

TAX SHELTERING DEATH CARE

VICTORIA J. HANEMAN*

Death is not free. Funeral, burial, or cremation costs are the third-largest category of expense over the lifetime of the average American, while poverty paradoxically remains the fourth leading cause of death. Many are unable to shoulder the often-exorbitant cost of death care without being forced to beg, borrow, or simply abandon human remains. Sufficient resources exist to ensure that everyone is laid to rest with dignity in the United States, but those resources are not evenly distributed. This is a conversation about affordable and humane disposition of remains as a right rather than a privilege. It is a discussion made more difficult because several underlying issues are colliding in one space: consumer behavior is aberrational because of a desire to render death invisible; the funeral industry has an outsized voice in its own regulation; there are no reliable and broadly accessible death care prepayment instruments; and, expanding the (arguably inadequate) social safety net in the United States is usually an idea met with resistance.

This Article proposes a way of leveraging the Internal Revenue Code to deliver death benefits to low- and middle-income taxpayers through the section 529 savings infrastructure. Section 529 plans are the fastest growing investment product in the United States, with every state administering a structure that provides parents with a tax-advantaged way to save for college. These existing pathways may be used to tax shelter deathcare savings. The 529 End-of-Life Plan is politically strategic in its subtlety; the same scaffolding that provides substantial tax incentives may be dual-purposed to deliver targeted safety-net death benefits to our most vulnerable.

Introduction	624
I. The Deathcare Industry	630
A. Death Care Today	632
B. A Vulnerable Consumer in an Idiosyncratic Marketplace	635
C. Funeral Poverty	640
II. 529 Plans	647

* Associate Dean for Research & Innovation and Frank J. Kellegher Professor of Trusts & Estates at Creighton University School of Law. It was a great honor to present this research and receive valuable feedback at The Future of Death Care in America Symposium hosted by Wake Forest University School of Law and at the “Death and Taxes: Dynasty Trusts and Wealth in America” American Bar Association Webinar. My gratitude to Dominique Mosbergen at *The Wall Street Journal* for drawing public attention to this important research. I want to extend a special acknowledgement to Darren Bush, Katherine A. Macfarlane, Carla Spivack, and Paul E. McGreal, all of whom have always been so supportive of my work in the deathcare space and deeply thoughtful with feedback. And special thanks to my hardworking and brilliant research assistants, Carson L. Drake, Peyton J. Bellon, and Tony Thies.

III.	Disrupting Entrenchment	650
A.	No Time Like the Present	651
B.	Obstacles	653
IV.	Towards Solutions	659
A.	Incentives for Pre-Need Planning	659
B.	A Targeted Program	661
C.	The 529 End-of-Life Savings Plan	663
D.	The Comparison	667
E.	Expanding the Safety Net	670
	Conclusion	674

INTRODUCTION

Death is not free.¹ Funeral, burial, or cremation costs are the third-largest category of expense over the lifetime of the average American.² Many are unable to shoulder the often-exorbitant cost of death care without being forced to beg, borrow, or simply abandon human remains.³ An estimated 20% of millennials have relied upon memorial crowdfunding,⁴ and more than 125,000 memorial fundraisers have been posted to GoFundMe with \$330 million being raised every year.⁵ Begging for money through internet crowdsourcing is underwriting an

1. “It would cost about \$10,000 to bury your dead ass right now. I’m talking to you, 18- to 35-year-olds. . . . That \$10,000 is just an average figure for a simple American funeral.” Mike Pearl, *People Are Now Crowdfunding Their Funerals Online*, VICE (Sept. 19, 2013, 6:03 PM), <https://www.vice.com/en/article/people-are-now-crowdfunding-their-funerals-online-5886b6eb6ad7d845dbc2b38c/> [https://perma.cc/F44K-V68H]. See also David Horton & Reid Kress Weisbord, *Probate Litigation*, 2022 U. ILL. L. REV. 1149, 1174 (reporting results of empirical study, which found that the “average total amount of fiduciary and attorney fees represented approximately 2.2% of the average estate value”).

2. FTC, REPORT TO THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS 19 (2009), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-white-house-council-women-and-girls/100528cwg-rpt.pdf> [https://perma.cc/2GJ9-GJWB]. The price for funerals and burials in the United States has risen 227.1% from 1986 to 2017, as compared to 123.4% for all consumer items. *The Rising Cost of Dying, 1986–2017*, U.S. BUREAU LAB. STAT. (Oct. 31, 2017), <https://www.bls.gov/opub/ted/2017/the-rising-cost-of-dying-1986-2017.htm>.

3. Roughly 45% of adult men and 51% of adult women in the U.S. carry no life insurance whatsoever (including burial or final expense insurance). Saad Imran, *Top Life Insurance Statistics for 2025*, MARKETWATCH, <https://www.marketwatch.com/guides/insurance-services/life-insurance-statistics/> [https://perma.cc/6RNS-H32Q] (Sept. 11, 2024).

4. *A Growing Number of Millennials Seek Crowdfunding for Final Expenses*, MIDLAND NAT’L (June 9, 2023, 7:52 PM), <https://www.midlandnational.com/learn-and-plan/millennial-crowdsourcing-funerals> [https://perma.cc/K2A6-J6M9].

5. *Id.*

inadequate social safety net⁶ in a deeply flawed way, with campaigns involving the white, male, young, and attractive far more likely to go viral and exceed goals because racist, sexist, ableist, and homophobic tropes of “deservingness” bear upon who is successful.⁷ An estimated 85% of crowdfunding campaigns fail,⁸ which forces those without resources or savings to turn to borrowing. Some lean on credit cards⁹ or turn to the funeral lending industry, despite interest rates as high as 35.99%.¹⁰ And finally, for those with no options, it is estimated that at least 1% of remains are simply unclaimed by loved ones.¹¹

This conversation turns on the question of affordable and humane disposition of human remains as a right versus a privilege. It is a conversation made more difficult because several underlying issues collide in one space: consumer behavior is aberrational because of a desire to render death invisible; the funeral industry has an outsized voice in its own regulation; there are no reliable and broadly accessible death care prepayment instruments; and, expanding the (arguably inadequate) social safety net in the United States is usually an idea that meets resistance.

Death care is an expense that we have no desire to think about while living.¹² In doing so, however, the consumer pays a premium that weighs

6. The metaphor “safety net” is not used uncritically. This is a term that may mean different things to different readers. Situated within vulnerability theory, the ideal social safety net would develop structures that would foster citizen resilience—and the ability to weather unexpected disaster or catastrophe. Matthew B. Lawrence, *Against the “Safety Net,”* 72 FLA. L. REV. 49, 64 (2020).

7. For example, COVID-19-related GoFundMe campaigns raised more than \$416 million of pandemic assistance, but the most successful campaigns seemed to be for people residing in wealthier communities. Shira Ovide, *The Inequality of the GoFundMe Economy*, N.Y. TIMES, <https://www.nytimes.com/2021/06/21/technology/gofundme-online-giving.html> (Aug. 19, 2021).

8. *The Dark Side of Crowdfunding: Why Campaigns Fail*, ARORA PROJECT (Oct. 29, 2021), <https://www.aroraproject.co/2021/10/29/the-dark-side-of-crowdfunding-why-campaigns-fail/> [<https://perma.cc/ZBC6-T2WN>].

9. It is estimated that 24% of Americans do not have a credit card. See KEVIN FOSTER, CLAIRE GREENE & JOANNA STAVINS, FED. RSRV. BANK OF ATLANTA, PUB. NO. 19-02, THE 2018 SURVEY OF CONSUMER PAYMENT CHOICE: SUMMARY RESULTS 7 (2019), <https://web.archive.org/web/20240702005417/https://www.atlantafed.org/-/media/documents/banking/consumer-payments/survey-of-consumer-payment-choice/2018/2018-survey-of-consumer-payment-choice.pdf>.

10. *Financing for Memorial Services*, PROSPER, <https://www.prosper.com/personal-loans/funeral-services> [<https://perma.cc/7Q8T-GMKZ>].

11. Mary Jordan & Kevin Sullivan, *Alone in Death*, WASH. POST (Sept. 17, 2021), <https://www.washingtonpost.com/nation/2021/09/17/alone-death/>.

12. Our brains seem to categorize death as an unfortunate occurrence that happens to other people, which is compounded by the fact that those living in economically developed countries generally have the luxury of distancing themselves from the deathcare process. See Ian Sample, *Doubting Death: How Our Brains Shield Us*

heavily upon the most economically vulnerable. The median cost of a funeral in the United States exceeded \$9,000 in 2023,¹³ at a time when four out of ten Americans have difficulty covering an unexpected \$400 expense.¹⁴ Although the consumer is best protected through careful pre-need (during life) planning of death care—when researched and thoughtful decisions can be made without the cognitive impairment¹⁵ of grief directly impacting choices—the norm in the United States leans strongly in favor of at-need (after death) planning.¹⁶ This behavior drives cost, with lower income families spending far more than higher income families in every year studied for almost three decades.¹⁷ Funeral poverty remains an ongoing but often undiscussed challenge for the low-income, middle-income, and fixed-income elderly. Further, very little scholarly attention is being paid to the fact that many American families are being caught in the “elder catch”¹⁸—or the caregiving dilemma where one is

from *Mortal Truth*, GUARDIAN (Oct. 19, 2019, 3:00 AM), <https://www.theguardian.com/science/2019/oct/19/doubting-death-how-our-brains-shield-us-from-mortal-truth> [<https://perma.cc/KZ8F-AMMP>].

13. This median price is for a funeral with burial and vault. Vaults are not required by law, but most cemeteries require them to prevent the burial space from collapsing when decomposition advances. Press Release, Nat’l Funeral Dirs. Ass’n, 2023 NFDA General Price List Study Shows Inflation Increasing Faster than the Cost of a Funeral (Dec. 8, 2023), <https://nfda.org/news/media-center/nfda-news-releases/id/8134/2023-nfda-general-price-list-study-shows-inflation-increasing-faster-than-the-cost-of-a-funeral> [<https://perma.cc/3HYE-VEG6>].

14. FED. RSRV. BD., ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2022, at 31 (2023), <https://www.federalreserve.gov/publications/files/2022-report-economic-well-being-us-households-202305.pdf> [<https://perma.cc/4FMQ-8DGZ>] (noting that four in ten adults would have to cover the expense by selling something or borrowing money); see also David Horton, *Borrowing in the Shadow of Death: Another Look at Probate Lending*, 59 WM. & MARY L. REV. 2447, 2496 (2018) (discussing the predatory potential of lending to the bereaved).

15. “I thought that over time, my grief would shrink. That it wouldn’t fill every inch of me like it had for so long. My sadness never shrank but I grew... and grew... until I was so large, the grief just felt smaller.” *And Just Like That...: Bomb Cyclone*, at 35:13 (Max July 20, 2023).

16. See generally Victoria J. Haneman, *Prepaid Death*, 59 HARV. J. ON LEGIS. 329 (2022) [hereinafter Haneman, *Prepaid Death*].

17. Deathcare spending is a unique expense that carries cultural and societal baggage—and extraordinary levels of consumption relative to overall wealth occur for the at-need consumer, perhaps driven by guilt of loss—but sometimes because of a desire to satisfy community expectations or avoid judgment. See CYNTHIA WILLIAMS RESOR, *DISCOVERING QUACKS, UTOPIAS, AND CEMETERIES: MODERN LESSONS FROM HISTORICAL THEMES* 106–07 (2019); see also ELIZABETH CURRID-HALKETT, *THE SUM OF SMALL THINGS: A THEORY OF THE ASPIRATIONAL CLASS* 33 (2017).

18. Jessica Dixon Weaver, *The Perfect Storm: Coronavirus and the Elder Catch*, 96 TUL. L. REV. 59, 61 (2021).

employed while caring for young children and elder relatives.¹⁹ Sufficient resources exist to ensure that everyone is laid to rest with dignity in the United States, but those resources are not evenly distributed.²⁰

Government-funded or universal death care is an idea that has been extraordinarily successful in other countries.²¹ It is grounded in the belief that the dignified treatment of remains is nothing more than an extension of health care as a basic human right.²² The reality, however, is that universal initiatives resoundingly fail to survive modern political processes in the United States, both at the idea stage and also at the polls.²³ Recent failed initiatives include universal basic income, health care, preschool, and family care.²⁴ Programs in the United States are

19. See Juliana Menasce Horowitz, *More Than Half of Americans in Their 40s Are 'Sandwiched' Between an Aging Parent and Their Own Children*, PEW RSCH. CTR. (Apr. 8, 2022), <https://www.pewresearch.org/short-reads/2022/04/08/more-than-half-of-americans-in-their-40s-are-sandwiched-between-an-aging-parent-and-their-own-children/> [<https://perma.cc/NDF6-VGBB>] (labeling them as part of the so-called “sandwich generation”).

20. Eleanor Cummins, *How 'Big Funeral' Made the Afterlife So Expensive*, WIRED (Oct. 1, 2021, 9:00 AM), <https://www.wired.com/story/death-funeral-industry-lobbying-politics-health/> (quoting Victoria Haneman: “We should not be normalizing \$9,000 as the average cost of a funeral Not only is that staggering, it’s wholly unnecessary.”).

21. For example, Sweden instituted a burial tax in 1990 to guarantee every resident a funeral and burial or cremation. *Id.*

22. See *id.*

23. The U.S. is the only high-income country to not offer universal health care. Munira Z. Gunja, Evan D. Gumas & Reginald D. Williams II, *U.S. Health Care from a Global Perspective, 2022: Accelerating Spending, Worsening Outcomes*, COMMONWEALTH FUND (Jan. 31, 2023), <https://www.commonwealthfund.org/publications/issue-briefs/2023/jan/us-health-care-global-perspective-2022>. Research shows that it is the outcome of an intrinsically political process. See Scott L. Greer & Claudio A. Méndez, *Universal Health Coverage: A Political Struggle and Governance Challenge*, 105 AM. J. PUB. HEALTH S637 (2015). In California, a universal health care initiative from 2022 died without a vote, *California Universal Health Care Bill Dies Without a Vote*, NPR (Jan. 31, 2022, 9:01 PM), <https://www.npr.org/2022/01/31/1077155345/california-universal-health-care-bill-dies-without-a-vote>, while universal family care remains in the idea stage. See Press Release, Nat’l Acad. of Soc. Ins., Nonpartisan Expert Panel Examines Policy Options to Better Support Families and Caregivers (June 24, 2019), <https://www.nasi.org/wp-content/uploads/2019/06/Designing-Universal-Family-Care-Report-Press-Release-June-24-2019.pdf> [<https://perma.cc/SU8W-JYKL>] (releasing a report that develops approaches for designing universal family care).

24. See, e.g., Linda Jacobson, *Calif. Voters Reject Universal Pre-K Initiative*, EDUC. WK. (June 13, 2006), <https://www.edweek.org/teaching-learning/calif-voters-reject-universal-pre-k-initiative/2006/06> [<https://perma.cc/638C-FUN4>]. In the 2020 election cycle, universal basic income was floated as an idea, not for the first time. See Joseph Semprevivo, *Universal Basic Income: An Idea That’s Already Been Tried and Failed*, INV.’S BUS. DAILY (Dec. 20, 2018, 3:00 PM), <https://www.investors.com/politics/commentary/universal-basic-income-experiments-fail/>; Michael W. Howard,

more durable politically and have better utilization rates when targeted by income,²⁵ tied to employment, focus on those in poverty as well as the middle class, are federally funded, provide indirect benefits rather than cash, and focus on marginalized groups in need that are otherwise unsupported.²⁶

We exist in a society in which there is an uneasy relationship with providing safety net assistance to the relatively poor or middle class. Proposals to broaden the social safety net seem to be met with opposition when those who have been employed are blamed for not planning ahead to deal with an inevitable expense. The stated concern is that social safety net programs will “turn the safety net into a hammock that lulls able-bodied people to lives of dependency and complacency, that drains them of their will and their incentive to make the most of their lives.”²⁷ In this type of a society, incentivized savings and precommitment devices arguably become an effective weapon in a limited arsenal to support poverty reduction and economic mobility—and a moral imperative to assist low- and middle-income families with bearing an expense that will be both sizeable and unavoidable, but one that few want to think about.

This Article proposes a way of leveraging the Internal Revenue Code to deliver death benefits to low- and middle-income taxpayers through existing section 529 savings infrastructure, expanding the social safety net through a tax-incentivized savings program to sidestep political opposition. Created in 1999 and named after an eponymous Internal Revenue Code section, 529 Plans have been one of the fastest growing

The U.S. Could Help Solve Its Poverty Problem with a Universal Basic Income, SCI. AM. (Jan. 6, 2023), <https://www.scientificamerican.com/article/the-u-s-could-help-solve-its-poverty-problem-with-a-universal-basic-income/> [https://perma.cc/78JP-AV46].

25. “In the 1960s and 1970s, a universalistic approach to social policy – under which the entire population is eligible for social benefits as a basic right – prevailed in developed and developing countries. Since the 1980s, however, policymakers have increasingly embraced targeting, which limits eligibility for social benefits to beneficiaries who meet specific criteria.” Katia Savchuk, *Why Universalism Trumps Targeting in Social Policy*, POLIS (May 6, 2012), <https://www.thepolisblog.org/2012/05/why-universalism-trumps-targeting-in.html> [https://perma.cc/M9DA-ZVVP].

26. See Robert Greenstein, *Targeting, Universalism, and Other Factors Affecting Social Programs’ Political Strength*, BROOKINGS (June 28, 2022), <https://www.brookings.edu/articles/targeting-universalism-and-other-factors-affecting-social-programs-political-strength/> [https://perma.cc/2KF4-TUWW].

27. SARAH AYRES, CTR. FOR AM. PROGRESS, *THE SAFETY NET IS GOOD ECONOMIC POLICY: WHAT REP. RYAN GETS WRONG ABOUT THE WAR ON POVERTY* 1 (2014) (quoting Paul Ryan, former Speaker of the U.S. House of Representatives), <https://www.americanprogress.org/wp-content/uploads/sites/2/2014/03/RyanBudgetAyresStandard.pdf> [https://perma.cc/D4MK-3ZCG].

investment products in the United States since 2001.²⁸ As of June 2020, more than \$373 billion was invested in 14.6 million plans in the United States.²⁹ These are exceedingly simple savings vehicles—and withdrawals (including any earnings on the account) are not subject to tax if made for a “qualified” education expense.³⁰ The use of a 529 plan—equivalent for deathcare service savings is practical and easily administered: Infrastructure reuse allows for maximization of incentive design with more predictable downside risk and allowing for deathcare services savings plans to be administered through already established pathways in each state.³¹

This Article offers a creative and politically feasible solution that resists branding as a “handout” while also working to nudge³² consumer behavior towards planning for death care³³ prior to shuffling off this mortal coil.³⁴ Part I explores the costs associated with purchasing death

28. Mercer E. Bullard, *The Visible Hand in Government-Sponsored Financial Services: Why States Should Not Be Allowed To Offer 529 Plans*, 74 U. CIN. L. REV. 1265, 1265, 1267 (2006).

