written document setting forth instructions for death care services and naming a person to manage these final arrangements is sufficient.<sup>151</sup> Although statutory law in the United States varies dramatically as to the scope of rights and the approaches by which to assert those rights,<sup>152</sup> a decedent or their representative often have no absolute legal right to enforce death care instructions, though courts are generally deferential to written death care instructions.<sup>153</sup>

The focus of this Article is pre-need prepayment or precommitment of funds for funerary expenses. Although pre-need prepayment is generally marketed as offering peace of mind to the decedent that a large expense has been managed, the reality is that any commercial marketplace involving a potentially significant lapse of time between payment and service is likely to be replete with issues if it is not regulated properly.

Prepayment for space in a cemetery is not uncommon, with rights to burial spaces or graves being transferred immediately.<sup>154</sup> Conversely, prepayment for other death care products and services is less common and more problematic. No reliable data has been gathered on the number of consumers who have prepaid for death care, and prepayment is not governed by the Funeral Rule.<sup>155</sup> A best estimate is that 70% of consumers do no lifetime planning whatsoever for death care, but of the 30% who do, roughly 50% to 80% prepay.<sup>156</sup>

Pre-need prepayment of funerary expense is regulated at the state level, and governing law varies wildly from state to state. Characterized broadly, prepayment is generally funded through one of two paths: (1) the pre-need trust; or (2) pre-need insurance contract.<sup>157</sup> Many states expressly require the consumer who wishes to enter into a pre-need funeral contract to fund an

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<sup>150</sup> “[H]uman remains are not property and decedents therefore have no right to convey their remains via will.” MARSH, *supra* note 67, at 42.

<sup>151</sup> In two states, New Jersey and New Mexico, the person must be named in the will. *See* N.J. STAT. ANN. § 3B:10-21.1 (Westlaw current through L.2021, c. 440 and J.R. No. 9); N.M. STAT. ANN. § 45-3-701 (Westlaw current through Chs. 1 to 3, 7, 14, 27, 34, and 35 of the 2nd Reg. Sess. of the 55th Leg.).

<sup>152</sup> *See* MARSH, *supra* note 67, at 43–44.

<sup>153</sup> *See generally id.* at 43 (citing *Fidelity Union Trust Co. v. Heller*, 84 A.2d 485 (N.J. Super. Ch. 1951)): “The general rule is that although not essentially testamentary, and legal compulsion may not attach to them, the wishes or directions of a decedent as to his interment are entitled to respectful consideration and have been allowed great weight. It always has been, and ever will continue to be, the duty of the courts to see to it that the expressed wish of one, as to his final resting place, shall, so far as it is possible, be carried out.”)

<sup>154</sup> *See* MARSH, *supra* note 67, at 74.

<sup>155</sup> *See Pre-Paid Funeral Plans: Buyer Beware*, ELDER LAW ANSWERS (Dec. 24, 2018), <https://www.elderlawanswers.com/pre-paid-funeral-plans-buyer-beware-1098> [https://perma.cc/HYV6-L7PL]. The Funeral Rule, adopted in 1984 and enforced by the Federal Trade Commission, imposes requirements upon the funeral industry with the goal of protecting consumers. *See* 16 C.F.R. § 453.

<sup>156</sup> MARSH, *supra* note 67, at 75.

<sup>157</sup> *See id.*

arrangement through some form of funeral trust.<sup>158</sup> Other states do not explicitly require a “trust” but do mandate something that functions like a trust—simply referring to some form of escrow arrangement or depositing of funds.<sup>159</sup> Other states allow funds to be placed into master trust programs that pool the deposits of hundreds or thousands of consumers. The mechanics of these trusts can also vary dramatically, with some states characterizing the funds as held for the benefit of the funeral provider while others classify they are held for the benefit of the consumer.<sup>160</sup>

Some state funeral home associations have established pre-need trusts that are pooled income trusts (sometimes called “master trust programs”). The number of participants in pooled income trusts may create a false sense of security, but these trusts are not without controversy. The California Master Trust, established in 1985<sup>161</sup> by the California Funeral Directors Association, advertised at one time that it had helped over 100,000 consumers prefund funerals in California.<sup>162</sup> In 2011, Attorney General Kamala Harris sued California Master Trust (with an estimated \$63 million under management) to recover \$14 million charged against the trust for allegedly excessive administrative fees and payment of illegal kickbacks to funeral homes.<sup>163</sup> The Illinois Funeral Directors’ Association was not licensed to operate a trust by the state but nonetheless did,<sup>164</sup> and proceeded to lose \$100

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<sup>158</sup> See generally Judith A. Frank, *Preneed Funeral Plans: The Case for Uniformity*, 4 ELDER L.J. 1 (1996); see also, e.g., ALASKA STAT. ANN. § 45.50.471(24) (Westlaw current with legis. through Ch. 34 of 2021 First Reg. Sess. of the 32nd Leg.); ARIZ. REV. STAT. ANN. § 32-1391.04 (Westlaw current through legis. effective Mar. 24, 2022 of the Second Reg. Sess. of the Fifty-Fifth Leg.); ARK. CODE. ANN. § 23-40-111 (Westlaw current through the 2022 Fiscal Sess. of the 93rd Arkansas Gen. Assemb.); COLO. REV. STAT. ANN. § 10-15-107 (Westlaw current through legis. effective Mar. 17, 2022 of the Second Reg. Sess., 73rd Gen. Assemb.).

<sup>159</sup> See, e.g., R.I. GEN. LAWS ANN. § 5-33.1-4 (Westlaw current with effective legis. through Ch.6 of the 2022 Reg. Sess. of the Rhode Island Leg.); VT. STAT. ANN. tit. 26, § 1272(1) (Westlaw current through Acts 81 and M-8 of the Adjourned Sess. of the 2021-2022 Vermont Gen. Assemb.).

<sup>160</sup> Some states benefit the “seller” or providers of the funeral. See, e.g., FLA. STAT. ANN. § 497.458; (Westlaw current through Feb. 24, 2022, in effect from the 2022 Second Reg. Sess.); IND. CODE ANN. § 30-2-10-3(4) (Westlaw current through legis. of the 2022 Second Reg. Sess. of the 122nd Gen. Assemb. effective through Mar. 14, 2022). Others aim to benefit the consumer by safeguarding funds within a trust until full performance of services rendered. See, e.g., CONN. GEN. STAT. ANN. § 42-203 (Westlaw current through the 2022 Supp. to the Gen. Stat. of Connecticut); HAW. REV. STAT. ANN. § 441-39(b) (Westlaw current through the end of the 2021 Spec. Sess.); N.J. STAT. ANN. § 2A:102-13 (Westlaw with laws through L.2021, c. 440 and J.R. No. 9).

<sup>161</sup> CAL. MASTER TR., <http://www.californiamastertrust.com> [<https://perma.cc/Q6MA-UM8U>].

<sup>162</sup> Complaint, ¶ 32, n.4, Cemetery and Funeral Bureau v. California Master Trust, 2011 WL 1461837 (Cal. Superior 2011). As of 2009, 27,000 consumers using more than 300 California funeral homes had entrusted money to this trust. *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> This oversight was not momentary. The trust was operated for several decades without a license. “The state comptroller and the Illinois Department of Financial and Professional Regulation, which reports to the governor, cannot agree—even today—on whose job it is to regulate such trusts.” *Our Opinion: IFDA Fund Regulation Boched from Start*, ST. J. REG.

million of what was once a \$300 million trust for pre-need funeral contracts.<sup>165</sup> In September 2012, Wisconsin regulators sued the Wisconsin Funeral Directors Association, Inc. (“WFDA”) and Fiduciary Partners, Inc. (trustee of the \$48 million Wisconsin Funeral Trust, started in 1999) alleging a potential long-term deficit of \$21 million.<sup>166</sup> The trust was not set up as a normative trust with a separate legal existence but was instead an “investment product” owned by WFDA.<sup>167</sup> Wisconsin regulators alleged that the trust assets were treated “as a hedge fund, improperly investing depositors’ money in a portfolio of high-risk illiquid investments.”<sup>168</sup> Commenting on this Wisconsin disaster, one industry professional said:

Funeral home owners need to rethink on a large scale the best way to handle preneed. . . . It’s not to say that trust is bad or insurance is good . . . that’s not the point . . . We just have to realize that if we are going to make a commitment to be in the financial services business, which is what we are doing, then we have to be prepared to run this money as if we are a bona fide professional financial services company.<sup>169</sup>

The gravity of these words should not be lightly dismissed.

Funeral trusts that are not pooled trust arrangements may also be utilized by the individual consumer for prepayment purposes. A funeral trust is a financial vehicle that allows a consumer to set aside funds that will be dedicated to the payment of their death care expense. The Internal Revenue Service requires that the trusts be created as a result of a contract with a person engaged in the trade or business of providing death care services.<sup>170</sup> The beneficiary of the trust is the funeral home (or other death care provider) with whom the services contract has been entered. The trustee must make an election for the trust to be treated as a “qualified funeral trust” for tax pur-

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(Jan. 30, 2010), <https://www.sj-r.com/story/opinion/editorials/2010/01/31/our-opinion-ifda-fund-regulation/42945487007/> [<https://perma.cc/5U8N-YYNH>].

<sup>165</sup> “While funeral directors are on the hook for losses under state law, funeral contract purchasers also have an interest. Funeral directors say losses might be so steep that some funeral homes could be driven out of business, raising questions about how prepaid funeral services would be provided. The fund is earmarked to pay for funerals for more than 40,000 state residents.” Bruce Rushton, *Federal Investigation Begun of Funeral Fund*, REGISTER-MAIL (July 17, 2009, 4:01 PM), <https://amp.galesburg.com/amp/45868153007> [<https://perma.cc/JM7W-NPVB>].

<sup>166</sup> Bruce Kelly, *\$6M in Investor Funds Goes Missing from Trust*, INV. NEWS (Sept. 23, 2012), <http://www.investmentnews.com/6m-in-investor-funds-goes-missing-from-trust-46996> [<https://perma.cc/4YMY-KBXW>].

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* (quoting the complaint in a suit brought against Wisconsin Funeral Directors Association Inc. and Fiduciary Partners Inc., “trustee of the \$48 million Wisconsin Funeral Trust, alleging the two organizations invested the money improperly”).

<sup>169</sup> THOMAS A. PARMALLEE, FUNERAL SERV. INSIDER, \$21M PRENEED SHORTFALL LEADS TO TAKEOVER OF WISCONSIN ASSOCIATION 7 (2012), <http://www.fsawisconsin.org/Resources/Documents/Funeral%20Service%20Insider%20-%20Wisconsin%20Funeral%20Trust.pdf> [<https://perma.cc/5JFU-XPXM>].

