

RETHINKING THE LAW OF THE DEAD

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INTRODUCTION

There are few subjects as fundamental to the human experience as death. One of the hallmarks of humanity is that we do not casually dispose of what remains.¹ Instead, humans attach great social and religious significance to the rituals that surround death.² In societies dominated by a single culture or religion, there is understandable conformity in funeral rites and disposition methods. But America has a unique way of death,³ one that has traditionally respected cultural and religious diversity.⁴ The body of laws that govern the treatment and disposition of human remains, which I refer to as the “law of the dead,” has complemented that respectful approach. The law has never prescribed a particular practice and has placed few explicit limits on postmortem rituals and methods of disposition. On the surface, the American law of the dead appears to honor individual choice—a structure seemingly consistent with a diverse society that values freedom of expression, religious freedom, the family, and privacy.

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1. NIGEL BARLEY, *GRAVE MATTERS: A LIVELY HISTORY OF DEATH AROUND THE WORLD* 14 (1997) (“In the archaeological record, ritual concern with mortal remains is amongst the first signposts that Man has evolved from mere hominid and emerged as a higher being.”); Herman Feifel, *Psychology and Death: Meaningful Rediscovery*, 45 *AM. PSYCHOLOGIST* 537, 537 (1990) (“From the beginnings of recorded history, realization of finitude has been a powerful concern and shaping force. Indeed, many feel that one of humanity’s most distinguishing characteristics, in contrast to other species, is its capacity to grasp the concept of a future—and inevitable—death.”).

2. Albert N. Hamscher, *Pictorial Headstones: Business, Culture, and the Expression of Individuality in the Contemporary Cemetery*, 23 *MARKERS: ANN. J. ASS’N FOR GRAVESTONE STUD.* 6, 8 (2006).

3. See, e.g., JESSICA MITFORD, *THE AMERICAN WAY OF DEATH REVISITED* 14 (Vintage Books 2000) (1963).

4. See generally JAMES J. FARRELL, *INVENTING THE AMERICAN WAY OF DEATH, 1830–1920* (1980).

But a deeper critique reveals that the law actually embraces and promotes certain norms that (1) have broad social, economic, and environmental impacts and (2) undermine the independent preferences of a growing number of Americans. This Essay deals with one important norm—the unstated preference of the law for the for-profit funeral services provider at the expense of those who historically handled funeral services: families, religious communities, and nonprofit organizations. The dominance of the funeral service industry is reflected in a variety of legal rules that limit choice and thus undermine our core values.

In this Essay, I first describe the historical forces that shaped the modern law of the dead. Second, I argue that these laws support for-profit funeral-service providers, who in turn prefer resource-intensive, profitable death rituals and methods of disposition. Third, I present evidence that a growing number of Americans prefer less costly and resource-intensive alternatives. Finally, I outline principles upon which the American law of the dead could be reconstructed.

I. HISTORICAL FORCES THAT SHAPED THE LAW OF THE DEAD

The law of the dead has long been neglected by legal scholars, policy makers, and the public. This disregard is consistent with the broader disconnect between the living and the dead in modern American society. Throughout human history, death has been surrounded by superstition and taboo.⁵ More so than other modern cultures, Americans find death distasteful—a failure of science and willpower.⁶ Herman Feifel wrote that modern Americans view death as a “dark symbol not to be stirred—not even touched—an obscenity to be avoided.”⁷ Given our society’s efforts to banish reminders of death from the world of the living,⁸ it is unsurprising that we have ignored the law of the dead. As a result of our collective disregard, two historical forces forged the American law of the dead: English ecclesiastical law and the funeral services industry.

5. See James A. Thorson & F.C. Powell, *Elements of Death Anxiety and Meanings of Death*, 44 J. CLINICAL PSYCHOL. 691, 691 (1988) (“[D]eath avoidance does seem to be central to human existence.”).

6. ROBERT W. HABENSTEIN & WILLIAM M. LAMERS, *FUNERAL CUSTOMS THE WORLD OVER* 730 (1963); see GLENNYS HOWARTH, *LAST RITES: THE WORK OF THE MODERN FUNERAL DIRECTOR* 14 (1996) (“In modern societies, dying people have become separated from the healthy and this has created an illusion of distance from death.”).

7. Feifel, *supra* note 1, at 538.

8. See, e.g., Philippe Aries, *The Reversal of Death: Changes in Attitudes Toward Death in Western Societies*, in *DEATH IN AMERICA* 134, 134–35 (David E. Stannard ed., 1975) (discussing how human sciences have remained largely silent on the subject of death such that “ordinary men . . . behave as though death no longer exist[s]”).

In the seventeenth and eighteenth centuries, the formative years of the American common law, the Church of England and families organized and controlled the funeral and burial processes in England.⁹ At that time, the English law of the dead was ecclesiastical law, rooted in Anglican church doctrine.¹⁰ Relevant Anglican doctrine was, in turn, essentially Catholic doctrine with minor modifications. Although ecclesiastical law was not expressly adopted into American common law, courts informally incorporated ecclesiastical principles into American common law.¹¹ Therefore, the American law of the dead is strongly informed by English ecclesiastical law and, in turn, by seventeenth- and eighteenth-century Anglican doctrine.¹²

Until the late nineteenth century, American burial practices were similar to those in England, with necessary adaptations.¹³ Families, communities, and religious organizations controlled the funeral and burial processes.¹⁴ Corpses were washed, wrapped in a shroud or placed in a simple box, and buried in the ground.¹⁵ Early Americans relied less on churchyards than the English, creating an array of cemeteries owned by municipalities, nonprofit organizations, and families.¹⁶ But during the Civil War, the fact

9. RALPH HOULBROOKE, *DEATH, RELIGION, AND THE FAMILY IN ENGLAND, 1480–1750*, at 336 (1998). Certain categories of people were denied burial in the parish churchyard: those who committed suicide, those who were executed for certain crimes, or those who were excommunicated. *Id.* at 335–36.

10. R.H. TYLER, *AMERICAN ECCLESIASTICAL LAW* 419 (Albany, William Gould, Law Bookseller & Publisher 1866) (“The law of burial, in its relations to the place of internment, and the protection of the dead body, has usually been considered as belonging to that class of topics falling under the consideration of the ecclesiastical courts.”); *see also* PERCIVAL E. JACKSON, *THE LAW OF CADAVERS AND OF BURIAL AND BURIAL PLACES* 24 (2d ed. 1950) (“The English ecclesiastical courts exercised [authority] over the burial of the dead.”).

