

GOING BEYOND THE GRAVE: A DEFENSE OF A RIGHT TO A FUNERAL

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I. INTRODUCTION: HART ISLAND'S HEARTLESS HISTORY

You must travel by boat, about a half-mile East from the Bronx.¹ There, in the Long Island Sound, sits a 131-acre island of abandoned buildings and greenspace.² It sits still and silent while the wealthiest metropolis in the world bustles nearby.³ You cannot see its many residents; many have not been seen for decades. The only traces of them are “3-f[oo]t white posts stuck in the ground every 25 [yards] or so.”⁴ The island, like all its inhabitants, is dead.⁵ Each post represents 150 stacked bodies beneath the surface, cloaked by only a thin layer of soil. On Hart Island, these posts are everywhere.⁶

Hart Island is the U.S.’s largest mass grave.⁷ But unlike mass graves compelled by specific tragedies, it has outlived many disasters and epidemics. Looming like New York’s ghost isle, “[f]or more than 150 years, Hart Island . . . has been a depository of the marginalized.”⁸ The island has been the perfect cache for New York City’s neglected dead, whether they died of tuberculosis, the 1918 flu, AIDS, or COVID-19.⁹ What was once also a place for living stowaways is now just a lonely potter’s field hiding in New York City’s periphery.¹⁰

1. W.J. Hennigan, *Lost in the Pandemic: Inside New York City’s Mass Graveyard on Hart Island*, TIME (Nov. 18, 2020), <https://time.com/5913151/hart-island-covid/> [<https://perma.cc/LX6X-9VBB>].

2. *Id.*

3. “[M]ost New Yorkers are oblivious to [Hart Island’s] existence.” *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. John Freeman Gill, *Hart Island’s Last Stand*, N.Y. TIMES (July 16, 2021), <https://www.nytimes.com/2021/07/16/realestate/hart-island-planned-demolition.html> [<https://perma.cc/QME5-BPUP>].

9. *Id.* Hart Island’s abandoned buildings “used to house a mental hospital, a tuberculosis sanitarium, a drug addicts’ workhouse, [and] a boys’ reformatory,” among other operations. Hennigan, *supra* note 1.

10. Hennigan, *supra* note 1. “Potter’s field is a biblical term from the New Testament that refers to land purchased by Jewish high priests with the 30 pieces of silver returned by a repentant Judas.” *Id.* Hart Island was designated for the purpose of being a potter’s field because its clay-heavy land was deemed unsuitable for farming. *Id.*

Despite being the final resting place for over a million people, few living travel there.¹¹ The trip to Hart Island is not meant for the living or even for most of the dead; rather, New York exclusively issues tickets to “strangers” and individuals who cannot afford a funeral.¹² For those individuals, this journey is their last—at least until an ebbing tide erodes the island and drags what is left of them to the Long Island Sound.¹³ Because of COVID-19, New York faced a growing number of people to bury. Morgues across New York City were overwhelmed, and at the peak of the pandemic, the rate of burials at Hart Island rocketed from 25 burials per week to 25 burials per day.¹⁴

With so many people buried at Hart Island, one might expect it to be a place where people celebrate the lives of those resting there. Yet, Hart Island is no place to visit a loved one; it is not open to the public. “Family-member gravesite visits are allowed only twice a month [and] require weeks of careful planning.”¹⁵ Hart Island is also no place for a funeral. Those buried are interred without a funeral and placed in one of the many mass graves without individual grave markers, and each person is given a number in place of a name.¹⁶ These numbers can then be used to find a grave location in the online database. In some cases, family members will use this database to find and remove their deceased loved one to give them a proper funeral and burial.¹⁷

The number of people buried in potter’s fields is growing. In 2020, around 34,000 people were left to local governments to bury.¹⁸ While Hart Island is exceptional in its size, similar places exist across the country.¹⁹ Unfortunately, “stranger” is a fitting term for those buried in potter’s fields like Hart Island; New York City and many other communities across the

11. *Id.*

12. *Id.* “In New York City, these strangers have always been a cross section of America’s down-trodden and overlooked: poor workers of all races and backgrounds, criminals, the mentally ill[,] and any unidentified person with no one to claim them.” *Id.* The term “stranger” is used to describe individuals who are unidentified when buried. *See* Miss. Code Ann. § 43-31-29 (West 2022).

13. “Bones are sometimes found jutting from the coastline where erosion has washed away the soil.” Hennigan, *supra* note 1.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* In fact, one of the reasons people are buried at Hart Island rather than cremated is because of the risk that next of kin will later wish to claim the body and remove them from Hart Island. *Id.* The Hart Island Project has done amazing work to tell the stories of those buried there. *See* THE HART ISLAND PROJECT, <https://www.hartisland.net/> [<https://perma.cc/NS6C-59M8>] (last visited Feb. 18, 2023).

18. Mary Jordan & Kevin Sullivan, *Alone in Death*, WASH. POST. (Sept. 17, 2021), <https://www.washingtonpost.com/nation/2021/09/17/alone-death/> [<https://perma.cc/LXV2-2L97>].

19. *See e.g.*, Ted Slowik, *Dozens of 1995 heat wave victims were buried in a south suburban mass grave. Witnesses ‘still think about it.’* CHICAGO TRIBUNE (MAR. 2, 2023), <https://www.chicagotribune.com/suburbs/daily-southtown/opinion/ct-sta-slowik-homewood-cemetery-anniversary-st-0823-20200821-emm3ixbegngfflntk4j5y2behq-story.html> [<https://perma.cc/XA76-8DLH>] (discussing Chicago 1995 mass grave in the context of the COVID-19 pandemic).

U.S. treat these people like strangers in life and death. They are often overlooked and forgotten, made a stranger to their community, and deprived of their dignity. It should be an essential duty of political institutions to promote community and dignity. Thus, it is time for the U.S. to adopt more than a toothless right to burial and recognize a right to a funeral.

In this note, I advocate for U.S. recognition of a right to a funeral, focusing on the indigent as they are the group most commonly deprived of the right. Section I focuses on the current and historical importance of funerals. Section II discusses the cost of dying and the burden that high costs place on the right to a funeral. Section III lays out the current legal environment and the typical indigent burial process. Section IV examines alternatives to typical indigent burial programs and explains why they have fallen short in the absence of a right to a funeral. Lastly, Section V discusses legislative proposals that would affect the right to a funeral.

II. ONE LAST HURRAH: THE SIGNIFICANCE OF FUNERALS

A. Historical Background

It is important to view funerals within the broader context of death preparation. We excessively avoid our own mortality but are expected to plan for our deaths and the deaths of our loved ones. Wills, hospice care, burial plots, and funerals are all part of an elaborate death puzzle we are expected to solve before tragedy strikes.²⁰ Many fail to prepare, and only after a loved one dies do they start making funeral and other death arrangements.²¹ Death also often brings about bitter disputes over funerary arrangements among family members.²² Like estate planning, there is a proclivity for dispute, but unlike estate planning, a funeral does not involve

20. Death planning has become more complicated with technological advancement. For an interesting discussion of the growing issue of estate planning for a decedent with digital assets, see John Conner, *Digital Life After Death: The Issue of Planning for a Person's Digital Assets After Death*, 3 EST. PLAN. & CMTY. PROP. L.J. 301–22 (2010) (discussing the growing issue of estate planning for a decedent with digital assets).

21. See generally Elyria Kemp & Steven W. Kopp, *Have You Made Plans for that Big Day? Predicting Intentions to Engage in Funeral Planning*, 18 J. MKT. THEORY & PRAC. 81 (2010). Sometimes wealthy people make elaborate plans for their own deaths. See *Ashes of Hunter S. Thompson blown into sky*, N.Y. TIMES (Aug. 21, 2005), <https://www.nytimes.com/2005/08/21/world/americas/ashes-of-hunter-s-thompson-blown-into-sky.html> [<https://perma.cc/X6TG-EGFA>]. “[W]ith a deafening boom, the Ashes of Hunter S. Thompson were blown into the sky from a 153-foot tower as relatives and a star-studded crowd bid an irreverent farewell to the founder of ‘gonzo journalism.’ *Id.*

22. For example, the deaths of public figures often continue to make headlines beyond the death itself due to the family drama that follows. See Ann M. Murphy, *Please Don't Bury Me Down in That Cold Cold Ground: The Need for Uniform Laws on the Disposition of Human Remains*, 15 ELDER L.J. 381, 382 (2007) (discussing the extreme publicity surrounding family disputes following actress Anna Nicole Smith's and baseball player Kirby Puckett's respective deaths).

self-interests. Among death preparation responsibilities, a funeral is unique in its purpose to celebrate the life of the decedent.

