

## **NAIL IN THE COFFIN: CAN ELDERLY AMERICANS AFFORD TO DIE?**

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*High funeral costs and confusing funeral regulations prevent families and friends from burying their loved ones with dignity. Current federal regulations, as well as past proposed regulations focus on misrepresentation in the funeral industry with little consideration to how regulations actually affect cost. In this Note, Ms. Howell Boldt examines the Funeral Rule as well as two Acts that were proposed by the 112th Congress to change the funeral industry, the Bereaved Consumer's Bill of Rights Act of 2011, and the Indigent Funeral Expense Reimbursement Act of 2011. Ms. Howell Boldt argues that in order for federal regulations to assist low-income consumers, the United States Congress must consider the price implications of funeral regulations, including the effects of legislation on minority cultural or ethnic groups. Further, the United States Congress should focus on making cost savings an important goal in the promulgation of funeral regulations, along with the prevention of misrepresentation and fraud.*

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## I. Introduction

Recently, rats were discovered eating bodies in the refrigerated garage of a county coroner's office.<sup>1</sup> The garage was the only available storage space for unclaimed bodies because the coroner's office was at its storage capacity.<sup>2</sup> This is not a result of abuse in the funeral industry; the coroner's office was storing the bodies out of necessity.<sup>3</sup> Rather it is a result of high funeral costs and confusing funeral regulations, preventing families from burying their loved ones with dignity.

For quite some time death has been called the great equalizer, as Mitch Albom writes, "[m]aybe death is the great equalizer, the one big thing that can finally make strangers shed a tear for one another."<sup>4</sup> Yet, while everyone dies, those left behind are unequal. The average current cost of a funeral in America is \$6,560.<sup>5</sup> Dying is something that low-income elders, as well as their family members, cannot afford.<sup>6</sup> This Note will focus on the difficulties of paying for "at need funerals" and not on the complex issues associated with pre-need funeral contracts.<sup>7</sup> Sixty-seven percent of Baby Boomers believe they will run out of money during their lifetime.<sup>8</sup> They will leave their loved ones with the problem of paying for a funeral no one can afford.

The American funeral industry handles roughly two million deaths per year.<sup>9</sup> The majority of consumers are elders making arrangements for their spouses, partners, or themselves.<sup>10</sup> The county or state may pay for funerals, but as state and local government budg-

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1. Christine Daleiden, *Regulations for the Dead*, 10 HAW. B. J. 4, 4 (2006).

2. *Id.*

3. *Id.*

4. MITCH ALBOM, *TUESDAYS WITH MORRIE* 51 (1997).

5. *Funeral Service Facts*, NAT'L FUNERAL DIRS. ASS'N, <http://www.nfda.org/about-funeral-service-/trends-and-statistics.html#fcosts> (last visited Mar. 31, 2013).

6. Megan C. Wells, *Dead Bodies Everywhere (Dun Dun Dun): Funeral Trends in This Recession and the Laws Regulating These Changes*, 2 EST. PLAN. & COMMUNITY PROP. L. J. 485, 486 (2010).

7. Daleiden, *supra* note 1, at 6. Pre-need contracts, funeral trusts, life insurance policies, and joint accounts can be used as money-saving mechanisms to offset future funeral expenses. Wells, *supra* note 6, at 491-97. While there are pre-planning money saving mechanisms available, poor elders cannot afford to make death arrangements ahead of time. *Id.*

8. *Id.* at 507.

9. Fred S. McChesney, *Consumer Ignorance and Protection Law: Empirical Evidence from the FTC Funeral Rules*, 7 J. L. & POL. 1, 15 (1990).

10. Tracy E. Smith, *Scamming the Elderly: A Look into Funeral Fraud*, 24 PROB. & PROP. 60, 61-63 (2007).

ets face increasing pressure these benefits are often cancelled.<sup>11</sup> In 2012, the Cook County morgue found itself in a scandal for storing 363 bodies in a morgue cooler built for 300 bodies.<sup>12</sup> The problem stemmed from a \$10.7 million cut in the funding of indigent burials.<sup>13</sup> The Cook County “morgue mess” is just an example of a problem that is quickly becoming a national issue.<sup>14</sup> As economic concerns continue, more and more elders are in need of assistance that does not exist. While consumer advocate groups suggest money saving techniques such as skipping embalming or purchasing caskets and urns online, this is not enough for many elders.<sup>15</sup> The alternative is to leave the bodies of their loved ones unclaimed without any control over how the body is treated.<sup>16</sup> Thus, low-income American elders are increasingly in situations where they are unable to claim the bodies of their loved ones and bury them with dignity.

Current federal regulation, the Funeral Rule, and regulations proposed in the past focus on misrepresentation in the funeral industry and give little consideration to how regulations actually affect cost.<sup>17</sup> The proposed Bereaved Consumer’s Bill of Rights Act of 2011 (Bereaved Consumer’s Bill) continues this trend.<sup>18</sup> Similarly, while the proposed Indigent Funeral Expense Reimbursement Act of 2011 (Expense Reimbursement Act) deals with those unable to afford funerals,

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11. See Christine Des Garennes, *Cuts Force Funeral Homes to Stop Offering Public Aid Funerals*, CHAMPAIGN NEWS-GAZETTE, Oct. 19, 2011, <http://www.news-gazette.com/news/politics-and-government/2011-10-19/cuts-force-funeral-homes-stop-offering-public-aid-funerals.h>.

12. Jack Nicas, *Changes Ordered at Troubled Morgue*, WALL ST. J., Jan. 30, 2012 at A3.

13. *Id.*

14. *See id.*

15. *Ten Tips for Saving \$\$\$*, FUNERAL CONSUMERS ALLIANCE, (Nov. 26, 2007) <http://www.funerals.org/frequently-asked-questions/funeral-arrangements/66-ten-tips-for-saving-funeral>.

16. Mary L. Clark, *Keep Your Hands Off My (Dead) Body: A Critique of the Ways in Which the State Disrupts the Personhood Interests of the Deceased and His or Her Kin in Disposing of the Dead and Assigning Identity in Death*, 58 RUTGERS L. REV. 45, 68 (2005). “[I]n many jurisdictions, unclaimed dead bodies become the property of the state and the bodies are transferred to state-based medical schools to serve as cadavers for dissection and anatomy training.” *Id.*

17. FTC Funeral Rule, 16 C.F.R. § 453.1 (1994); H.R. 411, 108th Cong. (2004); S. 3168, 107th Cong. (2002); McChesney, *supra* note 9, at 70. *See generally* David E. Harrington & Kathy J. Krynski, *The Effect of State Funeral Regulations on Cremation Rates: Testing for Demand Inducement in Funeral Markets*, 45 J. L. & ECON. 199 (2002) (focusing on state regulations).

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

it does nothing to decrease funeral costs.<sup>19</sup> It focuses strictly on repaying funeral service providers for their costs.<sup>20</sup> In order for federal regulation to assist low-income consumers, it must consider the price implications implicit in current regulations and consider cost savings as an important goal, along with prevention of misrepresentation and fraud. Absent regulations that favor low-income consumers, next of kin will be forced to leave their loved ones unclaimed or turn to non-traditional, potentially disfavored, burial and body disposal methods.<sup>21</sup>

This Note will propose funeral regulations that benefit low-income consumers. This Note focuses on funeral providers, excluding cemetery and mausoleum issues except as they relate to the funeral provider. Part II explores the history of the funeral industry, as well as common terms critical for understanding the funeral industry. It will include a historical analysis of regulation in the industry. Then, it will look at both the Bereaved Consumer's Bill and the Expense Reimbursement Act. Part III analyzes the effectiveness of current and proposed regulations. It will also explore options for cost reduction absent meaningful regulation. Part IV makes recommendations for deregulation in areas that increase consumer costs and regulation in areas that decrease consumer costs, while simultaneously meeting the goals of public health and safety, as well as prohibiting industry fraud and misrepresentation. Part V concludes by considering the best ways to reduce funeral costs for low-income next of kin. It will also predict the likely success of new congressional proposals similar to the proposed Bereaved Consumer's Bill of Rights Act of 2011 and Indigent Funeral Expense Reimbursement Act of 2011.