<sup>170</sup> 26 U.S.C. § 685.

poses, and if established through a funeral home, the trustee should be an independent third party with a fiduciary duty to provide accountings.<sup>171</sup> The contributions to the trust are only for the purpose of paying for death care and are generally held or invested. To the extent that invested funds earn interest, the interest is reported as income on the tax return of the settlor. Life insurance policies are sometimes used to fund these trusts, the benefit of which is that the growth of the policy is not taxable. As a practical matter, funeral trusts are so rarely used by professional financial planners that absolutely no information about them is included in CFP certification materials.<sup>172</sup>

It is not uncommon for pre-need insurance policies to be utilized to fund pre-payment arrangements, though this prepayment option is prohibited in New York and Alaska.<sup>173</sup> The insurance product is usually obtained through or with the assistance of the funeral home and the benefit amount approximates the amount of estimated preplanned services.<sup>174</sup> There is often a minimum age of forty to apply for these insurance benefits and a waiting period after purchase may apply.<sup>175</sup> The benefits may be impacted if the funeral home goes out of business and also may not be portable to a different funeral home.<sup>176</sup>

### B. Pre-Need Prepayment Problems

Pre-need planning may be done without pre-need prepayment being made. Facilitated through a consumer-safe financial instrument, pre-need prepayment relieves survivors of the transactional component of death.<sup>177</sup> An irony inheres when the nature of an industry is such that a consumer should engage in preplanning and prepayment, but available options to facilitate prepayment are unreliable, problematic, or exploitative. This section disentangles practical challenges from legal ones. Every available prepayment instrument or option available today has costs that arguably exceed benefits, and consequently, accepted wisdom is that the living should not prepay for death care. The Executive Director of a nonprofit dedicated to the protection of consumer rights, Josh Slocum, has described funeral prepay-

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<sup>171</sup> Leslie Haddock-Dehart, *The Pros and Cons of Funeral Trusts*, BANKRATE (Feb. 8, 2021), <https://www.bankrate.com/finance/insurance/pros-and-cons-of-funeral-trusts-1.aspx> [https://perma.cc/Y3XQ-Z4UY].

<sup>172</sup> *Id.*

<sup>173</sup> MARSH, *supra* note 67, at 76.

<sup>174</sup> *Id.*

<sup>175</sup> See Anthony Martin, *12 Best Final Expense and Burial Insurance Companies*, CHOICE MUT. (Feb. 11, 2022), <http://choicemutual.com/best-burial-insurance-companies/> [https://perma.cc/S5NT-H56U].

<sup>176</sup> *See id.*

<sup>177</sup> Pre-need planning is always advisable and need not involve prepayment. However, to the extent that pre-need planning is not supported by prepayment, it may also be substantially less detailed—which does not relieve survivors of the burden of at-need decision-making, planning, and purchasing.

ment as “state-sanctioned robbery” and “not a good investment anywhere in the country,” and he warns that consumers should not be careful not to be “misled by funeral homes that suggest prepaying just in case you end up using Medicaid.”<sup>178</sup>

Medicaid plays an important role in pre-need prepayment. Most states permit a consumer to use some type of prepayment device (irrevocable funeral trust (“IFT”) or an equivalent) to “spend down” assets and qualify for Medicaid.<sup>179</sup> Medicaid is a state and federally funded insurance program that provides medical coverage for those over the age of sixty-five and long-term care coverage for the medically needy (or those with assets below a certain threshold).<sup>180</sup> Long-term care is extraordinarily expensive and “spend down” can happen implicitly as the elderly pay for care out of pocket and assets are divested.<sup>181</sup> Consumers are told that preplanning and prepaying for death care services is a smart approach: any amounts spent on death care service preplanning and prepayment are exempt from being counted towards Medicaid qualification, do not usually violate the sixty-month asset transfer (look back) rule,<sup>182</sup> and relieve surviving family of the burden of an inevitable expense.<sup>183</sup>

Medicaid eligibility rules are constantly changing. Although there may be good reason to prepay for death care service as part of a Medicaid spend-down strategy, this process needs to be done through an experienced prearrangement specialist. State by state variations in regulations can cause this

<sup>178</sup> Josh Slocum of Funeral Consumers Alliance also notes that roughly twenty-one states allow the funeral home to keep fifteen percent of the trust amount off the top. Nancy Hicks, *Epilogue: Woman Finds Problem with Prepaid Funeral Plans*, LINCOLN J. STAR (Mar. 23, 2015), [http://journalstar.com/special-section/epilogue/epilogue-woman-finds-problem-with-prepaid-funeral-plans/article\\_591d986d-8fda-5492-ae4d-25cabcdf551.html](http://journalstar.com/special-section/epilogue/epilogue-woman-finds-problem-with-prepaid-funeral-plans/article_591d986d-8fda-5492-ae4d-25cabcdf551.html) [https://perma.cc/24FD-CFX8] (“The idea we can take care of everything so the kids don’t have to worry, it’s magical thinking. It is not true.”).

<sup>179</sup> In fact, a benefit of an IFT is that countable assets for Medicaid purposes can be converted to non-countable assets, and that countable assets may be further spent down by purchasing IFTs for spouses and children. *How Irrevocable Funeral Trusts Help Medicaid Applicants Qualifying for Medicaid Long-Term Care*, AM. COUNCIL ON AGING (Jan. 11, 2021), <http://www.medicaidplanningassistance.org/irrevocable-funeral-trust/> [https://perma.cc/LF43-6A47] [hereinafter AM. COUNCIL ON AGING].

<sup>180</sup> See *Policy Basics: Introduction to Medicaid*, CTR. ON BUDGET AND POL’Y PRIORITIES (Apr. 14, 2020), <http://www.cbpp.org/research/health/introduction-to-medicaid> [https://perma.cc/VA28-A7E4].

<sup>181</sup> Michelle Fox, *Many Americans Will Eventually Need Long-term Care. Here’s How to Pay For It*, CNBC (Oct. 19, 2020, 9:29 AM), <http://www.cnn.com/2020/10/17/how-to-pay-for-long-term-care-like-nursing-homes-home-health-aides.html> [https://perma.cc/5MMN-2C7V] (“The average lifetime cost of formal long-term care is \$172,000 . . . . You have to spend down to a very low level of assets in order to qualify for Medicaid.”).

<sup>182</sup> *Understand Medicaid’s Look-Back Period; Penalties; Exceptions & State Variances*, AM. COUNCIL ON AGING (Dec. 14, 2021), <https://www.medicaidplanningassistance.org/medicaid-look-back-period/> [https://perma.cc/3MJ8-ZLRC].

<sup>183</sup> Though the Medicaid asset limit varies by states, in 2022, the limit is generally \$2,000 for a single applicant. An applicant with \$15,000 would not be Medicaid eligible. However, if they pre-paid their funeral expenses by purchasing an IFT for \$13,000, they would have only \$2,000 remaining in countable assets. Therefore, they would be eligible for Medicaid. AM. COUNCIL ON AGING, *supra* note 182.

spend-down process to be extraordinarily (and unnecessarily) complex for the consumer: every state has different limits on the amount of money that may be placed in a funeral trust;<sup>184</sup> an IFT must be irrevocable to be Medicaid compliant, but a number of states do not address revocability within their statutes;<sup>185</sup> and many states require that the state be named as the residual beneficiary to receive any funds remaining in the trust after all allowable expenses are paid.<sup>186</sup>

Setting aside the issues attendant to Medicaid spend downs, there are a myriad of cascading issues that are raised by pre-need prepayment instruments. Enforcement of the pre-need prepayment contract or agreement by survivors<sup>187</sup> may be problematic in the event of an alleged breach because of privity issues—the contracting party is now deceased.<sup>188</sup> Also, a number of complexities arise because these agreements are generally a blend of both products and services. With the service element of these contracts, the customer is reliant upon the reliability and reputation of the service provider. If a specific funeral provider has contracted to provide services, important considerations include: the time the provider has been in business; the reputation of the provider in the community, including Better Business Bureau or Yelp ratings; the financial outlook of the provider, if available; and the refundability or transferability of prepayment (e.g., relocation out of state). If a contracted provider ceases operation, prepayment may be a total loss (though a clause allowing the contract to transfer to other providers may protect against this). As concerns the portion of the contract governing the purchase of products or goods, allocation of risk of loss is important: for products ordered during lifetime, storage (and related storage costs) and responsibility for damage; for products ordered post-mortem, discontinued products, appropriate substitutions, and responsibility for cost increases. And, of course, there is always the concern about fraud and mismanagement.<sup>189</sup>

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<sup>184</sup> See *id.*

<sup>185</sup> Frank, *supra* note 158, at 9.

<sup>186</sup> See AM. COUNCIL ON AGING, *supra* note 182.

<sup>187</sup> Enforcement of arrangements can be problematic for survivors. For example, Gladys Bohn arranged and paid for her funeral when she was eighty-five. She arranged an elegant affair—selecting a beautiful casket, shoes, and dress. Everything was given to the funeral home. She died at age ninety-six and her family was surprised to find that her body, in a hospital gown, was shoved into a Styrofoam box for a simple graveside burial. See Tracy E. Smith, *Scamming the Elderly: A Look into Funeral Fraud*, 21 APR. PROB. & PROP. 60, 62-63 (2007).

<sup>188</sup> Courts are divided as to whether to allow the contract purchased by the decedent to be enforced by survivors. TANYA MARSH, *THE LAW OF HUMAN REMAINS* 76 (2016) (“Generally an action for breach of contract may only be brought by a party to the contract. Typically the only two parties to the pre-need contract are the funeral home and the decedent.”).

<sup>189</sup> Pooled trust arrangements or products offered through or with the endorsement of state funeral home associations are not the only pre-need prepayment arrangements subject to large scale mismanagement. In 2015, a jury awarded \$491 million in damages (later overturned on appeal in 2017) in a civil suit against National Prearranged Services, Inc. (NPS). NPS represented that customer funds from pre-paid funeral contracts would be held in trust, but funds

Perhaps the most vexing difficulty to address with pre-need prepayment instruments is that the federal government has decided to cede all regulation to the states: the Funeral Rule wholly ignores pre-need prepayment instruments. There is a gradient scale of decent to mediocre to terrible in terms of state regulation of prepayment, with some states enacting somewhat favorable consumer protections and others leaving the consumer so vulnerable as to make prepayment inadvisable in all circumstances.<sup>190</sup> Conventional

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were diverted—resulting in 97,000 victims and an NPS owner, 2 officers, an employee, a company lawyer, and an investment advisor sentenced to prison terms ranging from 18 months to 10 years. Robert Patrick, *Jury Awards \$491 Million in Damages for Fraud by Prepaid Funeral Company in Clayton*, ST. LOUIS POST-DISPATCH (Mar. 9, 2015), [http://www.stltoday.com/news/local/crime-and-courts/jury-awards-491-million-in-damages-for-fraud-by-prepaid-funeral-company-in-clayton/article\\_5a1b7d82-1238-5432-b49d-a4ff94ca466e.html](http://www.stltoday.com/news/local/crime-and-courts/jury-awards-491-million-in-damages-for-fraud-by-prepaid-funeral-company-in-clayton/article_5a1b7d82-1238-5432-b49d-a4ff94ca466e.html) [https://perma.cc/NB75-T9HH].