29. Ann Carrns, *Tips on Spending the Money in College Saving Accounts*, N.Y. TIMES, <https://www.nytimes.com/2020/09/04/your-money/college-savings-529.html> (Oct. 11, 2021).

30. Keith T. Jones & Rebecca Hamm, *Look Before You Leap Into a 529 Plan*, J. ACCT. (June 1, 2020), <https://www.journalofaccountancy.com/issues/2020/jun/funding-higher-education-529-plans-roth-ira.html> [<https://perma.cc/W2HR-RBK7>].

31. The purpose of this Article is not to debate whether states should or should not hold a monopoly over 529 plans or whether these plans should also be available through the private marketplace. For more discussion on this topic, see Quinn Curtis, *Costs, Conflicts, and College Savings: Evaluating Section 529 Savings Plans*, 37 YALE J. ON REGUL. 116, 116 (2020) (noting “some states generate significant revenue from plan fees” which “raises questions about . . . whether investors are adequately protected by existing regulations”), and Bullard, *supra* note 28.

32. The term “nudge” was coined by Professors Richard Thaler and Cass Sunstein. They argue that humans have biases and cognitive limitations that can result in suboptimal decision-making. A nudge is meant to describe a form of intervention that gently steers an individual to make a choice that aligns with long-term interests. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 6 (Penguin Books updated ed. 2009) (2008).

33. Although some evidence suggests that a nudge does not work to change consumer behavior by itself, there is evidence that “combinations of nudging methods together with changes in taxation and subsidies have a stronger effect on sustainable consumption than either being implemented alone.” Magda Osman, *Nudge Theory Doesn’t Work After All, Says New Evidence Review—But It Could Still Have a Future*, CONVERSATION (July 29, 2022, 10:50 AM), <https://theconversation.com/nudge-theory-doesnt-work-after-all-says-new-evidence-review-but-it-could-still-have-a-future-187635> [<https://perma.cc/J3KK-UD7D>].

34. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1, ll. 64–69, at 66 (T. J. B. Spencer ed., Penguin Books 2005) (“Devoutly to be wished. To die, to sleep — / To sleep — perchance to dream. Ay, there’s the rub! / For in that sleep of death what dreams

care in the United States, with an overview of an idiosyncratic industry and aberrational consumer norms. The popularity of 529 plans and existing infrastructure created through Internal Revenue Code section 529 is considered in Part II. Both the need for and the impracticality and political theatre of universal death care is explored in Part III. Part IV proposes a solution that is equal parts positive, normative, and prescriptive: spending through the Internal Revenue Code to broaden the social safety net via benefits administered through the 529 plan system.³⁵ The proposed 529 End-of-Life (EOL) Plan is politically strategic in its subtlety: It provides both a structure through which savings is incentivized for all and a targeted deathcare benefit is also delivered to our most vulnerable.

I. THE DEATHCARE INDUSTRY

Disposition at death was historically managed in the home by women. The professionalization³⁶ movement of the nineteenth century reshaped the manner in which death is handled.³⁷ As dying moved out of the home,³⁸ the process of death and dying has become remote and scary³⁹ and associated with contagion, disease, and decay.⁴⁰ Along with our

may come / When we have shuffled off this mortal coil / Must give us pause. There's the respect / That makes calamity of so long life.”).

35. The social safety net is generally defined as those programs or subsidies intended to help individuals and families weathering significant economic shocks. Examples include supplemental security income (SSI), supplemental nutrition assistance program (SNAP), temporary assistance for needy families (TANF), and Medicaid. THEODORE FIGINSKI, U.S. DEP'T OF THE TREASURY, THE ECONOMIC SECURITY OF AMERICAN HOUSEHOLDS—ISSUE BRIEF FOUR: THE DISTRIBUTION AND EVOLUTION OF THE SOCIAL SAFETY NET AND SOCIAL INSURANCE BENEFITS: 1990 TO 2014, at 2 (2017), <https://home.treasury.gov/system/files/226/The-Economic-Security-of-American-Households-the-Safety-Net.pdf> [https://perma.cc/V6KV-WZU3].

36. “Death services have been professionalized, and with professionalization comes commodification . . .” Victoria J. Haneman, *Funeral Poverty*, 55 U. RICH. L. REV. 387, 425 (2021) [hereinafter Haneman, *Funeral Poverty*].

37. See Mütter EDU Staff, *CPP Curiosities: How Abraham Lincoln and the Civil War Changed American Death Practices*, COLL. PHYSICIANS PHILA. (May 17, 2022), <https://collegeofphysicians.org/programs/education-blog/cpp-curiosities-how-abraham-lincoln-and-civil-war-changed-american-death-practices> [https://perma.cc/TQ4D-7RYT].

38. “He died a modern death, in hospital, . . . after medical science had prolonged his life to a point where the terms on which it was being offered were unimpressive.” JULIAN BARNES, *NOTHING TO BE FRIGHTENED OF*, at 10 (2008).

39. Kim Velsey, *Disrupting the Funeral: Are Millennials Killing the Death Industry?*, CURBED (May 6, 2022), <https://www.curbed.com/2022/05/can-end-of-life-start-ups-change-american-death.html> [https://perma.cc/5AQN-6NF7].

40. It is said that every generation has the monster that it deserves, and the monsterification of the dead (*i.e.*, zombies) in today's popular horror culture is

“deliberate estrangement from the dead body,”⁴¹ we have outsourced death so that the deceased may appear to be peacefully slumbering⁴² and decomposition held at bay in a waterproof, satin-lined casket enveloped in a concrete grave vault.⁴³ Death is now a \$20.2 billion industry in the United States,⁴⁴ with an estimated \$15.6 billion generated by funeral homes.⁴⁵ Although it is suggested that gross profit in the industry approximates 62.5%, the profit margin for an independent funeral home likely runs closer to 10% to 30%.⁴⁶ Most of the 3.4 million deaths in 2020⁴⁷ will be managed by more than 130,000 employees and workers.⁴⁸ This Part considers the landscape of modern death care, the vulnerability

impossible to ignore. Julia Métraux, *The Living Dead Embody Our Worst Fears*, JSTOR DAILY (May 9, 2022), <https://daily.jstor.org/the-living-dead-embody-our-worst-fears/> [https://perma.cc/B5FF-KZLM].

41. Rebecca Mead, *Our Bodies, Ourselves*, NEW YORKER (Nov. 22, 2015), <https://www.newyorker.com/magazine/2015/11/30/our-bodies-ourselves> [https://perma.cc/88ME-MSS8].

42. “I’m glad I’m not going to be whisked away and waxed up in a funeral home.” Maggie Jones, *The Movement To Bring Death Closer*, N.Y. TIMES, <https://www.nytimes.com/2019/12/19/magazine/home-funeral.html> (June 15, 2023).

43. See Sarah Chavez, *The Story of Death Is the Story of Women*, YES! (Aug. 22, 2019), <https://www.yesmagazine.org/issue/death/2019/08/22/dying-feminist-funeral-women-caitlin-doughty> [https://perma.cc/C3AR-E4EM] (“[T]he aversion Americans have towards death and corpses is not common elsewhere. Where we’ve created a hard boundary between ourselves and death, for most of the world a softer line exists, creating space for the living to work through their grief . . .”).

44. To situate this number, the recorded music industry in the United States hit \$15.9 billion in 2022, marking a record high. Niccolo Conte, *Charted: 50 Years of Music Industry Revenues, By Format*, VISUAL CAPITALIST (Oct. 20, 2023), <https://www.visualcapitalist.com/music-industry-revenues-by-format/>.

45. John LaRosa, *U.S. Funeral Home Revenues Grow the Most in 20 Years in 2020*, MARKETRESEARCH.COM: MKT. RSCH. BLOG (Aug. 1, 2022), <https://blog.marketresearch.com/u.s.-funeral-home-revenues-grow-the-most-in-20-years-in-2020> [https://perma.cc/7854-ACGA].

46. Caleb Wilde, *10 Terrifying Things About Funeral Homes You Didn’t Know: A Response*, CONFESSIONS FUNERAL DIR. (Aug. 4, 2017, 4:49 PM), <http://www.calebwilde.com/2017/08/10-terrifying-things-about-funeral-homes-you-didnt-know-a-response/>; see also JESSICA MITFORD, *THE AMERICAN WAY OF DEATH REVISITED* 70 (Vintage Books ed. 2000) (suggesting the undertaker pockets “slightly more than half of the funeral dollar,” supporting an entire industry of “cemeteries, florists, monument makers, [and] vault manufacturers”).

47. It is estimated that this number is 20% higher than 2019 because of the COVID-19 pandemic. *2020 US Death Statistics Show 20% More Deaths than in 2019*, USAFACTS, <http://usafacts.org/articles/preliminary-us-death-statistics-more-deaths-in-2020-than-2019-coronavirus-age-flu/> [https://perma.cc/YWW9-AWJG] (Mar. 9, 2022).

48. Perianne Boring, *Death of the Death Care Industry and Eternal Life Online*, FORBES (Apr. 25, 2014, 8:00 AM), <http://www.forbes.com/sites/perianneboring/2014/04/25/the-death-of-the-death-care-industry-and-eternal-life-online/> [https://perma.cc/TFM3-69HV].

of the deathcare consumer, and the oft-present but little-discussed issue of funeral poverty.

A. *Death Care Today*

The United States is a proverbial melting pot of cultures and traditions, which is also reflected in its funeral processes. With the traditional Jewish burial, a combination of custom (“minhag”) and commandment (“mitzvah”) guides the expedient burial of the deceased in a plain pine box.⁴⁹ An Islamic burial involves a grave positioned perpendicular to Mecca, and cremation is strictly forbidden.⁵⁰ Buddhists believe in reincarnation and cremation is the disposition of choice, though it is scheduled seven days after the passing of the deceased.⁵¹ There are more than two hundred Christian denominations in the United States, and thus Christian funeral custom varies widely.⁵² A funeral is generally held a week after passing,⁵³ with flexibility as to cremation or burial.⁵⁴ For atheists and the “unchurched,” a nonreligious or humanist funeral may be planned.⁵⁵

Although specifics vary, traditional funeral and burial practice may be broken into three stages: pre-funeral or viewing, the ceremony, and disposition. The pre-funeral phase begins with a phone call made almost immediately following the moment of death to either a funeral home or

49. *Religious Traditions: Judaism Funeral Customs*, FUNERAL SOURCE, <https://web.archive.org/web/20201005234346/https://www.thefuneralsource.org/trad0203.html>; see also *Jewish Funeral Customs*, FUNERAL PARTNERS, <https://www.funeralpartners.co.uk/help-advice/arranging-a-funeral/types-of-funerals/jewish-funeral-customs/> [https://perma.cc/48NN-CU3K].

50. *Muslim Funeral Services*, FUNERAL PARTNERS, <https://www.funeralpartners.co.uk/help-advice/arranging-a-funeral/types-of-funerals/muslim-funeral-services/> [https://perma.cc/5KBG-A5QY].

51. Empathy’s Funeral & Memorial Specialists, *Buddhist Traditions in Death and Mourning*, EMPATHY, <https://www.empathy.com/funeral/buddhist-traditions-in-death-and-mourning> [https://perma.cc/A2BQ-K8VM].

52. See Donavyn Coffey, *Why Does Christianity Have So Many Denominations?*, LIVE SCI., <https://www.livescience.com/christianity-denominations.html> [https://perma.cc/VD8B-6BA9] (July 29, 2022).

53. *Christian Funerals*, BBC, <https://www.bbc.co.uk/religion/religions/christianity/ritesrituals/funerals.shtml> [https://perma.cc/B47Y-8UJ2] (June 23, 2009).

54. See Adrienne Greene, *Ask Pastor Adrienne: Cremation: Is It a Sin?*, TOPEKA CAP.-J. (Jan. 2, 2020, 7:34 AM), <https://www.cjonline.com/story/lifestyle/faith/2020/01/02/ask-pastor-adrienne-cremation-is-it-sin/1972959007/> [https://perma.cc/ZGX8-9A2L] (noting that nothing in the Bible prohibits cremation, which is therefore not considered a sin).

55. Olivia Waring, *What Is a Humanist Funeral? Dale Winton To Be Laid To Rest at Non-Religious Service*, METRO, <https://metro.co.uk/2018/05/22/humanist-funeral-dale-winton-laid-rest-non-religious-service-7568038> [https://perma.cc/4XWE-WCXF] (Dec. 12, 2019, 5:13 PM).

local government agency.⁵⁶ A visitation, viewing, or wake may then be planned. The deceased must be prepared for viewing through embalming or some equivalent preservation process (such as refrigeration).⁵⁷ In fact, no other country in the world embalms human remains at a rate done in the United States.⁵⁸ If embalming is involved, the deceased usually receives glamorization treatments (makeup, hair, cosmetics) to present them looking their best. If the deceased is maimed or decayed, or the process will be too emotional for attendees, the event may be a viewing of a closed casket or shrouded remains. The ceremony—either a funeral or memorial service—will likely occur in a residence, funeral home, or religious site. The event usually consists of some combination of religious rites, readings, speeches, and eulogies.⁵⁹ Mourners may or may not take one last opportunity to view the remains of the decedent. The last stage of the deathcare process is the disposition, which has traditionally been either burial or incineration-based cremation. If the deceased is cremated after the funeral, cremated remains will be returned to loved ones who will opt for storage (*e.g.*, in a cremation niche, bench, mausoleum, or personal residence) or dispersal.⁶⁰

56. Brendan Kiley explains the process:

If you happen to die in North America, this is probably what will happen next: Someone will pause for a moment in front of your corpse and then make a phone call. They'll call either a funeral home or a local government agency, depending on how much money you have. Some minutes later—I've never timed the interval, but in my experience it's always at the crossroads of too soon and eternity—two people will show up in suits to take your body away.

Brendan Kiley, *The Architect Who Wants To Redesign Being Dead*, STRANGER (Mar. 3, 2015, 11:00 AM), <https://www.thestranger.com/features/feature/2015/03/03/21792773/the-architect-who-wants-to-redesign-being-dead> [<https://perma.cc/W7R7-B2ZT>].

57. In general, no state law requires embalming—although some may require embalming or refrigeration if the body is not buried or cremated within a certain period of time. *The FTC Funeral Rule*, FTC: CONSUMER ADVICE (July 2012), <https://www.consumer.ftc.gov/articles/0300-ftc-funeral-rule> [<https://perma.cc/PRX9-QD6K>].

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

59. See, *e.g.*, Scott Ginsberg, *Do Atheist People Have a Funeral?*, TITAN (Dec. 1, 2022), <https://titancasket.com/blogs/funeral-guides-and-more/do-atheist-people-have-a-funeral> [<https://perma.cc/HU6K-PX2W>].

60. The number of Americans being cremated has increased dramatically over the last two decades and norms surrounding “cremains” are shifting. A minority of cremains (about thirty-two percent) are delivered to a cemetery, but most cremains are “kept in an urn at home, scattered in a sentimental location, split among relatives, kept in a place of worship, or some other option.” *Statistics*, NAT'L FUNERAL DIR. ASS'N,

An important feature of the traditional⁶¹ deathcare service in the United States is the open casket viewing and/or funeral. The casket is usually the most expensive item involved in a traditional funeral.⁶² The open casket funeral is a valuable opportunity to upsell the consumer, and the deceased is generally preserved through embalming⁶³ and cosmetized so as to appear to be peacefully slumbering.⁶⁴

Demand for green and alternative disposition options is rising.⁶⁵ Green disposition may require advance planning⁶⁶ and a broader range of decisions,⁶⁷ however, because any deathcare approach that undermines the upsell of the open casket funeral is not broadly embraced by mainstream funeral culture.⁶⁸ Green disposition approaches eschew chemical preservation of the deceased (such as embalming), promote respect for the environment, optimize land use and conservation, involve

<https://web.archive.org/web/20240119171500/https://nfda.org/news/statistics> (Oct. 23, 2023).

61. For purposes of this Article, “traditional” refers to mainstream practices over the past century in the United States.

62. *Funeral Costs and Pricing Checklist*, FTC: CONSUMER ADVICE (July 2012), <https://consumer.ftc.gov/articles/funeral-costs-pricing-checklist> [<https://perma.cc/BTY2-D7A8>].

63. Outside of the United States, open casket viewings and/or funerals are not necessarily a norm. In the United Kingdom, an open casket is the exception, not the rule. *See Open Casket or Closed?*, CASKET COOP. LTD., <https://thecasketcooperation.co.uk/open-casket-or-closed/> [<https://perma.cc/N6TY-CFAX>].

64. The open casket funeral treads upon the “fraught area between life and death,” and the goal of the embalmer is to “give [survivors] their loved one back” for an event where the “viewing of the body [serves] as the centerpiece of the funeral ritual.” Oliver Whang, *The Fading Art of Preserving the Dead*, N.Y. TIMES, <https://www.nytimes.com/2022/11/01/science/embalming-funerals-death.html> (June 20, 2023).

65. “The growth in demand is in part due to Covid-19, experts say. The pandemic brought death to the forefront of the public consciousness and exposed concerns about its environmental destruction as places like Los Angeles had to suspend air pollution rules to allow an influx of bodies to be processed.” Kari Paul, *The Disruptors Who Want To Make Death Greener*, WIRED (Feb. 25, 2023, 8:00 AM), <https://www.wired.com/story/the-disruptors-who-want-to-make-death-greener/> [<https://perma.cc/X956-EYBW>].

66. As of 2023, there are 418 cemeteries that offer some form of green burial, increased from 150 in 2016. Eric Neuhaus, *The Future of Green Burial*, CREMATION.GREEN (Sept. 14, 2020), <https://www.cremation.green/the-future-of-green-burial/> [<https://perma.cc/MPN8-J8ZV>]. Further, it is estimated that 12% of green burial plots are Catholic. Valeria Zehl, *More Catholics Choose ‘Green Burials’ Hoping for a Lighter Footprint*, U.S. CATH. (Apr. 21, 2020), <https://uscatholic.org/articles/202004/more-catholics-choose-green-burials-hoping-for-a-lighter-footprint/> [<https://perma.cc/CKL5-5F7H>].

67. *See generally* Victoria J. Haneman, *Tax Incentives for Green Burial*, 21 NEV. L.J. 491 (2021).

68. *See* Sonya Vatomsky, *Thinking About Having a ‘Green’ Funeral? Here’s What To Know*, N.Y. TIMES (Mar. 22, 2018), <https://www.nytimes.com/2018/03/22/smarter-living/green-funeral-burial-environment.html>.

only natural and biodegradable materials, and generally advance communal memorialization over individual monuments or tributes.⁶⁹ Natural environments are preserved and cultivated, and green cemeteries generally avoid use of heavy machinery, fertilizers, and pesticides.⁷⁰

B. A Vulnerable Consumer in an Idiosyncratic Marketplace

The deathcare industry is an idiosyncratic marketplace in which timing directly influences behavior. It is a marketplace of inevitable consumption, and yet our desire to ignore death during lifetime creates uncertainty around the timing of need.⁷¹ Death care can be planned or purchased “pre-need” before death or “at-need” after death.⁷² It is more efficiently and inexpensively managed by those who engage with the topic of death while they are still alive through preplanning, or at a minimum, conversations with loved ones. Norms skew in favor of at-need deathcare purchasing in the United States, however, because we live in a culture that strives to make death and dying invisible.⁷³

The vulnerability of the at-need deathcare consumer is profoundly impactful, and death is undoubtedly one of life’s most stressful events.⁷⁴ The other largest expenditures in the life cycle of the average American, housing and transportation, do not ordinarily occur when the consumer

69. See generally Mark Shelvock, Elizabeth Anne Kinsella & Darcy Harris, *Beyond the Corporatization of Death Systems: Toward Green Death Practices*, 30 *ILLNESS CRISIS & LOSS* 640 (2021).