“[A] funeral service involves not only the disposition of the body, but the commemoration of a life lived.”²³ Funerals “validate the lives of those who are deceased.”²⁴ Most religions and cultures celebrate life through funerals, though there is great diversity amongst cultural burial practices.²⁵ In Abrahamic faiths like Christianity, Judaism, and Islam, the normal practice is to bury the dead.²⁶ Hindus, Jains, Sikhs, and Buddhists use cremation.²⁷ The “thread linking these [two] practices is that . . . they are sacred to those who believe in them.”²⁸ Funerals have been described as giving “meaning and significance to life by framing death within a larger picture of eternity and destiny through the idea of salvation.”²⁹ Thus, the right to a proper funeral has been historically recognized both in religion and tangentially through legal rights to burial.³⁰ Despite this, the law of the United States has long recognized a duty of the living to ensure that the dead are properly interred, but the law has not gone so far as to recognize an explicit right to a funeral.³¹ While burial and other methods of disposition hold cultural significance, the funeral is where people can truly celebrate the deceased’s life.

The recognition of the right to a funeral is not new. The Romans and Greeks believed a proper funeral was necessary to guarantee an afterlife for the deceased.³² However, U.S. common law only extends to a limited right to burial,³³ and as later discussed, this right is all but nonexistent to the indigent.³⁴ Burial and funeral arrangements have changed throughout U.S. history. In the first half of the nineteenth century, the common practice was burial or entombment, but norms have since broadened to include

23. Michael J. Millonig, *Funerals & Burials: Law and Customs*, 25 PROB. L.J. OHIO, 164, 166 (2015).

24. Wanda L. Collins & Amy Doolittle, *Personal Reflections of Funeral Rights and Spirituality in a Kentucky African American Family*, 30 DEATH STUDIES 957, 957 (2006) (internal quotation omitted).

25. Khushbu Solanki, *Buried, Cremated, Defleshed by Buzzards? Religiously Motivated Excaratory Funeral Practices Are Not Abuse of Corpse*, 18 RUTGERS J. L. & RELIGION 350, 350 (2017).

26. *Id.*

27. *Id.*

28. *Id.* at 350–51. There are other more unorthodox funeral practices with cultural significance to those who practice them. For an interesting discussion supporting a Free Exercise exception to abuse of corpse laws for excarnatory funeral practices of religions like Zoroastrianism, see *id.*

29. KODO MATSUNAMI, *INTERNATIONAL HANDBOOK OF FUNERAL CUSTOMS*, 194–95 (1998).

30. Solanki, *supra* note 25, at 361.

31. *Id.* at 362. Justice Joseph Story stated in an address at a cemetery dedication in 1831 that “it is the duty of the living . . . to provide for the dead.” *Id.* at 361.

32. *Id.* at 362.

33. *Id.* at 358–59.

34. See *infra* Part III.A.

cremation.³⁵ This is likely because religious teachings on burial, especially among Christian faiths, have relaxed their original belief that burial was required for resurrection.³⁶ Regardless, the right to a funeral and burial continues to be an individual right and a public interest, irrespective of its recognition under U.S. law.³⁷

Major changes to funeral practices began when the U.S. developed economically around the end of the seventeenth century.³⁸ Funerals became considerably more ceremonial, with ministers providing words of comfort and families using funerals to display their wealth.³⁹ The class distinction became a major characteristic of U.S. funerary practices that remains today.⁴⁰ The elite would be buried in churches—mirroring old English custom—and common people would be buried on the family farm with a basic gravestone.⁴¹ Social mobility partially bridged this gap during the nineteenth century, and death became less routine with the eradication of many diseases and an increase in the average U.S. lifespan.⁴² Funeral services became even more ritualized at this time, and these practices were common to most families.⁴³ With the increased demand for ritualized funeral services, an entire industry sprouted and embraced technological advancement, using new technology to create value for funeral homes but at a high price to consumers. Mass-produced metal caskets, advanced embalming techniques, and various gravestone options have commodified funerals, turning death into dealings.⁴⁴ This begs the question of what principles bankroll this industry. Regardless, it is clear that Americans value funeral and burial arrangements for themselves and their loved ones.

B. Human Dignity & Community

The concept of human dignity has evolved over time with competing definitions. The Roman concept of *dignitas hominis* referred to dignity earned by the status of the individual.⁴⁵ Dignity was attained through status,

35. Solanki, *supra* note 25, at 359.

36. *Id.* at 362.

37. Mark E. Wojcik, *Discrimination After Death*, 53 OKLA. L. REV. 389, 394 (2000). “This article discusses the topic of discrimination after death in the specific context of funerals and burials for persons who have died of causes related to HIV or Aids.” *Id.* at 390. “In the earlier years of the epidemic, it was not uncommon for persons to go from one funeral home to another looking for a place that would handle the funeral.” *Id.* at 401. Sometimes this would occur more subtly, and funeral homes would steer Aids victims to funeral homes that had “more experience.” *Id.*

38. Virginia R. Beard & William C. Burger, *Change and Innovation in the Funeral Industry: a Typology of Motivations*, 75 J. DEATH & DYING 47, 49 (2017).

39. *Id.*

40. You will not find the wealthy buried at Hart Island. See Hennigan, *supra* note 1.

41. Beard & Burger, *supra* note 38, at 49.

42. *Id.*

43. *Id.*

44. *Id.* at 56.

45. Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19

institutions, offices, and the state itself.⁴⁶ For example, the English Bill of Rights of 1689 referred to “royal dignity,” a remnant of *dignitas hominis*.⁴⁷ This dignity was protected by the force of law, with civil remedies and criminal penalties being imposed when an individual’s dignity was violated.⁴⁸ These protections were broad and powerful, but their scope limited, as dignity was not viewed as inherent to all humans; thus, the legal protection of one’s dignity was only accorded to the elite and political institutions.⁴⁹

Roman classical writers embraced a different conception of human dignity. Cicero recognized an innate human dignity in all persons, regardless of status.⁵⁰ Cicero’s view of human dignity stemmed from his views on the human mind which he viewed as formed by “study and reflection” rather than mere “bodily satisfaction.”⁵¹ This attachment between human reason and the recognition of dignity would become the bridge between theological dogma and classical thought, making human dignity an abstraction existing inside and outside of religion.⁵² A more modern restatement of this principle is that human dignity derives from the human ability to be rational rather than the individual characteristics of a person.⁵³ Under this view, human beings are all capable of being rational, and therefore are fundamentally equal in dignity.⁵⁴

Despite the prominence of this view of inherent dignity throughout history, it was not until the first half of the twentieth century that dignity prominently entered legal discourse in any clear way.⁵⁵ In the U.S., twentieth-century law adopted the predominant view of dignity as equal among all persons by virtue of one’s humanity.⁵⁶ Dignity began permeating U.S. jurisprudence in the 1940s.⁵⁷ Justice Frankfurter and Justice Murphy embraced the concept of dignity in Supreme Court jurisprudence, which continued prominently in the opinions of Justice Brennan.⁵⁸ “Since then, the Supreme Court has used the concept of human dignity in the interpretation

EUR. J. INT’L L. 655, 656 (2008).

46. *Id.* at 657.

47. *Id.*

48. Arthur Chaskalson, HUMAN DIGNITY AS A CONSTITUTIONAL VALUE 133, 135 (2001).

49. *Id.*

50. McCrudden, *supra* note 45, at 657.

51. Cicero, *De Officiis*, I, at 30.

52. McCrudden, *supra* note 45, at 659 (discussing Immanuel Kant’s secular view of dignity).

53. Patrick Lee & Robert P. George, *The Nature and Basis of Human Dignity*, 21 *RATIO JURIS* 173, 174 (2008).

54. *Id.*

55. McCrudden, *supra* note 45, at 664.

56. *Id.*

57. *Id.* at 684.

58. *Id.* It was believed that Justice Murphy’s religious beliefs played a role in his views of human dignity in the law. *Id.* Justice Murphy is perhaps best known for his scathing dissent in *Korematsu v. United States*, 323 U.S. 214, 233–43 (1944) (Murphy, J., dissenting).

of the Eighth Amendment, the Due Process Clause, the extent of privacy rights in the abortion context, and in First Amendment free speech cases.”⁵⁹ Despite the emanations of dignity throughout the U.S. legal system, the current law surrounding indigent burials promotes an unequal recognition of dignity, leaving the poor to die unceremoniously.