<sup>190</sup> Three states have repealed their state statutes without replacement: Iowa, Indiana and Montana. For a list of all other state statutes, see ALA. CODE §§ 27-17-1 to 16 (Westlaw current through Act of 2022-46 of the 2022 Reg. and First Spec. Sess.); ALASKA STAT. § 45.50.471 (Westlaw current through legis. through Ch. 34 of the 2021 First Reg. Sess. of the 32nd Leg.); ARIZ. REV. STAT. ANN. § 32-1391 (Westlaw current through legis. effective Mar. 3, 2022 of the Second Reg. Sess. of the Fifty-Fifth Leg.) (repealed 1998); ARK. CODE ANN. §§ 23-40-101 to 126 (Westlaw current through the 2022 Fiscal Sess. of the 93rd Arkansas Gen. Assemb.); CAL. BUS. & PROF. §§ 7735–7746 (Westlaw current through urgency legis. through Ch. 10 of 2022 Reg. Sess.); COLO. REV. STAT. §§ 10-15-101 to 123 (Westlaw current through signed legis. effective March 17, 2022 of the Second Reg. Sess., 73rd Gen. Assemb.); CONN. GEN. STAT. §§ 42-200 to 207 (Westlaw current through the 2022 Supplement to the Gen. Statutes of Connecticut); DEL. CODE ANN. tit. 5, §§ 3401–3411 (Westlaw current through Ch. 284 of the 151st Gen. Assemb. (2021-2022)); FLA. STAT. §§ 497.450–456 (Westlaw current through February 24, 2022, in effect from the 2022 Second Reg. Sess.); GA. CODE ANN. § 10-14-7 (Westlaw current through Act 518 of the 2022 Reg. Sess. of the Georgia Gen. Assemb.); HAW. REV. STAT. §§ 441-1 to 46 (Westlaw current through the end of the 2021 Spec. Sess.); IDAHO CODE §§ 54-1129 to 1138 (Westlaw current with effective legis. through Ch. 80 of the Second Reg. Sess. of the Sixty-sixth Idaho Leg.); ILL. ADMIN. CODE tit. 38, § 610 (Westlaw current through rules published in the Illinois Reg. Vol. 46, Issue 11, March 11, 2022); KAN. STAT. ANN. §§ 16-300 to 336 (Westlaw current through laws enacted during the 2022 Reg. Sess. of the Kansas Leg.); KY. REV. STAT. ANN. §§ 367.932–974 (Westlaw current through laws effective Mar. 10, 2022 and the Nov. 3, 2020 election); LA. STAT. ANN. §§ 37:861–867 (Westlaw current through the 2021 Reg. Sess. and Veto Sess.); ME. REV. STAT. ANN. tit. 32, §§ 1401–1402 (Westlaw current through Ch. 509 of the 2021 Second Reg. Sess. of the 130th Leg.); MD. CODE ANN. HEALTH OCC. § 7-405 (Westlaw current through Joint Res. 1 from the 2022 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ch. 112, §§ 83–87 (Westlaw current through Ch. 14 of the 2022 2nd Ann. Sess.); MICH. COMP. LAWS §§ 328.211–.235 (Westlaw current through P.A.2022, No. 34, 2022 Reg. Sess., 101st Leg.); MINN. STAT. § 149A.97 (Westlaw current with legis. effective through Mar. 19, 2022 from 2022 Reg. Sess.); MISS. CODE ANN. §§ 75-63-1 to 23 (Westlaw current with laws from 2022 Reg. Sess. effective through Mar. 14, 2022); NEB. REV. STAT. §§ 12-1102 to 1121 (Westlaw current through legis. effective Mar. 15, 2022, of 2nd Reg. Sess. 107th Leg. (2022)); NEV. REV. STAT. §§ 689.265, .375, .715 (Westlaw current through Ch. 2 (End) 33rd Spec. Sess. (2021)); N.H. REV. STAT. ANN. §§ 325:43, :46-a (Westlaw current through Ch. 5 2022 Reg. Sess.); N.J. REV. STAT. §§ 45:7-83 to 90 (Westlaw current with laws through L.2021, c. 420 & J.R. No. 9); N.M. STAT. ANN. 59A-49-1 to 8 (Westlaw current through Chs. 1 to 3, 7, 14, 27, 34, & 35 of 2nd Reg. Sess. 55th Leg. (2022)); N.Y. GEN. BUS. § 453 (Westlaw current through L.2022, chs. 1 to 49, 61 to 110); N.Y. PUB. HEALTH §§ 3428, 3442 (Westlaw current through L.2022, chs. 1 to 49, 61 to 110); N.C. GEN. STAT. §§ 90-210.60 to .79 (Westlaw current through S.L. 2021-162, 2021 Reg. Sess. Gen. Assemb.); N.D. CENT. CODE §§ 43-10.1–01 to 08 (Westlaw current through 2021 Reg. & Spec. Sess. 67th Legis. Assembly); OHIO REV. CODE ANN. §§ 4717.32–.38 (Westlaw current through File 85 of 134th Gen. Assemb. (2021-2022)); OKLA.

advice to consumers is simply to avoid investment into pre-need prepayment rather than to try to wrestle with state-by-state determinations as to the level of potential horribleness written into both the governing statute and prepayment contract.

If we follow the stack of problems related to pre-need prepayment upward, we arrive at an issue that is far more meta—namely, the development of the law of human remains<sup>191</sup> and the quasi-property status afforded to a corpse.<sup>192</sup> Most, if not all, of the issues with the payment instruments available for pre-need preplanning are in/directly traceable to two core issues that are foundational within this area: the law of human remains has not developed in a cohesive way, resulting in a patchwork of complexity and bad policy; and robust conflict of law provisions are necessary to bridge a lack of uniformity in state laws dealing with remains.<sup>193</sup>

The common law approach was simple and arose out of the nineteenth century view that a corpse was of little value and disposition needed to occur without threat to public health.<sup>194</sup> The common law “no property in a dead body rule” (or *nullius in bonus* rule) offered a straightforward approach that

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STAT. tit. 36, §§ 6121–6136 (Westlaw current with legis. of Second Reg. Sess. 58th Leg.); OR. REV. STAT. §§ 97.923–.949 (Westlaw current through Ch. 1 enacted in 2022 Reg. Sess. 81st Legis. Assemb.); 49 PA. CODE §§ 13.204–.206, 13.224–.226 (Westlaw current through Pa. Bull., Vol. 52, Num.10, dated Mar. 5, 2022); 5 R.I. GEN. LAWS §§ 33.1-1–10 (Westlaw current with effective legis. through Ch. 6 of the 2022 Reg. Sess.); S.C. CODE ANN. §§ 32-7-10 to 130 (Westlaw current through 2022 Act No. 125); S.D. CODIFIED LAWS §§ 55-11-1 to 15 (Westlaw current through laws of the 2022 Reg. Sess.); TENN. CODE ANN. 62-5-401 to 417 (Westlaw current with laws from the 2022 Second Reg. Sess. of the 112th Tenn. Gen. Assemb.); TEX. FIN. ANN. CODE §§ 154.001–.416 (Westlaw current through the end of the 2021 Reg. and Called Sesss. of the 87th Leg.); UTAH CODE ANN. §§ 58-9-701 to 708 (Westlaw current with laws through the 2021 Second Spec. Sess.); VT. STAT. ANN. tit. 26 §§ 1271–1277 (Westlaw current through Acts 81 and M-8 of the Adjourned Sess. of the 2021-2022 Vt. Gen. Assemb.); VA. CODE ANN. §§ 54.1-2820 to 2825 (Westlaw current through the 2022 Reg. Sess. cc. 1 to 3); WASH. REV. CODE §§ 18.39.240–.370 (Westlaw current through ch. 11 of the 2022 Reg. Sess.); W. VA. CODE §§ 47-14-1 to 14 (Westlaw current through 2022 First Spec. Sess. and Reg. Sess.); WIS. STAT. § 445.125 (Westlaw current through 2021 Act 126); WIS. STAT. § 440.92 (Westlaw current through 2021 Act 126); WYO. STAT. §§ 26-32-101 to 201 (Westlaw current through Mar.10, 2022 of the 2022 Budget Sess.).

<sup>191</sup> Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 363 (2000) (noting the “law of the body is currently in a state of confusion and chaos. Sometimes the body is characterized as property, sometimes it is classified as quasi-property, and sometimes it is not conceived as property at all, but rather as the subject of privacy rights”).

<sup>192</sup> “Scholars and judges mistakenly and repeatedly cite *Pierce v. Proprietors of Swan Point Cemetery*, an 1872 Rhode Island Supreme Court decision, as the first case to apply quasi-property status to the dead. My research shows that, in fact, the first case occurred in Cleveland, Ohio, roughly a year before.” Alix Rogers, *Unearthing the Origins of Quasi-Property Status*, 72 HASTINGS L.J. 291, 299 (2020) (noting that different biological materials are afforded different legal status in the United States, but corpses are very solidly regarded as quasi-property).

<sup>193</sup> For more on this, 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 (2020).

<sup>194</sup> See RAY D. MADOFF, *IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD* 16 (2010).



the decedent held no property interest in his or her remains.<sup>195</sup> And accordingly, the law made perfectly clear that one had no legal right to dictate method and manner of disposition at death. There is only a quasi-property interest in human remains, meaning that most of the civil, criminal, or constitutional implications of property status do not attach.<sup>196</sup>

This simple approach developed at a time when death care was not yet professionalized and licensed, subject to regulation by the state, and occurred largely within the home—meaning, no substantial expense was passed from one generation to the next. Common law norms since have been supplanted with a patchwork of modern statutes that are inconsistent and overly formalistic.<sup>197</sup> Contemporary law arguably recognizes a need to afford the decedent a property interest in their remains and dispense with an antiquated common law rule, but modern law has not adequately responded with legislation that effectively and efficiently creates a property interest. A number of states have attempted to protect the decedent's rights to control his or her remains after death, which has resulted in statutes that are often strongly influenced by the funeral industry's desire to avoid or limit liability.<sup>198</sup> At both the state and federal level, legislators look to the funeral industry for guidance in drafting the state law governing the law of human remains.<sup>199</sup> The need for a Uniform Bodily Remains Law, promulgated by a committee that has expertise but is not self-interested, is needed to guide states towards a more cohesive, comprehensive, and forward-thinking rule of law on bodily remains.<sup>200</sup>

Today, one may plan during their lifetime for the disposition of their remains. And although there are well-known examples of eccentric death care wishes being facilitated,<sup>201</sup> there are also many (if not more) examples

<sup>195</sup> Roy Hardiman, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV. 207, 225 (1986).