70. *Id.* at 650.

71. “When a consumer is unaware of the time period in which they must consume, they are unlikely to do so unless the need becomes obviously more pressing—which is the reason that socioeconomic, age and infirmity all have a bearing on both estate planning and death service prearrangement.” Haneman, *Funeral Poverty*, *supra* note 36, at 404 (footnote omitted).

72. Haneman, *Prepaid Death*, *supra* note 16, at 331.

73. “As [death] moved out of the home and into the hospital, we lost our familiarity with many traditions and rituals, and dying became something remote and creepy, a thing to be avoided and denied.” Velsey, *supra* note 39.

74. A third of survivors suffer from mental or physical health issues following a loss. Colin Murray Parkes, *Coping with Loss: Bereavement in Adult Life*, 316 *BMJ* 856, 856 (1998). In fact, terminating life support of a loved one has been found to cause the same stress levels as those endured by survivors of construction and ferry disasters, and twice as high as those who have lose a personal residence to fire. Christine Nelson & Jonathan Fields, *OHSU Researchers Discover Powerful Role of Advance Directives in Relieving Family Stress*, OHSU (Mar. 15, 2001), <https://web.archive.org/web/20240518234410/https://news.ohsu.edu/2001/03/15/ohsu-researchers-discover-powerful-role-of-advance-directives-in-relieving-family-stress>.

is potentially impaired by grief.⁷⁵ Grieving is a natural process that follows the death of a loved one, but it can have a profound effect upon cognitive processes and decision-making. Emotions are heightened, making it difficult to think clearly. Sadness, confusion, and guilt can cloud judgment and make it difficult to process information rationally. Grief can also bring about feelings of fatigue, which can interfere with the ability to think logically and concentrate. Grief is known to cause increased blood pressure, higher risk of blood clots, and suppressed immunity.⁷⁶ Nearly every study on bereavement shows that grief increases mortality rates.⁷⁷ Strong emotions can also cause the bereaved to act impulsively and make unwise decisions. Those grieving tend to rely heavily upon the authority of others, seeking confirmation for simple or basic decisions (“what would you do here?”)—which is particularly problematic when the confirmation is often being sought from a funeral industry professional⁷⁸ who stands to financially gain from some decisions.⁷⁹

75. *Consumer Expenditures--2023*, U.S. BUREAU LAB. STAT. (Sept. 25, 2024, 10:00 AM), <https://www.bls.gov/news.release/cesan.nr0.htm>.

76. See Thomas Buckley, Dalia Sunari, Andrea Marshall, Roger Bartrop, Sharon McKinley & Geoffrey Tofler, *Physiological Correlates of Bereavement and the Impact of Bereavement Interventions*, 14 *DIALOGUES CLINICAL NEUROSCI.* 129, 130 (2012) (observing that “cortisol remains elevated for at least the first 6 months bereavement,” thereby linking bereavement to physical manifestations of grief as cortisol is “associated with increased cardiac risk, reduced immune function, and reduced quality of life” (footnotes omitted)).

77. ROBERT KASTENBAUM, *DEATH, SOCIETY, AND HUMAN EXPERIENCE* 338 (Allyn & Bacon 5th ed. 1995) (1977).

78. “Funeral directors are not lawyers, law enforcement officials, or members of the court. However, the public is convinced—along with institutional authorities, including policymakers, and even lawmakers—that a funeral director is the only go-to for things like body removal.” Lee Webster, *Why Caring for Our Own Dead Is an Act of Social Justice*, 8 *WAKE FOREST J.L. & POL’Y* 125, 130 (2018).

79. See KAREN WINDLE, SOKRATIS DINOS, ALEXANDER MARTIN, FRANCES SHIPSEY & IMOGEN MARTIN, NATCEN SOC. RSCH., *EXPLORING CONSUMER VULNERABILITY IN THE FUNERAL MARKET: RAPID EVIDENCE ASSESSMENT 19* (2020) [hereinafter NATCEN ASSESSMENT], http://assets.publishing.service.gov.uk/media/5f33c66ae90e0732e2d7ca2b/Funerals_NatCen_rapid_evidence_assessment_120820.pdf [<https://perma.cc/8AKK-293Y>].

Disconnection from death⁸⁰ and “deliberate estrangement from the dead body”⁸¹ in the United States also results in a lack of experience that reinforces a dependence upon perceived experts.⁸² The increased number of deaths happening in hospitals and medical facilities means that few people have dealt with a death at home.⁸³ For many cultures, death and grief are times of incredibly strong human connection (“[a] person is a person through other persons”⁸⁴), but in the United States this connection has been outsourced to the funeral industry. We have the luxury of cognitive dissonance: We all know that we will die, and we may think about other people dying, but we pay a premium to ignore the fact that we are going to die.⁸⁵ The proverbial deck is stacked in favor of an industry expert with a profit-making incentive.

This information asymmetry and etiquette uncertainty also plays an important role in the context of at-need deathcare spending.⁸⁶ Death care is a purchase that is a combination of a good and a service. It is also a purchase with which most consumers do not have vast experience—the average consumer purchases 9.4 cars over a lifetime,⁸⁷ but may only purchase death care once or twice.⁸⁸ Further, an important but usually undiscussed economic decision for the deathcare consumer is the fact

80. “How else would you go about the mundane aspects of your daily life — cleaning the gutters, paying the bills, sitting in traffic — if you were constantly aware of the inevitability of your own death?” Emma Pattee, *Covid-19 Makes Us Think About Our Mortality. Our Brains Aren’t Designed for That.*, WASH. POST (Oct. 7, 2020), http://www.washingtonpost.com/health/covid-thinking-about-death/2020/10/02/1dc0f7e4-c520-11ea-8ffe-372be8d82298_story.html.

81. Mead, *supra* note 41. See generally ERNEST BECKER, *THE DENIAL OF DEATH* (1973).

82. Libby Sallnow et al., *Report of the Lancet Commission on the Value of Death: Bringing Death Back into Life*, 399 LANCET 837, 847 (2022).

83. *Id.* The report also noted an interview with Kathryn Mannix, a palliative care specialist and author, who said that “being at a deathbed is not a duty, but a gift,” as was discovered by many families during the COVID-19 pandemic when isolation restrictions prevented families from being physically present at the deathbed. *Id.* at 849.

84. *Id.*

85. See Pattee, *supra* note 80.

86. For example, one father experienced “etiquette uncertainty” when he lost his infant son. It was important to the father to remain graveside until his son’s casket was buried. The cemetery staff insisted that the casket would not be buried until everyone departed. The father felt pressured to leave and did not possess the knowledge or confidence to push back. Years later, he worried about whether his son’s casket was really buried. Mercedes Bern-Klug, *The Decision Labyrinth: Helping Families Find Their Way Through Funeral Options*, GENERATIONS, Summer 2004, at 31, 32.

87. Phil LeBeau, *Americans Buying Fewer New Cars in Lifetime*, CNBC, <https://www.cnbc.com/2012/10/22/americans-buying-fewer-new-cars-in-lifetime.html> [<https://perma.cc/5A5V-WBWF>] (Nov. 14, 2012, 3:03 PM).

88. Elizabeth Taylor Quilliam, *The Often-Forgotten Nonfuneral Consumer Grief for the Grieving*, 42 J. CONSUMER AFFS. 471, 473 (2008).

that only 16.8% of consumers visited *or called* more than one funeral home.⁸⁹ Choice of funeral home is based almost entirely on customer convenience,⁹⁰ and consumers tend to choose a funeral home based upon location or past experience.⁹¹ The vast majority of consumers are consequently held hostage by the menu of options and range of prices offered by the first and only funeral home that they contact.⁹² Because of etiquette uncertainty, the consumer relies upon the advice of the industry professionals at the funeral home with an obvious profit-seeking objective. The consumer often does not know or understand where corners can be cut or less expensive choices made.⁹³

The at-need consumer also feels constrained by time.⁹⁴ Decisions are perceived as rushed or time-sensitive and cannot be undone (or are rarely undone) if a mistake is made.⁹⁵ Deathcare service becomes part of a tapestry of remembering for the living, and there is often a sense that a mistake or flaw will implicitly dishonor the deceased. Also, the products and services are usually not returnable or exchangeable.⁹⁶ Research also shows that a strategy used by the living to cope with the

89. NAT'L FUNERAL DIRS. ASS'N, 2019 CONSUMER AWARENESS AND PREFERENCES STUDY 5 (2019) [hereinafter NFDA 2019 STUDY].

90. Few funeral homes place pricing online, and so an online price comparison is not possible. Effie Anolik, *The Business of Dying in the U.S. Is Broken. Here's How the FTC May Fix It—and Why We're Worried It Won't Be Enough*, FORTUNE (Feb. 27, 2023, 5:23 AM), <https://fortune.com/2023/02/27/funeral-home-pricing-broken-ftc-fix-consumers-price-transparency-effie-anolik/> [<https://perma.cc/MXN4-9TNC>] (examining 14,358 funeral home websites and finding that only 18% had prices listed online).

91. Angbrothers, *How Location Plays a Vital Role in Funeral Home Choices*, MEDIUM (Sept. 29, 2023), <https://angbrothers5.medium.com/how-location-plays-a-vital-role-in-funeral-home-choices-28b0e2522ecd> [<https://perma.cc/4KGU-9VHM>].

92. Unusual for a large purchase, “[m]ost people go to the same funeral home their family has always used, and just say ‘yes’ to everything.” Kelli Grant, *Amid the Tears, Don't Overpay for Funeral Costs*, CNBC, <https://www.cnbc.com/2016/09/22/comparison-shopping-funeral-costs-can-yield-big-savings-.html> [<https://perma.cc/X4ZT-F4EK>] (Sept. 27, 2016, 1:57 PM).

93. Bern-Klug, *supra* note 86, at 31–32.

94. NATCEN ASSESSMENT, *supra* note 79, at 17 (“‘Oh my God, how do I bury my husband?’ I had no knowledge that he stayed in the mortuary and the funeral director picked him up, and the funeral director arranged the death certificate. I didn’t know what happened [...] the nurse said, ‘You need to organize a funeral director’ and I went ‘Oh, how much time do I have?’ you know, like do I have to do it tonight? Do I do it tomorrow? When do you do this?” (alteration in original) (quoting Pippa Blackburn & Caroline Bulsara, “*I Am Tired of Having To Prove That My Husband Was Dead.*” *Dealing with Practical Matters in Bereavement and the Impact on the Bereaved*, 42 DEATH STUD. 627, 629 (2018))).

95. On average, funerals are held within a week of the decedent passing. Mychelle Blake, *How Long After Someone Dies Is the Funeral Held?*, LOVETOKNOW, <https://www.lovetoknow.com/life/grief-loss/how-long-until-funeral-after-someone-dies> [<https://perma.cc/6P63-CTZB>] (Aug. 9, 2022).

96. Bern-Klug, *supra* note 86, at 32.

negative emotions of deathcare purchasing is (unsurprisingly) to reduce the amount of time that they have to spend thinking about deathcare purchasing.⁹⁷ Those who are decision-avoidant will often rely on truncated decision processes to avoid complicated planning processes, but this type of disordered thinking can be costly for the at-need consumer.⁹⁸

For many bereaved consumers, an important part of saying goodbye to a deceased loved one is believing that the remains are “safe.”⁹⁹ For the grieving consumer with information asymmetry, shortened attention span, and impaired reasoning, it is not uncommon for “safe” to translate to protecting the “integrity and wholeness” of the remains.¹⁰⁰ Funeral directors are able to manipulate death fears using this concept of safety, upselling in the name of preservation (*e.g.*, “this casket is airtight and nothing will get in”).¹⁰¹

A study of 14,358 funeral home websites showed that 18% listed prices online, and only 6% featured pricing in a prominent location.¹⁰² The Federal Trade Commission’s Funeral Rule does not require that pricing be posted online,¹⁰³ and California is the only state with this

97. NATCEN ASSESSMENT, *supra* note 79, at 16.

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

99. NATCEN ASSESSMENT, *supra* note 79, at 18.

100. *Id.* (emphasis omitted). This desire to preserve wholeness and integrity of remains has been reported in studies of those who declined organ donation on behalf of a deceased loved one. *Id.*

101. Caleb Wilde, *Five Ways Funeral Directors Can Bully Their Clients*, CONFESSIONS FUNERAL DIR., <http://www.calebwilde.com/category/death/funeral-directing/consumer-rights/> [<https://perma.cc/DS83-X8XX>].

102. Anolik, *supra* note 90. In another survey, the Funeral Consumers Alliance partnered with the Consumer Federation of America and found that roughly three-quarters of funeral homes have no pricing listed online. JOSHUA SLOCUM & STEPHEN BROBECK, FUNERAL CONSUMER ALL., CONSUMER FED’N OF AM., *A NEEDLE IN A HAYSTACK—FINDING FUNERAL PRICES ONLINE IN 26 STATE CAPITALS* (2018), <https://consumerfed.org/wp-content/uploads/2018/01/needle-in-a-haystack-finding-funeral-prices-online-report.pdf> [<https://perma.cc/2GQW-DHE4>].

103. See 16 C.F.R. § 453.2.

requirement,¹⁰⁴ though an exception¹⁰⁵ effectively swallows the rule.¹⁰⁶ Funeral homes rely upon face-to-face engagement with the bereaved consumer to engage in “thinly-disguised salesmanship designed to persuade consumers to purchase additional and costlier funeral merchandise and services.”¹⁰⁷

C. Funeral Poverty

“Funeral poverty” is a term that has been coined to draw attention to the unaffordability of deathcare services and the financial hardship that can fall upon all but the wealthiest Americans when there is an unexpected death.¹⁰⁸ The average funeral with viewing and burial is

104. Teri Sforza, *Funeral Homes With Online Price Lists Charge 30% Less, Analysis Says*, ORANGE CNTY. REG., <https://www.ocregister.com/2020/02/14/funeral-homes-with-online-price-lists-charge-30-less-analysis-says/> [https://perma.cc/S7P3-Z9K3] (Feb. 14, 2020, 3:01 PM); Ann Carrns, *Funeral Homes Don’t Have To List Prices Online. That May Change.*, N.Y. TIMES, <https://www.nytimes.com/2023/04/14/your-money/funeral-homes-prices-online.html> (Apr. 17, 2023).

105. The California Funeral Directors Association lobbied for an exception to the requirement that prices be posted online, and instead, the funeral home may simply state “price by request.” Michael Walters, *The Death Industry Is Getting Away With Murder*, WASH. MONTHLY (July 23, 2019), <https://washingtonmonthly.com/2019/07/23/the-death-industrys-biggest-threat/> [https://perma.cc/Q9U8-SVW9].

106. As Joshua Slocum explains:

Senate Bill 658 (proposed in 2011; amended, passed, and enacted January 1, 2013) requires funeral homes to either: (a) post their complete General Price List on their website with a prominent and intuitive link; or (b) in the absence of posting the complete price list, list the sixteen categories of goods and services required by the FTC Funeral Rule to be listed on funeral home price lists, along with a notice to consumers that a complete price list is available upon request. This compromise . . . gives an “out” to funeral homes who wish to keep their prices difficult to obtain

Joshua L. Slocum, *The Funeral Rule: Where It Came From, Why It Matters, and How To Bring It to the 21st Century*, 8 WAKE FOREST J.L. & POL’Y 89, 107–08 (2018) (footnote omitted).

107. BUREAU OF CONSUMER PROT., FTC, FUNERAL INDUSTRY PRACTICES: FINAL STAFF REPORT TO THE FTC AND PROPOSED TRADE REGULATION RULE (16 CFR PART 435) 4 (1978).

108. Anne Corden and Michael Hirst further explain:

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

Anne Corden & Michael Hirst, *The Meaning of Funeral Poverty: An Exploratory Study* 3–4 (Univ. of York Soc. Pol’y Rsch. Unit Working Paper, Paper No. 2668, 2015).

\$9,995 (without cemetery costs)¹⁰⁹ at a time when roughly 40% of Americans are unable to shoulder an unexpected \$400 expense without selling something or borrowing.¹¹⁰ It is estimated that the average cost of a funeral has risen nearly twice as fast as inflation over the past few decades.¹¹¹ It is a particularly important topic to consider given that state and federal governments may be driving economic burdens with state laws that increase costs and ineffective federal regulation that does not do enough to protect consumers.

The way in which deathcare spending impacts lower-income and -wealth families is profound. The poorest one-third of consumers spend a “26% greater share of total expenditures than the national average,” the middle one-third falls in line with averages, and the wealthiest one-third spends significantly less.¹¹² In fact, the top 1% spend far less (not relative to total expenditures but in absolute dollars) than all other consumers.¹¹³ The reason for the distortion in spending is not entirely clear, though we know that the wealthier (and/or educated) are far more likely to be cremated than buried, which can substantially reduce expense.¹¹⁴ This type of expense is sometimes driven by varied and layered issues that include guilt,¹¹⁵ satisfying community expectations, honoring the deceased, or a deep-rooted need to advertise a certain social

109. This almost \$10,000 figure excludes the cost of a cemetery plot, but includes other costs associated with burial, including a burial vault. Press Release, Nat’l Funeral Dirs. Ass’n, *supra* note 13.

110. FED. RESRV. BD., ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2022, at 31 (2023), <https://www.federalreserve.gov/publications/files/2022-report-economic-well-being-us-households-202305.pdf> [<https://perma.cc/4FMQ-8DGZ>].

111. Liz Farmer & Mattie Quinn, *Rising Funeral Costs Put Pressure on Local Governments*, GOVERNING, <https://www.governing.com/archive/gov-funeral-assistance-cost.html> [<https://perma.cc/HQ6E-VZUJ>] (June 6, 2019, 11:54 AM).

112. CURRID-HALKETT, *supra* note 17, at 33.

113. *Id.*

114. *Id.* at 34. Death is not perceived as an appropriate time to bargain shop. One study found that loved ones want to do what is “best” for the deceased, and controlling for funeral costs is viewed as “insulting to the deceased and a sign to the community that the deceased was not valued.” NATCEN ASSESSMENT, *supra* note 79, at 18 (emphasis omitted).