The concept of dignity often arises in discussions of end-of-life decisions such as hospice care and assisted suicide.⁶⁰ Another unique example is the act of giving a last meal and the opportunity to make a final speech to those condemned to execution.⁶¹ Even those condemned to die for what society considers the most heinous of crimes are given (some) autonomy and dignity in their last moments, which has remained a consistent element despite legal changes to the death penalty.⁶² A last meal is a final recognition of a death row inmate’s humanity and dignity. There is clearly a significance to the act of providing a last meal despite society’s prejudicial view against death row inmates, and I believe the same principles undergirding that discussion are relevant here. Those in state custody on death row are recognized in death, but those who die unclaimed are deprived of the opportunity to die with dignity, many dying alone in the streets of their community. The funeral is the last chance to provide dignity and recognition.

Despite the many differences across cultures regarding how funerals are conducted, a recognition of one’s dignity is an essential component.⁶³ Dignity is the basis of any potential right to a funeral. If human dignity is truly equal among all persons and not a product of wealth or status, then the law should promote equality by ensuring this basic right. While the law does not typically concern itself with the rights of the deceased, the right to a funeral could be best viewed as an inchoate right that can only be fully realized after a person has died. Thus, the right can only be completely realized postmortem. Even if this inchoate right theory proves unpersuasive, there is a public interest in ensuring that members of a community have this right protected.

The right to a funeral must be recognized because “the dying and the dead are among the weakest and most vulnerable members of society, and societies should be judged by how they treat their weakest and most

59. McCrudden, *supra* note 45, at 684.

60. See Peter Allmark, *Death with Dignity*, 28 J. MED. ETHICS 255, 255–56 (2002); see also Courtney S. Campbell & Margaret A. Black, *Dignity, Death, and Dilemmas: A Study of Washington Hospices and Physician-Assisted Death*, 47 J. PAIN & SYMPTOM MGMT. 137, 140–41 (2014).

61. Daniel LaChance, *Last Words, Last Meals and Last Stands: Agency and Individuality in the Modern Execution Process*, 32 L. & SOC. INQUIRY 701, 702 (2007).

62. *Id.* at 719–22.

63. JACQUILINE S. THURSBY, *FUNERAL FESTIVALS IN AMERICA* 132 (2006). “The sweet, nearly festive activities that surround the dying and bereaved in . . . varied . . . cultures suggest that cultural plurality in the United States is alive and well.” *Id.*

vulnerable members.”⁶⁴ Society places significant value on the wishes of the dead and their autonomy in other areas of the law, so recognizing these interests through funerals is not far-fetched.⁶⁵

Importantly, there is a foundational role that funerals play in community building. It is significant that a community provides for the people within it. “A desire to be a part of a community is returning, but community identity is difficult to pin down.”⁶⁶ A community was traditionally the place in which you lived, but human experience in communities is much broader than this definition conveys.⁶⁷ The word “community” is about people, not places.⁶⁸ The social philosophy of communitarianism embodies this principle by “emphasiz[ing] the importance of society in articulating the good,” standing in sharp contrast to “theories that emphasize the centrality of the individual.”⁶⁹ Neighborhoods and cities can be communities or vehicles by which communities grow within, but they are not necessarily communities by themselves.⁷⁰ Ultimately, the driving force for a community is to meet common needs.⁷¹ Our political institutions should build community by creating ties among members beyond mere geographic proximity.

Despite the appearance that we live in a communitarian society, research suggests that the U.S. is consistently the most individualistic country in the world.⁷² Moreover, U.S. culture is slow to change.⁷³ This deep-seated individualism affects the way a community approaches problems and faces crises.⁷⁴ Individualism also affects the way our communities function.⁷⁵ Many people believe our communities are becoming more “isolated and atomized” as we liberate ourselves from

64. Khushbu Solanki, *Buried, Cremated, Defleshed by Buzzards? Religiously Motivated Excrucatory Funeral Practices Are Not Abuse of Corpse*, 18 RUTGERS J. L & RELIGION 350, 361 (2017).

65. *Id.* at 362–63 (discussing the rights of the deceased in cases of in which the deceased wishes regarding disposition of their remains).

66. Rosie Niven, *The Complexity of Defining Community*, THE GUARDIAN (May 3, 2013, 2:00 PM), <https://www.theguardian.com/voluntary-sector-network/2013/may/03/community-spurs-fans#:~:text=Traditionally%2C%20community%20was%20the%20place,%2C%20hopes%20and%20dreams%20with%22> [https://perma.cc/L9T7-X659].

67. David M. Chavis & Kien Lee, *What is Community Anyway?*, STAN. SOC. INNOVATION REV. (May 12, 2015), https://ssir.org/articles/entry/what_is_community_anyway [https://perma.cc/H7NK-5VJN].

68. *See id.* (“Community is both a feeling and a set of relationships among people.”).

69. Amitai Etzioni, *Communitarianism*, THE ENCYCLOPEDIA OF POLITICAL THOUGHT, First Edition, 1.

70. *Id.*

71. *Id.*

72. Caroline Newman, *Big Data Analytics Shows How America’s Individualism Complicates Coronavirus Response*, UVA TODAY (July 6, 2020), <https://news.virginia.edu/content/big-data-analytics-shows-how-americas-individualism-complicates-coronavirus-response> [https://perma.cc/Z2JS-UQ5W].

73. *Id.*

74. *Id.*

75. Chayenne Polimédio, *Our Laser-Like Focus on Individualism is Destroying Our Communities*, NEW AM., (Oct. 4, 2018), <https://www.newamerica.org/weekly/our-laser-focus-individualism-destroying-our-communities/> [https://perma.cc/AU2D-84UA].

“social bonds.”⁷⁶

Funerals are unique in that they often celebrate a person’s individualism through a communitarian act—an expression of both ends of the philosophical spectrum and an example of how each view can coexist harmoniously. Communitarianism plays a role because a sense of community will drive local governments and community members to provide funerals to the deceased who are strangers to those involved. This gesture would come at the last opportunity to incorporate the deceased into the community and speak volumes to those living within it. Moreover, with a greater sense of community, more people would be concerned about their local indigent burial programs. This starts with awareness of the issue. For example, the Hart Island Project brought attention to the injustice of New York City’s indigent burial practices and encouraged the city to adopt new policies.⁷⁷ Ultimately, the onus should be on our political institutions, not charity, to promote community and support their citizens, and the current law fails to place enough responsibility on the government.

III. DEATH TAKES A (COSTLY) TOLL

Not only are funerals culturally significant, but they also pose significant costs. It costs more than a life to die. “In 2019, the median cost of an adult funeral with viewing and burial exceeded \$9,000.”⁷⁸ This number is particularly shocking considering that “four out of ten Americans would have difficulty covering an unexpected \$400 expense, and 12% would be unable to pay the unexpected \$400 by any means.”⁷⁹ Moreover, these costs are incurred at a time fraught with emotion, and the funeral industry benefits from consumers’ unwitting decision-making.⁸⁰ This is exacerbated by Americans’ “death illiteracy:” a phenomenon prevalent in the U.S., where people distance themselves from their own mortality and the deaths of loved ones.⁸¹ As a result, consumers do not make arrangements for their own deaths or a loved-one’s until pressured by their imminency.⁸² In fact, a 2004 national survey showed that while 72% of consumers believed prearranging a funeral was a good idea, only 36% had actually taken steps to plan their funeral.⁸³ This avoidance has contributed to rising funeral costs, and now, on average, funeral expenses are the third-largest

76. *Id.*

77. *See* Jordan & Sullivan, *supra* note 18 and accompanying text.

78. Victoria J. Haneman, *Funeral Poverty*, 55 U. RICH. L. REV. 387 (2021).

79. *Id.* at 387–88.

80. *Id.* at 388.

81. *Id.* at 390.

82. *Id.*

83. Kemp & Kopp, *supra* note 21, at 81.

expense paid by an American in their lifetime.⁸⁴

For a typical consumer, there are several types of funerals with enormous variations in costs.⁸⁵ Three common types are explained in the Federal Trade Commission's (FTC) Consumer Guide: traditional full service, direct burial, and direct cremation.⁸⁶ "The traditional full-service funeral is the most expensive type of funeral."⁸⁷ "It includes a viewing or visitation, a formal service, and transportation of the body to the cemetery for burial."⁸⁸ Despite being the most expensive, low-income consumers favor them over the other options but are often deprived of this choice.⁸⁹ A cheaper option is a direct burial in which "the body is buried immediately without a viewing or visitation."⁹⁰ Sometimes, a memorial service may be held instead of a visitation or viewing, and this ceremony is often held in lieu of a formal funeral ceremony to reduce costs.⁹¹ The cheapest option of the three is direct cremation, in which the body is immediately cremated, and a memorial service may be held in lieu of a visitation or viewing.⁹² Direct burial and direct cremation are the most similar to indigent burials, but notably, the deceased indigent buried by local governments are most-often buried without a memorial or grave marker, and their remains are sent to places like Hart Island.⁹³ Lastly, another option is having an at-home funeral.⁹⁴ This practice is growing in popularity but is not included in the FTC's funeral service provider model.⁹⁵ An at-home funeral is often the least expensive option because it forgoes expensive funeral home care, and the body preparation, services, and burial occur at the deceased's or a loved

84. Haneman, *supra* note 78, at 388. Large corporations have occupied the funeral home industry because of how lucrative it has become. Elizabeth Howell Boldt, *Nail in the Coffin: Can Elderly Americans Afford to Die?*, 21 ELDER L.J. 149, 153–54 (2013). In response to manipulative tactics by the funeral home industry, the FTC promulgated "The Funeral Rule" in 1994, which requires price disclosures of costs associated to a funeral. *Id.* at 158–60. However, the rule is somewhat ambiguous and has led to the funeral home industry exploiting loopholes. *Id.* at 167–70.