## II. History and Background

The funeral industry is made up of many parts. There are a variety of factors at play when funeral service providers make decisions about which goods and services to offer. This section discusses the market's history, relevant terminology, as well as the Funeral Rule, the Bereaved Consumer's Bill, the Expense Reimbursement Act, and

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

20. H.R. 1033.

21. See *Ten Tips for Saving \$\$\$*, *supra* note 15 (suggesting that consumers unable to afford funerals donate bodies to science, direct burial, cremation, and home funerals).

state regulation. First, this Note will look to the history of the funeral industry as a basis for analysis.

#### A. History of the Funeral Industry

Today, consumers can expect to pay between \$7,000 and \$10,000 for a traditional funeral and between \$800 and \$1,000 for cremation.<sup>22</sup> In the United States, funerals have not always been a thousand dollar affair. It is important to understand the history behind the funeral industry to assess the many factors at work in the industry today affecting funeral providers.

Originally, burial preparation and funerals took place at home, at the hands of family members.<sup>23</sup> The dead were buried on family land, and there were no professionals involved in the process.<sup>24</sup> This rendered the need for outside monetary assistance moot, as all care occurred at home. As the number of hospitals increased, people began to die outside of the home, and professional funeral directors became popular.<sup>25</sup>

Although there is a perception that most funeral homes are family owned, consolidation occurred throughout the beginning of the twenty-first century.<sup>26</sup> Today, three large companies own over one-fifth of funeral homes: Service Corporation International, Alderwoods Group, and Stewart Enterprises.<sup>27</sup> Service Corporation International is the largest funeral home corporation in the United States and owns and operates 1,405 funeral homes in North America alone, occupying forty-three states.<sup>28</sup> Large corporations have entered the market because it has proven to be lucrative, as Americans now spend in excess of thirteen billion dollars a year on funerals.<sup>29</sup> The funeral market

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22. Wells, *supra* note 6, at 491 (demonstrating likely cost ranges, not the average cost of a funeral).

23. Ann M. Murphy, *Please Don't Bury Me in That Cold Cold Ground: The Need for Uniform Laws on the Disposition of Human Remains*, 5 ELDER L. J. 381, 387 (2007).

24. *Id.*

25. *Id.*

26. Julie Brienza, *Advocates for Reform of Funeral, Cemetery Industry Are Never at Rest*, 34 NOV. TRIAL 14, 17 (1998). See generally Ashley Hunt, *There Is a New Trend of Corporate "Death Care:" Let the Buyer Beware*, 27 NOV. L. REV. 449 (2003) (describing the problems arising from the consolidated funeral industry).

27. Brienza, *supra* note 26, at 17; see Hunt, *supra* note 26.

28. Service Corp. Int'l, Annual Report (Form 10-K) (Feb. 14, 2011).

29. Harrington & Krynski, *supra* note 17.

continues to expand to include technological advances.<sup>30</sup> Funerals are no longer a product of at home care, or even community based care; they are part of a thriving international industry.

## B. Funeral Terminology

There are several types of funerals each with different costs. In order to discuss funeral accessibility and cost, it is critical to understand the different types of funerals and their associated costs. There are three common types of funerals, as explained in the Federal Trade Commission's *Consumer Guide*.<sup>31</sup> First, this section considers the traditional full service funeral.<sup>32</sup> Second, this section defines the direct burial funeral.<sup>33</sup> Finally, this section looks to direct cremation.<sup>34</sup> At home funerals, outside of the typical funeral service provider model, are also gaining popularity.<sup>35</sup>

The traditional full service funeral is the most expensive type of funeral.<sup>36</sup> It includes a viewing or visitation, a formal service, and transportation of the body to the cemetery for burial.<sup>37</sup> The many parts of a traditional funeral mean it is necessary to purchase a variety of funeral goods and services.<sup>38</sup> Low-income consumers favor traditional funerals despite their expense.<sup>39</sup>

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30. See *New Memorial Options Make it SO Easy . . . To Do Something SO Right*, <http://www.memorialtechnology.com/> (last visited Mar. 31, 2013) (selling memorial websites, video tributes, gravestone technology, memorial jewelry, memorial wreaths, and funeral webcasting).

31. FED. TRADE COMM'N, FUNERALS: A CONSUMER GUIDE, available at [www.consumer.ftc.gov/articles/pdf-0056-funerals.pdf](http://www.consumer.ftc.gov/articles/pdf-0056-funerals.pdf).

32. *Id.*

33. *Id.*

34. *Id.*

35. Wells, *supra* note 6, at 503.

36. *Id.*; see also LISA CARLSON & JOSHUA SLOCUM, FINAL RIGHTS: RECLAIMING THE AMERICAN WAY OF DEATH 1, 52 (2011).

37. *Id.*

38. *Id.*

39. McChesney, *supra* note 9, at 71; see *infra* text accompanying notes 65–72. Low-income populations such as immigrants may have certain religious, ethnic, or cultural concerns that prevent them from choosing the cheapest funeral option. These low-income populations may be forced to choose between abandoning the body of their loved one at the local morgue or having a funeral for their loved one that goes against their system of beliefs, because they cannot afford a funeral that incorporates the necessary traditional, ritual, or customary elements. Elders in the low-income group of persons with special funeral considerations are the most disadvantaged by rules such as the Funeral Rule, and the proposed Bereaved Consumers Rights Bill and Expense Reimbursement Act which do not take into account religious, ethnic, and cultural considerations. *Id.*

Visitation and viewing are commonly confused but are not the same.<sup>40</sup> A visitation is a showing of support for the family members of the deceased.<sup>41</sup> The casket may be opened, closed, or not present at all.<sup>42</sup> A viewing, on the other hand, is time for family members or close friends to spend with the body of the deceased.<sup>43</sup> A private family viewing is less official and simpler than a public viewing of the body.<sup>44</sup> A public viewing is often more costly than a private family viewing.<sup>45</sup>

Another type of funeral is a direct burial, which is less costly than a traditional full service funeral.<sup>46</sup> The body is buried immediately without a viewing or visitation, so less funeral goods and services are necessary.<sup>47</sup> A memorial service may be held instead of visitation or viewing either at the graveside or at another time.<sup>48</sup>

A third option is direct cremation, where the body is immediately cremated and placed in an urn.<sup>49</sup> Again, a memorial service may be held instead of visitation or viewing either at the gravesite, dispersal location, or at another time.<sup>50</sup> Cremated remains may be buried or scattered at any private location with permission, or at sea three miles from the shore.<sup>51</sup> Cremation costs much less than a traditional funeral service.<sup>52</sup> However, higher-educated and higher-income consumers prefer cremation.<sup>53</sup>

While the three types of funerals discussed above are the most common, at home funerals are gaining popularity among some funer-

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40. Viewing and Visitation—the Difference, FUNERAL CONSUMERS ALLIANCE, (Nov. 26, 2007) [http://www.funerals.org/affiliateresources/doc\\_view/2B-viewing-and-visitation-the-difference](http://www.funerals.org/affiliateresources/doc_view/2B-viewing-and-visitation-the-difference).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *See id.*

46. FED. TRADE COMM'N, *supra* note 31, at 6–9.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. 36 C.F.R. § 2.62 (2012) (explaining a permit is required for burial in a national park); 40 C.F.R. § 229.1 (2012) (explaining regulations for burial at sea); *Cremation FAQ*, NAT'L FUNERAL DIRS. ASS'N & CREMATION ASS'N OF N. AM., <http://www.nfda.org/planning-a-funeral/cremation/160.html#scatter> (last visited Mar. 31, 2013) (explaining cremated remains can be buried or scattered onto private property with permission of the owner).