11. *See, e.g.*, *Wightman v. Wightman*, 4 Johns. Ch. 343, 347 (N.Y. Ch. 1820) (“Are the principles of natural law, and of Christian duty, to be left unheeded, and inoperative, because we have no ecclesiastical Courts recognized by law . . . ?”).

12. *See, e.g.*, *Brownlee v. Pratt*, 68 N.E.2d 798, 800–01 (Ohio Ct. App. 1946) (“The policy of the law to protect the dead and preserve the sanctity of the grave comes down to us from ancient times, having its more immediate origin in the ecclesiastical law. This salutary rule recognizes the tender sentiments uniformly found in the hearts of men, the natural desire that there be repose and reverence for the dead, and the sanctity of the sepulcher.”).

13. DAVID CHARLES SLOANE, *THE LAST GREAT NECESSITY: CEMETERIES IN AMERICAN HISTORY* 25–28 (1991).

14. *Id.* at 25.

15. Ronda Smith, *The American Death System* 25–26 (Dec. 9, 1997) (unpublished project for partial fulfillments of M.A. requirements, Sonoma State University) (on file with Sonoma State University Library, Sonoma State University); *see also* ROBERT W. HABENSTEIN & WILLIAM M. LAMERS, *THE HISTORY OF AMERICAN FUNERAL DIRECTING* 253 (1955) (“The early colonists in America . . . undoubtedly first buried their dead in the bare earth.”).

16. *See generally* HABENSTEIN & LAMERS, *supra* note 15.

that so many men died far away from their homes and families created a new problem. Surgeons and others employed a crude form of embalming in order to stabilize corpses so that they could be shipped home for burial.¹⁷ Following the war, newly trained embalmers refined their skills and products and worked to create new markets at home.¹⁸ They were very successful. As embalming became a uniquely American social norm,¹⁹ families and religious organizations lost control of their dead.²⁰ By the dawn of the twentieth century, funeral directors and embalmers were no longer simply tradesmen; they had styled themselves as professionals.²¹ By the end of World War II, American funeral services had become fully commercialized and industrialized, and the structure of the modern law of the dead was in place.²²

17. DREW GILPIN FAUST, *THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR* 86–101 (2008); JACK MCLAUGHLIN, *GETTYSBURG: THE LONG ENCAMPMENT* 183 (1963) (“A whole slew of them had descended on Gettysburg in the high spirit of profit. Setting up their places of business within a macabre distance of the field hospitals, they did not wait long for a flourishing trade. . . . [T]he embalmers pumped the bereaved for all the cash they could get and then pumped in their preservative.”); Smith, *supra* note 15, at 27 (“Because of [their] offensive behaviors the U.S. Army established the first licensing rules for embalmers and undertakers during the Civil War.”).

18. Between 1860 and 1869, ten patents were granted for embalming materials and processes. HABENSTEIN & LAMERS, *supra* note 15, at 328–29.

19. 3 WILLIAM WOOD, *WOOD’S MEDICAL AND SURGICAL MONOGRAPHS* 618 (New York, William Wood & Co. 1889); *see also* DARRYL J. ROBERTS, *PROFITS OF DEATH: AN INSIDER EXPOSES THE DEATH CARE INDUSTRIES* 12 (1997) (“One should note . . . that the ritual of embalming for viewing the dead is primarily an American phenomenon Elsewhere throughout the world, we are looked upon with bewilderment and some disgust for our burial practices.”); Smith, *supra* note 15, at 30 (“[A]lthough, it is common in other countries for a body to remain in a home for three or more days before calling a business to dispose of it, American culture has strong psychological and emotional inhibitions surrounding a corpse. The simplicity of washing a body and keeping it cool while close family and friends gather is generally viewed with great distaste in America. In contrast, embalming is essentially used in other countries only for the purpose of long-term public viewing as in the cases of dignitaries and rulers, but, in general, such viewing is considered ghoulish and distasteful.”).

20. GARY LADERMAN, *REST IN PEACE: A CULTURAL HISTORY OF DEATH AND THE FUNERAL HOME IN TWENTIETH-CENTURY AMERICA* 4 (2003) (“Funeral directors achieved an air of authority in mortal matters, and became the primary managers of the corpse and the ceremonies to dispose of it.”).

21. In 1882, the Undertakers’ Mutual Protection Association was renamed the National Funeral Directors Association because the title of “funeral director” was perceived to be more professional than “undertaker.” Smith, *supra* note 15, at 27.

22. *Id.* at 25 (“In present day America, only one institution is responsible for the body, i.e., the physical representation of death, and that is the funeral industry. Although death rites . . . were once largely conducted through community, family and church, the norm for current practices is to purchase all services and goods through the marketplace. Thus, to study the American way of death is to study the methods and practice of the death industry, which controls this market.”).

Early funeral directors sought a regulatory licensing structure to add credibility and stature to their profession.²³ Virginia was the first state to enact a law regulating embalming in 1894.²⁴ Over the next six years, nearly half of the states enacted similar laws.²⁵ The fledgling National Funeral Directors Association (“NFDA”) continued to press for formal licensing laws at the turn of the century, but it met resistance with many state legislators who held the view that “funeral service legislation was passed only to secure the benefit of the funeral director, and therefore as wholly a favor to him.”²⁶ Throughout the twentieth century, the NFDA and similar organizations overcame that political resistance and, as the only groups with expertise in the area, have played a key role in drafting the law of the dead.²⁷ Most statutes regarding the treatment and disposition of the dead appear in chapters of state code that deal with the licensing of funeral directors and embalmers, and many laws focus on limiting the liability of such licensed persons.

Thus, Anglican doctrine informed the common law of the dead, and the funeral services industry largely wrote the modern statutory law of the dead.

II. THE LAW SUPPORTS FOR-PROFIT FUNERAL SERVICES PROVIDERS

Given this history, it is not surprising that state statutory law supports the for-profit funeral services industry in a number of ways. Every state but two has laws that forbid funeral directing without a license.²⁸ Funeral directing is generally defined by state statutes as including the following services: removing the corpse from the place of death or coroner’s office, preparing the remains

23. See, e.g., HABENSTEIN & LAMERS, *supra* note 15, at 492–501.

24. *Id.* at 497; David Foos, *State Ready-to-Embalm Laws and the Modern Funeral Market: The Need for Change and Suggested Alternatives*, 2012 MICH. ST. L. REV. 1375, 1387.