115. Overspending by the lower and middle classes is not historically without precedent—as was seen with sometimes lavish Edwardian and Victorian funerals. CURRID-HALKETT, *supra* note 17, at 33–34.

status.¹¹⁶ Further, physical or economic insecurity has been known to drive materialistic tendencies and consumption.¹¹⁷

Roughly one-half of U.S. consumers claim to have insurance covering final expenses, which usually means they have a life insurance or “final expense” insurance policy (sometimes referred to as funeral or burial insurance).¹¹⁸ Final expense (FE) insurance is a specific type of coverage, usually a whole life insurance policy with a small death benefit ranging from \$5,000 to \$25,000, that is meant to cover deathcare expenses.¹¹⁹ These policies are generally marketed to seniors without sufficient other assets to cover death care.¹²⁰ It is expensive insurance—and the average rate for only \$10,000 of coverage for a male over 60 is almost \$70 per month.¹²¹ These policies also often have a graded death benefit that limits payout under the policy if the insured dies within two to three years of taking out the policy.¹²²

FE insurance may also be used to fund pre-need funeral contracts taken with specific funeral homes. Use of insurance policies to fund pre-need funeral contracts comes with an interesting panoply of issues: two states (New York and Alaska) prohibit use of insurance for this purpose;¹²³ many plans are available only to consumers over a minimum age threshold; there may be a waiting period (of a year or more) before benefits are available; benefits are not necessarily portable to different states; and benefits may not transfer to a different funeral home, which is an issue if the original funeral home ceases to operate.¹²⁴ Further, although FE insurance value may build over time, this is also problematic

116. The grieving consumer can sometimes believe that excessive spending is necessary to truly honor the deceased. *See, e.g.,* Annie Nova, *As the Cost of Dying Rises, More Families Try Crowdfunding for Funerals*, CNBC (Dec. 7, 2019, 9:45 AM), <https://www.cnbc.com/2019/12/07/more-families-are-turning-to-crowdfunding-to-pay-for-funeral-costs.html> [<https://perma.cc/8U6P-JZ9J>] (“Tina Middaugh, Bowen’s older sister, was determined to give him a meaningful memorial service. ‘I couldn’t imagine people walking in and not knowing people loved him,’ [she] said.”).

117. Tori DeAngelis, *Consumerism and Its Discontents*, MONITOR PSYCH., June 2004, at 52, 53–54.

118. Maggie Leyes, *Life Insurance Is Only for Final Expenses*, LIFE HAPPENS (Aug. 4, 2021), <https://lifehappens.org/blog/life-insurance-is-only-for-final-expenses> [<https://perma.cc/F7TG-7K4R>].

119. Jason Metz & Les Masterson, *Do You Need Burial Insurance?*, FORBES, <https://www.forbes.com/advisor/life-insurance/burial-insurance/> [<https://perma.cc/P8XM-8Z7W>] (Aug. 16, 2023, 5:28 PM).

120. *Id.*

121. *Id.*

122. *Id.*

123. TANYA D. MARSH, *THE LAW OF HUMAN REMAINS* 76 (2016).

124. *See* Anthony Martin, *8 Best Burial Insurance Companies*, CHOICE MUT., <https://choicemutual.com/blog/best-burial-insurance-companies/> [<https://perma.cc/F25M-YKPP>] (Jan. 9, 2025).

if a consumer is concerned with Medicaid eligibility because this insurance is a countable asset for Medicaid purposes.¹²⁵

There are two enduring myths that consumers discover are untrue when they most need assistance: medical donation is an option for anyone who cannot afford death care, and Social Security survivors' benefits (or other government benefits) will cover deathcare costs. Many Americans are disqualified from donating their remains for medical research and education because of a broad list of disqualifications that include some or all of the following: trauma to the body or dismemberment (*e.g.*, a car accident); death because of infectious disease (*e.g.*, COVID-19); a body mass index over thirty-five; and height and weight restrictions (*e.g.*, two hundred pounds and six feet tall).¹²⁶ Social security benefits do not come close to covering the cost of even a direct cremation, with a one-time settlement amount of \$255 paid by the Social Security Administration to the spouse or children of the decedent.¹²⁷ For a non-service-related death, the U.S. Department of Veterans Affairs will pay \$978 for deaths after October 1, 2024, if proof of payment is provided for reimbursement, reimbursement has not been received by another government entity, and the decedent was not dishonorably discharged (subject to several other conditions).¹²⁸ If a national disaster has been declared, burial funds may be available through the Federal Emergency

125. *Irrevocable Funeral Trusts & Medicaid: When Not To Use One*, PAYING FOR SENIOR CARE, <https://www.payingforseniorcare.com/medicaid-waivers/irrevocable-funeral-trusts> [<https://perma.cc/NW3U-F4TW>] (Mar. 25, 2024).

126. Medical school equipment generally cannot accommodate a cadaver that is larger than two hundred pounds or longer than six feet. Also, medical students and staff must move cadavers, and larger bodies present more of a risk of injury. Jeanne Sager, *Most Americans Are Too Fat To Donate Their Bodies to Science*, VICE (Mar. 14, 2017, 10:00 AM), https://www.vice.com/en_us/article/vvjz3d/most-americans-are-too-fat-to-donate-their-bodies-to-science [<https://perma.cc/5WRU-J6Z7>] (noting also “[w]hen you’re doing medical dissection, and you’re up to your elbows in fat, it’s greasy and unpleasant”).

127. *Does Medicaid Pay for Cremation?*, MEDICARE.ORG, <https://www.medicare.org/articles/does-medicaid-pay-for-cremation/> [<https://perma.cc/6XYL-XVZL>] (July 16, 2019).

128. *Compensation: Burial Benefits*, U.S. DEP’T VETERAN AFFS., <https://www.benefits.va.gov/compensation/claims-special-burial.asp> [<https://perma.cc/U6Y3-QW2R>] (Oct. 3, 2024).

Management Agency (FEMA).¹²⁹ States and municipalities¹³⁰ sometimes have funds to assist with deathcare expenses, but it is not uncommon for these programs to run out of funds.¹³¹

When all available resources have been exhausted, those who are economically constrained are left with few options other than to beg, borrow, or abandon the deceased.¹³² Crowdfunding for deathcare services is the process of soliciting and collecting small contributions through an online platform and/or social media,¹³³ with popular sites including GoFundMe, Funeralwise,¹³⁴ Funeralfund,¹³⁵ Give A Hand,¹³⁶ and Ever Loved.¹³⁷ Although GoFundMe staffers coach funeral organizers on how to craft a crowdfunding campaign to increase the odds of

129. Legislation enacted in March 2021 authorized FEMA to reimburse \$9,000 per decedent for death care related to a COVID-19 death. This level of payout from FEMA is historically unprecedented. *See COVID-19 Funeral Assistance*, FEMA, <https://www.fema.gov/disaster/historic/coronavirus/economic/funeral-assistance> [https://perma.cc/WJ6W-TBZW] (Feb. 4, 2025); Kenneth Terrell, *FEMA To Help Cover Funeral Costs for COVID Victims*, AARP (Mar. 17, 2022), <https://www.aarp.org/politics-society/government-elections/info-2021/fema-covid-funeral-assistance.html> [https://perma.cc/2Y4L-8VBH]. With three 2017 hurricanes, an average of \$2,700 in burial assistance was provided for 976 applications. Yeganeh Torbati, *Trump Hasn't Released Funds That Help Families of COVID-19 Victims Pay for Burials. Members of Congress Want To Change That.*, PROPUBLICA (May 4, 2020, 1:45 PM), <https://www.propublica.org/article/trump-hasnt-released-funds-that-help-families-of-covid-19-victims-pay-for-burials-members-of-congress-want-to-change-that> [https://perma.cc/DTC5-JQFR].

130. By way of example, for those receiving some types of public assistance in Illinois, deathcare assistance may be available (up to \$1,370 for a funeral and \$686 for burial or cremation). Annie Nova, *Some States Offer Assistance to Families Unable To Afford Funeral Costs*, CNBC, <https://www.cnbc.com/2022/01/19/some-states-offer-assistance-to-families-unable-to-afford-funeral-costs-.html> [https://perma.cc/3N4J-HD2M] (Jan. 19, 2022, 1:56 PM).

131. Farmer & Quinn, *supra* note 111 (noting that West Virginia's funeral assistance program ran out of funds twice, once in March 2015 and again in 2017, after being hit hard by the opioid epidemic).

132. Haneman, *Funeral Poverty*, *supra* note 36, at 391.

133. Andrew M. Wasilick, *The Tax Implications of Crowdfunding: From Income to Deductions*, 97 N.C. L. REV. 710, 712 (2019).

134. *Crowdfunding for Funerals and Memorials*, FUNERALWISE, <https://www.funeralwise.com/funeral-cost/crowdfunding/> [https://perma.cc/F4QB-96BA].

135. *Crowdfunding for Funeral Expenses*, FUNERALFUND, <https://www.funeralfund.com> [https://perma.cc/L38N-VVRY].

136. *Raise Money for a Memorial or Funeral*, GIVE A HAND, <https://giveahand.com/funeral-fundraising> [https://perma.cc/KUW4-J88M].

137. *Celebrate an Amazing Life*, EVER LOVED, <https://everloved.com> [https://perma.cc/YZ3P-6GMX].

it going viral,¹³⁸ the average success rate for crowdfunding campaigns is 22.4%.¹³⁹ The reliance on crowdfunding by millennials¹⁴⁰ likely signals larger societal issues,¹⁴¹ with GoFundMe reporting that one in six millennials has relied upon funeral crowdfunding.¹⁴² An additional layer of inequity¹⁴³ is that crowdfunding campaigns are more likely to succeed if the subject of the campaign is white, male, young, and attractive.¹⁴⁴ There also seems, at least anecdotally, to be a rise in crowdfunding for death care among the terminally ill.¹⁴⁵

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

139. Maddie Shepherd, *Crowdfunding Statistics: Market Size and Growth*, FUNDERA, <https://www.fundera.com/resources/crowdfunding-statistics> [https://perma.cc/6YLV-XRHR] (Jan. 23, 2023).

140. The following tweet captures the attitude of millennials toward crowdfunding:

Baby Boomers: social media is killing millennials
Actual millennials: *looks up from crowd funding cancer treatment* what
— don't @ me (@alyssakeiko) March 23, 2017.

Jonno Revanche, *The State Has Let Millennials Down. That's Why We Crowdfund Basic Needs*, GUARDIAN (Apr. 4, 2017, 4:00 PM), <https://www.theguardian.com/commentisfree/2017/apr/05/the-state-has-let-millennials-down-thats-why-we-crowdfund-basic-needs> [https://perma.cc/4UK9-SWPR].

141. “Millennials have nevertheless dealt with the breakdown in the social safety net through community support, connectivity and responsibility. We’ve used social media to create a new kind of economy, one where decisions and directions have the potential to be mitigated, controlled and owned by those formerly most vulnerable. In an era of welfare cutbacks, young people have responded by crowdfunding the needs of their peers.” *Id.*

142. An estimated twenty percent of millennials have engaged in memorial crowdfunding, as opposed to only four percent of those over the age of forty. *A Growing Number of Millennials Seek Crowdfunding for Final Expenses*, *supra* note 4.

143. Tamara Kneese, *Mourning the Commons: Circulating Affect in Crowdfunded Funeral Campaigns*, SOC. MEDIA + SOC’Y, Jan.–Mar. 2018, at 1, 9 (noting that “[t]hose who are most marginal in society are the least likely to attract sufficient compassion and are therefore likely to have failed crowdfunding campaigns”).

144. *Id.*

145. Deanne Stein, *OKC Woman Starts GoFundMe for Her Own Funeral*, NEWS 9 (Sept. 7, 2023, 7:23 PM), <https://www.news9.com/story/64fa6aa873b39f071a86c0ec/okc-woman-starts-gofundme-for-her-own-funeral> [https://perma.cc/29W6-U56T]; Kate Cimini, *The Cost of Dying: Salinas Woman Fundraising for Her Own Funeral*, CALIFORNIAN, <https://www.thecalifornian.com/story/news/2019/03/29/go-fund-me-help-california-family-funeral-costs/3072429002/> [https://perma.cc/5TL5-Y26R] (Mar. 29, 2019, 7:53 AM); Jacob Davidson, *Death 2.0: Crowdfunding Your Funeral*, TIME (Sept. 23, 2013), <https://newsfeed.time.com/2013/09/23/death-2-0-crowdfunding-your-funeral/> [https://perma.cc/KBJ5-D2BL].

Those who are unwilling or unable to raise money from friends, family, or strangers must borrow to pay for deathcare expense.¹⁴⁶ Funeral homes generally accept credit cards, and the credit card of the deceased may not legally be used.¹⁴⁷ This is not an option for many, as roughly 24% of Americans do not have a credit card.¹⁴⁸ Those with bad or nonexistent credit may still apply for a funeral loan but they may pay interest rates as high as 35.99%.¹⁴⁹

The final option is also the largely undiscussed option—abandoning remains.¹⁵⁰ Tens of thousands of deceased are unclaimed every year.¹⁵¹ Many county coroner offices will allow loved ones to sign a release form stating they cannot afford to pay, and the decedent will become the responsibility of the county or state.¹⁵² Method of disposition varies widely based upon the locality, but generally unclaimed or abandoned remains are cremated or buried in a potter's field.¹⁵³

146. Sian Bradley discusses crowdfunding alternatives:

Not everyone is crowdfunding. SunLife found that people are borrowing from a friend or relative, using a credit card or loan provider, paying the funeral director in instalments, or borrowing money from a loan provider, while 16 per cent also sold their belongings to cover costs. Also, a quarter of all funerals carried out between February 2020 and July 2021 were direct cremations – cremations without a service – as they are the cheapest option.

Sian Bradley, *Too Poor To Die: The Rise of Crowdfunded Funerals*, HUCK (Nov. 11, 2022), <https://www.huckmag.com/article/too-poor-to-die-the-rise-of-crowdfunded-funerals> [https://perma.cc/9TJB-U477].

147. *What Happens to Credit Card Debt When You Die?*, CHASE, <https://www.chase.com/personal/credit-cards/education/basics/credit-card-debt-after-death> [https://perma.cc/9Z4A-PFAQ].

148. See FOSTER, GREENE & STAVINS, *supra* note 9, at 7.

149. Eric Bank, *4 Best Bad-Credit Funeral Loans (Feb. 2024)*, BADCREDIT.ORG, <https://web.archive.org/web/20240423014748/https://www.badcredit.org/how-to/bad-credit-funeral-loans/> (Jan. 27, 2024).

150. “When family members can’t afford to claim a body, the burden falls on local governments to handle the remains. There’s no comprehensive data on the number of unclaimed bodies in morgues across the country, but everyone agrees it’s a problem that’s getting worse.” Farmer & Quinn, *supra* note 111.

151. There is no official record of the exact number of abandoned or unclaimed decedents. This is a best estimate. Jordan & Sullivan, *supra* note 11 (noting that this is a growing problem, with 2% to 3% of the roughly 60,000 remains in Los Angeles County abandoned each year).

152. *What Happens if You Can’t Pay for Funeral Home Services?*, SCHILLING FUNERAL HOME (Jan. 17, 2022), <https://www.schillingfuneralhome.com/what-happens-if-you-can-t-pay-for-funeral-home-services> [https://perma.cc/JBD6-MHMS].

153. More than a million people have been buried in the trenches of Hart Island since 1869—a potter’s field just outside of New York City. See Nina Bernstein, *Unearthing the Secrets of New York’s Mass Graves*, N.Y. TIMES (May 15, 2016), <https://www.nytimes.com/interactive/2016/05/15/nyregion/new-york-mass-graves-hart-island.html>.

II. 529 PLANS

The consumer should preplan but not prepay for their funeral.¹⁵⁴ State law varies widely on the regulation of funeral prepayment instruments, with some states engaging in what has been characterized as “state-sanctioned robbery.”¹⁵⁵ It is a market failure that reliable and affordable precommitment devices are not in place to plan for deathcare expense. This Article proposes a 529 plan equivalent that leverages a tax incentive to nudge consumers to engage with end-of-life planning and precommitment of funds. This Part provides an overview of existing 529 plan infrastructure.

The 529 plan was developed in 1999 as a tax-advantaged way for parents to invest and save for college education.¹⁵⁶ These accounts derive their name from section 529 of the Internal Revenue Code, which authorizes two types of state-administered education savings programs.¹⁵⁷ The first type of program is known as a prepaid tuition program and permits the user to prepay tuition at in-state post-secondary schools. This

154. Haneman, *Prepaid Death*, *supra* note 16, at 331–32. *See generally* Leanne Potts, *8 Tips for Funeral Planning*, AARP (Dec. 1, 2021), <https://www.aarp.org/home-family/friends-family/info-2020/funeral-planning-tips.html> [<https://perma.cc/9H9W-ULVS>] (sharing the advice of Joshua Slocum, executive director of industry nonprofit watchdog group Funeral Consumers Alliance, that “[f]uneral homes sell plans that promise better rates if you buy a package now, years before you die. Don’t do it”); Helen Simon, *3 Reasons You Should Never Prepay Funeral Expenses*, MOTLEY FOOL, <http://www.fool.com/investing/general/2016/01/05/3-reasons-you-should-never-prepay-funeral-expenses.aspx> [<https://perma.cc/UB9N-HXKY>] (Oct. 3, 2018, 9:29 PM) (noting that funeral homes go out of business and there are often no provisions allowing for transfer in the event of relocation); Jack Suntrup, *Prepaid Funeral Plans on Rise in Missouri, Offer Peace of Mind*, COLUM. MISSOURIAN (June 1, 2015), http://www.columbiamissourian.com/news/local/prepaid-funeral-plans-on-rise-in-missouri-offer-peace-of-mind/article_9ec9064c-fd66-11e4-8a54-9fe74856b81a.html [<https://perma.cc/5MBP-DRNN>] (Jim Fitzpatrick, Treasurer of the Funeral Consumers Alliance of Greater Kansas City: “We always recommend preplanning, but not prepaying”); Pat McKeough, *Hidden Risks of Prepaid Funerals*, TSI WEALTH NETWORK: DAILY ADVICE (Mar. 3, 2025), <http://www.tsinetwork.ca/daily-advice/wealth-management/hidden-risks-investing-money-prepaid-funerals/> [<https://perma.cc/J5FJ-T2MC>] (listing drawbacks of prepaid funerals, including the fact that prepaid funerals limit options and prices “may not rise as much as [anticipated]”).

155. The Funeral Consumers Alliance is the largest nonprofit dedicated to protecting funeral consumers. The alliance extensively studies state prepayment regulation, characterizing New York as the state with most protections and Florida as the state with the least. Nancy Hicks, *Epilogue: Woman Finds Problem with Prepaid Funeral Plans*, LINCOLN J. STAR (quoting Josh Slocum, Executive Director of the Funeral Consumers Alliance), https://journalstar.com/special-section/epilogue/epilogue-woman-finds-problem-with-prepaid-funeral-plans/article_591d986d-8fda-5492-ae4d-25cabeddf551.html [<https://perma.cc/Q8GE-CJC3>] (Mar. 23, 2015).