52. McChesney, *supra* note 9, at 71.

53. *Id.*; *see infra* text accompanying Part II.C (discussing the importance of ritual, tradition, and custom).

al advocates.<sup>54</sup> At home funerals are funerals where the body preparation, services, and burial all occur at home.<sup>55</sup> The experience of preparing a loved one's body can be very meaningful for family members, and the process can save many of the costs associated with funeral home care.<sup>56</sup> State law can complicate the process, as some states require a funeral home director to handle the body at some point in the funeral process.<sup>57</sup>

There are other cost-saving mechanisms available to some consumers.<sup>58</sup> For example, "[a]ll veterans are entitled to a free burial in a national cemetery and a grave marker. This eligibility also extends to some civilians who have provided military-related service and some Public Health Service personnel."<sup>59</sup> Donating a body to science is another cost saving alternative.<sup>60</sup> After the body has been used by a medical facility, the body is cremated and returned to the family at no cost.<sup>61</sup> Another option is buying items, like coffins and flowers, at wholesale retailers, such as Costco and Sam's Club.<sup>62</sup> Options such as

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54. See *How to Plan a Home Funeral*, HOME FUNERAL DIRECTORY, <http://homefuneraldirectory.com/how-to-plan-a-home-funeral> (last visited Mar. 31, 2013).

Home funerals can provide more meaningful end-of-life rituals and this helps the families take the time they need to grieve in a familiar environment. In the comfort of their own home family members experience less fear of death and they are free to mourn in their own way. This more natural pacing deeply honors the deceased and the experience. Additionally, being physically involved in the process helps in grieving.

*Id.* (listing additional benefits of home funerals including cost savings, environmental concerns, and personalization).

55. Wells, *supra* note 6, at 503.

56. *Id.*

57. *Id.* at 505.

58. See *infra* text accompanying notes 59–62.

59. FED. TRADE COMM'N, *supra* note 31, at 16.

Spouses and dependent children are also entitled to a lot and marker when buried in a national cemetery. There are no charges for opening or closing the grave, for a vault or liner, or for setting the marker in a national cemetery. The family generally is responsible for other expenses, including transportation to the cemetery.

*Id.*

60. *'Til Death Do We Save: There Are Many Ways to Reduce Funeral Expenses*, HARTFORD COURANT, Nov. 15, 2009, [http://articles.courant.com/2009-11-15/business/hc-dying-on-less-suncon1115.artnov15\\_1\\_cremation-costs-funeral-homes-offer-direct-burial-dimaria-s-licensed-funeral-business](http://articles.courant.com/2009-11-15/business/hc-dying-on-less-suncon1115.artnov15_1_cremation-costs-funeral-homes-offer-direct-burial-dimaria-s-licensed-funeral-business).

61. *Id.*

62. *Id.* See e.g., *Funerals*, COSTCO, <http://www.costco.com/funeral.html> (last visited Mar. 31, 2013) (selling caskets, urns, keepsakes, and sympathy flowers). *But see infra* text accompanying notes 149–50 (discussing the benefits and detri-

these can substantially reduce costs, but are not available for all consumers.

Notably, even apart from price considerations, not every consumer is flexible as to the type of funeral he or she may choose for a loved one.<sup>63</sup> Certain consumers may be restrained by the formalities of their religious or ethnic group via strict procedures they must follow after the occurrence of a death.<sup>64</sup> Thus, the most affordable type of funeral may not be an option consumers consider. As indicated in the discussion above, distinctions between types of funerals cause great variation in how funeral costs are calculated.

### C. Cultural and Religious Considerations

In a discussion of funeral costs, it is important to give credence to religion or cultural ritual. One author describes the importance of religious traditions at death as something that gives “meaning and significance to life by framing death within a larger picture of eternity and destiny through the idea of salvation,” while ritual is the “basic human or social behavior with the power to comfort and encourage individuals during difficult periods of life.”<sup>65</sup> Indigent persons unable to bury their elderly loved ones may have a religious or cultural background, which prevents them from choosing “the cheapest option” for burial.

For example, the practice of Judaism “abhors” cremation, as the preservation of the dead body from utter destruction is of religious importance.<sup>66</sup> On the other hand, it is not unusual for practitioners of Hinduism to choose cremation because of their concerns about the “neutralizing of death pollution and the freeing the spirit of worldly attachment;” however, there are different concerns in the burial of a holy man.<sup>67</sup> Cultural and religious customs vary greatly, as cultural

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ments of e-commerce and the variety of e-commerce laws and regulations in various states).

63. Hunt, *supra* note 26, at 469; *see also* McChesney, *supra* note 9, at 43 tbl.10 (showing that in choosing a funeral provider, consumers consider location, reputation, religious or social background, family plot, and price, in order of importance).

64. Hunt, *supra* note 26, at 449.

65. KODO MATSUNAMI, INTERNATIONAL HANDBOOK OF FUNERAL CUSTOMS 194–95 (1998) (arguing that ritual will eventually replace religion in modern culture).

66. *Id.* at xxii.

67. *Id.* at xx.

groups, religious groups, and ethnic groups have a wide variety of funeral traditions.<sup>68</sup> There might also be intra family pressure or tradition dictating a specific funeral custom.

In *Rest in Peace*, author Gary Landerman discusses the effects of American culture on funerals. He discusses the seminal work of the funeral industry, Jessica Mitford's *The American Way of Death*, and its impact on American recognition of the corruption and abuse in the funeral industry.<sup>69</sup> Landerman notes the impact of American communal events, especially the death and funeral of John F. Kennedy and the events of September 11th.<sup>70</sup> He discusses the importance of making sense of death and saying goodbye within American culture.<sup>71</sup> Landerman also notes that part of the September 11th tragedy included the struggle of families from a variety of cultural and religious backgrounds to mourn their loved ones without a body, preventing the practice of traditional, religious, or ritual practices.<sup>72</sup> Thus, a variety of influences determine what options families have at the death of their loved one. Custom, culture, religion, and ritual may dictate the options of the family, even if the family's loved one or the family themselves is indigent or low-income and unable to afford a funeral.

#### D. The Funeral Rule

The Funeral Rule is the most important piece of regulation relating to funeral providers. As such, it is important to understand the rule to begin analyzing the issues surrounding its effectiveness. The Funeral Rule is promulgated by the Federal Trade Commission (FTC), which is charged with protecting America's consumers.<sup>73</sup> The Funeral Rule was amended in 1994 and regulates the actions of the funeral industry, particularly funeral providers.<sup>74</sup> It describes funeral providers as "any person, partnership or corporation that sells or offers to sell

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68. See generally *id.*

69. GARY LANDERMAN, *REST IN PEACE* 83–118 (2003).

70. *Id.* at xxxi–xl (discussing the assassination, funeral, and national mourning associated with the death of John F. Kennedy and the continued impact of the Kennedy funeral). Today, high profile funerals continue to become national news and impact the way Americans view funerals. See e.g., *Funerals*, ACCESS HOLLYWOOD, <http://www.accesshollywood.com/funerals> (last visited Mar. 31, 2013) (continuing coverage of the latest celebrity funerals).