85. Boldt, *supra* note 84, at 154.

86. *Id.*

87. *Id.*

88. *Id.*

Visitation and viewing are commonly confused but are not the same. A visitation is a showing of support for the family members of the deceased. The casket may be opened, closed, or not present at all. A viewing, on the other hand, is time for family members or close friends to spend with the body of the deceased. A private family viewing is less official and simpler than a public viewing of the body. A public viewing is often more costly than a private family viewing.

Id. at 155.

89. *Id.* at 154.

90. *Id.* at 155.

91. *Id.*

92. *Id.*

93. Hennigan, *supra* note 1.

94. Boldt, *supra* note 84, at 155–56.

95. *Id.* at 154.

one's home.⁹⁶

There are other cost-saving mechanisms, but these are not available to all consumers. Moreover, “not every consumer is flexible as to the type of funeral he or she may choose for a loved one.”⁹⁷ As discussed, funerals and religious practices are often intertwined when choosing an option, and certain ethnic groups may follow certain formalities.⁹⁸ Ultimately, many people die unclaimed with no one to determine their funeral arrangements. For unclaimed decedents or those unable to afford a funeral, an indigent burial program awaits them.⁹⁹

IV. CURRENT LEGAL ENVIRONMENT: FOR WHOM THE BELL DOES NOT TOLL

A. Burial and the Common Law

Despite a growing funeral industry accompanied by an FTC regulatory scheme, the common law right to burial has remained illusory and stagnant, with only a hortatory right to burial. Under tort law, there is a cause of action available *only* to family members who are entitled to “disposition of the body” when one “intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper internment or cremation.”¹⁰⁰ Noticeably, the authors of the Restatement of Torts took no position as to whether persons other than family members could have any cause of action under this tort.¹⁰¹ Furthermore, according to the official comments, there is no clear guidance as to whom, among family members of the deceased, is entitled to the disposition of the body.¹⁰² Though the “interference with dead bodies” tort is its own unique cause of action, it bears a resemblance to other torts where

96. *Id.* at 156. “State law can complicate the process, as some states require a funeral home director to handle the body at some point in the funeral process.” *Id.*

97. *Id.* at 157.

98. *Id.* at 157. For interesting personal accounts of African American funeral practices in Kentucky, see Solanki, *supra* note 25.

99. An “indigent burial program” can include entombment or cremation as a means of disposing of remains despite commonly being called a “burial program.” Additionally, it is somewhat of a misnomer to call it an “indigent” burial program because rising costs of funerals have forced lower income people who traditionally would not be considered indigent into this option. Moreover, the phrase “indigent burial” bears a connotation that, like the burial practices of local governments, separates, by class, people for whom such a practice is necessary, rather than using language incorporating those people as community members of equal value. The use of “indigent burial” in this piece is to use consistent language commonly used by localities when describing their programs, though a phrase like “community burial” would be more appropriate.

100. RESTATEMENT (SECOND) OF TORTS § 868 (1979).

101. *Id.*

102. *Id.* cmt. b. “Normally the right of disposition is in the surviving spouse, if any; or if none, then in the next of kin in order of succession.” *Id.*

a tortfeasor elicits someone else's emotional distress.¹⁰³ Because the tort applies to a unique situation and is practically subsumed by other torts, it is rarely pleaded.¹⁰⁴ When the tort arises, it is often against funeral homes or coroner's offices. The tort, simply stated, protects family members of the deceased against any "unwarranted interference with the right to burial."¹⁰⁵

Despite this cause of action, the unclaimed are all but deprived of this right. "Conservative estimates are that 1 percent of all deaths result in an unclaimed body."¹⁰⁶ As mentioned, in 2020, "3.4 million Americans died, [and] there were at least 34,000 bodies left for local governments to bury."¹⁰⁷ However, these are just estimates, and many local governments and states do not track this information.¹⁰⁸ Thus, many coroners believe the national figure could be as high as 3 percent.¹⁰⁹ This is a significant number of people who are effectively deprived of any way to assert the right to a burial because there is no person to defend their right. In fact, the right to a burial does not really exist under tort law—the right to a family member's burial does. It is up to the family member, if such a person exists, to protect the right. This is a significant limitation to tort law because the cause of action is left without a suitable plaintiff in cases where there is an unclaimed body.

Despite there being no explicit individual right to burial in the common law, there is a general duty of the local government to "see that the bodies of deceased persons are properly disposed of."¹¹⁰ This is a practical duty of local governments to promote public health.¹¹¹ Over time, this duty has broadened to allow local governments to cremate instead of bury deceased

103. "The technical basis of the cause of action is the interference with the exclusive right of control of the body, which frequently has been called by the courts a "property" or a "quasi-property" right." *Id.* cmt. a. There are few uses of a dead body aside from internment or cremation, so the recognition of a property right is somewhat misleading. "In practice the technical right has served as a mere peg upon which to hang damages for the mental distress inflicted upon the survivor; and in reality the cause of action has been exclusively one for the mental distress." *Id.*

104. "The rule stated in [§ 868] has thus a great deal in common with the rules stated in §§ 46, 312[,] and 313." *Id.* cmt. a.

105. *Muchow v. Lindblad*, 435 N.W.2d 918, 923 (N.D. 1989). Interestingly, the North Dakota Supreme Court suggested there is a presumption of serious mental distress in cases relating to the right to burial, stating "[t]he unusual circumstances associated with the right to burial serve as a guarantee of genuine and serious mental distress." *Id.* However, it is not clear that this is a common interpretation of the tort.

106. *Jordan & Sullivan*, *supra* note 18. Some unclaimed bodies are unidentified, though not most. *Id.*

107. *Id.*

108. *Id.* "Maryland, unlike most states, tracks the unclaimed in all its cities and towns, and has seen the number climb steadily in recent years." In 2020, "Maryland's 2,510 unclaimed bodies accounted for more than 4 percent of all deaths [in the state]." *Id.* Though not addressed in detail herein, the lack of data surrounding this issue presents significant concerns.

109. *Id.* "Covid-19 increased the number of unclaimed bodies in many places, including Maricopa, which had a 30 percent spike." *Id.* The opioid crisis is also believed to have contributed to a recent spike in these deaths. *Id.*

110. *Pac. Undertakers v. Wilbur*, 113 Cal. 201, 204 (1896).

111. *Id.*

persons, but generally, one can expect that all bodies, unclaimed or otherwise, will not merely be left in public. Perhaps, through this duty, there is some quasi-right to burial or cremation, but it would be a right vested in the public, not a right of the individual or even their loved ones.¹¹² This legal environment has created the current scenario where local governments are charged with determining how to most conveniently dispose of indigent remains, and the current law is insufficient in that it focuses solely on disposition. The focus of the law is not on the dead but, instead, the living public. Most importantly, the duty of government should go beyond disposition, and communities should act in the promotion of community and dignity. This may end with disposition through burial or cremation but not without a penultimate and pertinent gesture: a funeral.

To move beyond the right to burial and towards a right to a funeral, it is essential to frame the right to burial under current law. Perhaps the best view of the right to burial is as a public right. Currently, the right to burial only exists as a public right to live in a community that disposes of human remains.¹¹³ This right has been strong enough to create a duty in every American local government to dispose of human remains.¹¹⁴ Thus, it may only need to be reframed and pushed further, turning community norms and expectations into non-negotiable duties of local governments. Historically, the right to a proper funeral has already been recognized outside of the law within cultural institutions.¹¹⁵ To create a legal right would only require extending this significant cultural right to a right protected by the government.

Assuming a right to a funeral exists, it is only under threat for those who cannot afford a funeral and burial. Those who can afford a funeral will pay for one privately, as most individuals do, but those who cannot are often completely deprived of the right. This need for change is constantly growing with the rising costs of funerals in the U.S., pushing more individuals into indigent burial programs.