156. Bullard, *supra* note 28, at 1265.

157. I.R.C. § 529.

Article focuses on the second type of 529 program, which is a state-administered tax-deferred investment account.¹⁵⁸

529 plans are one of the “fastest growing investment products” in the United States,¹⁵⁹ with more than \$508 billion invested in 16.8 million plans as of 2024.¹⁶⁰ The success of 529 plans for tax-sheltered savings is attributable to state and federal tax incentives, low administration costs, and overall simplicity.¹⁶¹ The Internal Revenue Code does not allow a tax deduction for contributions to a 529 plan, but roughly thirty states allow some type of deduction against state taxes.¹⁶² All income earned in the 529 plan is sheltered or exempt from tax so long as a withdrawal from the plan is made for a “qualified” education expense.¹⁶³ No other investment vehicle (except for Roth IRAs) allows for both tax-deferral and tax-free withdrawals: Income earned on 529 assets is not subject to federal income tax, and if withdrawn and used for qualified educational expenses, it will *never* be subject to federal income tax.¹⁶⁴

A broad range of expenses are considered “qualified,” including for trade schools, K–12 education, private religious schools, and registered apprenticeships.¹⁶⁵ Some amount of 529 plan funds may also be used to pay student loan debt.¹⁶⁶ If the student is awarded a scholarship, a “nonqualified” withdrawal will be permitted up to the amount of the scholarship.¹⁶⁷ If there are funds remaining in the 529 plan after the education or death of the beneficiary, another beneficiary may be named (subject to some limitation).

158. § 529(b)(1)(A)(ii).

159. Bullard, *supra* note 28, at 1265.

160. COLL. SAV. PLANS NETWORK, 529 SAVINGS PLANS 2024 MID-YEAR DATA (2024), https://www.collegesavings.org/wp-content/uploads/2024/09/NAST24-036580-01-529-EOY-Infographic_0904A-1.pdf [<https://perma.cc/GN9T-8FQ9>].

161. *See* Jones & Hamm, *supra* note 30.

162. Bullard, *supra* note 28, at 1268; *see also* Jones & Hamm, *supra* note 30.

163. Jones & Hamm, *supra* note 30.

164. Bullard, *supra* note 28, at 1268.

165. As amended by the Tax Cuts and Jobs Act of 2017, tuition in connection with enrollment at a K–12 public, private, or religious school is a “qualified” expense eligible for tax-free plan distributions. I.R.C. § 529(c)(7), *amended by* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11032, 131 Stat. 2054, 2081–82. The SECURE Act added registered apprenticeships to the list of qualified expenses. § 529(c)(8), *amended by* Setting Every Community Up for Retirement Enhancement (SECURE) Act, Pub. L. No. 116-94, § 302, 133 Stat. 2534, 3175 (2019).

166. Under the SECURE Act, \$10,000 (per plan beneficiary) may be withdrawn from a 529 account to pay student loan debt. *See* Carrns, *supra* note 29.

167. A nonqualified withdrawal, unlike a qualified withdrawal, will be taxed. Carrns, *supra* note 29 (“If you are awarded a scholarship, you can take a ‘nonqualified’ withdrawal from a 529 up to the amount of the scholarship. You’ll owe taxes on the investment earnings, but you won’t have to pay the 10 percent penalty.”).

Federal tax law has shaped the benefit itself, but the infrastructure for the 529 plan (including plan structure and options) exists at the state level, with each state serving as administrator of its own 529 plan.¹⁶⁸ Each state has essentially been granted its own 529 plan monopoly.¹⁶⁹ There are currently ninety-one college savings plans available through the states under section 529.¹⁷⁰ Most of these plans are available to investors regardless of state of residency.¹⁷¹ These plans are managed differently in each state, but generally, administration and oversight occurs through a politically appointed advisory board that offers high-level oversight of all plans for the state.¹⁷² Daily administration of the funds is usually accomplished through either an in-house administrative staff or a contract with a third-party manager.¹⁷³ Plan administrators seem to largely invest the 529 plan funds through mutual funds.¹⁷⁴

Section 529 infrastructure has proven to be a flexible wealth transfer tool that offers substantial tax benefits to the wealthy, in both obvious and not-so-obvious ways.¹⁷⁵ A grandparent loophole allows for 529 plans to be funded by a grandparent without impacting eligibility for college financial aid.¹⁷⁶ Dynasty 529 plans may be used to transfer intergenerational wealth tax-free through an educational legacy that may accumulate at a rate that may provide for the education of both lineal and collateral descendants.¹⁷⁷ In an effort to expand school choice, Senator Ted Cruz included a provision in the Tax Cuts and Jobs Act of 2017 (effective January 1, 2018) that expanded 529 plans to include up to

168. See Bullard, *supra* note 28, at 1267–69.

169. For more discussion on this topic, see Curtis, *supra* note 31.

170. *Id.* at 126.

171. “This choice, however, is more circumscribed in states that offer tax benefits in the form of a state-level income tax deduction and condition the availability of that deduction on using the state’s own plans.” *Id.* at 150.

172. Professor Curtis suggests that it may be beneficial to have board oversight at the individual-plan level. *Id.* at 160.

173. *Id.* at 128.

174. Bullard, *supra* note 28, at 1268.

175. Ron Lieber, *The Rich Get College Subsidies While the Student Debt Debate Goes On*, N.Y. TIMES, <https://www.nytimes.com/2022/12/13/your-money/student-loans/student-debt-529-savings.html> (June 20, 2023) (“[W]ealthy individuals can front-load large 529 deposits in such a way that the accounts can pay for several college educations decades from now and still have money left over for other family members pursuing higher education in future generations. It’s all legal, and if you jump through a few modest hoops, it’s generally tax-free.”).

176. During the FAFSA process, parent-owned assets must be reported, but not grandparent-owned assets. Opher Ganel, *10 Ways 529 Plans Profit the Wealthy—Can You Benefit?*, MEDIUM (Feb. 22, 2023), <https://medium.com/financial-strategy/10-ways-529-plans-profit-the-wealthy-can-you-benefit-5244cb8c338f>.

177. See generally Victoria J. Haneman, *Dynasty 529 Plans and Structural Inequality*, 61 WASHBURN L.J. 497 (2022).

\$10,000 per year for private, public, religious, or homeschooling K–12 education.¹⁷⁸ And effective 2024, the SECURE 2.0 Act will allow up to \$35,000 (lifetime amount) of unused 529 funds to be rolled into the beneficiary’s Roth IRA without a tax penalty.¹⁷⁹

Because the benefits from these plans mostly accrue to higher income and wealthy households, President Barack Obama proposed to eliminate the popular savings accounts in his 2015 State of the Union address.¹⁸⁰ The backlash against his proposal was so fierce that he walked it back within one week.¹⁸¹ As will be considered in Part IV, however, many cities and states are now exploring creative uses of section 529 plans through contribution matching and grants.

III. DISRUPTING ENTRENCHMENT

Many attributes of the deathcare marketplace have a particularly pernicious effect on those suffering from funeral poverty, but perhaps the most troubling aspect of the industry is its resistance to change. Disruptive innovation—or a change in competitive norms that disrupts and shifts the status quo—is happening across industries, but not yet touching death care, which has remained relatively unchanged until recently. Potential disruptors in the deathcare industry often find themselves struggling against economic and regulatory systems that are outdated. Facilitating change to benefit consumers requires support of new investment, limitations on gatekeeping laws, federal intervention on pricing disclosure, and incentives to encourage pre-need planning. Part III of this Article considers the pursuit of and obstacles to disruption in this industry.

178. See *ICYMI: Sen. Cruz: Amendment Expanding 529s Is Most Far-Reaching Federal School Choice Legislation Ever Passed*, TED CRUZ U.S. SENATOR FOR TEX. (Dec. 6, 2017) [hereinafter *Sen. Cruz: Amendment*], <https://www.cruz.senate.gov/newsroom/press-releases/icymi-sen-cruz-amendment-expanding-529s-is-most-far-reaching-federal-school-choice-legislation-ever-passed> [https://perma.cc/2RAV-CDHK].

179. See *529-to-Roth IRA Rollovers: What To Know*, CHARLES SCHWAB (Nov. 9, 2023), <https://www.schwab.com/learn/story/529-to-roth-ira-rollovers-what-to-know> [https://perma.cc/YH7J-DRBH].

180. Jonathan Weisman, *Obama Relents on Proposal to End ‘529’ College Savings Plans*, N.Y. TIMES (Jan. 27, 2015), <https://www.nytimes.com/2015/01/28/us/politics/obama-will-drop-proposal-to-end-529-college-savings-plans.html>.

181. Cary Gibson, Opinion, *Obama’s 529 Missteps*, U.S. NEWS (Feb. 2, 2015, 4:15 PM), <https://www.usnews.com/opinion/blogs/opinion-blog/2015/02/02/obama-proposal-to-tax-529-college-savings-plans-was-a-major-misstep> (noting backlash “not just from Republicans, but also from members of his own party”).

A. No Time Like the Present

Norms are shifting.¹⁸² The “death positive” movement is gaining traction in the United States with the aging of the baby boomer generation,¹⁸³ promoting honest and open dialogue¹⁸⁴ around a topic that has long been relegated to the taboo.¹⁸⁵ Families are more geographically dispersed, and visiting a local cemetery has become less of a priority. Record numbers are now “unchurched” and do not feel obligated to abide by certain customs or traditions dictated by religion. There is more consciousness about the unnecessary environmental impact of traditional disposition, and rising interest in having one’s last act not be an existential threat to the future of the planet. Online memorial services and virtual attendance of in-person memorials have shifted attitudes about traditional funerals.¹⁸⁶ Finally, loved ones are increasingly concerned that

182. “Revered Silicon Valley venture capitalist Keith Rabois writes, ‘formula for startup success: find a large, highly fragmented industry with low NPS; vertically integrate a solution to simplify the product’. Deathcare services – which includes everything from wills, estate planning, end of life care, funeral planning, and funeral services – is an example of a fragmented industry, with piecemeal, point solutions.” Jessy Wu, *The Death Industry: How Innovation Is Breathing New Life into the Market*, SMARTCOMPANY (Sept. 30, 2021), <https://www.smartcompany.com.au/business-advice/innovation/death-industry-innovation-new-life-market/> [https://perma.cc/Y8VS-53R9].

183. “Somber, embalmed-body funerals, with their \$9,000 industry average price tag, are, for many families, a relic. Instead, end-of-life ceremonies are being personalized: golf-course cocktail send-offs, backyard potluck memorials, more Sinatra and Clapton, less ‘Ave Maria,’ more Hawaiian shirts, fewer dark suits. Families want to put the ‘fun’ in funerals.” Karen Heller, *The Funeral as We Know It Is Becoming a Relic — Just in Time for a Death Boom*, WASH. POST (Apr. 15, 2019, 5:00 AM), https://www.washingtonpost.com/lifestyle/style/the-funeral-as-we-know-it-is-becoming-a-relic--just-in-time-for-a-death-boom/2019/04/14/a49003c4-50c2-11e9-8d28-f5149e5a2fda_story.html.

184. “Return Home [a human composting service] has more than 617,000 followers on TikTok, where its employees answer questions like ‘what happens to hip replacements in the human composting process?’ and ‘how does it smell during the process?’” Kari Paul, *From Cradle to Compost: The Disruptors Who Want To Make Death Greener*, GUARDIAN (Feb. 19, 2023, 6:00 AM), <https://www.theguardian.com/society/2023/feb/19/human-composting-industry-deathcare> [https://perma.cc/4QRC-9P79].

185. Shivani Gorle, *Til Death Do Us Part*, MEDIUM (May 31, 2019), <https://medium.com/thoughtmatter/til-death-do-us-part-c9a4277fcf8b> [https://perma.cc/Y7CM-TRCK].

186. People are embracing shifting trends and technological advancement in death care in very different ways:

The American dead, like American voters, fall roughly into two camps. In this rough analogy, the conventional burial industry is like the Republican Party: a lot of suits, a lot of money, lobbyists to protect their interests, and a general acceptance that cutting down trees (for caskets), pouring concrete (for vaults), and putting toxic chemicals underground (embalming fluids) are simply part of the American way. Cremationists are more like the Democratic

pictures will be taken with the deceased at viewings and funerals and later placed online.¹⁸⁷

Consumer protection within the deathcare space requires more than a change to positive law. Structural change is required to meaningfully address four market features that the industry zealously guards to drive profits: a lack of transparency, the open casket funeral, regulatory gatekeeping, and the vulnerable at-need consumer.

First, a lack of transparency inures to the benefit of the industry. A deeply personal and organic process has been professionalized and whisked out of sight by an industry that has traditionally profited from the process remaining opaque.¹⁸⁸ The Federal Funeral Rule requires that funeral homes provide an itemized price list on request in person or by phone if requested, but most funeral homes do not place pricing online.¹⁸⁹ Funeral homes choose to not place prices online because profit margins are maximized through in-person upselling to a price-insensitive and grieving consumer. When California proposed regulation that would require online pricing, the industry lobbied for an exception that all but swallowed the requirement.

Second, the industry relies upon the open casket funeral as the ultimate upsell. Any innovative death technology that removes the casket from disposition threatens status quo.¹⁹⁰ Jessica Mitford, in the renowned industry exposé *The American Way of Death*, notes that if the body is taken out of the funeral, a funeral director has little to sell.¹⁹¹ Without question, the casket is usually the biggest single expense in the funeral

Party: slightly looser dress code, still interested in profit margins but perhaps not as fanatically (there is a lot less money to be made from a \$400 urn than a \$3,000 casket), and a belief that they are on the progressive side of history.

Kiley, *supra* note 56.

187. “Three workers hired to help with the funeral and burial of Diego Maradona have been condemned for taking photos next to his open coffin.” *Maradona: Anger Over Funeral Home Photos with Legends’s Open Coffin*, BBC (Nov. 27, 2020), <https://www.bbc.com/news/world-latin-america-55100817/> [https://perma.cc/PW5M-RYCD].

188. Throughout the twentieth century, the image of the undertaker was one of a somber white older male in a black suit, which correlates to the obvious gender dominance in a profession that is largely male. The average funeral director is white (77%), male (64.7%), and middle-aged (48 years old). *Funeral Director Demographics and Statistics in the U.S.*, ZIPPPIA, <https://www.zippia.com/funeral-director-jobs/demographics/> [https://perma.cc/F877-87LV] (Jan. 8, 2025). Prior to the professionalization of death care, it was largely regarded as “women’s work” and far more visible. See *Gender Dominance in Funeral Service Is Changing*, NAT’L FUNERAL DIRS. ASS’N (May 27, 2021), <https://nfda.org/news/blog/gender-dominance-in-funeral-service> [https://perma.cc/J5RW-6MP5].

189. Anolik, *supra* note 90.

190. Mütter EDU Staff, *supra* note 37.

191. MITFORD, *supra* note 46, at 54–55.

budget,¹⁹² ranging in price from \$900 “no-frills” caskets¹⁹³ to premium options that may cost \$40,000.¹⁹⁴ But this is less about the casket itself and more about an opportunity to sell a splendid¹⁹⁵ and luxurious funeral package.¹⁹⁶ The open casket funeral includes preparation of the remains for viewing (embalming, hair, makeup, styling), a viewing and ceremony (facility fees, printed materials, flowers), and cemetery expenses (plot, vault or liner, headstone or marker, flowers, graveside ceremony fees).

Third, gatekeeping masquerading as consumer protection ironically shapes an excessively regulatory environment that entrenches status quo and drives up cost for consumers.¹⁹⁷ Regulation is used by the industry as both sword and shield, to block new businesses from entering the market and potentially disrupting competitive norms.¹⁹⁸ And finally, as explored in Part I, the deathcare consumer behaves idiosyncratically. Norms in the United States skew in favor of at-need deathcare purchase, at a time when the consumer usually feels time-pressured, grief-stricken, and cost-insensitive.

B. Obstacles

Business leaders in entrenched spaces often live in existential terror of disruptive innovation, which can upend products, firms, and entire

192. *Funeral Costs and Pricing Checklist*, *supra* note 62.

193. Dave Roos, *Grave Matters: Why Are Caskets So Expensive?*, HOWSTUFFWORKS (Nov. 15, 2021), <https://people.howstuffworks.com/culture-traditions/funerals/caskets-so-expensive-news.htm> [<https://perma.cc/U5Z4-T5Z3>].

194. Zsa Zsa Gabor was buried in a 24-carat gold-plated \$40,000 casket. Scott Ginsberg, *Top 7 Most Expensive Caskets in the World*, TITAN CASKET (Feb. 2, 2023), <https://titancasket.com/blogs/funeral-guides-and-more/top-7-most-expensive-caskets-in-the-world> [<https://perma.cc/87SZ-NZN4>].

195. The premium funeral package allows your family “to buy you a special burial suit, lay you in a bronze, silk-lined coffin, flank you with banks of hothouse posies, and install you in the hushed stateliness of the viewing chamber, where they can gaze upon you to their heart’s content.” Victoria Loe, *Extreme Unctuousness*, TEX. MONTHLY (May 1981), <https://www.texasmonthly.com/articles/extreme-unctuousness/>.

196. *See* MITFORD, *supra* note 46, at 72–73.

197. Caitlin Doughty, *How Death Became Big Business in America*, LITERARY HUB (Oct. 4, 2017), <https://lithub.com/how-death-became-big-business-in-america/> [<https://perma.cc/EJM4-S8QN>].

198. Lindsay Marchello, *Regulations, Market Dynamics Changing Funeral Business*, BLADEN J. (Oct. 31, 2017), <https://www.bladenjournal.com/news/business/14911/regulations-market-dynamics-changing-funeral-business> [<https://perma.cc/HGX4-XCR3>].

industries.¹⁹⁹ When regulatory power becomes too heavily influenced or dominated by the underlying industry that it is regulating, law and policy can tilt more heavily in favor of commercial interest than public interest.²⁰⁰ Regulatory capture exists when such a close relationship develops between regulators²⁰¹ and the industry being regulated that the former essentially becomes the puppet of the latter.²⁰² Artificial barriers may be created to limit entry into the industry, and economic distortions may drive prices and limit consumer choice.²⁰³

Although laws serve an important protective function, they may also create barriers to entry for new technology—barriers that protect those already operating within a marketplace.²⁰⁴ Regulatory capture exists in those marketplaces where legislators have become puppets of a specific

199. The firm that is unable to adapt and respond to change may be rendered obsolete by the innovation lag, as seen with Kodak, Polaroid, Blockbuster, Tower Records, Toys “R” Us, Pan Am, Compaq, Xerox, MySpace, and Radio Shack. Umar Farooq, *15 Companies that Couldn’t Innovate Their Way out of Failure*, MARKETINGTUTOR.NET, <https://www.marketingtutor.net/companies-that-failed-to-innovate/> [https://perma.cc/M98J-B6XG]; Seim Mol, *6 Major Companies that Failed To Innovate in Time*, GROUND CONTROL, <https://togroundcontrol.com/blog/6-major-companies-that-failed-to-innovate-in-time/> [https://perma.cc/QSD4-R3YA] (Dec. 9, 2021); Frances Goh, *10 Companies that Failed To Innovate, Resulting in Business Failure*, COLLECTIVE CAMPUS, <https://www.collectivecampus.io/blog/10-companies-that-were-too-slow-to-respond-to-change> [https://perma.cc/J2T2-3HPX]; Poonkulali Thangavelu, *Companies that Failed To Innovate and Went Bankrupt*, INVESTOPEDIA, <https://www.investopedia.com/articles/investing/072115/companies-went-bankrupt-innovation-lag.asp> [https://perma.cc/GJZ3-SVLP] (Sept. 29, 2024).