71. LANDERMAN, *supra* note 69, at 214–15.

72. *Id.*

73. *FTC Resources for Reporters*, FED. TRADE COMM'N, <http://www.ftc.gov/opa/reporter/advertising/funeralrule.shtml> (last visited Mar. 31, 2011).

74. 16 C.F.R. §§ 453–453.1(i) (2012).

funeral goods and funeral services to the public.”<sup>75</sup> As described in the FTC’s *Funerals: A Consumer’s Guide*, the purpose of the Funeral Rule is to protect consumers from the manipulative tactics of funeral professionals.<sup>76</sup> Importantly, the necessity of this protection is criticized by academics who claim funeral consumers are not in need of any special vulnerability protections.<sup>77</sup> The Funeral Rule itself focuses on the areas of price disclosure, misrepresentation, required purchases, unapproved services, and retention of documents and disclosure.<sup>78</sup>

The price disclosure section of the Funeral Rule requires disclosure to customers for the costs of “embalming, transportation of remains, use of facilities, caskets, outer burial containers, immediate burials, or direct cremations.”<sup>79</sup> The information must be provided by telephone, as well as in person.<sup>80</sup> Notably, funeral providers need not include the prices of funeral goods, which can be specially ordered.<sup>81</sup> Thus, a funeral provider will likely list a casket they have in stock at the average price of a casket, roughly \$2,000,<sup>82</sup> but might not have a simple \$200 casket in stock although they are available for purchase by special order.<sup>83</sup> Because the \$200 casket needs to be specially ordered, the Funeral Rule does not require the price to be listed.<sup>84</sup> Thus, only the \$2,000 casket will be included on the price list.

The price requirements allow for a basic service fee that can be added to any funeral services provided.<sup>85</sup> As long as the basic service fee does not include charges that are unapproved under the Funeral Rule, the funeral consumer cannot decline to pay the fee or negotiate with the service provider.<sup>86</sup> The fee must be disclosed on the general price list or the price list for caskets.<sup>87</sup> The fee includes the overhead of the funeral provider, which can include things such as planning,

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75. *Id.*

76. FED. TRADE COMM’N, *supra* note 31, at 4–5.

77. McChesney, *supra* note 9, at 9.

78. 16 C.F.R. §§ 453.2–453.6 (2012).

79. § 453.2(a).

80. § 453.2(b)(1).

81. §§ 453.2(b)(2)(i), (3)(i).

82. FED. TRADE COMM’N, *supra* note 31, at 11–12 (explaining that the average cost of a casket is slightly more than \$2,000, but caskets can sell for a range of prices up to \$10,000).

83. CARLSON & SLOCUM, *supra* note 36.

84. 16 C.F.R. §§ 453.2–453.6 (2012).

85. § 453.2(b)(4)(iii)(C)(1) (2012).

86. *Id.*

87. *Id.*

preparation, and coordination of the funeral.<sup>88</sup> The basic service fee can be increased if it is included with the costs of a casket and a consumer chooses to furnish a casket him or herself.<sup>89</sup>

The misrepresentation section of the Funeral Rule focuses on embalming, caskets, and outer burial containers.<sup>90</sup> The Funeral Rule does not define embalming. The National Funeral Directors Association defines it as, “chemically treat[ing] a body to reduce the presence and growth of microorganisms, retard organic decomposition, and restore an acceptable physical appearance; embalming offers temporary preservation of a deceased person’s body and allows for funerals to be held several days after the death has occurred.”<sup>91</sup> There are no public health benefits from embalming, and embalming does not protect a body from eventual decomposition.<sup>92</sup> As the Funeral Rule indicates, the law does not require embalming except under special circumstances.<sup>93</sup>

A casket is a “rigid container which is designed for the encasement of human remains and which is usually constructed of wood, metal, fiberglass, plastic, or like material, and ornamented and lined with fabric.”<sup>94</sup> It is natural that the Funeral Rule addresses caskets in the misrepresentation section because caskets are the most expensive part of many funerals, often ranging from \$2,000 to \$10,000 in price.<sup>95</sup> It is illegal for funeral service providers to assert that a casket is required for direct cremations.<sup>96</sup>

Outer burial containers are defined by the Funeral Rule as “any container which is designed for placement in the grave around the casket including, but not limited to, containers commonly known as burial vaults, grave boxes, and grave liners.”<sup>97</sup> This definition does

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88. FED. TRADE COMM’N, *supra* note 31, at 9.

89. 16 C.F.R. § 453.2(b)(4)(iii)(C)(2) (2012).

90. § 453.3.

91. Glossary, *Embalming*, NAT’L FUNERAL DIRS. ASS’N, <http://www.nfda.org/media-center/glossary.html?id=23> (last visited Mar. 31, 2013).

92. Harrington & Krynski, *supra* note 17, at 207; *see also* CARLSON & SLOCUM, *supra* note 36, at 57.

93. 16 C.F.R. § 453.3(a)(2)(ii) (2012).

94. § 453.1(c).

95. Asheesh Agarwal & Jerry Ellig, *Buried Online: State Laws That Limit E-Commerce in Caskets*, 14 ELDER L.J. 283, 309 (2006).

96. 16 C.F.R. § 453.3(b) (2012).

97. § 453.1(n).

not include cremation interment containers or urn vaults.<sup>98</sup> The Funeral Rule prevents funeral providers from claiming containers are required and compels them to disclose that state law does not require a container.<sup>99</sup>

The misrepresentation section of the Funeral Rule also prevents funeral providers from making misrepresentations about regulations.<sup>100</sup> Providers cannot tell consumers that bodies will be protected or prevented from decay by funeral goods and services.<sup>101</sup> Finally, the misrepresentation section of the law includes protection for pre-need consumers.<sup>102</sup>

The Funeral Rule holds that required purchases cannot be conditioned upon one another.<sup>103</sup> Funeral providers cannot require a casket purchase for cremation.<sup>104</sup> They can only charge for the aforementioned service fee,<sup>105</sup> the purchases made by the consumer, and itemized required purchases.<sup>106</sup>

In discussing services provided without prior approval, the focus is again on embalming.<sup>107</sup> Service providers cannot embalm a body for a fee without appropriate approval, unless it is required by law.<sup>108</sup> Although, there is an exception if the appropriate authority cannot be located.<sup>109</sup> The funeral providers cannot later charge the authority if they select a service that would not normally require embalming.<sup>110</sup>

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98. CREMATION ASS'N OF N. AM., MODEL CREMATION LAW AND EXPLANATION (2010), available at [http://www.bioresponsefuneral.com/pdf/Model\\_Cremation\\_Law\\_-\\_APPROVED\\_1-22-2010.pdf](http://www.bioresponsefuneral.com/pdf/Model_Cremation_Law_-_APPROVED_1-22-2010.pdf). An urn vault is defined as

a rigid outer container that, subject to a cemetery's rules and regulations, is composed of concrete, steel, fiberglass, or some similar material in which an urn is placed prior to being interred in the ground, and which is designed to withstand prolonged exposure to the elements and to support the earth above the urn.

*Id.*

99. 16 C.F.R. § 453.3(c) (2012).

100. § 453.3(d).

101. § 453.3(e).

102. § 453.3(f).

103. § 453.4(2)(b).

104. § 453.5(a)(1).

105. See *supra* text accompanying notes 85–89 (discussing the inclusion of the service fee in the Funeral Rule).

106. 16 C.F.R. § 453.4(2)(b)(iii) (2012).

107. § 453.5.

108. §§ 453.5(a)(1), (2).

109. § 453.5(a)(3).