112. For an interesting discussion of whether the dead retain interests in what happens to their body, see Dorothy Nelkin & Lori Andrews, *Do the Dead Have Interests? Policy Issues for Research After Life*, 24 AM. J.L. & MED. 261 (1998). This article focuses on research uses of dead bodies, recognizing that “[l]aws have recognized the corpse’s instrumental value as an object for scientific study, clinical teaching and commercial gain, but they have also accommodated the desire to respect remains.” *Id.* at 262.

113. *Pacific Undertakers*, 113 Cal. at 204, 273.

114. *Id.*

115. MATSUNAMI, *supra* note 29.

B. *The Indigent Burial Process*

As discussed, there is a duty of local governments to inter the dead for public health purposes.¹¹⁶ Thus, the death of indigent persons is an issue that is generally handled at the local level.¹¹⁷ State statutes will authorize or require local governments to establish an indigent burial program.¹¹⁸ For example, in Arizona, “[w]hen a death investigation has been completed . . . and no person takes charge of the body of the deceased, the [medical] examiner shall cause the body to be delivered to the funeral establishment[.]”¹¹⁹ Similarly, in Idaho, “[i]t shall be the duty of the [county] board to provide for burial or cremation of any deceased indigent person.”¹²⁰ Some states authorize counties to participate in optional programs providing additional services or having different requirements. In Montana, counties are allowed to participate in an “indigent assistance program” in which the county provides for all expenses of an indigent burial.¹²¹

These statutes are notably vague in their requirements, though they sometimes provide options for localities to manage indigent burials. An Arizona county can use a “rotation system whereby bodies are delivered equally in sequence to all licensed funeral establishments” in an area.¹²² The statute also allows the county to deliver bodies to a community college with an accredited mortuary science program.¹²³ Ohio has a detailed statute requiring counties to bury or cremate the indigent individual at the expense of the township or municipality in which the individual was a resident.¹²⁴

Some statutes have standards for an indigent burial. Arizona requires that a funeral establishment participating in their rotation system “perform[s] a *normal* county indigent burial, in the manner and for the fee then being paid by the county.”¹²⁵ In Mississippi, the “board of supervisors of any county . . . shall *decently* bury [paupers], . . . and the board shall

116. *Pacific Undertakers*, 113 Cal. at 204, 274.

117. *Id.*

118. Even if a state statute does not expressly require a local government to establish an indigent burial program, the local government will still have a duty under common law. *See id.* at 274. Practically, the local government must carry out this duty in the absence of any alternative.

119. ARIZ. REV. STAT. ANN. § 11-600(A) (West 2022).

120. IDAHO CODE ANN. § 31-341 (West 2022).

121. MONT. CODE ANN. § 53-3-116 (West 2021). “A person is indigent for purposes of this subsection if the value of all income and resources available to pay for that person’s burial, entombment, or cremation at the time of death is less than the negotiated amount due the funeral home or mortician for an indigent burial.” §53-3-116(5). Practically speaking, Montana’s “indigent assistance program” is not optional because if local governments do not cover the costs of indigent burials, then it is unlikely it would be paid for at all, and as discussed, it is the duty of local governments to provide for the disposition of human remains. *Pacific Undertakers*, 113 Cal. at 204.

122. ARIZ. REV. STAT. ANN. § 11-600(A) (West 2022).

123. *Id.*

124. OHIO REV. CODE ANN. § 9.15 (West 2022).

125. ARIZ. REV. STAT. ANN. § 11-600(A) (West 2022) (emphasis added).

decently bury strangers dying in the county.”¹²⁶ These are notably weak standards that give local governments broad discretion to choose how to conduct their programs and give no consideration to the dignity of the deceased.

There are practical reasons for this. Not all localities are created equal. Some localities have a greater ability to provide local tax revenue for indigent burials, whereas some do not, and with loose expectations, a locality can choose to provide minimal quality. Certain localities may also be able to provide much more for their indigent burials than others. However, the issue is that the latter seems to dominate the former; unsurprisingly, the localities confronted with a greater indigent burial problem are often the localities ill-equipped to manage the issue.¹²⁷ A lingering issue is that there is often no one to come forward to make sure that a deceased person is buried “decently,” so any standard is wholly arbitrary when there is no check to ensure it is followed.¹²⁸ Sometimes, there is additional state oversight and control over indigent burials, but the majority of states allow counties to act independently.¹²⁹

Though the indigent burial process is not uniform by jurisdiction, there are generally certain guidelines that local coroners and medical examiners should follow.¹³⁰ The statutes enacted to manage this process are merely extensions of a preexisting duty of local governments to manage the disposition of deceased persons.¹³¹ Generally, after a person dies in the jurisdiction, the coroner must go through a process to ensure that the deceased is truly indigent and unclaimed. Sometimes, the coroner can face liability if no reasonable efforts to locate next of kin are made, and next of kin later surface concerned about their loved one.¹³²

The efforts made to find next of kin differ from jurisdiction to jurisdiction, and the process can be undeniably difficult. Though the internet has made this task easier, it is still daunting, and coroners’ offices must determine how much effort they should employ.¹³³ In Maricopa County

126. MISS. CODE ANN. § 43-31-29 (West 2022) (emphasis added). The term “pauper” refers to a very poor person and is often used interchangeably with “indigent.”

127. For example, New York City, the wealthiest city in the U.S. with a huge population of indigent people, relies on Hart Island. Hennigan, *supra* note 1.

128. This is the same representation issue arising out of the right to burial under tort law. *See supra* Part III.A.

129. Jordan & Sullivan, *supra* note 18.

130. Hereinafter “coroner” will be used to refer to coroners and medical examiners or whomever is given such duties irrespective of their formal title.

131. 23 Cal. Jur. 3d. Dead Bodies § 11. *See Pac. Undertakers v. Wilbur*, 113 Cal. 201, 204 (1896) (explaining “[i]t is, no doubt, the general duty of the municipal government to see that bodies of deceased persons are properly disposed of, just as it is a general duty to do many other things necessary to public health, decency, comfort, and convenience”).

132. *Davila v. County of Los Angeles*, 57 Cal. Rptr. 2d. 651, 653 (1996) (holding the Los Angeles County Coroner had a “duty to make reasonable efforts to locate decedent’s next of kin”).

133. It was a simple determination for the court in *Davila*. The Los Angeles County Coroner had

(home of Phoenix, AZ), for example, there are five full time researchers who are charged with finding next of kin,¹³⁴ and the county spends approximately one million dollars every year to handle the unclaimed.¹³⁵ Some local governments do not have the same resources or are not staffed with people dedicated to finding the next of kin for the unclaimed.

This has inevitably led to many instances of coroners giving up the search and either neglecting the remains or rushing to dispose of the remains. For example, in Lexington, Kentucky, there were multiple reported instances of bodies remaining in the coroner's office for many years, including an indigent woman who remained in a county freezer for 26 years.¹³⁶ The Fayette County coroner, claimed he was searching for next of kin, but he was nonetheless criticized by former deputy coroners and other medical professionals for waiting so long to bury the woman.¹³⁷ On the other hand, the Los Angeles County Coroner cremated the decedent in *Davila v. County of Los Angeles* immediately without taking basic measures to discover next of kin.¹³⁸ Similarly, on Hart Island, burials were happening at such a quick pace that many family members had to come forward after their loved one was already buried to exhume the remains and provide for a proper burial.¹³⁹ The norm and best practice lies somewhere in the middle of these two extremes.¹⁴⁰ After all, while finding next of kin is certainly a noble effort, the coroner has a duty to dispose of human remains in a timely manner.

Whenever the process of looking for next of kin is over, if the deceased remains unclaimed, the coroner's office will use municipal funding to arrange for either a burial or cremation through the county's indigent burial program.¹⁴¹ Even if next of kin are found, the coroner may remain

egregiously ignored personal effects of the deceased that clearly identified the decedent and next of kin. *Id.* at 652. After, the deceased's family began looking for him, they discovered he had died while on a trip to Los Angeles. *Id.*

134. Jordan & Sullivan, *supra* note 18.

135. *Id.*

136. Miranda Combs, *Disrespect of the Dead? Body Left in Coroner's Cooler for 26 Years*, WKYT (Mar. 29, 2018, 7:44 AM), <https://www.wkyt.com/content/news/WKYT-Investigates--Disrespect-of-the-dead-Body-left-in-coroners-cooler-for-26-years-478276423.html> [<https://perma.cc/2QUP-WUZA>].