200. Saverio Mazza, *Regulatory Capture and Its Impact on Innovation: A Critical Analysis*, MEDIUM (Sept. 16, 2023), <https://medium.com/@saveriomazza/regulatory-capture-and-its-impact-on-innovation-a-critical-analysis-99ae9b91c5f2>.

201. Patricia Sabatini, *Last Rites: Pennsylvania’s Funeral Regulators Failing Consumers, Report Finds*, PITT. POST-GAZETTE (July 1, 2021, 4:50 AM), <https://www.post-gazette.com/business/money/2021/07/01/Pennsylvania-State-Board-Funeral-Directors-Consumer-Federation-America-Funeral-Consumers-Alliance/stories/202106280094> (Josh Slocum, Executive Director of the Funeral Consumers Alliance: Most states have oversight boards with a supermajority of members from the funeral industry and “[t]hey see themselves as serving the funeral industry rather than the consumer.”); see also Adam Gottschalk, *Giving Up the Ghost: How the Funeral Rule and State Licensing Boards Are Failing To Protect Consumers from Underhanded Undertakers*, 27 ELDER L.J. 423, 430 (2020) (noting that all seven members of Illinois’s board are licensed funeral providers, which seems to be the norm).

202. This is a topic that has been discussed since at least the 1950s. Dorit Rubinstein Reiss, *The Benefits of Capture*, 47 WAKE FOREST L. REV. 569, 570–71, 570 n.3, 580 (2012).

203. Mazza, *supra* note 200.

204. See generally Tanya D. Marsh, *Regulated to Death: Occupational Licensing and the Demise of the U.S. Funeral Services Industry*, 8 WAKE FOREST J.L. & POL’Y 5 (2018).

industry, structuring laws so as to preserve and maintain the status quo.²⁰⁵ This can be seen in a number of ways in the deathcare industry, but it is most obvious in efforts to stop new technology from coming to market and the patchwork of regulation that prevents nationwide direct-to-consumer (DTC) providers.²⁰⁶

Three innovative death technologies have encountered substantial and expensive opposition, including alkaline hydrolysis, natural organic reduction, and promession. Alkaline hydrolysis (also known as liquid cremation or aquamation) involves the dissolution of the bonds that hold the body together, yielding a sterile liquid and bones that are ground to powder to be returned to loved ones.²⁰⁷ Although the process is legal in at least twenty-eight states,²⁰⁸ an Indiana lawmaker and owner of two casket companies derailed the legalization of the process in his state.²⁰⁹ Natural organic reduction,²¹⁰ or human composting, transforms human remains into sweet-smelling topsoil over a period of weeks.²¹¹ As of early

205. Reiss, *supra* note 202, at 570.

206. It is often said that the most effective way to dismantle regulatory capture is to not regulate an industry at all. Mark Calabria, *Preventing Regulatory Capture*, REGUL. REV. (June 23, 2016), <https://www.theregreview.org/2016/06/23/calabria-preventing-regulatory-capture/> [<https://perma.cc/NCQ9-NNBV>].

207. Victoria J. Haneman, *Alkaline Hydrolysis*, 47 ACTEC L.J. 55, 56 (2021).

208. In 2024, alkaline hydrolysis is legal in the following states: Alabama, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Maine, Maryland, Michigan, Minnesota, Missouri, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. *Alkaline Hydrolysis Legal States 2025*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/alkaline-hydrolysis-legal-states> [<https://perma.cc/LE8N-W9SK>].

209. Tony Cook, *Casket-Making Lawmaker Helps Kill Bill Allowing Alternative to Burial*, INDYSTAR. (Mar. 20, 2015, 6:11 PM), <https://www.indystar.com/story/news/politics/2015/03/20/casket-making-lawmaker-helps-kill-bill-allowing-alternative-burial/25109443/> [<https://perma.cc/TUM9-M8DP>].

210. Natural organic reduction also provides environmental benefits:

Rich soil is a disappearing resource: According to the Soil Science Society of America, it takes between 500 and a few thousand years to form an inch of topsoil, but only a year or two of farming and erosion to lose it. Our dead bodies could help ameliorate the problem: More than half of the world's population lives in cities, and [it is estimated that] each body could produce a cubic yard of compost.

Kiley, *supra* note 56.

211. The deceased is wrapped in an organic shroud and placed in a vessel, surrounded by organic matter. The process is sometimes accelerated by increasing the temperature, airflow, and humidity in the vessel so that microbes thrive. In temperature controlled indoor facilities, the process may take thirty to forty-five days. Outside facilities may take months. *Becoming Human Compost: The Process of Natural Organic Reduction*, TALKDEATH (June 21, 2022), <https://www.talkdeath.com/becoming-human-compost-the-process-of-natural-organic-reduction/> [<https://perma.cc/ZEW6-8KSV>].

2023, the process was legal in six states.²¹² In 2024, a legislator in Idaho introduced a bill to expand the state definition of cannibalism over fears of human composting.²¹³ IceBurial technology is being tested and used in China, with remains being freeze dried with liquid hydrogen and reduced to environmentally nurturing powder.²¹⁴ Promession is a similar process that faces legal opposition in the United States. Although the Kansas Legislature intended to broaden its statutes to accommodate “future forms of disposition,” Promessa has been told that the process of promession remains illegal in Kansas.²¹⁵

The DTC sales model is one of disintermediation, or removing the middleman from a supply chain and bringing a product or service directly to the consumer. As the world becomes increasingly digitized, the model has become increasingly popular with consumers.²¹⁶ DTC is creeping into death care through casket sales and cremation services.²¹⁷ Most caskets are sold through funeral homes, and some states require that caskets be purchased through someone with a funeral license.²¹⁸ Two casket companies (Batesville and Matthews) hold 82% market share and

212. States that have legalized natural organic reduction include Washington, Colorado, Oregon, California, New York, and Vermont. Natasha Piñon, ‘Human Composting,’ *Already Legal in 6 States, Could Help the Planet: ‘Young People Are Going To Teach Us To Die Better,’* CNBC, <https://www.cnbc.com/2023/02/16/what-is-human-composting-eco-friendly-alternative-to-burial-cremation.html> (Feb. 16, 2023, 3:17 PM).

213. Ian Max Stevenson, ‘They Fed It to Them’: Idaho Lawmaker Worried About Cannibalism, *Because of Human Compost*, IDAHO STATESMAN, <https://www.idahostatesman.com/news/politics-government/state-politics/article285234417.html> (Feb. 15, 2024, 7:41 AM).

214. Ani, *China Introduces IceBurial Tech Amid Risking Number of Covid Deaths*, BUS. STANDARD, https://www.business-standard.com/article/international/china-introduces-iceburial-tech-amid-rising-number-of-covid-deaths-123012000131_1.html (Jan. 20, 2023, 9:34 AM) (“This type of funeral has been run in Wuhan City on a trial basis. Corpses can be instantly frozen in liquid nitrogen at minus 196 degrees, and then turn into powder form. Much faster than cremation . . .”).

215. Michael Waters, *The Future of Death Tech Has No Rules—Yet*, WIRED (Jan. 24, 2020, 8:00 AM), <https://www.wired.com/story/the-future-of-death-tech-has-no-rules-yet/> [https://perma.cc/L6HM-K3BB].

216. Keith Nealon, *How Covid-19 Changed Retail — Probably Forever*, FORBES (July 22, 2021, 8:50 AM), <https://www.forbes.com/sites/forbesbusinesscouncil/2021/07/22/how-covid-19-changed-retail---probably-forever/>.

217. Caskets are a \$4 billion industry in the United States, with less than two percent of sales happening direct to the consumer. Jake Rossen, *Happily Buried: The Direct-to-Consumer Casket Business Is Taking Off*, MENTAL FLOSS (June 17, 2022), <https://www.mentalfloss.com/posts/direct-to-consumer-titan-casket> [https://perma.cc/VG23-XG7S].

218. Michael Waters, *Can the American Caskey Monopoly Be Disrupted?*, HUSTLE, <https://thehustle.co/casket-industry-monopoly-batesville/> [https://perma.cc/X2TB-6XMX] (Feb. 9, 2024).

are responsible for 8 of every 10 caskets sold.²¹⁹ Titan Casket has decided to challenge the casket monopoly,²²⁰ with the goal of delivering caskets directly to consumers at prices 50% to 85% less than retail.²²¹ Tulip Cremation is blazing a similar path forward in the DTC market with cremation services.²²² All arrangements for cremation through Tulip may be made online or over the phone, with comprehensive pricing available within minutes.²²³ Because of state licensing requirements, however, Tulip is currently operating in only nine states.²²⁴

In this type of regulatory climate, start-up companies are understandably leery of launching without legislative approval of the underlying product or service,²²⁵ and the cost of investor dollars is far higher when the law needs to be reformed.²²⁶ Regulation of the deathcare industry happens at the federal level through the Funeral Rule, which

219. *Id.*

220. It is estimated that military caskets account for one quarter of all of Titan's current sales. Gabriela Barkho, *Inside Titan's Strategy To Disrupt the Casket Industry*, MODERNRETAIL (Apr. 24, 2023), <https://www.modernretail.co/marketing/inside-titans-strategy-to-disrupt-the-casket-industry/> [https://perma.cc/2ZF9-FFKB].

221. Barkho continues:

For nearly a century, Ginsberg said that the American casket industry has remained stagnant. Some cheaper options, including pre-assembled DIY casket kits sold on Amazon, have popped up over the years to help save Americans on funeral costs. Ginsberg said Titan's pricing model and digital fulfillment offer a value proposition to families

Id.

222. Michael Waters, *Cremation Borrows a Page From the Direct-to-Consumer Playbook*, N.Y. TIMES (Feb. 3, 2022) [hereinafter Waters, *Direct-to-Consumer Playbook*], <https://www.nytimes.com/2022/02/03/business/cremation-startups-direct-to-consumer.html>.

223. TULIP, <https://www.tulipcremation.com> [https://perma.cc/M6DP-TZ7K].

224. *Frequently Asked Questions*, TULIP, <https://www.tulipcremation.com/faqs/faq.html> [https://perma.cc/AES9-4A3N].

225. One Ohio funeral director took matters into his own hands:

In 2011, a funeral director named Jeff Edwards began performing alkaline hydrolysis in Ohio even though the state had not explicitly legalized the process. He interpreted the broad language of an old Ohio statute . . . to mean that alkaline hydrolysis was legal. Without consulting the state, he went ahead with his alkaline hydrolysis business. Months later, the state rebuked him. Health officials ruled that alkaline hydrolysis was not, in fact, legal under state law

Waters, *supra* note 215.

226. A climate for disruption must exist to attract investors. "It's interesting because to create disruption, we are going to have to have outsiders coming in," [Micah Truman, founder and CEO of a California human composting start-up called Return Home] said. 'Because everyone in the funeral industry is so invested in existing technologies, you need outsiders to help with thinking outside the box—no pun intended.'" Paul, *supra* note 65.

imposes few requirements and has spotty enforcement.²²⁷ Most regulation of the industry happens at the state level, which creates a quilt of inconsistent laws—overinclusive, underinclusive, and often outdated.²²⁸ Areas of particular concern in the deathcare industry involve state-level regulation of funeral director licensing, narrow definitions of cremation, and outdated ready-to-embalm and abuse-of-corpse laws. Outdated state regulation requiring embalming education and facilities increases costs for consumers.²²⁹ Abuse-of-corpse laws restrict new death technology in the name of respecting the dignity of the deceased,²³⁰ but they have also prophylactically served to restrict new death technology and approaches to death care from coming to market.²³¹ Further, narrow statutory definitions of cremation exclude newer technologies including alkaline hydrolysis and promession.²³²

The proposal to tax shelter savings for deathcare expenses is likely to meet substantial resistance from the industry. The system itself creates perverse incentives when the at-need consumer is vulnerable and likely to spend more than the consumer who has preplanned. To the extent that

227. It is estimated that there are more than 20,000 funeral homes in the United States. From 2004 to 2010, the FTC visited only 839 funeral homes (or slightly more than 4%). U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-65, DEATH SERVICES: STATE REGULATION OF THE DEATH CARE INDUSTRY VARIES AND OFFICIALS HAVE MIXED VIEWS ON NEED FOR FURTHER FEDERAL INVOLVEMENT 9–10 (2011), <https://www.gao.gov/assets/files/gao.gov/assets/gao-12-65.pdf> [<https://perma.cc/7WNC-KXGH>].

228. See Haneman, *Prepaid Death*, *supra* note 16, at 332–33; Haneman, *Funeral Poverty*, *supra* note 36, at 435–36.

229. It is estimated that outdated “ready-to-embalm” laws increase the cost of a simple cremation by \$313 and a burial by \$546. See Haneman, *Funeral Poverty*, *supra* note 36, at 436 (citing David E. Harrington, *Preserving Funeral Markets with Ready-to-Embalm Laws*, J. ECON. PERSPS., Fall 2007, at 215).

230. Brittany Watts is being charged for abuse of corpse after flushing fetal tissue down the toilet, though it is unclear if fetal tissue qualifies as a corpse under the ambiguous Ohio statute. Julie Carr Smyth, *A Black Woman Was Criminally Charged After a Miscarriage. It Shows the Perils of Pregnancy Post-Roe*, AP, <https://apnews.com/article/ohio-miscarriage-prosecution-brittany-watts-b8090abfb5994b8a23457b80cf3f27ce> (Dec. 16, 2023, 12:01 PM).

231. Processes of excarnation, or the removal of flesh from remains, are illegal in the United States. However, the United Kingdom and many EU countries lack similar restrictions. Because of U.S. restrictions, there are 11,000 practicing Zoroastrians who must fly remains overseas to be placed in a Zoroastrian Tower of Silence—where their bodies are consumed by vultures—because their faith prohibits cremation and burial. Matthew Ponsford, *Dying To Be in Nature*, WELLCOME COLLECTION (Aug. 5, 2020), <https://wellcomecollection.org/articles/XxBNlxAAACMADnyb> [<https://perma.cc/58P2-SXC4>].

232. Jonathan Shorman, *Can You Get Your Body Vibrated into Particles When You Die? Debate Unfolds in Kansas*, WICHITA EAGLE, <https://www.kansas.com/news/politics-government/article237888864.html> (Dec. 4, 2019, 11:04 AM) (noting that Kansas is the first state where Promessa has sought to operate because of the state’s relatively lax cremation law).

deathcare “saving” is not deathcare “spending” (and therefore a threat to pre-need prepayment), the deathcare industry has every incentive to quell any movement to bring this type of instrument to market. Furthermore, the informed consumer who has saved (and perhaps preplanned) is far less likely to be limited to the menu of options and prices available at the first funeral home that is contacted, and innovative death technology that is green or affordable is more likely to attract consumer dollars.

IV. TOWARDS SOLUTIONS

Wealth affords resilience and the ability to meet many of life’s emergencies or inevitabilities without sacrificing basic needs. Wealth inequality is driven by a complex web of issues that includes accessible opportunity, public policy, and government programs.²³³ In the United States, poverty is the fourth leading cause of death²³⁴ and death care is the third largest expense in the lifetime of the average consumer.²³⁵ In a marketplace where the state-level regulatory environment may be limiting competition and driving up cost, significant change becomes impossible absent federal (direct or indirect) intervention.²³⁶ The question then becomes how best to shape federal intervention. Part IV considers the use of already-established 529 pathways to structure a tax-advantaged 529 End-of-Life (EOL) Savings Plan.²³⁷

A. Incentives for Pre-Need Planning

The deathcare consumer is situated differently from other consumers—incurring a large expense while sometimes having one’s consciousness torn asunder with grief because of at-need (after death) purchasing. The at-need consumer commonly has emotional and financial pressures weighing upon the decision-making process, all while engaging

233. See Madeline Brown, Signe-Mary McKernan & Trina R. Shanks, *A Safety Net of Income Supports Won’t End Financial Insecurity Alone. Addressing Wealth Gaps Is Just as Important.*, URB. INST. (July 25, 2022), <https://www.urban.org/urban-wire/safety-net-income-supports-wont-end-financial-insecurity-alone-addressing-wealth-gaps>.

234. Briana Contreras, *Poverty Is the Fourth Leading Cause of Death in the United States, Study Finds*, MANAGED HEALTHCARE EXEC. (Apr. 23, 2023), <https://www.managedhealthcareexecutive.com/view/poverty-is-the-fourth-leading-cause-of-death-in-the-united-states-study-finds> [<https://perma.cc/XF35-SHTE>].

235. RESOR, *supra* note 17, at 106.

236. See Lorelei Laird, *Consumer Activists Seek To Challenge ‘Protectionist’ Funeral Laws*, ABA J. (Aug. 1, 2014, 9:30 AM), https://www.abajournal.com/magazine/article/consumer_activists_seek_to_challenge_protectionist_funeral_laws/.

237. For more information on tax-sheltered prepayment incentives, see Haneman, *Prepaid Death*, *supra* note 16.

with an industry that exists in a lucrative space protected by state regulatory authorities. It's a lot.²³⁸ The deathcare landscape would radically shift in a way that would benefit the deathcare consumer, particularly those struggling with funeral poverty issues, if norms of deathcare planning leaned away from the at-need (after death) stage in favor of the pre-need (before death) stage, and if incentives were offered to encourage pre-need planning.

Consumers are generally advised against prepayment of deathcare expenses,²³⁹ and final expense (FE) insurance is generally expensive and limited.²⁴⁰ And though it is well-established that reliable and accessible credit and financial tools are meaningful for poverty reduction, these instruments to assist with the expense of death care simply do not exist in most states.²⁴¹ However, pre-need planning of death care does not require prepayment. Researching options and conversations about expectations can significantly mitigate cost, ease planning, and alleviate guilt for survivors.

For those who wish to ensure that funds are earmarked and available to cover the expense immediately, best practice is to recommend that the consumer open a savings account with a payable-on-death (POD) designation (sometimes called a "Totten Trust") to earmark funeral or deathcare funds.²⁴² The funds in the POD account can be distributed without having to go through the probate process, and the beneficiary

238. Season 1, Episode 2 of *And Just Like That...* brilliantly captures a grieving widowed Carrie attempting to plan the "perfect" funeral to feel some sense of control. Monika Sudakov, *How Episode 2 of 'And Just Like That...' Nails Grief*, MIGHTY, <https://themighty.com/topic/grief/and-just-like-that-episode-2-grief-reaction/> (Nov. 9, 2022).

239. A myriad of issues exist around prepayment instruments, including the fact that death care is largely managed on a state-by-state basis and that one can never be certain that death will happen in the state where the prepaid instrument has been purchased. See generally Haneman, *Prepaid Death*, *supra* note 16. That article discusses this issue at length, so it will not be rehashed here.

240. Insurance to cover death care is particularly problematic. Insurance is intended to spread risk of a life event broadly, reducing impact on any one person. In the case of funeral insurance, the expense is almost entirely inevitable.

241. See Shawna-Gay White, Access to Credit: A Viable Means of Poverty Alleviation (June 2, 2010) (M.A. thesis, Stanford University) (on file with author).