110. *Id.*

Finally, the retention of documents portion of the Funeral Rule explains that price lists must be available to the Commission.<sup>111</sup> All disclosures must be clear and not contradictory.<sup>112</sup>

The FTC is charged with enforcing the Funeral Rule.<sup>113</sup> The FTC uses the Funeral Rule Offenders Program (FROP) as its enforcement mechanism.<sup>114</sup> FROP is run by the funeral industry and operated by the National Funeral Directors Association (NFDA).<sup>115</sup> It rectifies Funeral Rule violations through an education and certification program.<sup>116</sup> In 2002, at least 200 funeral homes were not in compliance with the rule.<sup>117</sup> These funeral homes entered the FROP program.<sup>118</sup> In 2008, 26 funeral homes of the 104 inspected (25%) were still not in compliance with the rule.<sup>119</sup> In 2010, an eight-state inspection of 126 funeral homes revealed 35 (roughly 28%) were violating the Funeral Rule.<sup>120</sup> In 2011, the FTC announced the Department of Justice had brought civil suit against two funeral homes for violation of the Funeral Rule.<sup>121</sup> The FTC gave no reason for their decision to bring suit instead of reliance on the FROP program, but they noted they had “‘reason to believe’ that the law has been or is being violated, and it appears to the Commission that a proceeding is in the public interest.”<sup>122</sup> Thus, it is clear the Funeral Rule continues to affect funeral providers working in the industry today.

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111. 16 C.F.R. § 453.6.

112. § 453.7.

113. Murphy, *supra* note 23, at 392.

114. Press Release, FTC, FTC Testifies on Funeral Rule Activities (Apr. 26, 2002), <http://www.ftc.gov/opa/2002/04/funeralruletest.shtm>.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* The FROP program is described by the FTC as “a non-litigation alternative for correcting ‘core’ Funeral Rule violations.” Funeral homes still have to pay fines, but the costs are less than if the FTC pursued a civil penalty. *Id.*

119. Press Release, FTC, Undercover Inspections of Funeral Homes in Seven States Ensure that Consumers Receive Price Lists Required by Law (Mar. 19, 2009), <http://www.funerals.org/newsandalerts/consumer-alerts/500-2009ftcsweeps>.

120. Press Release, FTC, FTC Sues Two Funeral Homes for Failing to Provide Price Lists; Undercover Inspections in Eight States Find Violations of FTC’s Funeral Rule (July 21, 2011), <http://www.ftc.gov/opa/2011/07/funeral.shtm>.

121. *Id.*

122. *Id.*

## E. Bereaved Consumer's Bill and Expense Reimbursement Act

### 1. BEREAVED CONSUMER'S BILL

The Bereaved Consumer's Bill was introduced to the United States House of Representatives on March 3, 2011.<sup>123</sup> Representative Bobby Rush, a Democrat of Illinois, introduced this Bill as well as The Bereaved Consumer's Bill of Rights Act of 2010.<sup>124</sup> In introducing the 2010 Bereaved Consumer's Bill, Representative Rush indicated that the Bereaved Consumer's Bill was in response to "the unauthorized removal of hundreds of human bodies, and the reselling of grave plots, at Burr Oak Cemetery in Alsip, Illinois."<sup>125</sup> The purpose of the 2011 Bereaved Consumer's Bill is also, "[t]o direct the Federal Trade Commission to establish rules to prohibit unfair or deceptive acts or practices related to the provision of funeral goods or funeral services," with a focus on funeral home fraud.<sup>126</sup>

The Bereaved Consumer's Bill was sent to the House Committee on Energy and Commerce on March 3, 2011.<sup>127</sup> It broadens and extends the Funeral Rule,<sup>128</sup> requiring price disclosure for all funeral goods and services.<sup>129</sup> It also prevents any misrepresentation of federal, state, or local law.<sup>130</sup> It prevents price conditioning and protects pre-need consumers, as well as requiring a contract at the time of purchase to disclose all fees.<sup>131</sup> Unlike the Funeral Rule, the Bereaved Consumer's Bill extends to cemeteries and non-profit entities.<sup>132</sup>

Representative Rush hoped that the Bereaved Consumer's Bill, if passed and made into law, would establish a baseline to prevent consumers from becoming "easy selling targets for bundles of unnecessary goods and services that get slipped into funeral and burial pack-

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

124. *Id.*; Honorable Bobby L. Rush, Chairman, Energy & Commerce Comm. Subcomm. on Commerce, Trade & Consumer Prot., Statement (Jan. 27, 2010), available at [http://democrats.energycommerce.house.gov/Press\\_111/20100127/rush\\_opening.pdf](http://democrats.energycommerce.house.gov/Press_111/20100127/rush_opening.pdf).

125. Rush, *supra* note 124.

126. *Id.*

127. H.R. 900.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* Price conditioning is "conditioning the provision of any funeral good or funeral service upon the purchase of any other funeral good or funeral service from that provider, except as required by law." *Id.*

132. *Id.*; see also 16 C.F.R. § 453 (2012).

ages.”<sup>133</sup> The Bereaved Consumer’s Bill is similar to the Funeral Rule and Representative Rush hoped it would take the Funeral Rule into modernity.<sup>134</sup> The Bereaved Consumer’s Bill died in committee at the close of the 112th Congress.<sup>135</sup>

## 2. EXPENSE REIMBURSEMENT ACT

The Expense Reimbursement Act was introduced to the United States House of Representatives on March 11, 2011.<sup>136</sup> Representative Paul Broun, a Republican of Georgia, introduced the Expense Reimbursement Act as well as a similar bill in 2009, The Indigent Funeral Expense Reimbursement Act of 2009.<sup>137</sup> In introducing the Expense Reimbursement Act, Representative Broun recognized state tax incentives to help in the burial of indigents are being cut.<sup>138</sup> The purpose of the Expense Reimbursement Act is to, “amend the Internal Revenue Code of 1986 to allow a credit for unreimbursed funeral expenses with respect to a deceased indigent individual.”<sup>139</sup>

The Expense Reimbursement Act would reimburse funeral homes up to \$3,000 for the burial of indigent individuals.<sup>140</sup> The eligibility of an individual would be determined by the state’s own definition of “indigent.”<sup>141</sup> Reimbursable costs are “any unreimbursed amount paid or incurred by such trade or business to provide funeral or burial goods and services for a deceased indigent individual.”<sup>142</sup>

The Expense Reimbursement Act was sent to the House Committee on Ways and Means on March 11, 2011.<sup>143</sup> Representative Broun believed the “straightforward tax credit would simply remove the financial burden and allow funeral homes to provide the care and services that they are trained to provide.”<sup>144</sup> Thus, federal money

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133. Rush, *supra* note 124.

134. *Id.*

135. H.R. 900 (112th): *The Bereaved Consumer’s Bill of Rights Act of 2011*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/hr900> (last visited Apr. 2, 2013) (noting the bill’s status in the overview section).

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

137. *Id.*

138. 157 CONG. REC. E460 (daily ed. Mar. 11, 2011) (statement of Hon. Paul C. Broun introducing the Indigent Funeral Expense Reimbursement Act of 2011, H.R. 1033, 112th Cong.).

139. H.R. 1033.

140. *Id.*

141. *Id.* at 2.

142. *Id.*

143. H.R. 1033.

144. Broun, *supra* note 138.

would supplement the cost of indigent funerals conducted by private funeral providers. The Expense Reimbursement Act also died in committee at the close of the 112th Congress.<sup>145</sup>

#### F. Background on State Regulatory Schemes

Along with federal regulation, state regulations have an important impact on the funeral industry. The Funeral Rule itself recognizes that the Funeral Rule will not preempt a state regulation if the state regulation provides greater protection for the consumer.<sup>146</sup> Regulations vary significantly from state to state, but it is important to understand the different types of legislation in a few key areas: e-commerce regulations, home burial regulations, licensing requirements, ownership disclosure, and county burial requirements.