137. *Id.* In fact, at some point in the 26-year period, a family member was found but was unable to provide for burial arrangements. *Id.* Per this Note's earlier discussion, the family member who was found may have had a cause of action under tort law. See *supra* notes 98–102 and accompanying text.

138. *Davila*, 57 Cal. Rptr. 2d. at 652.

139. Hennigan, *supra* note 1.

140. There seems to be a trend that larger cities like Los Angeles, with larger indigent populations, wait for a shorter time before beginning burial or cremation while smaller cities' coroner's offices have more space to accommodate remains while searching for next of kin. In Hawaii, several bodies were found being eaten by rats in a refrigerated garage at the coroner's office. Elizabeth Howell Boldt, *Nail in the Coffin: Can Elderly Americans Afford to Die?*, 21 ELDER L.J. 149 (2013). *Id.* at 150. The "Cook County morgue found itself in a scandal for storing 363 bodies in a morgue built for 300 bodies." *Id.* at 151.

141. Haneman, *supra* note 78, at 403. For an interesting discussion of the need for uniform laws governing the disposition of human remains, see Ann M. Murphy, *Please Don't Bury Me Down in That*

responsible for an indigent decedent if the next of kin are unable or unwilling to pay for funerary arrangements.¹⁴² This has become more common with the rising costs of funerals in the United States.¹⁴³ Importantly, in cases like *Davila v. County of Los Angeles*, the mistreatment of human remains was only exposed because a family member came forward.¹⁴⁴ Many do not have a loved one to do this. For the many of people who die unclaimed, there is little control over whether a local government mistreats their remains, and there is currently no obligation that the local government do anything but dispose of them.

Often, the remains of the unclaimed are buried in a potter's field like Hart Island.¹⁴⁵ Hart Island is a stark reminder of the disparate treatment of the deceased poor. But perhaps the more important question is whether potter's fields like Hart Island are a means by which communities "sequester [the deceased indigent] from the rest of the dead."¹⁴⁶ This sequestration is an injustice, and when a person dies without a funeral solely because of their poverty, the intentional sequestration of a community's poor could not be more obvious. The law surrounding indigent burials is a constant reminder of the class divide, and the community should bridge this divide by providing an alternative that recognizes a basic right to a funeral.

V. LOCAL ALTERNATIVES: DIFFERENT WAYS TO DIG THE GRAVE

A. *Alternative Indigent Burial Programs*

Louisville, Kentucky, embraced an alternative indigent burial program.¹⁴⁷ In the Spring of 2006, students at a local Catholic School started the St. Joseph of Arimathea Society after learning about a similar program

Cold Cold Ground: The Need For Uniform Laws on the Disposition of Human Remains, 15 ELDER L.J. 381 (2007).

142. Haneman, *supra* note 78. This has become increasingly common because of the rising funeral costs which have made it difficult for family members who wish to claim their loved-one to afford it. Jordan & Sullivan, *supra* note 18. Sadly, drug abuse and mental illness can often shatter families, leaving some next of kin unwilling to claim their deceased. *Id.*

143. Haneman, *supra* note 78.

[P]utting the deceased to rest carries (often unexpected) funerary expenses for cremations, funerals, burials, and/or memorials. In 2019, the median cost of an adult funeral with viewing and burial exceeded \$9000. This number is particularly stark given that four out of ten Americans would have difficulty covering an unexpected \$400 expense, and 12% would be unable to pay the unexpected \$400 by any means.

Id. at 387–88.

144. *Davila v. County of Los Angeles*, 57 Cal. Rptr. 2d. 651, 653 (1996).

145. *Id.* at 403.

146. *Id.* While mass graves are part of the larger issue, this note will focus on municipal funding of funerals.

147. Ben Kresse, *St. Joseph of Arimathea Society*, SAINT X (last visited Feb. 5, 2022), <https://www.saintx.com/student-life/clubs-activities/st-joseph-of-arimathea-society> [<https://perma.cc/S8WN-JYFK>].

in Cleveland, Ohio.¹⁴⁸ The goal of the organization was to provide a burial service for the people of Louisville who could not afford one.¹⁴⁹ It started with St. Xavier High School, but soon six catholic high schools were involved, as well as Bellarmine University and the Catholic Student Center at the University of Louisville.¹⁵⁰ Each school “br[ought] their unique gifts to the program,” with some bringing singers and other schools collecting money for flowers.¹⁵¹

Significantly, the program was supported by the dedicated staff of the Jefferson County Coroner’s Office.¹⁵² There was city funding available for the program that allowed the schools to provide their services.¹⁵³ In 2019, the city council threatened to cut the coroner’s office funding by \$65,000.¹⁵⁴ In response, Jefferson County Coroner, Barbara Weakley-Jones, threatened to end her involvement with the program.¹⁵⁵ In the end, this political battle resulted in the coroner’s budget reduction, and the coroner’s office involvement ended.¹⁵⁶

Ben Kresse, who leads the program at St. Xavier High School, fears that the program will slowly be dismantled without city funding or ongoing involvement of the coroner’s office.¹⁵⁷ The program continues as of now, administered by the Catholic Charities of Louisville.¹⁵⁸ Catholic Charities also began developing an “adopt a grave” program where people can donate to provide a headstone for a deceased person and upkeep of the cemetery’s pavilion.¹⁵⁹ This program, with the funeral service provided, was created to honor the deceased members of the community who otherwise would not be recognized.¹⁶⁰ The gravestone provides a place for loved ones or any

148. *Id.* The program in Cleveland is called the Arimathea Pallbearer Ministry. *See also Arimathea Pallbearer Ministry*, IGNATIUS (last visited Feb. 5, 2022), <https://www.ignatius.edu/faith-in-action/christian-action-team/arimathea-pallbearer-ministry>. The St. Joseph of Arimathea Society is named after the Catholic saint who purportedly provided a tomb for Jesus. Gerald O’Collins & Daniel Kendall, *Did Joseph of Arimathea Exist?*, 75 *BIBLICA* 235 (1994). For an interesting discussion of whether St. Joseph of Arimathea existed and the general truth surrounding the burial of Jesus, see *id.*

149. Kresse, *supra* note 147.

150. *Id.*

151. *Id.*

152. *Id.*

153. Darcy Costello, *Louisville Funerals for People without Loved Ones Nearly Lost in City Budget Tug of War*, *COURIER J.* (July 3, 2019, 8:49 PM), <https://www.courier-journal.com/story/news/politics/metro-government/2019/07/03/louisville-budget-indigent-burials-homeless-lonely-nearly-cut/1585126001/> [<https://perma.cc/MKP9-JNP4>].

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. Ruby Thomas, *Catholic Charities Provides Services for the Dead through its Indigent Burial Program*, *THE RECORD* (Sep. 1, 2021) <https://therecordnewspaper.org/catholic-charities-provides-services-for-the-dead-through-its-indigent-burial-program/> [<https://perma.cc/NJ38-NV5N>].

159. *Id.*

160. *Id.*

community members to continually return and remember the deceased.¹⁶¹ Louisville's program is an example of a community coming together to provide funeral services. However, a community should not have to rely on philanthropy to sustain what ought to be a fundamental right protected by the government.

There is an undeniably religious prerogative to the St. Joseph of Arimathea Society, but a funeral does not have to be inherently religious. In arguing that ritual will eventually replace modern religion, Kodo Matsunami describes rituals as a "basic human or social behavior."¹⁶² A funeral can certainly take a religious form, but it is inaccurate to describe something so culturally ubiquitous and grounded in human dignity as funeral practices as solely a religious practice. For example, in Sweden, one of Europe's most secular countries, there is a rise in non-religious funeral ceremonies.¹⁶³ Some people are even opting out of religious ceremonies altogether.¹⁶⁴ Sweden provides burial for all its citizens as a right, so Swedish citizens have used this money for different kinds of funeral rituals.¹⁶⁵ These rituals seem to focus on the person's life on earth rather than a potential afterlife.¹⁶⁶ Ultimately, "it is clear that in spite of secularization, rituals are not disappearing, they are just changing form and adapting to new contexts."¹⁶⁷ The U.S is not nearly as secular as Sweden, but a funeral is a right that can be exerted by any person, religious or not. In protecting the right to a funeral, it is worth considering the growing secularization of the U.S. Ultimately, the intersection of religious and cultural considerations makes community partnerships important in creating better local indigent burial programs.