242. "Funeral industry proponents tend to emphasize that prepurchase is helpful since there is then money dedicated toward funeral expenses. Consumer advocates discourage prepurchase, and instead encourage preplanning, which allows people to decide in advance what type of funeral they will have but pay at time of death." Steven W. Kopp & Elyria Kemp, *The Death Care Industry: A Review of Regulatory and Consumer Issues*, 41 J. CONSUMER AFFS. 150, 153 (2007) (cleaned up).

cannot access the account during the lifetime of the account holder.²⁴³ Detailed deathcare instructions should be placed in writing, signed, notarized, and entrusted to the agent named on the POD savings account. Deathcare instructions should not be included in the will or trust, which is often referenced after arrangements have already been made and the need for planning is moot.²⁴⁴ The user deposits money in a savings account on an after-tax basis, and any income generated by the account will also be taxed annually.²⁴⁵

Our current approach is less than ideal. Accessibility to dignified death care is a basic human right, with Hugo Grotius, “the father of modern law,” commenting that “[t]he right to burial is common to all civilized nations, and it is evidence of our common nature of compassion, religion, and humanity.”²⁴⁶

B. A Targeted Program

Government programs provide public assistance that may be universal, targeted, or a combination thereof. Universal transfers are those available to everyone without eligibility conditions.²⁴⁷ A recent example is the legislation enacted in March 2021 that reimbursed \$9,000 in deathcare costs for almost all COVID-19 deaths, without regard to family need.²⁴⁸ Conversely, targeted transfers are based upon some eligibility criteria that either directly or indirectly focus available resources. In the 1960s and 1970s, the United States tilted in favor of universalistic policies—with benefits often gradually narrowing and

243. Natalie M. Perry & Rebecca Wallenfelsz, ACTEC, *Pitfalls of Pay on Death (POD) Accounts*, YOUTUBE, at 02:23 (Nov. 9, 2023), <https://www.youtube.com/watch?v=og6NYztcALk&t=7s>.

244. There is an inherent timing problem with including deathcare instructions in a will: Death care is usually arranged far in advance of the will being read or reviewed.

245. BRENDAN McDERMOTT, CONG. RSCH. SERV., R47492, TAX-ADVANTAGED SAVINGS ACCOUNTS: OVERVIEW AND POLICY CONSIDERATIONS 1–2 (2023), <https://crsreports.congress.gov/product/pdf/R/R47492> [<https://perma.cc/CXR2-CS6T>].

246. Aaron Lester, *Life, Reflected in the Dead*, HARV. GAZETTE (Apr. 30, 2014), <https://news.harvard.edu/gazette/story/2014/04/life-reflected-in-the-dead/> [<https://perma.cc/55RD-U3CW>].

247. David Coady & Nghia-Piotr Le, *Designing Fiscal Redistribution: The Role of Universal and Targeted Transfers* 5 (IMF, Working Paper, Paper No. 20/105, 2020), <https://www.imf.org/en/Publications/WP/Issues/2020/06/26/Designing-Fiscal-Redistribution-The-Role-of-Universal-and-Targeted-Transfers-49502> [<https://perma.cc/HF2Z-XXQJ>].

248. *COVID-19 Funeral Assistance*, supra note 129.

becoming targeted in the name of efficiently allocating resources.²⁴⁹ Over four decades (1979 to 2019), targeted programs grew at an annual rate more than forty percent faster than three universal programs in the United States (Medicare, Social Security, and unemployment insurance).²⁵⁰ Both universalism and targeted policy have shortcomings—the former failing to address inequalities in resource allocation, and the latter usually excluding some group in need.²⁵¹

A universal deathcare benefit is not without support in the United States.²⁵² It is a unicorn proposition, however, likely to remain mythical because it is both deeply problematic and it ignores the current political landscape. This Article instead suggests a practical path forward through targeted assistance crafted, utilizing a tax expenditure.

Tax expenditures are a form of government spending²⁵³ that is criticized as surreptitious.²⁵⁴ General wisdom holds that direct spending should always be favored over indirect spending because tax expenditures may be more difficult to assess, more susceptible to abuse, and far stickier and resistant to elimination than a line item on a budget. Tax expenditures also layer complexity into an already complicated system, which is the enemy of a simple and transparent tax system. With that said, tax expenditures have remained politically popular²⁵⁵ and have been

249. See THANDIKA MKANDAWIRE, U.N. RSCH. INST. FOR SOC. DEV., TARGETING AND UNIVERSALISM IN POVERTY REDUCTION (2005), <https://cdn.unrisd.org/assets/library/papers/pdf-files/mkandatarget.pdf> [<https://perma.cc/D3TN-5DNT>].

250. Greenstein, *supra* note 26.

251. Jesse Bedayn, *Targeted Universalism: A Solution for Inequality?*, CALMATTERS (Feb. 3, 2022), <https://calmatters.org/california-divide/2022/02/targeted-universalism-racial-inequality/> [<https://perma.cc/TY9A-HQ32>].

252. “Big Funeral” and Some Thoughts on “Universal Death Care,” FUNERAL DIR. DAILY (Oct. 8, 2021), <https://funeraldirectordaily.com/big-funeral-and-some-thoughts-on-universal-death-care/> [<https://perma.cc/WD9X-QD2F>] (noting that Virginia Tech professor Philip Olson, a technology ethicist, is one such proponent).

253. “Professor Stanley Surrey was the first to note this functional equivalency between certain tax provisions and direct governmental spending; he coined the term ‘tax expenditures’ to refer to such provisions.” Jonathan P. Schneller, *The Earned Income Tax Credit and the Administration of Tax Expenditures*, 90 N.C. L. REV. 719, 722 (2012) (footnote omitted).

254. For more on tax expenditures, see Boris I. Bittker, *Accounting for Federal “Tax Subsidies” in the National Budget*, 22 NAT’L TAX J. 244 (1969); Stanley S. Surrey & William F. Hellmuth, *The Tax Expenditure Budget – Response to Professor Bittker*, 22 NAT’L TAX J. 528 (1969); Boris I. Bittker, *The Tax Expenditure Budget – A Reply to Professors Surrey & Hellmuth*, 22 NAT’L TAX J. 538 (1969); STANLEY S. SURREY, *PATHWAYS TO TAX REFORM* (1973); STANLEY S. SURREY & PAUL R. MCDANIEL, *TAX EXPENDITURES* (1985).

255. Christopher Ellis & Christopher Faricy, *America’s Messy Tax Code Is Actually Quite Popular*, FORTUNE (May 20, 2021, 9:00 AM), <http://fortune.com/2021/05/20/tax-deductions-file-government-spending-income/> (noting an overwhelming number of respondents support government assistance through tax subsidies, at 77% for

characterized as “fiscal superconductors” that “allow[] policymakers to neutralize impediments to spending.”²⁵⁶ Tax incentives are also an economic tool by which the government may reduce the cost of capital investment into a new higher-risk industry.²⁵⁷

Presently, the primary wealth-building vehicles delivered through the Internal Revenue Code are homeownership and retirement-savings accounts.²⁵⁸ Other government-subsidized savings accounts are also leveraged to encourage households to save for activities considered to be socially desirable.²⁵⁹ Tax-incentivized accounts may exclude contributions from tax at time of deposit (*e.g.*, traditional retirement accounts and HSAs) or shelter the growth of the account from being taxed (*e.g.*, Roth retirement accounts, 529 plans,²⁶⁰ Coverdell accounts, and ABLE accounts).²⁶¹ Saver’s Credits are also sometimes available.²⁶² The Saver’s Credit is a nonrefundable tax credit available for up to fifty percent of the first \$2,000 deposited into an individual retirement account (and ABLE accounts are eligible through 2025).²⁶³

C. The 529 End-of-Life Savings Plan

Creative utilization of 529 plans is a subject that has only started to be considered. Buried in 2022 legislation intended to assist people with saving for retirement, effective January 2024, parents may roll over \$35,000 of unused 529 plan funds into a Roth IRA for their child.²⁶⁴

retirement and 60% for mortgage interest, compared to direct spending, at 48% and 42%, respectively).

256. Steven A. Dean, *The Tax Expenditure Budget Is a Zombie Accountant*, 46 UC DAVIS L. REV. 265, 268, 272–73, 284 (2012).

257. Maya Forstater, *The Good, the Bad, and the Ugly: How Do Tax Incentives Impact Investment?*, CTR. FOR GLOB. DEV. (Oct. 16, 2017), <https://www.cgdev.org/blog/good-bad-and-ugly-how-do-tax-incentives-impact-investment>.

258. *How Might Low- and Middle-Income Households Be Encouraged To Save*, TAX POL’Y CTR., <https://www.taxpolicycenter.org/briefing-book/how-might-low-and-middle-income-households-be-encouraged-save> (Jan. 2024).

259. See McDERMOTT, *supra* note 245, at 1.

260. The federal government spent almost \$2 billion per year to support 529 plans as of 2019. SHARMILA MANN, EDUC. COMM’N STATES, 529 EDUCATION SAVINGS PLANS: FEDERAL ACTION AND STATE POLICY TRENDS 2 (2019), <https://www.ecs.org/wp-content/uploads/529-Education-Savings-Plans-Federal-Action-and-State-Policy-Trends.pdf> [<https://perma.cc/3FX8-CBDB>].

261. McDERMOTT, *supra* note 245, at 1–2.

262. The “take up” or use of the Saver’s Credit is fairly low, only 6.1% of taxpayers claimed the credit in 2019, because it is nonrefundable. *Id.* at 5.

263. *Id.*

264. *Families Can Roll Unused Funds from Their 529 Account into a Roth Individual Retirement Account (IRA)*, NEXTGEN 529, <https://www.nextgenforme.com/>

Also, Senator Ted Cruz included a little-known provision in the Tax Cut and Jobs Act of 2017 that is “the most far-reaching federal school choice legislation ever passed”; it expands use of 529 funds to K–12 private school education.²⁶⁵ Sixteen cities or states now offer some type of contribution matching or grant for the parent that opens a state 529 plan.²⁶⁶ In 2022, California launched a program for all families of low-income public school students, where a seed investment of \$500 to \$1,500 was automatically deposited in a state 529 plan for each child.²⁶⁷ Following California’s lead, in January 2023, every New York City kindergartener automatically received \$100 deposited into a state 529 plan in their name as an incentive to start college savings early.²⁶⁸

Creation of a 529 End-of-Life (EOL) Savings Plan for deathcare savings is practical and feasible. It would require only a simple amendment to the Internal Revenue Code to expand the federally tax-advantaged framework.²⁶⁹ Infrastructure reuse allows for maximization of incentive design with more predictable downside risk and for deathcare services savings plans to be administered through already established pathways in each state.²⁷⁰ It leverages the experience that has been gained from lessons learned and problems solved with 529 plan implementation.

Importantly, the 529 EOL Plan may be made “spend-down eligible” for Medicaid if irrevocable, with a named funeral agent designated on

rolling-unused-funds-from-a-529-account-into-a-roth-ira/ [https://perma.cc/9478-8MES].

265. *Sen. Cruz: Amendment*, *supra* note 178.

266. California, Colorado, Connecticut, Kansas, Louisiana, Massachusetts, Maryland, Maine, Nevada, New York City, North Dakota, Oregon, Pennsylvania, Rhode Island, Tennessee, and West Virginia. Trina Paul, *These States Offer Free Money When You Open a 529 College Savings Plan for Your Child*, CNBC: SELECT, <https://www.cnbc.com/select/states-offer-free-money-towards-529-college-savings-plans/> [https://perma.cc/BQ2P-HWSR] (Nov. 8, 2021).

267. *California Officially Launches Nation’s Largest College Savings Program for Millions of Students and All Newborns*, GOV. GAVIN NEWSOM (Aug. 10, 2022), <https://www.gov.ca.gov/2022/08/10/california-officially-launches-nations-largest-college-savings-program-for-millions-of-students-and-all-newborns/> [https://perma.cc/T375-ZK2H].

268. Amy Zimmer, *College Funds for NYC’s Kindergarteners: How To Get and Give Seed Money for Higher Education*, CHALKBEAT N.Y. (Dec. 22, 2022, 1:11 PM), <https://www.chalkbeat.org/newyork/2022/12/22/23522970/nyc-scholarship-account-kindergarten-college-savings-account-kids-rise-529-plan/> [https://perma.cc/5Y72-Q69A].

269. Tax-sheltered savings accounts for death care can and should be done independently of (or in addition to) the pre-need prepayment proposal. *See generally* Haneman, *Prepaid Death*, *supra* note 16.

270. The purpose of this Article is not to debate whether or not states should hold a monopoly over 529 plans or whether these plans should also be available through the private marketplace. For more discussion on this topic, see Curtis, *supra* note 31, and Bullard, *supra* note 28.

the account to arrange for use of funds on death. To qualify for Medicaid long-term care, senior citizens must have limited assets and income.²⁷¹ Prepaying for a funeral plan is usually exempt and will not be counted in determining Medicaid eligibility.²⁷² Rather than forfeiting any balance remaining in the account, and to disincentivize overspending on death care, the balance may be transferred to the 529 EOL Plan of a qualified individual (defined to include family members).

A tax-advantaged 529 EOL Plan would be used to pay for qualified deathcare expenses, with not all expenses being qualified for reimbursement. A person would open a 529 EOL Plan and be named as the account owner. Withdrawals from the plan would be called distributions, and only distributions for spending on qualified expenses would be made without tax penalty. All unqualified distributions from a traditional 529 plan incur federal income tax and an additional ten percent tax penalty, but making these accounts spend-down eligible for Medicaid purposes will require that no unqualified distributions are permitted at all. Only spending on expenses related to the now-deceased account owner would be eligible for reimbursement. The named account beneficiary would possess the rights of sepulcher²⁷³ over the decedent and control all decisions relevant to deathcare purchasing. Use of the 529 plan and designation of a beneficiary would allow the decedent to opt out of sepulcher statutes to vest the agent of their choice with control over their remains.

The criticism of the 529 EOL Plan may be that—drawing from experience with 529 plans for college savings—the plans will do little to help low- and middle-income households, many of whom do not even know of the availability of the savings instruments.²⁷⁴ It is true that almost all tax code-based public subsidies skew in favor of delivering benefits

271. To qualify for Medicaid in 2025, the income of a single patient may not exceed \$2,901 in most states, although this ceiling varies by state and type of Medicaid. For more data, see *Medicaid Eligibility Income Chart By State*, AM. COUNCIL ON AGING, <https://www.medicaidplanningassistance.org/medicaid-eligibility-income-chart/> [https://perma.cc/N6AJ-AA84] (Feb. 24, 2025).

272. *How Can a Prearranged Funeral Plan Help You Qualify for Medicaid?*, FUNERAL BASICS, <https://www.funeralbasics.org/medicaid-qualification-rules-and-how-to-spend-down-with-a-burial-plans/> [https://perma.cc/AXA3-5FWH].

273. The common law right of sepulcher is the ministerial right to the decedent's remains, to ensure that cremation, burial, or some other legal type of disposition takes place. Usually, the right of sepulcher is vested in statutorily defined next of kin. Tanya D. Marsh, *When Dirt and Death Collide: Legal and Property Interests in Burial Places*, PROB. & PROP., Mar./Apr. 2016, at 59, 62.

274. Robert H. Scott III & Steven Pressman, *Poor and Middle-Income Families Need a Better Way Than 529s To Save for College*, CONVERSATION (May 26, 2017, 7:34 PM), <http://theconversation.com/poor-and-middle-income-families-need-a-better-way-than-529s-to-save-for-college-78436> [https://perma.cc/KX34-ULBL].

to higher-income and wealthy taxpayers.²⁷⁵ This criticism is also based upon the way in which 529 plans are presently structured, but it ignores the fact that a 529 EOL Plan may be purposefully and creatively designed to broaden access. Further, the wealthiest one percent of taxpayers spend the least on deathcare expense and have little need for a contribution-limited 529 EOL Plan.

A number of researchers have devoted considerable resources to the use of 529s as building blocks for inclusive asset-building and savings policy.²⁷⁶ Contribution matching for 529 plans is available in several states for low- and moderate-income residents.²⁷⁷ Grants may be deposited into the accounts to provide the financial boost needed to encourage contribution.²⁷⁸ By way of example,²⁷⁹ all of New York City's kindergarteners will receive a \$100 investment in a state 529 plan in January 2023.²⁸⁰

The 529 EOL Plan would be structurally designed to appeal almost entirely to low- and middle-income families. In fact, the ability to deliver broad subsidies and incentives through these savings plans is arguably an untapped well. These plans are broadly available (every state has some form of 529 plan available) and relatively unrestricted in terms of initial contribution (they may generally be opened with a small deposit of as

275. Vada Waters Lindsey, *Encouraging Savings Under the Earned Income Tax Credit: A Nudge in the Right Direction*, 44 U. MICH. J.L. REFORM 83, 83–84 (2010) (“[T]he wealthiest 10% own more than two-thirds of the capital investments and private retirement assets.”). This was largely the reason why President Obama suggested to repeal the 529 plan during his 2015 State of the Union, although he walked back the proposed repeal almost immediately in the face of staggering bipartisan outcry. Betty Lochner, *President Realizes Formula for College Success Includes Savings Incentives*, COLL. SAV. PLANS NETWORK (Jan. 29, 2015), <http://www.collegesavings.org/president-realizes-formula-for-college-success-includes-savings-incentives/> [https://perma.cc/M2CL-JYLL].

276. Margaret Clancy, *College Success: Increasing Access Through Inclusion in 529 Plans*, WASH. UNIV. ST. LOUIS: CTR. FOR SOC. DEV., <http://csd.wustl.edu/items/college-success/> [https://perma.cc/6R46-2T8L] (noting that the Center for Social Development is researching and working to “put in place an inclusive 529 platform for educational savings to increase postsecondary degree success among lower-income children, youth, and non-traditional students”); Debra-Ellen Glickstein & Leila Bozorg, *Opinion: Investing in Opportunity Through Inclusive 529 College Savings Plans*, NYN MEDIA (May 31, 2023), <https://www.cityandstateny.com/nyn-media/2023/05/opinion-investing-opportunity-through-inclusive-529-college-savings-plans/386944/> [https://perma.cc/UW6S-2AT5].

277. Glickstein & Bozorg, *supra* note 276.

278. *Id.*

279. “In 2014, you had to visit at least five kindergarten classrooms in the lower income NYC neighborhoods to find one student with a 529 account, whereas in the highest income neighborhoods about half the students in a class had an account.” *Id.*

280. Zimmer, *supra* note 268 (also noting that parents receive an additional \$25 when they activate the account).

little as \$25).²⁸¹ In one survey considering ways to broaden access to 529 plans, 95% of respondents agreed or strongly agreed that offering 529 plans through employers (or in the workplace) would likely increase access to lower- and middle-income families, and 43% of employees surveyed by ADP stated that they would participate in a 529 plan if able to do so through payroll deduction.²⁸² Further, there are creative opportunities to introduce progressivity into these accounts at the state level through aggressive implementation of the savings match programs presently offered in some states for low- to moderate-income families.²⁸³

The 529 EOL Plan is a unique approach that tax shelters savings for lower-income taxpayers, and this savings approach depends upon matching, accessibility, and flexibility. Each account would allow a lifetime maximum of \$2,500 to \$5,000 to be placed into the plan. States may choose to offer state tax benefits for contributions into the plan, such as a tax deduction in the amount of the contribution. A tax refund may be paid directly into the 529 plan, with an incentive of an additional matching contribution. Refundable tax credits for those below a certain income level may instead be deposited into the 529 plan. Low contribution amounts, such as \$10, would be eligible for contribution directly through paycheck withdrawal. Any remaining account balance can be rolled into the 529 EOL Plan of another owner, up to \$3,000.