States differ on how to treat e-commerce.<sup>147</sup> Internet vendors such as Costco sell caskets at prices which are lower than that of a funeral service provider.<sup>148</sup> Many current regulations do not favor e-commerce, although less regulation for e-commerce may lower costs.<sup>149</sup> Certain states only allow licensed funeral vendors to sell caskets.<sup>150</sup> Federal courts are split on whether limiting e-commerce in casket sales is a violation of due process.<sup>151</sup>

As aforementioned,<sup>152</sup> states have a variety of requirements affecting home burial.<sup>153</sup> In certain states, a funeral director is required

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145. H.R. 1033 (112th): *Indigent Funeral Expense Reimbursement Act of 2011*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/hr1033> (last visited Apr. 2, 2013).

146. 16 C.F.R. § 444.5 (2012).

147. Agarwal & Ellig, *supra* note 95, at 284.

148. Judith A. Chevalier & Fiona M. Scott Morton, *State Casket Sales Restrictions: A Pointless Undertaking?*, 51 J.L. & ECON 1, 1 (2008).

149. See Asheesh Agarwal, *Protectionism as a Rational Basis? The Impact on E-Commerce in the Funeral Industry*, 3 J.L. ECON. & POL'Y 189, 189 (2007); Chevalier & Morton, *supra* note 148; Agarwal & Ellig, *supra* note 95.

150. Agarwal, *supra* note 149.

151. *Id.*; see e.g., *Powers v. Harris*, 379 F.3d 1208, 1215 (10th Cir. 2004). "As a state economic regulation that does not affect a fundamental right and categorizes people on the basis of a non-suspect classification, we determine whether the FSLA passes constitutional muster, both as a matter of substantive due process and equal protection, by applying rational-basis review." *Id.* But see *St. Joseph Abbey v. Castille*, CIV.A. 10-2717, 2011 WL 1361425 \*1, \*9 (E.D. La. Apr. 8, 2011). "[T]he Court does not see sufficient support for the Powers approach and will not adopt it." *Id.*

152. See *supra* text accompanying notes 54–57 (explaining that in some states there are barriers to home funerals).

153. Wells, *supra* note 6, at 503–06; see also CARLSON & SLOCUM, *supra* note 36, at 18–19.

to transport a body.<sup>154</sup> Other states require certifications or permits that can only be obtained or signed by a funeral director or someone else from within the industry.<sup>155</sup> Home burial regulations may be more strict in the future, as some legislators are calling for greater regulation.<sup>156</sup>

Licensing requirements for funeral directors differ amongst the states.<sup>157</sup> Licensing requirements create a barrier to the funeral provider market.<sup>158</sup> Barrier requirements create a limited market making it easier for funeral providers to use aggressive sales tactics.<sup>159</sup> This is more difficult in some states than in others because of the difference in licensing requirements.<sup>160</sup>

States have responded differently to the entrance of large corporations into state funeral industries.<sup>161</sup> Some states require a clear disclosure of ownership, while other states do not require any disclosure at all.<sup>162</sup>

Finally, for indigent persons, county burials were traditionally available.<sup>163</sup> In a county burial the state or municipality would be taxed for the cost of a funeral if friends or family of the deceased indicated they were unable to pay for a funeral.<sup>164</sup> A county burial or state monetary assistance may still be available in certain areas where it has not been cut from the state or local budget.<sup>165</sup>

As discussed in Part III of this Note, state regulations have important effects on the costs of funerals throughout the United States. Understanding the variety of funeral regulations in areas such as e-commerce regulations, home burial regulations, licensing requirements, ownership disclosure, and county burial requirements is important to understanding more about the rising cost of death.

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154. Wells, *supra* note 6, at 503–06.

155. *Id.*

156. *Id.*

157. Agarwal & Ellig, *supra* note 95, at 304.

158. *Id.*

159. *Id.* at 320.

160. *See id.* (noting that although state licensing of independent casket retailers may not provide consumer protection, state licensing of funeral directors may do so).

161. *See generally* Brienza, *supra* note 26 (giving the example of Florida).

162. Hunt, *supra* note 26, at 466.

163. Wells, *supra* note 6, at 502.

164. *Id.*

165. *Id.*

The funeral industry is a complex modern market. It is important to understand the market's history and terminology to place the industry in context. Knowledge of the Funeral Rule is necessary for understanding the current regulatory scheme guiding the funeral industry. Additional knowledge of the Bereaved Consumer's Bill and Expense Reimbursement Act are helpful in a discussion of how the industry is likely to change in the future. Although these proposals expired at the close of the 112th Congress, they were based on previously proposed legislation and exemplify the issues future proposals might encounter. Finally, understanding the distinctions amongst ever changing state regulations expands the conversation about the factors at play within the funeral industry.

### III. Analysis

This section addresses three issues. First, it examines the effectiveness of the Funeral Rule and current state regulations. Next, it discusses the effectiveness of the Bereaved Consumer's Bill and Expense Reimbursement Act both recently expired while in congressional committees.<sup>166</sup> Finally, this section explores the effectiveness of non-regulatory cost reduction strategies.

#### A. Effectiveness of Current Regulations: Does the Funeral Rule Really Work?

The Funeral Rule was set up in a world where the only county funerals were for indigents.<sup>167</sup> Sadly, as one coroner notes, today "[u]nclaimed corpses are not just those of the indigent, estranged, or unidentifiable," but are the bodies of loved ones who "simply cannot afford to bury or cremate them."<sup>168</sup> The elderly are particularly harmed by exploitive practices within the funeral industry, not only misrepresentation and fraud, but also high cost fostered by the gov-

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166. *H.R. 900 (112th): The Bereaved Consumer's Bill of Rights Act of 2011*, *supra* note 135 (explaining "the committee chair determines whether a bill will move past the committee stage," which has not occurred) (last visited Apr. 2, 2013).

167. *See supra* text accompanying notes 163–65 (explaining the requirements for county burial as an indigent person).

168. Wells, *supra* note 6, at 500.

ernment's regulatory scheme.<sup>169</sup> There is little evidence that the Funeral Rule, as currently enforced, benefits today's consumer.<sup>170</sup>

The first problem with the Funeral Rule is its assumption that funeral consumers are emotionally vulnerable, and therefore they need extra protection.<sup>171</sup> The Funeral Rule is focused on consumer vulnerabilities although there is little evidence to support the claim that funeral consumers are more vulnerable than other consumers.<sup>172</sup> Consumers are not always as ignorant as the Funeral Rule presupposes.<sup>173</sup> Most consumers have previous experience planning a funeral.<sup>174</sup> In light of this fact, elderly funeral consumers are likely to have previous experience planning a funeral given their age and life experiences.<sup>175</sup> Thus, the Funeral Rule is based on an incorrect assumption: although there are problems with fraud and misrepresentation within the industry, academic research does not support the presupposition that every funeral consumer is especially vulnerable.<sup>176</sup>

The second problem with the Funeral Rule is its disparate impact on certain types of funerals. As discussed in Part II of this Note, low-income consumers favor traditional funerals, perhaps for cultural, ethnic, or religious reasons, while high-income consumers favor direct cremation.<sup>177</sup> Current regulations make cremation cheaper, but because low-income individuals disfavor cremation, they are not assisted by these regulations.<sup>178</sup> In fact, current regulation may be harming low-income consumers more than a non-regulatory environment.<sup>179</sup> Some research demonstrates that funeral providers increase traditional funeral costs to offset costs lost by cremation-only funerals.<sup>180</sup> Regulation affects the choice to cremate by making it much more affordable than a traditional funeral service, leaving less choice for the low-income consumer.<sup>181</sup>

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169. See Keith E. Horton, *Whose Watching the Cryptkeeper?: The Need for Regulation and Oversight in the Crematory Industry*, 11 *ELDER L.J.* 425 (2003).