25. HABENSTEIN & LAMERS, *supra* note 15, at 497.

26. *Id.* at 498–99.

27. LISA CARLSON, *CARING FOR THE DEAD* 11 (1998); MITFORD, *supra* note 3, at 261–63; *ICCFA Speaking For You*, ICCFA: INT’L CEMETERY, CREMATION, & FUNERAL ASS’N, <http://www.iccfa.com/government-legal/advocacy-efforts/iccfa-speaking-you> (last visited Oct. 27, 2013) (“Congress looks to us when an expert on our industry is needed.”).

28. David E. Harrington, *Markets: Preserving Funeral Markets with Ready-to-Embalm Laws*, 21 J. ECON. PERSP. 201, 202 (2007). Colorado does not license individual funeral directors, but a new law that went into effect on January 1, 2010 requires the licensure of funeral establishments and prohibits people from offering funeral goods or services to the public unless they work for a licensed funeral establishment. See COLO. REV. STAT. § 12-54-110(1) (2012). Hawai’i also requires the licensure of embalmers, but not funeral directors. See HAW. REV. STAT. §§ 469-1-8 (1993) (stating that section 469-2 authorizes the Department of Health to establish rules for the “business of an undertaker” and to require the registration of those engaged in that business but does not authorize any licensing regime for funeral directors or undertakers).

(washing, embalming, dressing, and applying cosmetics), arranging the logistical details of the funeral and final disposition (which could include a range of services such as hosting a viewing, coordinating with the crematory and/or cemetery, and placing an obituary in the paper), and selling related products and services to the family.²⁹

Licensure is clearly a rational strategy to regulate embalmers. Few would argue that consumers or the public health would benefit if embalming were conducted by untrained individuals. But the remainder of the services offered by funeral directors could be competently performed by clergy and laymen. Indeed, most of these activities were in the domain of families, clergy, and communities before embalming became a social norm.³⁰

Licensure was desired by the funeral services industry for good reason. Once a funeral director is licensed, many states treat him as a quasipublic official, with the (sometimes sole) power to issue transportation and disposition permits.³¹ The widespread

29. See, e.g., N.C. GEN. STAT. § 90-210.20(k) (2011) (“Practice of funeral service’ means engaging in the care or disposition of dead human bodies or in the practice of disinfecting and preparing by embalming or otherwise dead human bodies for the funeral service, transportation, burial or cremation, or in the practice of funeral directing or embalming as presently known, whether under these titles or designations or otherwise. ‘Practice of funeral service’ also means engaging in making arrangements for funeral service, selling funeral supplies to the public or making financial arrangements for the rendering of such services or the sale of such supplies.”); *Occupational Outlook Handbook: Funeral Directors: What Funeral Directors Do*, BUREAU LAB. STAT. (Mar. 29, 2012), <http://www.bls.gov/ooh/Personal-Care-and-Service/Funeral-directors.htm#tab-2> (listing the common tasks of a funeral director).

30. The case of *Wasserman v. Burrell*, filed in the United States District Court for the Middle District of Pennsylvania, demonstrates the existing conflicts between modern licensing regimes and traditional methods of preparing the dead. Memorandum of Understanding, *Wasserman v. Burrell*, No. 1:12-CV-1521 (M.D. Pa. filed Dec. 17, 2012), available at http://www.funerals.org/publications-and-resources/doc_view/248-wasserman-settlement-pennsylvania-. Rabbi Wasserman, the director of funerary practices of the *Vaad HaRobonim* of Pittsburgh and its *Chevra Kadisha*, sued the members of the Commonwealth of Pennsylvania State Board of Funeral Directors after he was repeatedly investigated for the unlicensed practice of funeral directing when he “engaged in centuries-old prayer, practices and custom of religious burials and funerary rites, without payment or profit, and without any use whatsoever of preservatives or cosmetics for the deceased.” *Id.* at 2. The parties reached a settlement in which the Commonwealth of Pennsylvania agreed that individuals, religious denominations, or committees of congregations of religious believers who handle, transport, prepare, and dispose of deceased human bodies in accordance with the practice or observance of religion shall not be required to become licensed funeral directors in the Commonwealth. *Id.* at 8.

31. See, e.g., IND. CODE ANN. § 25-15-8-25 (LexisNexis 2007) (“A local health officer may issue a permit [for disposal of the body] under IC 16-37-3-10 only to a funeral director acting as an agent or a funeral home licensee or another individual acting under the direct supervision of a funeral director who is an agent of a funeral home licensee.”); LA. REV. STAT. ANN. § 37:848(D)(5)

requirement that funeral directors be trained embalmers,³² that funeral directors complete lengthy apprenticeships before licensure,³³ or that funeral homes have embalming rooms,³⁴ has the

(2007 & Supp. 2013) (“Every dead human body shall be disposed of and prepared through a funeral establishment and under the supervision of a licensed funeral home or embalmer.”); NEB. REV. STAT. § 71-605(1), (7) (2009 & Supp. 2012) (“The funeral director and embalmer in charge of the funeral of any person dying in the State of Nebraska shall cause a certificate of death to be filled out with all the particulars contained in the standard form adopted and promulgated by the department. . . . No dead human body shall be removed from the state for final disposition without a transit permit issued by the funeral director and embalmer having charge of the body in Nebraska . . .”).