B. Cross-Sector Partnerships

Cross-sector partnerships are relationships between businesses and non-profits and are government created to address community issues.¹⁶⁸ These partnerships have increased over the years and have been used to address a variety of issues, including economic development, education, healthcare,

161. *See id.*

162. MATSUNAMI, *supra* note 29, at 194–95.

163. Anne Christine-Hornborg, *Funerals of the Future? Sweden Sees Sharp Rise in Burials Without Ceremony*, THE CONVERSATION (Aug. 30, 2019, 5:11 AM), <https://theconversation.com/funerals-of-the-future-sweden-sees-sharp-rise-in-burials-without-ceremony-122211#:~:text=The%20number%20of%20people%20who,ago%20to%208%25%20this%20year> [<https://perma.cc/BA9Y-5UMN>].

164. *Id.*

165. *See infra* note 196 and accompanying text.

166. Christine-Hornborg, *supra* note 163.

167. *Id.*

168. John W. Selsky & Barbara Parker, *Cross-Sector Partnerships to Address Social Issues: Challenges to Theory and Practice*, J. OF MGMT., 849, 849 (2005).

and environmental sustainability.¹⁶⁹ They can exist in a more transactional way, such as government contracting or philanthropy, or they can require an ongoing relationship between the parties.¹⁷⁰ The issue of burial and funeral arrangements is ongoing, therefore, it would require an ongoing relationship between cross-sector parties to achieve solutions. For the purposes of this discussion, emphasis will be placed on both cross-sector relationships involving the government that are continual, as well as the viability of such relationships as a solution to the indigent burial problem.

A cross-sector partnership is more likely to be formed when the area of interest is turbulent, and there are competitive and institutional elements at play that promote the creation of the partnership.¹⁷¹ The greatest source of turbulence relating to this issue is that there is a growing number of people dying each year that will require community resources for their burial.¹⁷² Worse yet, the growing costs of dying have made it more difficult for the deceased and their families to make proper funeral arrangements.¹⁷³ These forces certainly justify the intervention of some kind, but perhaps the government or the non-profit sector could act alone in forming a solution.

A common reason for the cross-sector partnership is that one of the partners lacks a critical competency that the other partner has; together, they can address the social issue, whereas each partner would be less effective acting alone.¹⁷⁴ For example, the government may have the financial resources, while the non-profit is more connected with the community that is being served by the joint effort. A situation like this creates a mutually beneficial justification for partnership.

Currently, there are businesses, non-profits, and governments individually involved in the issue of providing burials. Businesses provide private funeral services and burial arrangements, and their high prices have resulted in a greater reliance on indigent burial programs.¹⁷⁵ Non-profits have acted in cities like Louisville and Cleveland to provide or supplement funeral services and burial arrangements.¹⁷⁶ Local governments sometimes provide funding for non-profits, but with or without non-profits, local governments are responsible for providing coroner services and establishing an indigent burial program.¹⁷⁷ Businesses, non-profits, and governments behave with pseudo-independence such that cooperation may be difficult,

169. *Id.* at 850.

170. *Id.*

171. John M. Bryson et al., *The Design and Implementation of Cross-Sector Collaborations: Propositions from the Literature*, PUB. ADMIN. REV. 44, 45–46 (2006).

172. Jordan & Sullivan, *supra* note 18.

173. Haneman, *supra* note 78.

174. Selsky & Parker, *supra* note 168, at 851. “[O]rganizations will only collaborate when they cannot get what they want without collaborating.” Bryson et al., *supra* note 171, at 45.

175. *See supra* Part II.

176. *See supra* Part IV.A.

177. *See supra* Part III.B.

but because there is a long history of various actors being involved in this issue, it is difficult to see a solution where one of them would exclude the others and take complete control. Thus, there is reason to believe that a partnership could be necessary in most communities.

Louisville's St. Joseph of Arimathea Society is an example of a failed cross-sector partnership. Originally, Louisville's local government provided a coroner and financial support to the program but has since abandoned the program, leaving it to their non-profit former partner.¹⁷⁸ Louisville's failed cross-sector partnership lacked many of the qualities of an effective partnership. First, "[c]ross-sector collaborations are more likely to succeed when they have committed sponsors and effective champions at many levels who provide formal and informal leadership."¹⁷⁹ In Louisville, the champions of the program originally came from within the coroner's office, but support for the program within the coroner's office waned after the city government began budget cuts.¹⁸⁰ Despite strong support within the non-profit community, the partnership failed. Second, "[c]ross-sector collaborations are more likely to succeed when they build in resources and tactics for dealing with power imbalances and shocks."¹⁸¹

In Louisville, the collaboration was unable to manage the political turbulence surrounding the coroner's office budget.¹⁸² Furthermore, understanding the "complexity of local environments" is important to manage the changes over time in a relationship.¹⁸³ The stability of the collaboration between the coroner's office and Louisville's non-profits relied too much on city budget changes, leaving the program expendable. A collaboration can best create value when it is "resilient and engage[s] in regular reassessments."¹⁸⁴ In this situation, the pair was unable to do this. The coroner's office was compelled to stop participating in the partnership entirely instead of reassessing how the coroner's office could use its budget to preserve the relationship. Perhaps it was impossible to preserve the program with the budget cuts, but this result likely reflects the relegated priority of the program in relation to other county expenses. In the end, the strength of the partnership depends on enthusiasm from its members and the ability of the partnership to legitimize its existence to external and internal stakeholders.¹⁸⁵

178. Thomas, *supra* note 158.

179. Bryson et al., *supra* note 171, at 47.

180. Thomas, *supra* note 158.

181. Bryson et al., *supra* note 172, at 50.

182. See Thomas, *supra* note 158.

183. Bryson et al., *supra* note 171, at 49. "[C]hanges in government policy often destabilize systems or alter resources in the policy fields in which networks are embedded and hence rearrange the structure of ties among members." *Id.*

184. *Id.* at 51.

185. *Id.* at 47.

The fate of Louisville's cross-sector partnership would likely have been different if there was a widespread recognition of a right to a funeral. The issue is that the collaboration in Louisville and similar collaborations are not compelled by a governmental duty. The local government had no duty to provide services beyond the routine disposition of human remains. Cross-sector partnerships could better solve a community's indigent burial problem if compelled by community expectations and, most importantly, the law, rather than being a budget item to be removed at the whim of local officials.¹⁸⁶ With a recognized right to a funeral, the city would have been unable to pull the plug on the program without creating a suitable replacement. With state support and compulsion, the cross-sector partnerships created would be less vulnerable to sudden shocks and county budget changes that put such programs at risk.

VI. LEGISLATIVE OPTIONS: PROPOSALS FOR DISPOSAL

The indigent burial problem is multifaceted, regulated at different levels of government, and spurred by rising funeral costs. In the U.S., indigent burial programs are run on a county level while the funeral industry is regulated by the FTC.¹⁸⁷ In other parts of the world, this issue is being addressed on a national scale.¹⁸⁸ For example, in the United Kingdom, the Fair Funerals pledge is an ongoing effort to raise awareness about the rising costs of funerals and reduce prices.¹⁸⁹ The campaign is focused on greater price transparency,¹⁹⁰ and the campaign successfully addressed the issue in front of parliament.¹⁹¹ Scotland went even further by implementing a funeral assistance program for low-income individuals.¹⁹² The assistance program provides for burial or cremation costs, certain transportation costs, and funeral directors' fees or flowers.¹⁹³ They even expanded the benefit in 2019.¹⁹⁴ Speaking on the new expansion, Social Security Secretary Shirley-Anne Somerville said, "[C]oping with the death of a loved one is one of the most tragic events any of us can face. At that difficult time, it's even harder when there's extra stress finding the money to pay for a funeral."¹⁹⁵ Sweden comprehensively addressed the issue by entitling all of its citizens to burial

186. "Formal and informal governing mechanisms are likely to influence collaboration effectiveness." *Id.* at 49.

187. *See supra* notes 85–97 and accompanying text.

188. Haneman, *supra* note 78, at 389.

189. FAIR FUNERALS PLEDGE, <https://fairfuneralscampaign.org.uk/node/2> (last visited Feb. 5, 2022).

190. *Id.*

191. Haneman, *supra* note 78, at 389.

192. *Id.*

193. *Funeral Expense Assistance*, SCOTLAND <https://www.gov.scot/news/funeral-expense-assistance/> [<https://perma.cc/NWM9-6WPL>] (last visited Feb. 5, 2022).

194. *Id.*

195. *Id.*

services that come from a scaled annual fee from each citizen's tax statement.¹⁹⁶

Proposals in the United States have not been nearly as comprehensive in scope, and they mostly focused on funeral home transparency and fraud regulation. For example, the Bereaved Consumer's Bill, introduced to Congress in 2011, was authored in response to a scandal in which Burr Oak Cemetery in Alsip, Illinois, removed hundreds of bodies from the cemetery without permission and then resold the grave plots.¹⁹⁷ The bill directed the FTC to establish more rules to prohibit "unfair or deceptive acts or practices related to the provision of funeral goods or funeral services."¹⁹⁸ The intent was to broaden the FTC's funeral rule with a focus on funeral home fraud.¹⁹⁹ This consumer-focused bill died in committee at the close of the 112th Congress.²⁰⁰ The bill, if passed, would have been a step towards disclosing prices for consumers, but this does little to control the rising costs of funeral services that created the problem in the first place.