170. McChesney, *supra* note 9, at 65.

171. FED. TRADE COMM'N, *supra* note 31.

172. McChesney, *supra* note 9, at 65 (finding there is not any "systematic evidence" of consumer benefit from the Funeral Rule).

173. McChesney, *supra* note 9, at 10.

174. *Id.* at 24–25.

175. See generally *id.*

176. *Id.* at 66.

177. See *supra* Part II.

178. Harrington & Krynski, *supra* note 17, at 222.

179. *Id.*

180. *Id.*

181. See *id.* at 222.

The primary reason for choosing funeral by cremation is to save costs, not because it is a preferred method of burial.<sup>182</sup> In part, this is due to the change in demographics of the dying; more Americans are living longer.<sup>183</sup> Nobel laureate James Buchanan has noted that this phenomenon demonstrates the favoritism of regulation towards high-income consumers.<sup>184</sup> This favoritism is harmful to elderly consumers whose low-income needs are not at the heart of the Funeral Rule regulation.

The third problem with the Funeral Rule is the service fee portion of legislation. Although consumers are allowed to purchase third-party consumer goods, such as caskets, the service fee means they might not save any costs.<sup>185</sup> When consumers purchase caskets from places other than the funeral home, service fees are raised to prevent a loss of profit.<sup>186</sup>

The final problem with the Funeral Rule is its ties to the funeral industry, the very industry the rule is claiming to regulate to prevent misrepresentation and fraud. Although the FTC is charged with enforcing its rules, the enforcement of the Funeral Rule is sporadic at best.<sup>187</sup> It is clear that the funeral industry is no longer made up of only “mom and pop” shops,<sup>188</sup> yet there have been no regulatory changes, even though large corporate funeral service providers are increasingly profit-driven, resulting in higher prices for consumers.<sup>189</sup> The FTC regulatory boards are filled with people from within the funeral industry.<sup>190</sup> The FROP program allows the industry to self-regulate.<sup>191</sup> The industry has decided not to publish the names of the Funeral Rule violators under the FROP program,<sup>192</sup> despite constant problems with

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182. INT’L CEMETERY & FUNERAL ASS’N, STUDY OF AMERICAN ATTITUDES TOWARD RITUALIZATION AND MEMORIALIZATION (2005), [http://www.sifuneral.com/common/cms/documents/2005Wirthlin\\_A.pdf](http://www.sifuneral.com/common/cms/documents/2005Wirthlin_A.pdf). Thirty percent of those surveyed indicate they choose cremation to save money. *Id.* at 20. The survey was conducted by telephone and includes American adults over the age of forty. *Id.* at 4. See also Horton, *supra* note 169, at 430–31.

183. Horton, *supra* note 169, at 430–31.

184. McChesney, *supra* note 9, at 70.

185. 16 C.F.R. § 453.2(b)(4)(iii)(C)(2) (2012).

186. Chevalier & Morton, *supra* note 148, at 5.

187. See Murphy, *supra* note 23, at 392. The investigation of the funeral industry began in 1973, although the rule was not adopted until 1984. *Id.* Since then, there still has not been regular oversight of the industry. *Id.*

188. Hunt, *supra* note 26, at 466.

189. *Id.*

190. Brienza, *supra* note 26, at 16.

191. See *supra* text accompanying notes 113–22 (outlining the FROP program).

192. Murphy, *supra* note 23, at 392.

compliance since the initiation of the program.<sup>193</sup> Allowing the industry to self-regulate is irresponsible. Elders and other consumers cannot avoid funeral homes with a history of Funeral Rule violations because there is no information available. Consumers should be provided with comprehensive information on Funeral Rule violations, so they can assess the reliability of a particular funeral home and avoid funeral homes with a history of rule violations.

Funeral prices are high because of problems with the market and the industry.<sup>194</sup> Problems are not solely because of fraud and misrepresentation.<sup>195</sup> The funeral industry is rich and powerful.<sup>196</sup> If the purpose of the Funeral Rule is to protect consumers, the FTC must stop its protection of the industry and begin to truly protect consumers.<sup>197</sup> The Funeral Rule must protect consumers from fraud and manipulative tactics, as well as the exorbitant prices that prevent low-income consumers from burying their loved ones with dignity. The Funeral Rule can only fully serve its purpose when it prevents exorbitant pricing, as well as fraud and misrepresentation.

## **B. Effectiveness of Proposed Regulations: Should Congress Pass the Bereaved Consumer's Bill and Expense Reimbursement Act?**

Congress should not pass legislation similar to the Bereaved Consumer's Bill or the Expense Reimbursement Act. They are problematic because they do not impact funeral costs for poor American elders. This section will discuss each proposal in turn.

### **1. BEREAVED CONSUMER'S BILL**

The Bereaved Consumer's Bill accounts for "unfair, deceptive acts or practices" relating to funerals.<sup>198</sup> This takes into account problems such as the body-dumping problem at Burr Oak Cemetery in Illinois but not problems such as the morgue body overflow in the

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193. See *supra* text accompanying notes 117–22 (demonstrating compliance problems with the FROP program).

194. Brienza, *supra* note 26, at 16–17.

195. *Id.*

196. *Id.*

197. See also FED. TRADE COMM'N, *supra* note 31, at 4–5.

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

Cook County, Illinois morgue.<sup>199</sup> Although prevention of fraud is important, particularly in areas where fraud perpetuates high prices, prevention of fraud is not enough to protect low-income consumers.

Despite recognizing the costs of funerals, the Bereaved Consumer's Bill does not include any cost-saving mechanisms for consumers.<sup>200</sup> It dictates that funeral service providers "furnish accurate price information" but does nothing to ensure a minimum price or adequate disclosure of cheaper alternatives to the traditional funeral.<sup>201</sup> Unless funerals become more affordable, counties will continue to run out of state or local money for burials and may be forced to keep bodies in morgues.<sup>202</sup> Not only will morgues face overflow problems but low-income individuals will also be unable to bury their loved one as his or her religious or cultural rituals dictate.

The justification for the Bereaved Consumer's Bill seems to be found in the language of the Bill recognizing "most funerals are planned by grieving family members at a time when they are especially vulnerable and unlikely to focus on cost comparison."<sup>203</sup> This holding is not born out by statistical data; as discussed above, many Americans, particularly the elderly, have planned a funeral previously and use that information to guide them in planning for a funeral service.<sup>204</sup>

Finally, the Bill fails to recognize that families are unable to "comparison shop" because large corporate funeral homes have taken over the market in many areas.<sup>205</sup> Those who have not planned a fu-

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199. Rush, *supra* note 124 (referencing the Burr Oak Cemetery problem); Nicas, *supra* note 12 (describing the problems at the Cook County morgue).