<sup>196</sup> As quasi-property, only limited rights attach, e.g., the right to control the body to manage and direct final disposition. Rogers, *supra* note 192, at 302–03.

<sup>197</sup> Marsh, *supra* note 193, at 151, 160–65.

<sup>198</sup> MADOFF, *supra* note 194, at 18.

<sup>199</sup> The National Funeral Directors Association developed model laws and formally encourages members to lobby state legislatures to adopt the NFDA model laws. The NFDA models have been used in Alabama, Arkansas, Georgia, Montana, New Hampshire, Ohio, Texas, and Wisconsin. Marsh, *supra* note 193, at 180; *see also* ICCFA *Speaking for You*, ICCFA, <http://www.iccfa.com/legal/pac/> (“Congress looks to us when an expert on our industry is needed.”) [HTTPS://PERMA.CC/M6VB-KLNK].

<sup>200</sup> For two articles explaining the need for Uniform Bodily Remains Law, see Anne M. Murphy, *Please Don't Bury Me in that Cold Cold Ground: The Need for Uniform Laws on the Disposition of Human Remains*, 15 ELDER L.J., 381 (2008); Tracie M. Kester, *Uniform Acts—Can the Dead Hand Control the Dead Body? The Case for a Uniform Bodily Remains Law*, 29 W. NEW ENG. L. REV. 571 (2007).

<sup>201</sup> MADOFF, *supra* note 194, at 14 (noting examples such as the corpse of Jeremy Bentham, the father of Utilitarianism, presently displayed in a glass case at University of London; Sandra West, Beverly Hills socialite, buried in her nightgown in a baby blue Ferrari; and the ashes of Hunter S. Thompson, author, which were shot from a cannon while his friends held their glasses raised in a toast).

of death care wishes being disregarded.<sup>202</sup> By the NFDA's count, there are forty-nine states that allow a decedent to control the disposition of their remains—though Professor Tanya Marsh counts only forty-two and notes that the statutes “lack meaningful enforcement mechanisms.”<sup>203</sup> It has been said that such statutes “provide more of a hope than a promise that a person's wishes regarding his or her body will be carried out.”<sup>204</sup> Lifetime investment of capital (prepayment) to finance pre-need planning seems foolish when enforceability is uncertain.

Further, the lack of uniformity in state law directly bears upon the practical reality that location of death is not fixed until the moment of death and the state law in which remains are located at time of death governs. For any person who is not homebound, a level of uncertainty exists as to where exactly in the country or the world one will be at the time of death. Although there are some requirements imposed upon the funeral industry by the federal government, the disposition of human remains is governed almost entirely by state and local law.<sup>205</sup> It is not reasonable to expect someone to make arrangements for death that comport with requirements in all fifty states, and only a handful of states have statutes that respect a personal preference or designated agent document validly executed in another state.<sup>206</sup> Current best practice falls short of the ideal: death care instructions set forth in a written instrument that is notarized and signed in the presence of two witnesses, a funeral agent designated in the will itself, and any other form or documentation required by the state in which the decedent is domiciled.<sup>207</sup> As discussed above in Section III A., the written instrument in which the instructions are set forth should not be the will itself.<sup>208</sup>

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<sup>202</sup> *Id.* at 14–16 (noting examples such as Albert Einstein, who wished to be cremated but instead had his brain removed and disaggregated by a pathologist—presently stored in several different locations; Ted Williams, who also wished to be cremated, but is now cryogenically stored in two separate pieces in Arizona; and Grace Metalious, author of *Peyton Place*, who wished to be donated to science with no funeral ceremony, but whose husband and children refused to abide by that request.); see also Murphy, *supra* note 200, at 408 (noting “[t]he families of Kirby Puckett, Ted Williams, Anna Nicole Smith, James Brown, Gram Parsons, and the Reverend Billy Graham have all had very bitter and very public disputes.”).

<sup>203</sup> Marsh, *supra* note 193, at 180.

<sup>204</sup> See MADOFF, *supra* note 194, at 18.

<sup>205</sup> The Federal Trade Commission's “Funeral Rule” was adopted in 1984 with several basic requirements imposed upon the funeral industry that are intended to protect consumers. For example, “funeral providers” must provide a general price list to consumers—though there remains no requirement that these prices be made available online. See 16 C.F.R. § 453.2 (2011).

<sup>206</sup> Marsh, *supra* note 193, at 177 (using the Kentucky statute as an example, which provides that no Kentucky hospital, coroner, or funeral director is obligated to honor a declaration executed in another estate but has the *discretion* to do so if the document meets the formalities set forth under Kentucky law).

<sup>207</sup> Murphy, *supra* note 200, at 400.

<sup>208</sup> In *In re Moyer*, 577 P.2d 108, 109 (Utah 1978), Thomas Moyer (a resident of Arizona) was visiting his mother in Utah for Christmas when he died unexpectedly. His mother had him buried in Salt Lake City. His father (executor of his estate) petitioned for his exhumation because Moyer clearly expressed his wishes in his will that he wanted to be cremated. The court held that the executor of the estate waived the right to cremation when he did not act

Although every state has a statute that allows probate of testamentary instruments from another state and similar conflict statutes recognizing the validity of death disposition instructions from another state would certainly be helpful here,<sup>209</sup> there are nonetheless unique issues that distinguish the law of human remains: property law rights are often unclear (discussed above); timing is of the essence as a corpse remains on ice; and, decision-making may have irreversible finality and cannot be undone.<sup>210</sup> A better solution comes in the form of clear rules that are accessible to the unrepresented and allow funerary service providers to make swift determinations without fear of liability.<sup>211</sup>

Incentivizing pre-need prepayment of death care services requires that an enforceable property interest be recognized for those who have engaged in pre-need, prepaid death care planning and that any agent on behalf of the estate or the decedent who opts for a different service must personally bear the cost of the alternative, without reimbursement from the estate. To protect the consumer, pre-need prepayment also requires portability to allow prepayment to be easily transferred from one state to another. This will be detailed further in Section V of this Article.

#### IV. TAX-SHELTERED SPENDING

Behavioral strategists have found that there are three basic approaches by which undesirable long-term behavior may be addressed: threats, promises, and precommitments.<sup>212</sup> Section IV provides an overview of spending on a pre-tax basis as a qualified benefit through an Internal Revenue Code section 125 cafeteria plan as a type of precommitment device<sup>213</sup>

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swiftly enough and permitted the burial to occur. For further discussion of this case, see Walker, *supra* note 113 at 400–01.

<sup>209</sup> 79 AM. JUR. 2D *Wills* § 725 (The Uniform Probate of Foreign Wills Act outlines “the written will of a testator who died domiciled outside the state, which upon probate may operate upon any property in the state, shall be admitted to probate upon proof that it stands probated or established in the jurisdiction where the testator died . . .”).

<sup>210</sup> Walker, *supra* note 113 at 388 (“[The] vast majority of disputes, major or minor, are resolved using self-help by the parties. Many discussions, negotiations, arguments, and concessions regarding the disposition of a loved one are made in funeral homes or living rooms every day. Experienced funeral directors and clergy are familiar with such disputes and can act as informal and compassionate mediators in arriving at a decision.”).

<sup>211</sup> Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971 (1999) (noting the “question of who owns death is implicitly deliberated each time a legal dispute ensues over who can direct the manner of a decedent’s burial . . . . [With] no definitive legal rule as to who has the right to control the disposal of mortal remains because there is no agreement as to who owns a body after death or whether the cadaver is subject to traditional property rights.”).

<sup>212</sup> ELISABETH HILDT & ANDREAS G. FRANKE, *COGNITIVE ENHANCEMENT: AN INTERDISCIPLINARY PERSPECTIVE*, at 297 (2013) (ebook).

<sup>213</sup> The classic example of a precommitment strategy in action comes from the story of Odysseus and the Sirens of Homer’s *Odyssey*. As you no doubt recall, Odysseus knew that if he heard the Sirens’ song, he would fall under their spell. In other words, he would enter a state of abnormal agency that had a certain level of risk associated with it. To enable himself to hear their song, without realizing the associated level of risk, Odysseus forced his shipmates to put

that modulates future actions by creating an incentive or rewarding desirable behavior and inflating costs for unattractive behavior. This precommitment approach has been proven effective in other areas such as smoking cessation<sup>214</sup> and healthful food shopping.<sup>215</sup> Precommitment through section 125 creates a paradigm of choices whereby a consumer may voluntarily commit to contemplating an undesirable subject in exchange for a reward.<sup>216</sup>

A flexible spending account (“FSA”) is an employer-provided cafeteria plan benefit authorized under section 125 that is funded by voluntary salary contributions of an eligible employee.<sup>217</sup> FSA contributions are set aside from earnings every pay period and deposited directly into an account against which pre-tax qualified expenses may be submitted for reimbursement.<sup>218</sup> Section 125 essentially allows the employee to select between taxable cash compensation and restricted but non-taxable benefits.<sup>219</sup> The employer is not required to make any contribution into the account.<sup>220</sup> One rough estimate is that as many as twenty to twenty-five percent of private sector and government employees actively and regularly use FSA accounts.<sup>221</sup>

How do these plans work? At the beginning of the election year, the employee decides how much they would like to contribute to the plan. Often these plans have a “use it or lose it” feature. Thus, it is important that the employee not overestimate the amount that they will use through the plan that year. The amount that is elected is then deducted from each pay period on a pro rata basis and deposited into the FSA account. On the first day of the plan year, the amount of the employee election is locked, meaning the employee is unable to adjust the amount being contributed to or deposited into the account unless there is a permitted “change in family status” under the plan terms. Employees typically pay for an allowable or qualified expense, submit the receipt through the FSA plan administrator for review, and

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wax in their ears and to bind him to the mast of the ship. This way, he was unable to do any harm to the ship. *Id.* at 297.

<sup>214</sup> Xavier Giné, Dean Karlan & Jonathan Zinman, *Put Your Money Where Your Butt Is: A Commitment Contract for Smoking Cessation*, AM. ECON. J. APPL. ECON. 2, 213–35 (2010).

<sup>215</sup> Janet Schwartz, Daniel Mochon, Lauren Wyper, Josiase Maroba, Deepak Patel & Dan Arieli, *Healthier by Precommitment*, PSYCHOL. SCI. 25, 538–46 (2014).

<sup>216</sup> This Article does not do the heavy lifting of trying to argue that any incentive can “force” someone to save who has absolutely no interest in saving.

<sup>217</sup> Daniel C. Schaffer, *Tax Law as Health Policy: A History of Cafeteria Plans 1978–1985*, 8 AM. J. TAX POL’Y 1, 1 (1989); see also Employee Benefits—Cafeteria Plans, 72 Fed. Reg. 43942 (proposed Aug. 6, 2007) (to be codified at 26 C.F.R. pt. 1.125-5(a)).

<sup>218</sup> *Explore Your Options*, FSAFEDS, <http://www.fsafeds.com/explore> [<https://perma.cc/H87K-W8Y6>].