Further, the list of qualified expenses may be adjusted to advance social goals. To the extent that one's last act on earth should not be to damage the planet through traditionally toxic funeral and burial practices, it may be forward-thinking to qualify only environmentally friendly expenses. In the interest of affordability, amounts reimbursable through the 529 EOL Plan should be capped (*e.g.*, no more than \$5,000 for funeral expenses and \$2,500 for burial expenses), to avoid placing upward pressure on pricing.

D. The Comparison

Prepayment of funeral expenses, as discussed above, is deeply problematic and usually inadvisable, with the exception being Medicaid spend-down.²⁸⁴ The only alternatives for those who wish to set aside the funds for death care is either a savings account with POD benefits or an

281. Some states allow accounts to be opened with as little as \$10 through an automatic deposit plan. MARGARET CLANCY & MICHAEL SHERRADEN, CTR. FOR SOC. DEV., *THE POTENTIAL FOR INCLUSION IN 529 SAVINGS PLANS: REPORT ON A SURVEY OF STATES* 14 (2003), <https://core.ac.uk/download/pdf/233216632.pdf> [<https://perma.cc/Q7D5-E6BG>].

282. *Id.* at 10.

283. *Id.* at 12.

284. Haneman, *Prepaid Death*, *supra* note 16, at 332 n.15.

insurance product. Both options are less than ideal. Insurance is increasingly expensive (and sometimes unaffordable) with age and health conditions.²⁸⁵ FE insurance is expensive, with an average rate of almost \$70 per month for \$10,000 of coverage for a male over sixty.²⁸⁶ These policies also often have a graded benefit that limits payout under the policy if the insured dies within two to three years of taking out the policy.²⁸⁷ Savings accounts with POD (payable on death) benefits are the best option for today's consumer, but these accounts frequently provide little return on investment, with a national average of 0.48% annually as of March 2025.²⁸⁸ The 529 EOL Plan is a more financially prudent approach to managing death care than burial or funeral insurance.

The below models assume that a 65-year-old male has applied for \$2,000 of FE insurance. Premiums on [Funeralfunds.com](https://www.funeralfunds.com) range from \$14 to \$23, so the models use a monthly premium of \$20. With a 529 EOL Plan, growth is not guaranteed. Returns may range from 1% to 20% annually depending upon market conditions and plan selected.²⁸⁹ The below models assume a 7%²⁹⁰ rate of return, compounded monthly.²⁹¹

285. Dominic Powell, Opinion, *Why It Pays To Consider the Cost of Your Funeral*, AGE (June 9, 2024, 5:00 AM), <https://www.theage.com.au/money/saving/why-it-pays-to-consider-the-cost-of-your-funeral-20240605-p5jjkb.html> [<https://perma.cc/4JQ3-5B8J>].

286. Metz & Masterson, *supra* note 119.

287. *Id.*

288. Lauren Ward & RaShawn Mitchner, *What Is the Average Savings Account Interest Rate?*, MARKETWATCH, <https://www.marketwatch.com/guides/savings/average-savings-account-interest-rate/> [<https://perma.cc/K9LE-Y6PN>] (Mar. 2024).

289. As of March 2025, the average annual return of New York's Mid-Cap Stock Index Portfolio since inception is 10.02%. *Price & Performance*, NY's 529 COLL. SAV. PROGRAM, <https://www.nysaves.org/home/which-investments/price-performance.html> [<https://perma.cc/P3KF-JM9K>]. Fidelity's Growth Opportunities Portfolio has a ten-year rate of return of 17.29%. *529 Plans: Pricing & Performance*, FIDELITY, https://institutional.fidelity.com/app/tabbed/avgannualreturns/FIIS_PP_SP36_DPL1_AVG.html [<https://perma.cc/4K67-M659>]. The state of Oklahoma's Diversified Equity Option has a ten-year rate of return of 8.83% and a rate of return of 7.84% since its inception in 2006. *Daily Price and Performance*, OKLA. 529, <https://www.oklahoma529.com/investment/price-performance> [<https://perma.cc/ZY27-MS3W>]. Vanguard's lower risk Target Enrollment 2022/23 Portfolio with a conservative allocation had a 2023 return of 5.24%. *529 Portfolio*, VANGUARD, <https://investor.vanguard.com/accounts-plans/529-plans/profile/4659> [<https://perma.cc/9TEL-HRRF>].

290. For the compound interest calculator used for computations, see *Compound Interest Calculator*, INVESTOR.GOV, <https://www.investor.gov/financial-tools-calculators/calculators/compound-interest-calculator> (last visited Mar. 20, 2025).

291. For illustration purposes, Fidelity assumes a 7% rate of return compounded monthly over eighteen months. FIDELITY INVS., *START INVESTING TODAY. BE READY*

<i>529 EOL Plan</i>	<i>FE Insurance</i>
\$0 initial investment \$20/month contribution	\$0 initial investment \$20/month premium
	<i>\$2,000 total benefit</i>
\$1,431 by Year 5 \$3,461 by Year 10 \$10,418 by Year 15	\$1,200 by Year 5 \$2,400 by Year 10 \$3,600 by Year 15

Model 1.

Model 1 illustrates that between years six and seven, this taxpayer will have earned more in the 529 EOL Plan than they will ever receive in benefits from the \$2,000 funeral insurance policy.²⁹² Most policies will also not provide benefits in years one or two (and sometimes year three), which means that a taxpayer would only potentially be in a better position with the FE insurance if they died in years four, five, or six. For those dying before year four or after year six, the 529 EOL Plan is a far better option.

<i>529 EOL Plan</i>	<i>FE Insurance</i>
\$100 initial investment \$10/month contribution	\$0 initial investment \$20/month premium
	<i>\$2,000 total benefit</i>
\$857 savings by Year 5 \$1,931 savings by Year 10	\$1,200 paid by Year 5 \$2,400 paid by Year 10

Model 2.

Model 2 illustrates that an initial investment of \$100 into a 529 EOL Plan (which can be provided to the lower income taxpayer through a government subsidy), plus \$10 per month in contributions, places the taxpayer in almost the same position by year ten as a payment of \$20 a

FOR COLLEGE TOMORROW., at 2, <https://institutional.fidelity.com/app/proxy/content?literatureURL=/792223.PDF> [<https://perma.cc/H3DY-TAQC>].

292. Amount saved in Year 7 is \$2,159.

month, every month. The benefit of the 529 EOL Plan, however, is that payments may cease at year ten. The payments with FE Insurance must continue until death or the \$2,000 benefit is lost.

<i>529 EOL Plan</i>	<i>FE Insurance</i>
\$1,000 initial investment	\$0 initial investment
\$0/month contribution	\$20/month premium
	<i>\$2,000 total benefit</i>
\$1,417 savings by Year 5	\$1,200 paid by Year 5
\$2,009 savings by Year 10	\$2,400 paid by Year 10

Model 3.

Model 3 illustrates the way in which the social safety net may be expanded to provide for death care for those with lower income. An initial investment of \$1,000 into a 529 plan, which may be made through a government subsidy for lower income taxpayers, will provide more than \$2,000 of deathcare benefits by year ten with \$0 contribution by the taxpayer.

E. Expanding the Safety Net

Federal subsidization of deathcare saving is one step in the right direction to provide for the basic human need of dignified death care, for several reasons. First, ignoring systemic gaps that prompt reliance upon social media and crowdfunding is a moral failure.²⁹³ Implicitly encouraging reliance on social media and crowdfunding perpetuates systemic inequality by forcing people to beg for assistance—particularly because some people are positioned to beg more effectively.²⁹⁴ Crowdfunding has demonstrated that a response to inequality is to

293. Crowdfunding should not be relied upon as a means to repair a fractured social safety net, and no one should have to beg for money to meet basic human needs such as housing and healthcare. *See Ovide, supra* note 7.

294. Jonathan Hiskes, *The Moral Failure of Crowdfunding Health Care*, MEDIUM (Apr. 3, 2017), <https://simpsoncenter.medium.com/the-moral-failure-of-crowdfunding-health-care-286c8e1b7b8e> (“Compelling people to compete for funds based on how deserving your personal narrative is a tragedy in itself.”).

reproduce the inequality²⁹⁵ because we assess narratives of deservingness in judging whether to contribute to a cause.²⁹⁶ It is causing us to ignore gaps in the social safety net in favor of a type of hyperindividualized misery competition.²⁹⁷

Further, the Internal Revenue Code has served an important role in expanding the social safety net and engaging with poverty mitigation.²⁹⁸ And though federally incentivized savings approaches largely benefit higher-income and wealthy taxpayers, creative approaches are being implemented to create a shift. In 2027, the Saver's Match program could potentially prove to dramatically assist low- and middle-income taxpayers²⁹⁹ with broadening their retirement savings.³⁰⁰ The federal government will match fifty percent of retirement account contributions for taxpayers earning up to \$35,500 per individual (or \$71,000 per couple) up to \$2,000 per year (or \$4,000 per couple).³⁰¹ The matching funds will be placed directly into the retirement account.³⁰² The ancillary benefit of this program is that it will likely provide state-run auto-IRA programs a boost.³⁰³ Also, this type of approach creates a "culture of

295. An estimated twenty percent of millennials have engaged in memorial crowdfunding, as opposed to only four percent of those over the age of forty. *A Growing Number of Millennials Seek Crowdfunding for Final Expenses*, *supra* note 4.

296. Hiskes, *supra* note 294 (noting that people use rhetoric to support deservingness, including "I wish I didn't have to do this. I'm so embarrassed," and disclaimers, such as "I wouldn't do this unless I had nowhere else to turn").

297. Lauren S. Berliner & Nora J. Kenworthy, *Producing a Worthy Illness: Personal Crowdfunding Amidst Financial Crisis*, 187 SOC. SCI. & MED. 233, 234 (2017).

298. The federal government estimates that the individual income tax reduces total poverty by fifteen percent. MARGOT L. CRANDALL-HOLLICK, GENE FALK & JAMESON A. CARTER, CONG. RSCH. SERV., R45971, THE IMPACT OF THE FEDERAL INCOME TAX CODE ON POVERTY (2020), <https://sgp.fas.org/crs/misc/R45971.pdf> [<https://perma.cc/BUK6-A28R>].

299. Margarida Correia, *Industry Wild About Government Match for Low Earners*, PENSIONS & INVS. (Jan. 16, 2023, 12:00 AM), <https://www.pionline.com/retirement-plans/industry-wild-about-government-match-low-pay-retirement-savers> (noting that the 2027 Saver's Match program is "very well targeted toward the soft middle of the retirement system," referring to middle-income workers who do not benefit much from tax incentives).

300. Mark Henricks, *The Federal Government Will Match Your Retirement Plan Savings by 50%. Here's Who Qualifies.*, SMARTASSET (Sept. 21, 2023, 7:00 AM), <https://smartasset.com/retirement/federal-government-retirement-match> [<https://perma.cc/9ADS-XFLA>].

301. Rachel Hartman, *How To Qualify for the Retirement Saver's Match*, U.S. NEWS (Mar. 15, 2024, 11:55 AM), <https://money.usnews.com/money/retirement/iras/articles/how-to-qualify-for-the-retirement-savers-match>.

302. *Id.*

303. Correia, *supra* note 299.

saving” for taxpayers who may not ordinarily set aside retirement funds.³⁰⁴

Third, expanding the deathcare safety net through the 529 EOL Plan structure is appropriate and necessary because of state-level regulatory capture. Although modern policy trends are in favor of shifting funding and governance of social safety net programs to state and local governments, the outsized role of the deathcare industry in most states must bear directly on any policy decision.³⁰⁵ State regulatory bodies responsible for oversight of the funeral industry on the local level are arguably captured by industry gatekeeping behaviors that discourage healthy competition. The interests of the incumbent businesses operating in the marketplace take priority over the protection of the consumer. Death technology innovators, such as Tulip, are contending with regulatory capture issues as they navigate entry into the marketplace and attempt to scale business across many states.³⁰⁶ Federal subsidies will circumvent state-level regulatory capture to shape policies intended to advance healthy competition within the deathcare market and may be directly tailored to do so.

This use of the 529 infrastructure to address a gap in the social safety net speaks to larger possibilities when navigating a highly partisan political process. Expanding the social safety net during the pandemic kept millions from falling into poverty,³⁰⁷ with more than \$5 trillion spent on broadening programs.³⁰⁸ The need for safety-net deathcare assistance during COVID-19 was obvious, and Congress authorized FEMA to provide up to \$9,000 of funeral assistance for COVID-19-related deaths occurring from January 2020 through March 2023.³⁰⁹

304. *Id.*

305. Sarah Bruch, Scholars Strategy Network, *Inequalities in U.S. “Safety Net” Programs for the Poor*, JOURNALIST’S RES. (Nov. 13, 2015), <https://journalistsresource.org/economics/inequalities-safety-net-programs-poor/> [https://perma.cc/77YT-Y2LV].

306. Waters, *Direct-to-Consumer Playbook*, *supra* note 222.

307. “According to the Census Bureau, the child tax credits alone pulled 5.3 million people out of poverty in 2021.” Kyle Swenson, *The \$5 Trillion Pandemic Safety Net Changed Lives. Now It’s Over.*, WASH. POST (Aug. 7, 2023, 6:10 AM), <https://www.washingtonpost.com/dc-md-vi/2023/08/07/maryland-cares-act-covid-relief-rescue-plan-ending/>; Asha Banerjee & Ben Zipperer, *Pandemic Safety Net Programs Kept Millions Out of Poverty in 2021, New Census Data Show*, ECON. POL’Y INST.: WORKING ECON. BLOG (Sept. 13, 2022, 3:34 PM), <https://www.epi.org/blog/pandemic-safety-net-programs-kept-millions-out-of-poverty-in-2021-new-census-data-show/> [https://perma.cc/2CWF-7NBK].

308. Swenson, *supra* note 307 (noting that the “federal government’s intervention prevented full-scale economic disaster during the pandemic”).

309. ELIZABETH M. WEBSTER, CONG. RSCH. SERV., IN11582, FEMA FUNERAL ASSISTANCE FOR COVID-19 1–2 (2023), <https://crsreports.congress.gov/product/pdf/IN/IN11582> [https://perma.cc/6E6Z-LAM7].

The hidden side of the American welfare state includes loans, loan guarantees, and tax expenditures.³¹⁰ Visible social welfare programs help the poorest and neediest, while tax expenditures often provide assistance for a broader swath of Americans.³¹¹ To the extent that direct spending should usually be favored over indirect spending, the reality is that many direct spending initiatives will not survive the political process. An important example is the Child Tax Credit and child tax exemption, both of which meaningfully reduce the number of children living in poverty.³¹² The Child Tax Credit should and could be replaced with a universal, monthly child allowance.³¹³ And yet, the likelihood of a universal child allowance surviving the political process is slim.³¹⁴ Throughout American history, direct spending programs have been met with controversy, debate, and resistance, whereas tax expenditures pass with far less resistance.³¹⁵ This approach falls short of the ideal, but it may be the only path to action to help those in need in a conflict-riddled political environment.

And, importantly, tax sheltering deathcare savings offers an incentive to encourage investment and innovation in the pre-need deathcare space.³¹⁶ Government intervention is warranted to fix the failures in a system in which consumers should be engaging with pre-need planning, but instead opt for at-need planning because of the undesirability of the underlying expense.³¹⁷ Tax incentives that stimulate investment activity may be direct (to the investor) or indirect (to

310. See Christopher Howard, *The Hidden Side of the American Welfare State*, 108 POL. SCI. Q. 403, 403 (1993).

311. *Id.* at 417.

312. H. Luke Shaefer et al., *A Universal Child Allowance: A Plan To Reduce Poverty and Income Instability Among Children in the United States*, RSF, Feb. 2018, at 22, 23.

313. *Id.* at 24.

314. See *id.* at 29.

315. "Congress's use of tax expenditures has accelerated over the years. In 1972, for example, the JCT Staff's first description of tax expenditures totaled some 60 items. Our 2007 pamphlet, by contrast, while employing essentially the same methodology as that of our first description 35 years earlier, listed 170 tax expenditures." STAFF OF JOINT COMM. ON TAX'N, 110TH CONG., A RECONSIDERATION OF TAX EXPENDITURE ANALYSIS 4 (Comm. Print 2008) (footnote omitted), <https://www.jct.gov/publications/2008/jcx-37-08/> [<https://perma.cc/HUB6-V8YY>].

316. "Private incentives to innovate and commercialize many technologies are often inadequate in terms of their social benefits. With America's economic leadership position at risk of slipping, it becomes increasingly important to consider what measures public entities can take to promote the innovation and commercialization of those technologies that are essential to American welfare." Sarah Tran, *Expediting Innovation*, 36 HARV. ENV'T L. REV. 123 (2012).

317. Jacob Nussim & Anat Sorek, *Theorizing Tax Incentives for Innovation*, 36 VA. TAX REV. 25, 31–32 (2017).

encourage consumption).³¹⁸ The 529 EOL Plan is designed to encourage lifetime planning and saving to support a more informed consumer at time of death.

CONCLUSION

Deathcare expense represents far more than disposal of organic waste, and there are several important noneconomic drivers: satisfying community expectations, honoring cultural traditions, contending with guilt of loss, and sometimes avoiding peer judgment. In several ways, this Article subtly speaks to the larger unanswered question of whether deathcare services are more for the benefit of the living or the deceased.

Expanding the social safety net to incentivize lifetime planning and saving for death care recognizes, on an implicit level, the role that the law plays in causing the problem itself.³¹⁹ This is the product of deeply intertwined issues, including the luxury of death invisibility, regulatory capture masquerading as consumer protection, and the profitability inherent in a vulnerable consumer. Tax sheltering savings through the proposed 529 EOL Plan leverages tax incentives to prompt a conversation around death care that implicitly strikes at the taboo that contributes to consumer vulnerability, while also serving as a scaffold by which meaningful assistance may be delivered to the most vulnerable, sidestepping political opposition to universal benefits programs. It is a program that will help to deliver resilience to our most vulnerable consumers and to provide a means by which dignified deathcare options will be available to all.

318. *Id.* at 73.

319. “Vulnerability theory emphasizes that state action influences the structures that develop individuals’ resilience against catastrophe—wealth, income, educational status, cultural competence, social networks, neighborhoods, and other tools that people rely on to endure hardship—and that these structures are often more important than laws or institutions that provide after-the-fact support to those who have suffered harm.” Lawrence, *supra* note 6, at 64.