32. Nineteen states and the District of Columbia explicitly require funeral directors to have embalming training and/or experience to become licensed. ARIZ. REV. STAT. ANN. § 32-1322(C) (2008); D.C. CODE § 3-405 (LexisNexis Supp. 2013); FLA. STAT. ANN. § 497.373 (West Supp. 2013); GA. CODE ANN. § 43-18-41 (2011); HAW. REV. STAT. § 469-1 (1993); 225 ILL. COMP. STAT. ANN. 41/10-10 (West 2012); IOWA CODE ANN. § 156.4 (West Supp. 2013); ME. REV. STAT. ANN. tit. 32, § 1501 (Supp. 2012); MASS. ANN. LAWS ch. 112, § 83 (LexisNexis 2004); NEB. REV. STAT. § 38-1415 (2008); N.H. REV. STAT. ANN. § 325:14 (LexisNexis 2010); N.J. STAT. ANN. § 45:7-49 (West 2004); N.M. STAT. ANN. § 61-32-9 (LexisNexis 2012); N.D. CENT. CODE § 43-10-12 (2007); 63 PA. CONS. STAT. ANN. § 479.5 (West 2010); R.I. GEN. LAWS § 5-33.2-6 (2009); S.D. CODIFIED LAWS § 36-19-21 (2004); UTAH CODE ANN. § 58-9-302(1)(f) (LexisNexis 2012); VT. STAT. ANN. tit. 26, § 1252 (2012); W. VA. CODE ANN. § 30-6-9 (LexisNexis 2012). Fourteen additional states require funeral directors to have graduated from a mortuary science or funeral service school accredited by the American Board of Funeral Services. All accredited mortuary schools in the United States require courses in embalming for graduation. The states that require a degree from a mortuary school and therefore indirectly require embalming training are: DEL. CODE ANN. tit. 24, § 3107 (2011); IDAHO CODE ANN. § 54-1108(2) (2012); IND. CODE ANN. § 25-15-4-3 (LexisNexis 2007); MD. CODE ANN., HEALTH OCC. § 7-303 (LexisNexis Supp. 2013); MICH. COMP. LAWS SERV. § 339.1806 (LexisNexis 2010); MINN. STAT. ANN. § 149A.20 (West 2011); MONT. CODE ANN. § 37-19-302 (West 2013); N.Y. PUB. HEALTH LAW § 3421 (McKinney 2012); N.C. GEN. STAT. § 90-210.25 (2011); OKLA. STAT. tit. 59, § 396.3 (West 2010); TENN. CODE ANN. § 62-5-305 (2009); TEX. OCC. CODE ANN. § 651.253 (West 2012); WASH. REV. CODE ANN. § 18.39.035 (West Supp. 2013); WIS. STAT. ANN. § 445.045 (West 2012).

33. Forty-three states and the District of Columbia require applicants for a funeral director's license to have an embalmer's license or to have served as an apprentice or resident trainee to a licensed funeral director for periods ranging from one to three years. These requirements are all barriers to entry that institutionalize the industry's control over who enters it. ALA. CODE § 34-13-72 (LexisNexis 2010); ALASKA STAT. § 08.42.050(b) (2012); ARIZ. REV. STAT. ANN. § 32-1322(C) (2008); ARK. CODE ANN. § 17-29-302 (2010); COLO. REV. STAT. § 12-54-110 (2013); CONN. GEN. STAT. ANN. § 20-217 (West 2008); DEL. CODE ANN. tit. 24, § 3107 (2011); D.C. CODE § 3-405 (LexisNexis Supp. 2013); GA. CODE ANN. § 43-18-41 (2011); HAW. REV. STAT. § 469-1 (1993); IDAHO CODE ANN. § 54-1108 (2012); 225 ILL. COMP. STAT. ANN. 41/10-10 (West 2012); IND. CODE ANN. § 25-15-4-3 (LexisNexis 2007); KAN. STAT. ANN. § 65-1714(b) (2002); KY. REV. STAT. ANN. § 316.030 (LexisNexis 2011); LA. REV. STAT. ANN. § 37:842 (2007); ME. REV. STAT. ANN. tit. 32, § 1501 (1999); MD. CODE ANN., HEALTH OCC. § 7-303 (LexisNexis 2013); MICH. COMP. LAWS SERV. § 339.1806 (LexisNexis 2010);

effect of further institutionalizing the for-profit funeral service model by creating high barriers to entry in the market, particularly for religious or nonprofit groups who may not wish to offer embalming.³⁵

State statutory law has a number of mechanisms to protect licensed funeral service providers from competition.³⁶ A number of states have laws that require individuals and firms that sell funeral services and products (such as caskets and urns) to be licensed.³⁷

MINN. STAT. ANN. § 149A.20 (West 2011); MISS. CODE ANN. § 73-11-51 (Supp. 2013); MO. ANN. STAT. § 333.041 (West 2008); MONT. CODE ANN. § 37-19-302 (2013); NEB. REV. STAT. § 38-1415 (2008); N.H. REV. STAT. ANN. § 325:14 (LexisNexis 2010); N.J. STAT. ANN. § 45:7-49 (West 2004); N.M. STAT. ANN. § 61-32-9 (LexisNexis Supp. 2012); N.Y. PUB. HEALTH LAW § 3421 (McKinney 2012); N.C. GEN. STAT. § 90-210.25 (2011); N.D. CENT. CODE § 43-10-11 (2007); OHIO REV. CODE ANN. § 4717.05 (LexisNexis 2013); OKLA. STAT. ANN. tit. 59, § 396.3 (West 2010); OR. REV. STAT. § 692.045 (2011); 63 PA. CONS. STAT. ANN. § 479.3 (West 2010); R.I. GEN. LAWS § 5-33.2-6 (2009); S.C. CODE ANN. § 40-19-230 (2011); S.D. CODIFIED LAWS § 36-19-21 (2004); TENN. CODE ANN. § 62-5-305 (2009); TEX. OCC. CODE ANN. § 651.253 (West 2012); UTAH CODE ANN. § 58-9-302 (LexisNexis 2012); VT. STAT. ANN. tit. 26, § 1252 (2012); WASH. REV. CODE ANN. § 18.39.035 (West Supp. 2013); W. VA. CODE ANN. § 30-6-9 (LexisNexis 2012); WIS. STAT. ANN. § 445.045 (West 2012).

34. Harrington, *supra* note 28, at 201–02. The number of states that require licensed facilities to include embalming rooms increased from thirty-seven in 1978 to thirty-nine in 2007. FED. TRADE COMM'N, FUNERAL INDUSTRY PRACTICES: FINAL STAFF REPORT TO THE FEDERAL TRADE COMMISSION AND PROPOSED TRADE REGULATION RULE (16 CFR PART 453) 113 & n.36 (1978), available at <http://www.ftc.gov/bcp/rulemaking/funeral/finstaffrept.pdf>.

35. SALLY LERMAN, IBISWORLD, IBISWORLD INDUSTRY REPORT 81221 FUNERAL HOMES IN THE US, RESTING PLACE: DEMOGRAPHIC TRENDS BENEFIT FUNERAL HOMES, BUT CREMATIONS WILL HAMPER GROWTH 5 (2013) (“Over the past five years, the size of the industry has expanded slowly, with the number of funeral home operators increasing at an average annual rate of 0.8% . . .”). A number of faiths prohibit or discourage embalming, most notably Islam and Judaism. See KENNETH V. ISERSON, DEATH TO DUST: WHAT HAPPENS TO DEAD BODIES? 225 (1994)

36. LERMAN, *supra* note 35 at 8 (“Caskets are typically the funeral homes’ most expensive merchandise and provide some of the highest profit margins.”).