<sup>219</sup> Leigh Osofsky, *Who’s Naughty and Who’s Nice? Frictions, Screening, and Tax Law Design*, 61 BUFF. L. REV. 1057, 1101 (2013).

<sup>220</sup> *What’s an FSA and How Do I Use It?*, BLUE CROSS BLUE SHIELD OF MICH., <https://www.bcbsm.com/index/health-insurance-help/faqs/plan-types/health-spending-accounts/fsa.html> [<https://perma.cc/268W-ZFXJ>].

<sup>221</sup> Jacqueline Cooke Haggarty, *Eligibility of Complementary and Alternative Medicine Expenses for Reimbursement Through Federal Health Care Flexible Spending Accounts*, 11 MICH. ST. U. J. MED. & L. 377, 378 (2007).

reimbursement of the expense will be made to the employee if funds are available in the account.<sup>222</sup>

Both the employer and employee benefit from the employee's use of the FSA. Employees have the benefit of using pretax funds for out-of-pocket, eligible expenses. For the employer, no Social Security or Medicare taxes are paid on the amounts contributed by the employee to the FSA account.<sup>223</sup> Further, funds are held in the account on a "use it or lose it" basis, meaning funds deposited into the account and unused within a predetermined timeframe are forfeited to the employer.<sup>224</sup> The risk of forfeiture or suboptimal use of the funds placed in the account is believed to create friction that prevents exploitative or abusive use of the FSA.<sup>225</sup> From a policy perspective, the FSA offers the broad applicability of a tax credit with the lower cost of a deduction. The economic impact of the FSA is the same as that of a deduction (qualifying amount multiplied by marginal tax rate) costing far less than the dollar-for-dollar reduction offered by the tax credit.<sup>226</sup> Use of an FSA satisfies notions of horizontal equity: the tax benefit is available to both lower-income non-itemizers and higher-income itemizers.<sup>227</sup>

The development of Section 125 and associated regulations (enactment spanning 1978 to 1985) is an interesting example of health and tax law converging.<sup>228</sup> Cafeteria plans as originally conceived are clearly not what cafeteria plans have evolved to be, and today these plans are not limited to medical expenses.<sup>229</sup> FSAs are the most common way in which employers provide assistance with dependent care assistance.<sup>230</sup> Further, adoption assistance may also be made available by an employer through an FSA.<sup>231</sup> If an employer offers all three types of FSA accounts (medical, dependent care

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<sup>222</sup> For further detail on all of these steps, see Trent D. Bryson, *The Benefits of Cafeteria Plans*, ENTREPRENEUR (Sept. 14, 2005), <http://www.entrepreneur.com/article/79978> [<https://perma.cc/C8DK-ECQD>].

<sup>223</sup> Richard F. Yates, *Social Security Tax Treatment of Cafeteria Plans*, 37 U. FLA. L. REV. 615, 617 n.20 (1985) ("[T]he Code does not exclude cafeteria plan benefits as such from the social security tax wage base. However, section 3121(a) provides specific exclusions from the social security tax wage base for many benefits that might be offered through a cafeteria plan."); see also I.R.C. § 3121(a)(2).

<sup>224</sup> Haggarty, *supra* note 221, at 381; see also 12 No. 1 Flex Plan Handbook Newsl. 7 (noting that President Bush's FY2004 proposed budget also repealed the use-it-or-lose-it forfeiture and permitted FSA rollovers from year to year).

<sup>225</sup> Some believe that there is no good reason for the use-it-or-lose-it rule. See, e.g., Osofsky, *supra* note 219, at 1100.

<sup>226</sup> Alyssa A. DiRusso, *Charity at Work: Proposing A Charitable Flexible Spending Account*, 2014 UTAH L. REV. 281, 306 (2014).

<sup>227</sup> *Id.* at 305.

<sup>228</sup> Schaffer, *supra* note 217, at 27–28.

<sup>229</sup> "They were supposed to be about insurance: life insurance, medical insurance, disability insurance. Sometimes this meant encouraging employer-provided insurance, and sometimes it meant eliminating double insurance coverage in families where both spouses had insurance on the job." Schaffer, *supra* note 217, at 44.

<sup>230</sup> I.R.C. § 129.

<sup>231</sup> I.R.C. § 137.

assistance, adoption assistance), the accounts may not be combined.<sup>232</sup> Reimbursement for medical expenses must be made out of a dedicated medical care FSA, and any funds set aside for dependent care assistance must be maintained separately and not commingled or aggregated.

Expenses are reimbursable through a healthcare FSA (or HC FSA) if they satisfy the requirements set forth in section 213 for “qualified medical expense.” Section 213 provides, in relevant part, that medical care means “amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body.”<sup>233</sup> The Treasury Regulations expand upon this definition, providing that expenses are reimbursable only if they are for the medical care of the taxpayer, the taxpayer’s spouse, or a dependent of the taxpayer, and not reimbursed by medical insurance.<sup>234</sup> Although reimbursement is tied to the way the Code defines a deduction, an irony inheres in the fact that the Section 213 deduction (below-the-line medical expense deduction) is available only to the minority of taxpayers that itemize, and then only to the extent that it exceeds a catastrophic level of expense to the taxpayer (or amounts in excess of 7.5% of adjusted gross income).<sup>235</sup>

The FSA account is not without its critics. On the one hand, FSAs are an attractive tax-favored form of employee compensation. But in a system with graduated tax rates, high-bracket taxpayers earn far more benefit from the tax excludability of FSA contributions than do low-bracket (or zero-bracket) taxpayers.<sup>236</sup> This results in a disproportionate subsidy (or indirect expenditure of public funds) to higher earners.<sup>237</sup> Setting aside this common complaint about most tax-favored employment incentives, the main complaint against FSAs is the use-it-or-lose-it rule providing that any unused funds in the account at the end of the plan year are wiped clean (subject to limited rollovers).<sup>238</sup>

## V. LEVERAGING SOLUTIONS

The structure, excesses, and regulatory environment of the death care industry impact consumers who must, ineluctably, deal with it.<sup>239</sup> This Arti-

<sup>232</sup> Employee Benefits—Cafeteria Plans, 72 Fed. Reg. 43,938, 43,942–43 (Aug. 6, 2007).

<sup>233</sup> I.R.C. § 213(d)(1)(A).

<sup>234</sup> Treas. Reg. § 1.213-1(a)(3)(i) (1979).

<sup>235</sup> I.R.C. § 213(a).

<sup>236</sup> “[The] public that balks at an expenditure of \$25 billion for poor children . . . is ignorant of[ ] a subsidy more than sixteen times as large to fund private health coverage, life insurance, pensions, and other fringe benefits . . . .” Mary E. O’Connell, *On the Fringe: Re-thinking the Link Between Wages and Benefits*, 67 TUL. L. REV. 1421, 1509 (1993).

<sup>237</sup> *Id.* at 1508 (noting that it is “in Surrey’s words ‘an upside-down result utterly at variance with usual expenditure policies’”).

<sup>238</sup> Osofsky, *supra* note 219, at 1060 (describing the use-it-or-lose-it rule as difficult to defend at best and “highly perverse” at worst).

<sup>239</sup> “The Institute of Justice, a nonprofit national law firm, has litigated dozens of cases regarding the funeral service industry . . . . ‘It’s unfortunate, but unsurprising, that the funeral

cle proposes incentive-based reform to nudge the consumer towards pre-need planning and prepayment. This reform will ideally be implemented in parallel with minor revision to the Funeral Rule and changes to priority of enforcement for pre-need prepayment and planning. Section V sets forth the important technical features of a pre-need prepayment tax incentive delivered through the existing structure of Section 125 of the Internal Revenue Code.

Funeral poverty is pervasive and death care spending is unique: disposition at death is the largest lifetime expenditure that most consumers have no desire to plan or contemplate. There is a need for safe, reliable, flexible pre-need prepayment instruments to assist the death care consumer with pre-need prepayment and planning. Shaping consumer-safe and reliable pre-need prepayment instruments accessible to a consumer living anywhere in the United States is problematic when instruments are regulated at the state level by an industry focused on rent-seeking and self-interest. In fairness, any regulated entity has an interest in lobbying to influence regulatory decisions and policy in its own favor.<sup>240</sup> Regulatory capture<sup>241</sup> is used to describe those instances when an industry has gained excessive influence or power<sup>242</sup> that is used to erect barriers to entry, unnecessarily impose costs, and preserve status quo—in essence, the regulators are now the dancing marionettes of the

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industry's reaction to honest competition is to call for more regulation . . . [i]t is important that people have choices and that entrepreneurs are able to respond to the need to keep prices down. Unreasonable regulations benefit no one but the funeral industry's pocketbooks.'" Lindsay Marchello, *Regulations, Market Dynamics Changing Funeral Business*, BLADEN J. (Oct. 31, 2017), <http://www.bladenjournal.com/news/14911/regulations-market-dynamics-changing-funeral-business> [https://perma.cc/E44K-FH7V].

<sup>240</sup> Sheldon Whitehouse & James Leach, *Afterword to Preventing Regulatory Capture: Special Interest Influence and How to Limit It*, TOBIN PROJECT (2013), <http://www.tobinproject.org/sites/tobinproject.org/files/assets/Afterword%20%283.29.13%29.pdf> [https://perma.cc/LF3U-Q2FX].

<sup>241</sup> This is a topic that has been discussed since at least the 1950s. See Dorit Rubinstein Reiss, *The Benefits of Capture*, 47 WAKE FOREST L. REV. 569, 570–71, 580 (2012).