The Expense Reimbursement Act was also proposed in 2011 in response to state tax incentives for indigent burial programs being reduced.²⁰¹ The bill "amend[ed] the Internal Revenue Code of 1986 to allow a credit for unreimbursed funeral expenses with respect to deceased indigent individuals."²⁰² The Act reimbursed up to \$3,000 per person.²⁰³ However, the reimbursement's eligibility was based on the state definition of "indigent," which can vary from state to state.²⁰⁴ Furthermore, it was also limited because it gave no account for differing religious or cultural practices, nor did the Act include the elements of consumer protection from the Bereaved Consumer's Bill.²⁰⁵ Also, it is questionable whether many people would be able to claim the reimbursement if they did not file for taxes.

The limitations of federal reform show the value of cross-sector partnerships. It may not be a core competency of local governments to provide a funeral, especially a religious service, and a non-profit may be better positioned to provide those types of benefits. However, the consumer protection element is also extremely important because it determines who will require an indigent burial, and the federal government and states are better at regulating that component of the cross-sector partnership.

196. Haneman, *supra* note 78, at 389–90.

197. Boldt, *supra* note 84, at 163.

198. H.R. 900, 112th Cong. (2011).

199. Boldt, *supra* note 84, at 163.

200. *Id.* at 164.

201. *Id.*

202. H.R. 1033, 112th Cong. (2011).

203. *Id.*

204. Boldt, *supra* note 84, at 164.

205. *Id.* at 173.

Ultimately, the federal government and states are poorly positioned to completely solve the indigent burial problem alone, but price regulation would be a positive step in reducing the number of people relying on indigent burial programs.

There are also state laws addressing indigent burials and rising funeral costs, but these laws are rarely comprehensive and sometimes only exacerbate the problem.²⁰⁶ Some states require a funeral director to handle a body at a funeral, which seems sensible at first blush but ultimately prevents some cheaper options, like at-home funerals, from being available to consumers.²⁰⁷ Additionally, the licensing requirements for being a funeral director vary from state to state and can be a barrier to entry, raising costs for competitors and consumers.²⁰⁸ On the county level, local funding plays a significant role in what funerals and burials look like for the indigent.²⁰⁹

Further, the requirements to become a coroner vary by jurisdiction and can affect the competency of the people running the indigent burial program of the county.²¹⁰ While some states require a coroner to be a licensed physician, many states do not, and some only require a high school education for their coroners.²¹¹ Most coroners are elected and are often laypersons.²¹² This means that even with adequate funding, a coroner's office may be ineffective in implementing a suitable indigent burial program due to the inexperience of the public officials involved. Some states demand more from their local governments, such as Maryland's requirement of additional tracking of indigent burial, but most states do not have such demands.²¹³ As of today, no state broadly recognizes a right to a funeral, though some communities have created cross-sector partnerships promoting this right.²¹⁴

The best possible reform would require cooperation from multiple political actors. The U.S. government could certainly implement a reimbursement program as proposed in 2011 and add consumer protection elements to the legislation. A reimbursement program would allow individuals to have greater discretion in determining the funeral and burial practices for their loved ones. However, this may not go far enough in

206. *Id.* at 165.

207. *Id.* at 165–66.

208. *Id.* at 166.

209. *See supra* Part III.B.

210. Andrea R. Tischler, *Speaking for the Dead: A Call for Nationwide Coroner Reform*, 33 SW. U.L.R. 553, 558 (2004).

211. *Id.*

212. *Id.* at 559. “Persons who have held the position of coroner include sheriff's deputies, school bus drivers, tow truck operators, gas station attendants, tavern owners, accountants, and even jewelry salesmen.” *Id.* For an entertaining discussion of this issue and the implications of it with respect to death investigation, see John Oliver, *Death Investigations: Last Week Tonight*, YOUTUBE (May 20, 2019), <https://www.youtube.com/watch?v=hnoMsfQP8>.

213. Jordan & Sullivan, *supra* note 18.

214. *See supra* Part IV.B.

lowering the costs of funerals, and many people who die without a funeral would lack the resources to receive such a reimbursement—especially those who die unclaimed. Unfortunately, the features of the death industry make rising costs inevitable without intervention. “The main features of the death services industry that impact consumer choices include uncertainty of need, information asymmetry, vulnerability of the consumer, and an inelastic marketplace.”²¹⁵ These incentives cannot be wished away by even the most progressive legislation.

The key to this issue is that no matter how the federal government regulates marketing practices to protect consumers in their vulnerable state, the death industry naturally produces faulty incentives to manipulate regulatory loopholes and exploit consumers because there are “systemic economic pressures upon the death services industry due to the inelastic nature of death.”²¹⁶ The funeral industry cannot manipulate the number of deaths in a year, though business should be on an upturn with the aging baby-boomer population.²¹⁷ Thus, individual funeral homes can only maximize their profit per funeral using the tactics the FTC has tried to control.²¹⁸ As a result, short of price ceilings, there is little lawmakers can do to alter these incentives. In fact, a subsidy alone, like that of the Expense Reimbursement Act, might only reinforce a faulty incentive system with government dollars.

The indigent burial issue can be fixed by attacking prices and practice, and the recognition of a right to a funeral is essential to this. Recognizing the right would change the scope of the issue from how the local government is going to dispose of indigent remains to how the local government will best recognize the dignity of its community members and protect the right to a funeral. Moreover, states should elevate the standards of an acceptable funeral and burial in recognition of an individual’s right to a funeral. This would be particularly relevant when there is no next of kin available to dictate the funeral proceedings because it shifts the burden of protecting the right from the deceased’s family to the community.

215. Haneman, *supra* note 78, at 404.

216. *Id.* at 407.

217. *Id.*

218. *Id.*

VII. CONCLUSION: THE OLD HART ISLAND LAID TO REST

New York City’s Park Department took over Hart Island in October of 2021.²¹⁹ The goal is to make Hart Island a more accessible and inviting place, but this will be an uphill battle.²²⁰ To make Hart Island more accessible, the city will need ongoing ferry services and a solution for the island’s many dilapidated buildings.²²¹ Advocates have called for Hart Island to have full accessibility with a museum and memorial recognizing forgotten New Yorkers, with some people suggesting an HIV/AIDS or COVID-19 memorial.²²² At the moment, these proposals seem far-fetched, and it will likely take many years to truly renew Hart Island.²²³

Hart Island leaves a lasting impact on those who journey to it—both dead and living. On one of the first Parks Department-led visits to Hart Island, one of the visitors, Kimberly Overton, who was visiting her stillborn brother and deceased grandfather, described a punitive environment on the island.²²⁴ Despite this, she said that seeing Hart Island humbled her. “I could take a breath once I got to the island,” Overton said.²²⁵ “I didn’t really know how badly I needed that type of closure for myself.”²²⁶ In an interview with NPR, Cas Torres, a non-profit worker and former inmate who buried the dead at Hart Island, spoke about those buried there.²²⁷ He said, “I think they would want someone to remember them, as simple as that.”²²⁸ Unfortunately, no matter what changes on Hart Island, the past cannot be fully repaired, and the dignity of the deceased never fully restored. Regardless, Hart Island is positioned to make a promise to be better. This change is welcomed.

The right to a funeral is symbolic: it is a right to be remembered, a right to be celebrated, and a right to be recognized. For many, death is the last chance not to be forgotten.

219. Brody Floyd, *The Biggest Public Graveyard in the U.S. is Becoming a Park*, BLOOMBERG (Oct. 15, 2021, 9:35 AM), <https://www.bloomberg.com/news/features/2021-10-15/nyc-s-biggest-public-graveyard-hart-island-gets-remodel> [<https://perma.cc/AGP6-6F99>].

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* She further claimed, “It was nice to see a park ranger uniform and not a correctional officer. . . . But I did feel like I was being watched.” *Id.* (internal quotations omitted).

225. *Id.* (internal quotations omitted).

226. *Id.* (internal quotations omitted).

227. Cas Torres, *He Buried the Unclaimed Dead on a New York Island. He Wants Others to Remember Them*, NPR MORNING ED. (July 16, 2021, 5:02 AM), <https://www.npr.org/2021/07/16/1016122868/nyc-burial-mass-graves-unclaimed-harts-island-covid> [<https://perma.cc/VG2U-LCJP>].

228. *Id.*