37. At least eleven states define “funeral directing” to include the sale of merchandise related to funerals or otherwise prohibit the sale of funeral goods without a license. ALA. CODE § 34-13-1 (LexisNexis 2010); COLO. REV. STAT. § 12-54-110 (2013); DEL. CODE ANN. tit. 24, § 3106 (2011); GA. CODE ANN. § 43-18-1 (2011); IDAHO CODE ANN. § 54-1102 (2012); ME. REV. STAT. ANN. tit. 32, § 1400 (1999); MINN. STAT. ANN. § 149A.02(20) (West 2011); OKLA. STAT. ANN. tit. 59, § 396.3a (West 2010); S.C. CODE ANN. § 40-19-20 (2011); VT. STAT. ANN. tit. 26, § 1211 (2012); VA. CODE ANN. § 54.1-2800 (2013). The constitutionality of these “casket laws” is in question. In 2000, a federal district court in the Fifth Circuit declared that there was no rational basis to require the vendors of caskets to be licensed funeral directors, and that the Mississippi casket law violated the Due Process and Equal Protection clauses of the Fourteenth Amendment. *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434, 440–41 (S.D. Miss. 2000). The Sixth Circuit used the same reasoning to strike down Tennessee’s casket law in 2002. *Craigmiles v. Giles*, 312 F.3d 220, 228–29 (6th Cir. 2002). Two years later, the constitutionality of Oklahoma’s casket law was upheld by the Tenth

These protectionist laws frustrate customers interested in purchasing low-cost caskets from bricks and mortar retail establishments or handmade coffins crafted by religious orders.³⁸ This limits personal expression and has the effect of discouraging or preventing families, religious organizations, and cooperative memorial societies from providing funeral goods and services on a nonprofit basis.³⁹

Federal law also protects the funeral services industry. In 1984, the Federal Trade Commission (“FTC”) adopted the “Funeral Rule.”⁴⁰ Intended as a consumer-friendly measure, it requires “funeral providers” to maintain a general price list and to itemize all charges, a significant improvement over the prior pricing structure where customers were required to purchase a package and routinely pay for services they declined. The problem with the FTC approach is that the industry insisted on a “nondeclinable” charge to cover the funeral providers’ basic services that are associated with arranging and planning a funeral as well as overhead.⁴¹ This charge is imposed on all customers of a particular provider at the same rate, regardless of whether they opt for the most minimal service or the most extensive. The fee is set by the provider. As of June 2013, the average nondeclinable basic services fee was \$1,914.⁴² There are significant price differences between the national corporate chains and independent funeral homes. The average nondeclinable basic

Circuit. *Powers v. Harris*, 379 F.3d 1208, 1225 (10th Cir. 2004). In October 2013 the Supreme Court of the United States declined the opportunity to resolve the circuit split when it denied certiorari in the case of *Castille v. St. Joseph Abbey*, 134 S. Ct. 423 (2013), allowing to stand the decision of the Fifth Circuit Court of Appeals that struck down Louisiana’s casket law, LA. REV. STAT. § 37:831(37), as unconstitutional. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 217 (5th Cir. 2013).

38. Conor Friedersdorf, *How 38 Monks Took on the Funeral Cartel and Won*, ATLANTIC (July 22, 2011, 8:30 AM), <http://www.theatlantic.com/national/archive/2011/07/how-38-monks-took-on-the-funeral-cartel-and-won/242336/>.

39. CAITLIN MOLDAVAY, IBISWORLD, IBISWORLD INDUSTRY REPORT 81222 CEMETERY SERVICES IN THE US, SIX FEET UNDER: THE POPULARITY OF LOWER COST CREMATIONS BURIES INDUSTRY REVENUE 23 (2013) (describing the high barriers to entry in the cemetery industry given the level of regulation that the industry faces).

40. 16 C.F.R. § 453.2 (2013).

41. *See id.* § 453.2(b)(4)(iv) (“The services fee permitted by § 453.2(b)(4)(iii)(C)(1) or (C)(2) is the only funeral provider fee for services, facilities or unallocated overhead permitted by this part to be non-declinable, unless otherwise required by law.”).

42. *A Conversation with the President and CEO of Everest Funeral Package*, FUNERAL SERVICES INSIDER, Jul. 8, 2013, at 7 [hereinafter “FUNERAL SERVICE INSIDER”] (featuring a “behind the numbers” section that discusses how families can get better prices as independent funeral homes); *see also Funeral Rule Comment by Funeral and Memorial Society of Greater Kansas City*, FED. TRADE COMM’N (Aug. 11, 1999), <http://www.ftc.gov/bcp/rulemaking/funeral/comments/Comment%20A-52%20-%20Mercedes%20Bern-Klug.htm>.

services fee charged by the two largest funeral home chains (Service Corporation International and Stewart Enterprises) was \$2,778.⁴³ Combined with the quasiofficial status of funeral directors in many states, the nondeclinable fee is essentially a government-compelled tax on death that supports for-profit companies.

Although the law does not prescribe a particular death ritual or method of disposing of human remains, the commercial funeral services industry strongly prefers what it refers to as the “traditional” American funeral, even though it is a twentieth-century creation.⁴⁴ In the “traditional” American funeral, the corpse is dispatched soon after death to a funeral home.⁴⁵ There it is embalmed, placed in a metal or wood casket, and often publicly displayed. Afterwards, the corpse is transported to the cemetery where a graveside service is conducted by the funeral director or a religious leader. The casket is then lowered into a vault or grave liner, usually made of plastic, concrete and/or steel, sealed, and covered with dirt. The corpse has thus been committed to a single grave, theoretically for perpetuity.⁴⁶

This model comes at a high personal and social cost. A traditional American funeral consists of four major costs: funeral home service fees, burial container(s) (casket and grave liner or vault), cemetery service fees, and cemetery plot. The average funeral service cost for a traditional funeral service in 2013 was \$4,417 for independently owned funeral homes and \$6,096 for funeral home chains.⁴⁷ This service cost includes the nondeclinable “basic services” fee plus embalming, an open-casket viewing at the funeral home, funeral service at the funeral home, and transportation to the cemetery.⁴⁸ Casket costs can vary widely and are very difficult to track because the vast majority are sold directly

43. FUNERAL SERVICES INSIDER, *supra* note 42.

44. The cremation rate has been steadily rising since the early 1980s, from approximately 12% in 1983 to more than 40% in 2010. At the same time, funeral service profits have declined from approximately 12% in the early 1980s to 5.5% in 2010. David Nixon, *Funeral Service Profit Versus the Cremation Rate*, in THE FUNERAL DIRECTOR'S GUIDE TO STATISTICS 2012 EDITION 45, 45–46 (2012).