<sup>242</sup> See Patricia Sabatini, *Last Rites: Pennsylvania's Funeral Regulators Failing Consumers, Report Finds*, PITTSBURGH POST GAZETTE (July 1, 2021), <http://www.post-gazette.com/business/money/2021/07/01/Pennsylvania-State-Board-Funeral-Directors-Consumer-Federation-America-Funeral-Consumers-Alliance/stories/202106280094> [https://perma.cc/R2VL-88BG] (noting that according to executive director of Funeral Consumers Alliance, most states have oversight boards with a supermajority of members from the funeral industry and "[t]hey see themselves as more serving the funeral industry rather than the consumer"); see also Adam Gottschalk, *Giving Up the Ghost: How the Funeral Rule and State Licensing Boards Are Failing to Protect Consumers from Underhanded Undertakers*, 27 ELDER L.J. 423, 430 (2020) (noting that Illinois's funeral board has seven members, and all seven members are licensed funeral providers, which seems to be the norm).

industry pulling their strings.<sup>243</sup> Any proposal for change requires a path around or through this state-level regulatory obstacle.<sup>244</sup>

Incentives delivered through the Internal Revenue Code are arguably suboptimal except when direct spending fails to accomplish the same result, or the incentive is for a legitimate public purpose that may be about more than dollars spent or saved.<sup>245</sup> The Internal Revenue Code is a powerful telegraphing device with an expansive reach that is able to capture the attention of the average American household (and their professional advisors) and disseminate important information. When informational restraint is an implicit barrier in a marketplace, the use of a tax incentive has been effective in the past to broaden public accessibility to information, products, and services.<sup>246</sup> Furthermore, although distributional data supports the notion that the Code may have been a suboptimal way to mitigate inequality in this modern era of tax policy, it has been at least somewhat effective with reducing poverty.<sup>247</sup>

Millions of Americans have been directly touched by COVID-19 illness or death, and for the survivors among us, many have endured the emotional and financial pressures brought by unplanned deaths. The business of death is arguably entrenched at the state level. Consumer protection within the death care space requires more than change to positive law—it requires structural change to correct the market obstacles and/or failures that are operating to the disadvantage of the consumer. The proposed paradigm offers the consumer the ability to pay for pre-need planning of funerary expenses and be reimbursed with pre-tax earnings for “qualified” expenditures through section 125 and flexible spending account principles. This approach delivers an incentive to the consumer while also sidestepping state-level regulatory issues: the federal tax incentive is only available for “qualified” pre-need payments and consumer demand for the incentive will generate the pressure necessary to develop consumer-favorable pre-need instruments.<sup>248</sup>

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<sup>243</sup> The “marionette” or string puppet is controlled from above by strings or threads. The art form was perfected in its current form in the mid-19th Century by English marionettist Thomas Holden. See George Speaight, *Marionettes or String Puppets*, BRITANNICA, <https://www.britannica.com/art/puppetry/Marionettes-or-string-puppets> [https://perma.cc/9KB7-YPD8].

<sup>244</sup> Most states regulate and control death care providers through a board. In a random sample of 20 states and 123 available board seats, 87 seats were controlled by the industry (or 70%). Spreadsheet on file with author.

<sup>245</sup> See Edward A. Zelinsky, *Efficiency and Income Taxes: The Rehabilitation of Tax Incentives*, 64 TEX. L. REV. 973, 1026 (1986) (“This Article deviates from the scholarly consensus in holding it presumptively appropriate to use the tax system for the implementation of federal policy in the domestic economy. Thus, the burden of proof should be placed on those asserting the inefficiency of any particular incentive or of incentives in general.”).

<sup>246</sup> See generally Haneman, *supra* note 53.

<sup>247</sup> See Susannah Camic Tahk, *The Tax War on Poverty*, 56 ARIZ. L. REV. 791, 795 (2014); David Kamin, *Reducing Poverty, Not Inequality: What Changes in the Tax System Can Achieve*, 66 TAX L. REV. 593, 598 (2013).

<sup>248</sup> This idea is not without substantial precedent. “Most OECD governments use tax incentives to encourage businesses to invest in research and development (R&D) to boost inno-



### A. *The FSA and Pre-Need Prepayment*

For many Americans, economic security is directly tied to participation in the labor market, either through the labor of themselves or a loved one.<sup>249</sup> The labor market provides access to a hodgepodge of noncash benefits, often inconsistent from employer to employer, through a system that is arguably inadequate, inefficient, or unfair.<sup>250</sup> In this way, the labor market arguably underwrites a form of social safety net that the system itself is not designed to provide. Based upon the Society of Human Resource Management's annual survey of U.S. employers, roughly sixty to seventy percent of employers offer Flexible Spending Accounts to employees.<sup>251</sup>

Using the FSA to incentivize pre-need planning for death services leans upon lessons learned from behavioral economics to encourage saving with respect to a category of expense that most consumers do not want to spend much time thinking about. Evidence suggests that a large portion of those families hardest hit by funeral poverty, the middle- and lower-income, are unlikely to amass the personal savings needed to shoulder an expected but significant expense.<sup>252</sup> The government already incentivizes savings and does so almost entirely through the tax system (e.g., 401(k) plans, IRAs) with mixed results but some appreciable impact.<sup>253</sup> The magic of an FSA in the context of funerary expense is that it acts as a precommitment device—in which the employee is purposefully committing to some future action as a way of encouraging themselves to follow through.<sup>254</sup> The FSA acts as a

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vation and drive economic growth.” ORG. FOR ECON. COOP. AND DEV., *Reform R&D Tax Systems to Boost Innovation and Help Young Firms*, Says OECD, (Oct. 10, 2013), <https://www.oecd.org/newsroom/reform-rd-tax-systems-to-boost-innovation-and-help-young-firms.htm> [<https://perma.cc/GXL7-L74S>]. A recent example of innovation driven by tax subsidies comes in the form of the solar industry. The CEO of the Solar Industry Association cites a 10,000% increase in capacity, a quarter million new jobs, and \$140 billion investment into the industry as a result of tax subsidies. Daniel Oberhaus, *Tax Credit Fueled the Solar Energy Boom. Now It's in Limbo*, WIRED, <https://www.wired.com/story/a-tax-credit-fueled-the-solar-energy-boom-now-its-in-limbo/> [<https://perma.cc/M3AC-C8V6>].

<sup>249</sup> See O'Connell, *supra* note 236, at 1423.

<sup>250</sup> See generally *id.*

<sup>251</sup> See SOC. FOR HUMAN RESOURCE MGMT., 2018 EMPLOYEE BENEFITS: THE EVOLUTION OF BENEFITS 1, 6 (2018), <http://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/2018%20Employee%20Benefits%20Report.pdf> [<https://perma.cc/KN3L-TVJZ>] (reporting sixty-eight percent of employers in 2014 and sixty-three percent in 2018). According to the U.S. Bureau of Labor Statistics, sixty-nine percent of state and local government workers and forty-one percent of private industry workers had access to healthcare flexible spending accounts in 2019. BUREAU OF LABOR STATS., U.S. DEPT. OF LABOR, FLEXIBLE BENEFITS IN THE WORKPLACE (2021), <http://www.bls.gov/nsc/ebs/factsheet/flexible-benefits-in-the-workplace.htm> [<https://perma.cc/3AL8-RC36>].

<sup>252</sup> See generally THOMAS L. HUNGERFORD, CONG. RSCH. SERV., RL33482, SAVING INCENTIVES: WHAT MAY WORK, WHAT MAY NOT (2006).

<sup>253</sup> *Id.*

<sup>254</sup> See *Precommitment*, BEHAVIORALECONOMICS.COM, <http://www.behavioraleconomics.com/resources/mini-encyclopedia-of-be/precommitment/> [<https://perma.cc/A2KR-MKK7>] (explaining that committing to a future action at a particular time tends to motivate action, and thus, reduce procrastination).

bridge over the cognitive dissonance between the future self (long-term goals) and the present self (immediate desires), by creating a penalty (loss of committed, automatically withdrawn funds) if pre-need death care planning does not happen within a set period of time.<sup>255</sup> Further, research demonstrates that partitioning earnings for a specific purpose encourages rather than discourages savings.<sup>256</sup> Additionally, incentives offered through employers may normalize conversations about death care saving and planning far ahead of retirement. As with all FSA accounts, limits placed on reimbursement for death care spending will blunt the upside-down nature of any tax subsidy and reduce any incentive for overspending. It may be worthwhile to set a lifetime limit (e.g., \$2,500 or \$5,000 per taxpayer) as delivery of a redundant benefit for a singular occurrence is unnecessary. FSA reimbursement may be permitted for both pre-need and at-need purchase of death care services for members of the same household, subject to these limits.

The illustration below demonstrates the way in which an FSA contribution for qualified death care service would benefit a taxpayer. This hypothetical taxpayer-employee earns \$60,000 annually (\$5,000 monthly). The taxpayer has elected to contribute \$3,600 towards death care FSA expenses (\$300 monthly). In doing so, the taxpayer has saved \$726.60 in taxes for the year (\$60.55 monthly).

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<sup>255</sup> See T.C. Schelling, *Economics, or the Art of Self-Management*, 68 AM. ECON. REV. 290, 291 (1978) (“Many sophisticated people use unsophisticated budgeting devices, like weekly spending allowances and special funds for self-indulgent expenditures, often using two or three savings accounts, sometimes in separate banks, to achieve self-control through self-intimidation.”).

<sup>256</sup> Lee Anne Fennell, *Personalizing Precommitment*, 86 U. CHI. L. REV. 433, 440 (2019).

	<b>Without § 125</b>	<b>With § 125</b>
Salary	\$5,000	\$5,000
Pre-tax Death Care		\$300
Taxable Income	\$5,000	\$4,700
Post-tax Death Care	\$300	
Social Security Tax of 6.2%	\$310.00	\$291.00
Medicare Tax of 1.45%	\$72.50	\$68.15
Federal Withholding (9%)	\$450.00	\$423.00
State Withholding (3.4%)	\$170.00	\$159.80
Net Paycheck	\$3,697.50	\$3,758.05
Total Taxes	\$1,002.50	\$941.95
Decrease in Total Tax Liability Monthly		\$60.55

The Joint Committee on Taxation publishes the Tax Expenditure Budget annually, setting forth an estimate of the revenue losses attributable to each federal tax expenditure.<sup>257</sup> Although a revenue estimate is provided for Health Savings Accounts,<sup>258</sup> also authorized under section 125, no revenue estimate is calculated for an FSA (distinguished from the HSA as a plan that requires substantiation of the qualified expense through a plan administrator, trustee, or custodian).<sup>259</sup> Although there is no departure point from which an estimate of FSA-eligible death care reimbursements may be calculated, this is an area that will take several years to develop with sufficient runway to

<sup>257</sup> JOINT COMM. ON TAX'N U.S. CONG., *Revenue Estimating*, <https://www.jct.gov/operations/revenue-estimating/> [https://perma.cc/V557-JS3T].

<sup>258</sup> The healthcare FSA has been available since 1978. Since that time, Congress has created health savings accounts (HSAs), Archer medical savings accounts (MSAs), and health reimbursement accounts (HRAs). STAFF OF JOINT COMM. ON TAX'N, 110TH CONG., *TAX EXPENDITURES FOR HEALTHCARE 26–27* (2008). “HSAs are one of the lowest cost tax expenditures in the health care sector.” *Id.*

<sup>259</sup> Or rather, it would appear that the Joint Committee on Taxation has made a policy decision to fold FSA costs in with the exclusion for employer-provided healthcare benefits, which is the largest portion of total expenditures for health. JOINT COMM. ON TAX'N, *ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2008-2012 14* (2008).

produce estimates as interest rises. Suffice it to say that it is one small step in developing a social safety net for funerary expenses in the United States, substantially less costly than the COVID-19 reimbursement program instituted by FEMA in April 2021 whose projected costs may exceed \$5 billion.<sup>260</sup>

### 1. *Two Paths Forward*

The infrastructure exists to allow employee contribution to an FSA account with reimbursement of qualified funerary expenses from pre-tax employee compensation. This is easily implemented through one of two approaches, each with advantages and disadvantages but neither impractical.