45. CARLSON, *supra* note 27, at 43–47; HABENSTEIN & LAMERS, *supra* note 6, at 739–48.

46. This process is the norm, but is not exclusive. A rising percentage of Americans are cremated. LERMAN, *supra* note 35, at 7. Many do not have open casket showings. *See id.* at 14–15 (stating that “[d]ue to falling demand for traditional funeral services and environmental concerns, demand for embalming has decreased over the past five years” and has included open casket showing as part of a traditional service).

47. FUNERAL SERVICE INSIDER, *supra* note 42.

48. Specifically, the traditional service charge includes the nondeclinable “basic services” charge, embalming, dressing and casketing, facilities and staff for visitation, facilities and staff for services, transfer vehicle to funeral home, hearse, utility/flower vehicle, and funeral procession lead car.

to funeral homes and American manufacturers do not publish price lists. A survey of funeral homes indicates that the average casket cost to funeral homes in 2012 was \$1,067, with an average markup of 16.53%.⁴⁹ Based on anecdotal information, that number seems low. A handful of funeral homes publish their casket price lists online. For example, Ruebel Funeral Home in Little Rock, Arkansas advertises caskets ranging from \$1,900 for a twenty gauge steel, silver crepe interior casket to \$32,000 for a solid mahogany hardwood casket with a rose tan velvet interior.⁵⁰ Meanwhile, on Costco.com, caskets (with standard shipping included) are available at prices ranging from \$949.99 to \$2,499.99.⁵¹

Most cemeteries require caskets to be contained within a grave liner or vault to create a flat surface for easier mowing.⁵² Price lists for these outer burial containers are also kept private, but one funeral home lists the popular Wilbert vault line online at retail prices ranging from \$650 (for the basic burial vault) to \$7,880 for the Wilbert Bronze Triple-Reinforced Burial Vault offering “premium protection.”⁵³ Cemetery service fees and costs of burial plots also vary widely and are difficult to survey. Municipal cemeteries often offer grave sites for several hundred dollars, while “premium” plots in many corporate cemeteries sell for thousands of dollars.⁵⁴ Adding

49. Tanya Kenevich & Thomas A. Parmalee, *FFDA Figures Show Funeral Profits Inching Up*, in THE FUNERAL DIRECTOR'S GUIDE TO STATISTICS 2012 EDITION, *supra* note 44, at 41, 41–43.

50. *Casket Price List*, RUEBEL FUNERAL HOME (April 1, 2012), http://www.ruebelfuneralhome.com/casket_price_list.pdf.

51. *Caskets Standard Shipping*, COSTCO WHOLESAL, <http://www.costco.com/caskets-standard-shipping-must-order-by-1100-am-est.html> (last visited Oct. 27, 2013). Although protective state casket laws normally prohibit bricks and mortar stores from selling caskets, there are a number of online providers, including general merchandise sites like Walmart.com and Overstock.com, and specialty sites like Bestpricecaskets.com, offering an eighteen gauge steel casket with a light pink velvet interior for \$995, a solid mahogany casket with a white velvet interior for \$1,995, and a brushed bronze casket for \$2,995. BEST PRICE CASKETS, <http://www.bestpricecaskets.com> (last visited Oct. 27, 2013).

52. Smith, *supra* note 15, at 33 (“[V]aults are required by most cemeteries for burial. No, these do not protect the body from foreign and alien objects, but vaults are useful in preventing ground sinking, thereby making it easier for landscaping upkeep.”).

53. *Burial Vaults—Wilbert*, CENT. CHAPEL FUNERAL & CREMATION, http://www.lanemoynihn.com/Concrete_Vaults_-14590.html (last visited Oct. 27, 2013).

54. On July 28, 2013, ebay.com listed 539 cemetery plots for sale, at “Buy It Now” prices ranging from \$699,000 for a four person “Bench Estate” plot in Westwood Village Memorial Cemetery in Westwood, California to \$250 for a single plot in Rienzi Cemetery in Fond du Lac, Wisconsin. *Compare Exclusive Westwood Village Memorial Cemetery Plot Near Celebrities Los Angeles*, EBAY, <http://www.ebay.com/itm/EXCLUSIVE-WESTWOOD-VILLAGE-MEMORIAL-CEMETERY-PLOT-NEAR-CELEBRITIES-LOS-ANGELES-/370866106949?> (last visited Oct. 27, 2013), with *Cemertery Plot in Rienzi Cemetery (Sect. 3NA-Lot 133) Fond Du Lac, Wisconsin (WI)*, EBAY, <http://www.ebay.com/itm>

together these expenses, it is easy to see how the traditional American funeral can cost more than \$10,000.⁵⁵

With an estimated 2.5 million annual American deaths,⁵⁶ the funeral industry is big business, projecting annual revenues of \$15.9 billion for funeral homes⁵⁷ and \$3.3 billion for cemeteries.⁵⁸ The revenues of the manufacturers of funerary merchandise, most notably casket manufacturers, are not publicly compiled.

There are other costs as well. Formaldehyde-based embalming fluid has been associated with higher rates of cancer and amyotrophic lateral sclerosis (Lou Gehrig's disease), yet it is routinely flushed into public sewers and buried in cemeteries.⁵⁹ It has been estimated that seven million gallons of embalming fluid are buried each year.⁶⁰

The idea that we should each occupy a single gravesite in perpetuity is a uniquely American idea and one that takes a great deal of real estate out of service for the living. In 1970, it was estimated that American cemeteries occupied two million acres of land.⁶¹ Of course this represents a tiny fraction of the American landmass, but people generally desire to be buried near where they or their families lived. As a consequence, on a per square foot basis, cemetery space is the most expensive real estate in New York City.⁶²

Cemeteries are also a profitable business.⁶³ Although the law generally assumes, and sometimes requires, that cemeteries are owned by nonprofit corporations, religious organizations, municipalities, and families,⁶⁴ the reality is that the largest and

/Cemetery-Plot-in-Rienzi-Cemetery-Sect-3NA-Lot-133-Fond-Du-Lac-Wisconsin-WI-/130874388682?pt=LH_DefaultDomain_0&hash=item1e78b8b0ca (last updated on Aug, 25, 2013).