#### a. *The Death Care FSA*

The first option is the creation of a dedicated Death Care Flexible Spending Account (with a lifetime maximum of \$3,000 to \$5,000).<sup>261</sup> Consistent with the way in which these plans are currently administered, the Death Care FSA would be funded by the taxpayer with pre-tax earnings contributed to this earmarked account. Amounts contributed to this account would not be combinable with any other FSA account. The taxpayer would use the funds contributed to this account on a pre-tax basis to purchase “qualified” pre-need death care services directly from a provider.

This approach is consistent with the structure currently in effect, wherein medical and dependent care FSA accounts are maintained separately. It allows the consumer to more accurately budget dependent care, medical care, and death care expenses. Further, this approach provides freedom of choice: employers have the option of not offering this product<sup>262</sup> and employees may choose not to participate.<sup>263</sup> Offering the Death Care FSA as a new product is, in and of itself, a communication device that may subtly shift norms. Employees will become more educated as to why this product

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<sup>260</sup> Deaths attributable to COVID-19 in the United States are estimated to exceed 600,000. FEMA established a program historically unprecedented in scope whereby survivors may be reimbursed up to \$9,000 per decedent for death care service costs incurred for any U.S. citizen, non-citizen national, or qualified alien who died on or after January 20, 2020 with COVID-19 listed as cause of death on a death certificate. No end date or cap has been placed on this program. Terrell, *supra* note 90.

<sup>261</sup> An annual maximum and lifetime maximum would apply to contributions, e.g., \$1,000 or \$2,500 annual maximum paired with a \$5,000 lifetime maximum.

<sup>262</sup> What is the benefit to employers of offering flexible spending accounts to employees? Employers do not need to pay payroll tax (Medicare and Social Security) on the amounts contributed by each employee to the FSA. For every dollar an employee contributes to his, her, or their FSA, the employer is saving roughly seven to eight percent on payroll taxes. WAGE WORKS, FLEXIBLE BENEFIT ACCOUNTS (2017), <https://www.wageworks.com/media/567696/healthcare-fsa-product-guide-for-employers.pdf> [<https://perma.cc/9M73-9AK8>].

<sup>263</sup> By purchasing something with dollars from an FSA, and using pre-tax funds, an employee is saving between twenty-five and forty percent (depending upon their individual rate of tax). *Id.*

is being offered through informational sessions that generally precede open enrollment periods.

The primary disadvantage with this approach is that death care expenses are not otherwise deductible elsewhere in the Internal Revenue Code, and section 125 defines a cafeteria plan as including benefits not includible in the gross income of an employee by reason of an express provision in the Code.<sup>264</sup> Consequently, the language of section 125 would need to be amended, e.g., a sentence added at the end of section 125(f)(1) providing that death care benefits in an amount up to \$5,000 per taxpayer per lifetime may be treated as qualified for purposes of flexible spending plan reimbursement. Additionally, revised language authorizing a Death Care FSA would likely need to be included in the proposed Treasury Regulations for section 125, which authorize and detail the administration of medical, adoption, and dependent-care FSAs.<sup>265</sup>

*b. Reimbursement as a Section 213 Expense*

The second option uses the healthcare FSA account in its present form. This approach requires only that death care or funerary expenses be added to the list of “qualified expenses” that may be reimbursed through the FSA.

There are many important policies being served by broadening the definition of section 213 “medical expense” to include pre-need prepayment of death care expenses (for the limited purpose of FSA reimbursement), including considerations that touch upon public health, consumer protection, environmental protection, and intergenerational equity. Disposition of a dead body is disposal of a special type of waste, with potential public health concerns if the waste is not disposed of properly.<sup>266</sup> Further, the definitional change to “medical expense” would reflect an important normative change and the incentivization of death care expenses being borne by the decedent rather than the survivor. Pre-need planning facilitates the cultivation of an informed death care services consumer—in other words, a consumer who is not time-constrained or cost-insensitive. This type of approach to planning allows the consumer to contemplate the scope of services available, carefully consider pricing, and perhaps also investigate the environmental impacts of the potential services.

An interesting advantage of this second approach is structural: the “use it or lose it” nature of the FSA plan. Every year, there are employees who engage in frivolous year-end spending to avoid losing excess funds remain-

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<sup>264</sup> I.R.C. § 125(f)(1).

<sup>265</sup> DiRusso, *supra* note 226, at 321 (discussing creation of a charitable flexible spending account).

<sup>266</sup> Although decomposing bodies are only a negligible public health threat, any type of waste (e.g., sewage, landfills, etc.) can create issues if they contaminate a water source. *Are Dead Bodies Dangerous?*, SLATE (Aug. 23, 1999, 7:15 PM), <http://slate.com/news-and-politics/1999/08/are-dead-bodies-dangerous.html> [<https://perma.cc/TDF7-7KBG>].

ing in their FSA account on January 1.<sup>267</sup> Death remains an unpalatable topic for many who may not opt into a Death Care FSA, but the threat of year-end waste in a healthcare FSA may direct a taxpayer's last-minute spending in the direction of pre-need prepayment of funerary expenses.<sup>268</sup> And though it is possible that frivolous year-end spending may be shifted from healthcare expenses to death care expenses, this would still be desirable consumer behavior, because the shift from at-need to pre-need spending would be supported. The government has an interest in supporting public health, and a tax expenditure offered through an FSA for safe and proper disposal of human remains at the conclusion of medical care can be viewed as supporting good public health policy.

## 2. *Accompanying Reform*

The tenor and tone of this section is tentative to the extent that the proposal to implement FSA reimbursement requires an accompanying reform that is obvious but significant: pre-need prepayment for funerary expenses should only be “qualified” if the payment is irrevocable, transferrable, and paid pursuant to a written agreement.<sup>269</sup>

The approach taken in this Article is ultimately meant to be practical. There is no question that the death care marketplace will be excited by tax incentives to fuel prepayment spending but concerned by a mandate that all pre-need prepayment be fully transferrable. It is important that the incentive be crafted with appropriate consumer protections—in other words, the industry must accept the benefit along with sensible burdens.

Irrevocability of an expense paid through any type of FSA is necessary to ensure that the pre-tax funds are being used as intended. Funds must be transferrable without penalty to an equivalent plan offered by another funeral home or death care provider—portable within or to a different state—because “life happens” in the span of time between prepayment and death, and there are many reasons a consumer would need to pivot to another provider (e.g., relocation, business failure, etc.). Concerns about administrative costs associated with plan management may be addressed through retention of a fixed nominal administrative transfer fee (e.g., \$250).<sup>270</sup> While the death care services provider has an expectation of providing the prepaid contracted

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<sup>267</sup> Press Release, Dept. of the Treasury, Treasury Modifies “Use-or-Lose” Rule for Health Flexible Spending Arrangements (Dec. 28, 2021), <http://www.treasury.gov/press-center/press-releases/Documents/103113FSA%20Fact%20Sheet.pdf> [<https://perma.cc/9U9X-677V>].

<sup>268</sup> When an employee realizes they need to spend \$500 in their FSA before the end of the year, perhaps pre-need purchase of a coral reef ball for cremated remains will be an appealing year-end (or holiday) purchase. ETERNAL REEFS, WHAT IS AN ETERNAL REEF? (2020), <http://www.eternalreefs.com/the-eternal-reefs-story/what-is-an-eternal-reef/> [<https://perma.cc/UM46-7CK8>].

<sup>269</sup> Frank, *supra* note 158, at 34 (noting there are a dozen states that do not require pre-need death care contracts to be written).

<sup>270</sup> This fee should be a fixed amount rather than a percentage of total prepaid funds.

good or service until date of death, no good or service has been provided and the provider is not entitled to any other payment. An accounting must be provided for interest or income earned through the deposit of prepaid funds held by the funeral provider, with interest and income also transferrable on request. Although prepayment and the contract may be transferable to another provider, barring unusual circumstances, it is likely that contracting providers will benefit from consumer inertia and most funds will not be transferred.<sup>271</sup>

The Funeral Rule is silent on pre-need prepayment arrangements, and imposing these standardized federal requirements for reimbursement through an FSA has a number of advantages.<sup>272</sup> State regulations vary wildly on whether or not pre-need prepaid contracts are transferable, and a benefit of tax-favored FSA reimbursement (and reimbursement eligibility requirements) is its ability to “nudge” marketplace behaviors in a direction more favorable to the consumer.<sup>273</sup> Reshaping consumer buying behavior in favor of pre-need planning and prepayment will dramatically shift the structure and composition of a marketplace employing approaches that have remained relatively static for a century.<sup>274</sup>

### B. Legal Enforceability of Pre-Need Planning, Generally

The law of human remains is an idiosyncratic area of the law that legitimizes *remembering* (the person who once was) as a moral practice, with positive legal protections that guard the empty vessel<sup>275</sup> vacated by the living from being defiled or disrespected.<sup>276</sup> Attempts to reform the law of human remains have focused largely on disputes over disposition of remains and

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<sup>271</sup> HBS Working Knowledge, *When Customers Don't Care: Lessons from 'Consumer Inertia' and Gas Prices*, FORBES (June 20, 2019, 8:06 AM), <http://www.forbes.com/sites/hbs-workingknowledge/2019/06/20/when-customers-dont-care-lessons-from-consumer-inertia-and-gas-prices/?sh=5cc07f8440bf> [<https://perma.cc/TK4P-7MVY>] (noting the consumer inertia that exists in some industries, with consumers driven to remain with the same provider of services or goods by simple considerations such as habit or laziness).

<sup>272</sup> Frank, *supra* note 158, at 34.

<sup>273</sup> See THALER & SUNSTEIN, *supra* note 20, at 1–3.

<sup>274</sup> Allie Volpe, *Disruption Comes for Death*, VOX (Mar. 23, 2019, 7:30 AM), <https://www.vox.com/the-goods/2019/5/23/18635971/cremation-sustainable-funeral-eco-friendly-alternatives-burial> [<https://perma.cc/9JQR-B8ER>] (noting that the modern “model of caring for and remembering the dead remained unchanged for over 100 years”).

<sup>275</sup> Sheelagh McGuinness & Margaret Brazier, *Respecting the Living Means Respecting the Dead Too*, 28 OXFORD J. LEGAL STUD. 297, 314 (2008) (noting the issue of the deceased vessel is certainly more complex than this, in that “the dead are owed some degree of respect. If dead bodies were truly of no more account than say vegetables there would be no objection even to their use as dog meat”).