55. No other people spend as much on funerals and burials as Americans do. A 1996 report revealed that Americans spend more than twice as much on funerals on a per capita basis than the British, French, or Australians. CARLSON, *supra* note 27, at 171.

56. Donna L. Hoyert & Jiaquan Xu, *Deaths: Preliminary Data for 2011*, NAT'L VITAL STAT. REP., Oct. 10, 2012, at 3.

57. LERMAN, *supra* note 35, at 4.

58. MOLDVAY, *supra* note 39, at 3.

59. Patricia A. Dempsey et al., *The Future of Formaldehyde: Risk, Regulations, Protections and Alternatives*, FORUM (Jan. 2009), http://www.massfda.org/Future_of_Formaldehyde_article.pdf.

60. Jeremiah Chiappelli & Ted Chiappelli, *Drinking Grandma: The Problem of Embalming*, 71 J. ENVTL. HEALTH 24, 24-25 (2008).

61. Joseph D. Lehrner, *Cemetery Land Use and the Urban Planner*, 7 URB. L. ANN. 181, 182 (1974).

62. Marc Santora, *Graveyard Gridlock*, N.Y. TIMES, Aug. 15, 2010, at RE1.

63. MOLDVAY, *supra* note 39, at 7 (finding that, as of July 2011, "profit margins for cemetery operators average 7.6%").

64. See, e.g., N.Y. NOT-FOR-PROFIT CORP. LAW § 1501 (McKinney 2005) ("This article is . . . in furtherance of the public policy of this state that cemeteries shall be conducted on a non-profit basis for the mutual benefit of plot owners therein.").

busiest cemeteries in dense population centers are operated by for-profit companies.⁶⁵ Even cemeteries owned by religious organizations are increasingly operated by for-profit companies.⁶⁶ Although there are more than 100,000 cemeteries across the United States, there has been remarkable consolidation in recent years. The four largest companies in the cemetery industry have a combined market share of 36.2%.⁶⁷ Cemeteries are increasingly owned and managed by for-profit enterprises, but the law still presumes that they are nonprofits and treats them as such, conveying valuable benefits, like property tax exemptions.⁶⁸

The modern American funeral and burial, a resource-intensive model controlled by for-profit institutions, is supported and, in many states, actively protected from competition by the law.

III. EVIDENCE OF CHANGING PREFERENCES

Although the modern American funeral is still the majority paradigm, a significant number of Americans prefer a range of alternatives because of (1) high costs, (2) environmental concerns with embalming and modern burial, (3) religious doctrines that require a simple coffin or shroud, and (4) a desire for the family and/or religious community to be more involved in death rituals and disposition.⁶⁹ Alternatives such as cremation, home funerals, and natural burials are growing in popularity, while the share of revenue attributable to the “traditional” American funeral is

65. See Serv. Corp. Int'l, Annual Report (Form 10-K) 5–6 (Feb. 14, 2011) (showing that, as of December 31, 2010, Service Corporation International [“SCI”] owned 381 cemeteries in 34 states). In 2010, SCI reported \$132.2 million in gross profits on \$697.7 million in North American cemetery revenue. *Id.* at 32.

66. For example, in October 2013, StoneMor Partners, a publicly traded company, entered into a 60-year lease and management agreement with the Archdiocese of Philadelphia for thirteen Catholic cemeteries in the archdiocese. StoneMor paid the Archdiocese \$53 million upfront and will make an additional \$36 million in annual lease payments, beginning in year six. One industry analyst commented that this deal is “smoking” for StoneMor, and that he calculated that they should see a 100% return on investment within six to ten years. Nat'l Funeral Dirs. Ass'n, *A New Template?: StoneMor Signs Lease Agreement with Archdiocese of Philadelphia to Manage 13 Catholic Cemeteries*, MEMORIAL BUS. J., Oct. 3, 2013, at 1, 2.

67. MOLDVAY, *supra* note 39, at 7.

68. See, e.g., GA. CODE ANN. § 48-5-41(a)(2) (2010); 35 ILL. COMP. STAT. ANN. 200/15-45 (West 2006); IOWA CODE ANN. § 427.1.3, 1.6 (West 2006). Although some states require cemeteries to be owned by a nonprofit organization to be exempt from property taxes, for-profit companies easily circumvent this requirement by holding the cemetery land in a nonprofit association and then entering into a management agreement with the nonprofit.

69. See, e.g., MOLDVAY, *supra* note 38, at 5 (“Cremations have been experiencing rising popularity because of environmental reasons, cost considerations, religious reasons and changing consumer preferences.”).

shrinking.⁷⁰ One industry analysis notes that in 2011, an estimated 61% of all funeral services performed were related to the norm, a significant decrease from 68% in 2006.⁷¹ By 2016, it is expected that only 43% of all deaths will result in a “traditional” American funeral.⁷²

The most popular and readily available alternative is cremation. Families choosing cremation have a range of options. The two ends of the continuum are (1) direct cremation, in which the body is transported to the crematory from the place of death and the ashes are returned to the family, or (2) “traditional” cremation, in which the body is embalmed and prepared by the funeral home for a viewing, then cremated in a casket and either interred in a columbarium, buried in a cemetery, or returned to the family.⁷³ A direct cremation, arranged by the family with the crematory without the involvement of a funeral director, can cost less than \$1,000, even in New York City.⁷⁴ The cost of a direct cremation arranged through a funeral home, which is required in many states, can vary widely.⁷⁵ The average cost (excluding an urn or disposition of cremains) in 2013 was \$2,055.⁷⁶ Cremation is rising in popularity for financial, environmental, and religious reasons. In 2011, an estimated 42.1% of deaths resulted in cremations, compared to 33.8% in 2006.⁷⁷ By 2025, the Cremation Association of North America estimates that nearly 56% of all funerals will include cremations.⁷⁸

A niche alternative growing in popularity is the home funeral. In a home funeral, family, friends, or a religious committee prepare the body for burial or cremation, rather than employing the services of a funeral director.⁷⁹ There are a number of books⁸⁰ and

70. *Id.* at 13 (explaining that funeral home revenues have been decreasing for the past five years, while cremations are gaining in popularity).

71. *Id.*

72. *Id.*

73. *See, e.g.*, ISERSON, *supra* note 35, at 237, 267, 277–78.

74. *See, e.g.*, *Direct Cremation Itemization*, CITY FUNERAL SERVICE (July 4, 2013), http://www.nycremation.com/pdf/direct_itemization.pdf (indicating that the general price for a direct cremation service is \$795).

75. *See, e.g.*, *General Price List*, N. DALLAS FUNERAL HOME (Mar. 4, 2013), <http://www.cremation-online.com/wp-content/themes/co/pdf/general-price-list.pdf> (indicating that a direct cremation can cost between \$1,125 and \$5,620 depending on the container used during cremation).

76. FUNERAL SERVICE INSIDER, *supra* note 42.

77. CANA, ANNUAL STATISTICS REPORT 2011, at 3 (2012), *available at* http://blcremationsystems.com/CANA_2011_Annual_Statistics_Report.pdf.

78. *Industry Statistical Information*, CANA: CREMATION ASS'N N. AM., <http://www.cremationassociation.org/?page=IndustryStatistics> (last visited Oct. 27, 2013).

79. *See, e.g.*, JOSHUA SLOCUM & LISA CARLSON, FINAL RIGHTS: RECLAIMING THE AMERICAN WAY OF DEATH 138 (2011) (discussing alternatives to funeral directors used by families).

80. *See id.*

organizations⁸¹ that explain the options and the legal impediments that exist in some states. Home funerals are attractive to families who want to save money as well as those who seek a deeper connection with the dead that is often missing from modern American life. As one author, who participated in a home funeral for his father-in-law wrote of the experience: "It occurred to me that if more Americans spent more time with their dead . . . they would come away with a new respect for life, and possibly a larger view of the world."⁸²

There are no generally available statistics on home funerals, perhaps because it is a noncommercial alternative. The AARP, however, conducted a survey in 2007 of 1,087 adults aged fifty and over that found that over three-fourths of the respondents (77%) had considered not using a funeral home.⁸³ That statistic would appear to capture people who are interested in direct cremation and home funerals. Despite the apparent growing interest in noncommercial alternatives, there is strong path dependency and the majority of Americans will likely continue to turn to the funeral services industry in the foreseeable future due to the logistical and legal impediments.⁸⁴

The third mainstream alternative to the modern American funeral is the natural burial. The unembalmed body may be buried in a biodegradable coffin, casket, or shroud.⁸⁵ No vault or outer burial container is used.⁸⁶ While the purpose of modern burial is to "protect" the remains from the earth, the purpose of natural burial is to permit natural decomposition.⁸⁷ Interest in natural burial is driven by cost, religious expression, a desire to connect more deeply with the dead, and environmental concerns. Although there are no generally available statistics on the popularity of natural burial, the 2007 AARP survey found that just over one-fifth (21%) of respondents were "very interested" or "interested" in a natural

81. See, e.g., CROSSINGS, <http://www.crossings.net/> (last visited Oct. 27, 2013); FUNERAL CONSUMERS ALLIANCE, www.funerals.org (last visited Oct. 27, 2013); NAT'L HOME FUNERAL ALLIANCE, <http://www.homefuneralalliance.org/> (last visited Oct. 27, 2013).

82. See Max Alexander, *The Surprising Satisfactions of a Home Funeral*, SMITHSONIAN.COM (Mar. 2009), <http://www.smithsonianmag.com/arts-culture/Presence-of-Mind-Which-Way-Out.html>.

83. LONA CHOI-ALLUM, AARP, FUNERAL AND BURIAL PLANNERS SURVEY 14 (2007), available at http://assets.aarp.org/rgcenter/consume/funeral_survey.pdf.

84. Smith, *supra* note 15, at 42 ("Our governmental systems impede the alternative family-oriented death care, and those who have sought out this route clearly demonstrate the inaccessibility of this right.")

85. See, e.g., SLOCUM & CARLSON, *supra* note 79, at 138–39.

86. See, e.g., *id.* at 139.

87. See, e.g., *Options for Green Burials on the Rise*, NEWSWEEK (Aug. 26, 2010, 7:00 AM), <http://mag.newsweek.com/2010/08/26/green-burial-options-increase.html>.

burial.⁸⁸ The most significant limitation on the availability of natural burial is the for-profit ownership and the increasing consolidation of cemeteries. Under the law, cemeteries are permitted wide latitude to set their own rules, perhaps because the law traditionally assumes that they are nonprofits operated in the community interest.⁸⁹ Given the significantly lower profit margins for natural burials (since expensive caskets and vaults are eschewed), it is not surprising that most modern cemeteries prevent natural burials by requiring the use of a grave liner or vault.⁹⁰ New cemeteries dedicated to natural burial have been opened in recent years, but many proposals have also been blocked by legal restrictions or the lobbying efforts of the funeral services industry.⁹¹

While Americans have long accepted the modern American funeral, there is evidence that our preferences are changing.

CONCLUSION

There is a clear tension between the funeral services industry and the growing interest of Americans in green alternatives, such as natural burials, access to lower cost products and services, and the ability to self-perform tasks normally defined as funeral directing. The law clearly supports the prevailing norms and thus promotes the interests of a particular industry at the expense of our core values. The government has an interest in regulating embalming, but the other legal structures that frustrate efforts to create meaningful postmortem rituals and disposition methods do not generally serve a substantial state interest. Indeed, the collective economic, environmental, and land use impacts of the prevailing norms undermine important state interests. The American law of the dead is therefore ripe for a dramatic reconceptualization to bring it in line with our modern values and practices.

We have neglected the law of the dead for far too long. Our collective, if passive, decision to allow the law to be shaped, first by English ecclesiastical law and then by the commercial funeral services industry, continues to have social, economic, and political implications. Most significantly, our individual and collective choices have been constrained by a legal structure that prefers

88. CHOI-ALLUM, *supra* note 83, at 15.

89. See, e.g., North Carolina Cemetery Act, N.C. GEN. STAT. ANN. § 65-46 (West 2012). The little state law that does exist regarding cemeteries mostly relates to establishing cemeteries, destruction and desecration of graves, and prepurchasing gravesites.

90. See, e.g., Mary Beth Breckenridge, *Honor the Dead, Heal the Living: Natural Burial an Eco-friendly Option*, FREDERICK NEWS-POST (June 23, 2013, 2:00 AM), http://www.fredericknewspost.com/news/environment/article_25503177-fe97-5f64-a540-e0c91ce1c866.html.

91. See, e.g., Philip Shishkin, *Green Revolution Hits Dead End in Georgia Cemetery Proposal*, WALL ST. J., Jan. 2, 2009, at A1.

costly and resource-intensive methods of disposition. There is evidence that Americans want meaningful alternatives. Much work remains to be done to begin to rebuild a law of the dead that honors individual choice and promotes our common interests.