<sup>276</sup> Canadian and American cemeteries are technically open, public memorial places—anyone can enter them. However, although certain ceremonies can take place there, cemeteries are not understood in mainstream culture as a social space where people gather or meet informally. . . . This validation of the attachment of private memory to human remains can be understood as granting some limited social space for the dead. Rachel Ariss, *Bring Out Your Dead: Law, Human Remains and Memory*, 19 NO. 1 CAN. J.L. & SOC'Y 33, 45 (2004).

redefining the meaning of family or bypassing the family paradigm entirely.<sup>277</sup> This Article suggests, but does not exhaustively consider, that carving an enforceable safe harbor for preplanned and prepaid death arrangements avoids unnecessary disputes entirely and creates certainty of outcome for the living.<sup>278</sup>

Those who take steps to engage in pre-need planning secured with prepayment have implicitly been led to believe that their plan will be enforceable after death and all clear instructions will govern.<sup>279</sup> And yet, such a strong systemic bias in favor of biological (or “traditional”) family members exists that probate courts and funeral homes may disregard the clear death care instructions of the decedent in favor of the preferences of the next of kin.<sup>280</sup> To the extent that morality is a form of meta-economics, connecting legal enforceability to death care prepayment makes sense.<sup>281</sup> The United States affords great deference to the freedom of testation doctrine,<sup>282</sup> and law can reinforce this respect of the individual through enforceability of disposition planning into which the decedent has made a lifetime financial investment.<sup>283</sup> Pre-need planning may be treated as “last wishes” (and merely ephemeral) unless and until it is supported by prepayment. Accepting prepayment subject to a contract or agreement to provide death care services creates a reasonable expectation that the contract or agreement will be enforceable after death, and if not, the Funeral Rule must be amended to require a mandatory disclosure that pre-need planning and prepayment may be wholly disregarded at time of death.

Giving priority to a pre-need funeral plan or contract (colloquially referred to as a “preneed”) between the decedent and a specific funeral provider is not without precedent.<sup>284</sup> Idaho has endorsed the pre-need funeral

<sup>277</sup> See Frances H. Foster, *Individualized Justice in Disputes over Dead Bodies*, 61 VAND. L. REV. 1351, 1364 (2008) (proposing an individualized justice system for disputes over human remains).

<sup>278</sup> The purpose of this discussion is to start a conversation to be continued in a future publication.

<sup>279</sup> “A funeral director was asked in a recent radio interview, ‘What happens . . . if the deceased has left instructions for a very simple funeral, but the survivors insist on something more elaborate?’ The funeral director answered, ‘Well, at a time like that, who are you going to listen to?’” JESSICA MITFORD, *AMERICAN WAY OF DEATH*, 181–82 (1963).

<sup>280</sup> See generally Hernandez, *supra* note 211.

<sup>281</sup> Major Bruce D. Page, Jr., *When Reliance Is Detrimental: Economic, Moral, and Policy Arguments for Expectation Damages in Contracts Terminated for the Convenience of the Government*, 61 A.F. L. REV. 1, 33 (2008).

<sup>282</sup> See Shelly Kreiczler-Levy, *Property’s Immortality*, 23 CARDOZO J. L. & GENDER 107, 108 (2016) (“The law of post mortem property transfers is founded on the principle of testamentary freedom.”).

<sup>283</sup> Pre-need planning and prepayment would ensure legal enforceability of death care instructions for those who feel uncomfortable with biological family potentially interfering with their last wishes. Kara Nowakowski, *Dying while Trans: A Critical Analysis of Respect After Death Laws*, 26 CARDOZO J. EQUAL RTS. & SOC. JUST. 79, 95 (2019).

<sup>284</sup> The sale of preneeds started in the 1930s and continues as a billion-dollar business today, often funded through the funeral trusts discussed in Section III of this Article. Walker, *supra* note 113.



plan that has been “funded in advance” in the Priority of Decision statute codified within the state, giving the highest priority in controlling disposition to the pre-need plan.<sup>285</sup> California and Massachusetts similarly enforce the terms of a pre-need contract, provided that prepayment has been made.<sup>286</sup> When the decedent has engaged in pre-need planning and prepayment, any other result is profoundly inequitable.

## VI. CONCLUSION

No one escapes death. For most of history, death was familiar, integral, and present. With the twentieth century came the rise of the funeral home and the institutionalization of death, and with the process moving outside of the home, modern society in the United States has allowed death to be rendered almost invisible. Interestingly, however, death has returned to contemporary society through the COVID-19 pandemic,<sup>287</sup> and the past year has exposed in stark relief the deeply intertwined issues of death sequestration, funeral poverty, and consumer vulnerability in a marketplace without accessible, reliable prepayment instruments to facilitate pre-need planning.

Perhaps all unique contributions to existing literature are the product of favorable timing: end-of-life planning is an idea now gaining traction with consumers and the government arguably grasps the need for a broadened social safety net that incentivizes emergency saving and/or assists with death care service. The issuance of large (historically unprecedented) COVID-19 FEMA reimbursement checks for funerary expenses has a certain undeniable appeal but will also reinforce existing taboo and death invisibility in a way that does not meaningfully address long-term issues. In a marketplace where some state regulatory authorities may have buckled to regulatory capture, this Article introduces the idea of federal tax incentives functioning as both a sword and shield within this marketplace, metaphorically changing the way that the game itself is played through tax-sheltered prepayment options, tax-favored savings options, and low-income taxpayer refundable tax credits.<sup>288</sup>

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<sup>285</sup> See, e.g., 1994 Idaho Sess. Laws 423, §§ 1–4.

<sup>286</sup> CAL. HEALTH & SAFETY CODE § 7100.1(a)(2) (Westlaw current through ch. 10 of 2022 Reg. Sess.); 239 MASS. CODE REGS. 3.09 (Westlaw current through Reg. No. 1464).

<sup>287</sup> See generally Hviid Jacobsen & Petersen, *supra* note 126.

<sup>288</sup> Tax-sheltered prepayment incentives are discussed in this Article. Tax-favored savings options and low-income taxpayer refundable credits will be explored in forthcoming publications.

## APPENDIX ONE

State	Statute	Writing Requirement	Transferability
Alabama	Ch. 482-3-005	Yes	Not specified
Alaska	Alaska Code §45.50.471(24)	Not specified	Not specified
Arizona	Az. Code §32-1391 et seq.	Yes	Not specified
Arkansas	Ark. Code Sec. 23-40-101 to 126	Yes	Yes, by either party; if seller and irrevocable no more expensive for the buyer
California	Ca. Bus. & Prof. Code §§7735-7746	Yes	Yes
Colorado	Colo. Rev. Stat. §§10-15-101 to 123	Yes	Yes
Connecticut	Conn. Gen. Stat. §§42-200 to 207	Yes	Yes
Delaware	5 Del. Code §§34011 to 3411	Not specified	Not specified
Florida	Fl. Stat. Ann. §§497.450 to 497.456	Yes	Transferrable by consumer
Georgia	GA. Code Ann., §10-14-7	Not specified	Transferrable by trustee of the preneed escrow account
Hawaii	Haw. Rev. Stat. §441-1 to 46	Yes	Not specified
Idaho	Idaho Code §54-1129 to 1138	Yes	Yes
Illinois	38 IL ADC 610	Yes	Not specified
Indiana	Repealed in 2012		
Iowa	Reserved in 2020		
Kansas	Kansas Sec. 16-300 to 336	No	Not specified

## APPENDIX ONE (CONT.)

State	Statute	Writing Requirement	Transferability
Kentucky	Ky. Rev. Stat. Ann. §367.932 to .974	No required contract provisions but “records of registrant must be available”	Not specified
Louisiana	LA Rev. Stat. § 37:861 (2019) to 867	Yes	Substitutions of goods/services of equal value allowed; otherwise, not specified
Maine	Me. Rev. Stat. Ann. tit. 32, §§1401-02	Yes	Not specified
Maryland	MD Health Occ Code § 7-405 (2019)	Yes	Yes, by seller to another licensed provider
Massachusetts	Mass. Gen. Laws. Ann. c.112, §§83-87	Not specified	Not specified
Michigan	Mich. Comp. Laws. Ann. §328.211 to .235	If not, then voidable by either party	Yes, by either party with appropriate notice
Minnesota	Minn. Stat. Ann. §149A.97	Yes	Consumer can make substitutions; provider not specified
Mississippi	Miss. Code Ann. §§75-63-1 to 75-3-23	Yes	Yes, upon change of ownership or cessation of performing funeral services
Missouri	MO Rev Stat § 436.400 (2019) to 525	Yes	Seemingly by purchaser only
Montana	Repealed		

## APPENDIX ONE (CONT.)

State	Statute	Writing Requirement	Transferability
Nebraska	Neb. Rev. Stat §§12-1102 to -1121	Yes	Substitutions of goods/services of equal value allowed; otherwise, not specified
Nevada	NV Rev Stat § 689.265 (2020) to .375; .715	Yes	Not specified
New Hampshire	NH Rev Stat § 325:46-a (2020); 325:43	Yes	Yes by both
New Jersey	Universal Citation: NJ Rev Stat § 45:7-83 to 90 (2019)	Yes	Not specified
New Mexico	NM Stat § 59A-49-1 to 8 (2019)	Not specified	Not specified
New York	NY. Gen. Bus. Law §453; PBH § 3442 and 3428	Yes	Only upon sale or dissolution of provider's organization and with notice
North Carolina	NC Gen Stat § 90-210.60 - 7 (2019)	No	Purchaser may substitute licensee; Provider can transfer with notice
North Dakota	N.D. Cent. Code §43-10.1-01 to -08	Not specified	Yes, requirement
Ohio	Ohio Rev. Code §4717.32 to 4717.38	Yes	Yes
Oklahoma	Ok. Stat. Ann. tit. 36, §§6121 to 6136	Yes	Not unless the provider is sold
Oregon	ORS 97.923 to 97.949	Yes- 3 copies	Not specified

## APPENDIX ONE (CONT.)

State	Statute	Writing Requirement	Transferability
Pennsylvania	Pa. Admin. Title Code §§13.204 to .206; .224 to .226	Yes	Not specified
Rhode Island	RI Gen. Laws §§5-33.1 to -10	Not specified	Not specified
South Carolina	SC Code § 32-7-10 to -130 (2019)	Yes	If provider goes out of business
South Dakota	SD Codified L § 55-11-1 to -15 (2019)	Yes	Not specified
Tennessee	TN Code § 62-5-401 to 417 (2019)	Yes	If irrevocable, yes
Texas	Tx. Stat. Ann. Finance Code, Tit. 3, Subtit. E, Chapter 154	Yes- detailed requirements	Not specified
Utah	UT Code § 58-9-701 to -708 (2019)	Yes	Not specified
Vermont	26 V.S.A. § 1271 to 1277	Yes	Yes, by either party but for provider must cease to do business/sell/ become insolvent
Virginia	Va. Code Ann. §§ 54.1-2820 to 2825	Yes	Not specified
Washington	Wash. Rev. Code §§ 18.39.240 to .370	Yes	Not specified
West Virginia	WV Code § 47-14-1 to -14 (2019)	Yes	Yes, impliedly
Wisconsin	WI Stat § 445.125 (2020); WI Stat § 440.92 (2020)	Yes	Not specified
Wyoming	WY Stat § 26-32-101 to 201 (2020)	Yes	Not specified