200. H.R. 900. The Bereaved Consumer's Bill states, "funeral arrangements are a major expense for most American households and families." *Id.*

201. *Id.*

202. See generally Nicas, *supra* note 12.

203. H.R. 900.

204. See *supra* text accompanying notes 171–76 (indicating consumer ignorance is not a rampant issue as many funeral consumers have previous experience planning a funeral); see also INT'L CEMETERY & FUNERAL ASS'N, *supra* note 182 (showing empirical evidence that 58% of Americans over the age of forty have been involved in funeral or cremation arrangements for either a friend or a relative). Notably, Hispanics (39%) are less likely than the general population (60%) to have previous experience planning a funeral. *Id.*

205. See *supra* text accompanying notes 26–29 (discussing how Service Corporation International, Alderwoods, Group, and Stewart Enterprises own over one-fifth of funeral homes in the United States and continue to expand as the funeral market grows more lucrative); see also Jules Polonetsky, *Funeral Rule Review: Comments*, N.Y.C. DEP'T OF CONSUMER AFFAIRS, <http://www.ftc.gov/bcp/rulemaking/funeral/comments/CommentA03.pdf> (last visited Feb. 18). In New York City,

[c]onsolidation is leading to higher funeral prices. An SCI funeral costs about 25% more than a funeral at an independent funeral home.

neral before may be prevented from making meaningful comparisons between funeral homes. Consumers are not vulnerable; rather, big industry has left them without the ability to choose a fairly priced funeral. The Bill needs to take cost and the availability of more affordable options into account.

The Bereaved Consumer's Bill does allow states to bring civil action for various types of relief as a remedy for violating it.<sup>206</sup> As discussed in the background section of this Note, this method of enforcement is not working for the current Funeral Rule.<sup>207</sup> It is unlikely that the Bereaved Consumer's Bill would be effectively enforced through civil suit, because the Funeral Rule in place today is not enforced, when the same method of enforcement is available.

Although the Bereaved Consumer's Bill highlights the importance of protecting consumers, as well as the importance of extending the Funeral Rule to include "cemeteries, crematoria, or sellers of monuments, urns or caskets," it does not sufficiently address the needs of low-income consumers.<sup>208</sup> The Bereaved Consumer's Bill does not include cost-saving mechanisms, recognize the need for adequate comparison of prices, or allow for enforcement that is likely to succeed.<sup>209</sup> Legislation based on the Bereaved Consumer's Bill should not be passed by Congress. The legislation does not adequately protect low-income consumers and does nothing to assist them in saying goodbye to their loved one in the manner they choose.

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If consolidation continues, funeral prices will likely rise even more in the future. By using a strategy called clustering, funeral chains can corner a portion of the funeral market and raise prices. For example, SCI owns 5 out of 6 Jewish Funeral homes in Manhattan. A Jewish funeral in Manhattan costs 50 percent more than a Jewish funeral at an independent funeral home.

*Id.*

206. H.R. 900. Methods of relief for violation of the Funeral Rule include damages, restitution, other compensation, or relief, as the court deems appropriate. *Id.*

207. *See supra* text accompanying notes 187-93 (discussing the problems with industry self regulation and the FROP program).

208. H.R. 900.

209. *Id.*

## 2. EXPENSE REIMBURSEMENT ACT

The Expense Reimbursement Act recognizes the need to cover funeral expenses for deceased indigent or low-income individuals.<sup>210</sup> While the Expense Reimbursement Act considers low-income Americans unable to pay for funerals, it takes the opposite direction of the Bereaved Consumer's Bill and does nothing to prevent consumer fraud or misrepresentation by the funeral provider.<sup>211</sup>

As discussed in Part II of this Note, the Expense Reimbursement Act would assist with funeral costs by providing a tax rebate for the funeral service provider.<sup>212</sup> As this is an industry fraught with problems disclosing prices and correctly informing consumers, it is critical to note that the Expense Reimbursement Act lacks any means or methods of insuring that funeral providers provide consistent services to all clients, including indigent individuals.<sup>213</sup> The Expense Reimbursement Act does nothing to ensure the funeral provider correctly represents information to the consumer.<sup>214</sup> The Act would give money to the very industry that has a history of problems with compliance to consumer protection rules.<sup>215</sup>

Also, the Expense Reimbursement Act sets the maximum reimbursement amount at \$3,000.<sup>216</sup> While this payment might cover a basic funeral service or cremation, it does nothing to take into account the higher costs that may be associated with an indigent individual's religious or cultural practices. For example, there are approximately 300,000 Hmong living in the United States.<sup>217</sup> Funerals are the most important custom for the Hmong, lasting three days and costing between \$3,000 and \$12,000.<sup>218</sup> It is important for the Hmong funeral customs to be carried out to ensure a dead person reaches his or her

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

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *See supra* text accompanying notes 117–22 (demonstrating compliance problems with the FROP program).

216. H.R. 1033.

217. Antony Graceffo, *Hmong Searching for a Home*, FOREIGN POLICY JOURNAL (Mar. 27, 2011), <http://www.foreignpolicyjournal.com/2011/03/27/hmong-searching-for-a-home/>.

218. *Hmong Funeral Customs*, FUNERAL WISE, <http://www.funeralwise.com/customs/hmong> (last visited Apr. 2, 2013); *Weekend-Long Hmong Funerals Cause Waves in Local Community*, NEW AMERICA MEDIA (July 14, 2004), [http://news.newamericamedia.org/news/view\\_article.html?article\\_id=ee9761df44fe654d0563d054a51faee3](http://news.newamericamedia.org/news/view_article.html?article_id=ee9761df44fe654d0563d054a51faee3).

ancestors.<sup>219</sup> Similarly, many Samoans living in the United States follow *Fa'a Samoa* in which it is customary to give gifts to those in attendance at a funeral, a financial burden for many families, but nevertheless a cultural expectation even for those living in the United States.<sup>220</sup> For cultural groups such as these, a reimbursement of \$3,000 is not sufficient, and giving the money to the funeral director may not cover the costs important to the family. If the costs of a funeral were lowered overall, this would give the family more money to spend at their discretion.

Finally, the Expense Reimbursement Act reimburses funeral service providers but does nothing to ensure costs are kept low. Three thousand dollars is not sufficient when consumers can expect to pay between \$7,000 and \$10,000 for a traditional funeral and between \$800 and \$1,000 for a cremation, especially given the fact that funeral providers are at liberty to choose a service fee of any amount. Funeral service providers could charge low-income consumers utilizing the Expense Reimbursement Act a service fee of several hundred dollars forcing them to forgo a visitation or viewing, or ensuring cremation is their only choice. The Expense Reimbursement Act will not work without limits on the service fee.

Similar legislation in the future should not pass congressional scrutiny.<sup>221</sup> This legislation recognizes that there are many Americans who can no longer afford funerals but does nothing to recognize the needs of those individuals. The legislation should have incorporated methods of cost reduction such as allowing e-commerce or unlicensed casket sellers, requiring the sale of caskets and urns of minimal cost, or lesser home burial restrictions.<sup>222</sup> The legislation could have pro-

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219. *Hmong Funeral Customs*, *supra* note 218.

During the 2-3 days of services, someone plays a *qeej*, a flute-like instrument made of bamboo, to help guide the deceased person's spirit back to its ancestral home. . . . The Hmong believe that the sacrificed animals will lead the deceased on their next journey. Hmong mourners set up continuous feasts for family and guests.

*Id.*

220. Randal C. Archibold, *A Voice for His People: Samoan Chief Tries to Bridge Gap Between Island Tradition and Mainland Reality*, L.A. TIMES (May 2, 1993), [http://articles.latimes.com/1993-05-02/local/me-30366\\_1\\_samoan-community/3](http://articles.latimes.com/1993-05-02/local/me-30366_1_samoan-community/3). In 1993, some Samoan funerals cost over \$40,000. *Id.*; see also *Hmong Funeral Customs*, *supra* note 218.

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

222. See *supra* text accompanying notes 52-62 (describing cost-saving mechanisms).

vided funding to counties for county burials.<sup>223</sup> At bare minimum, the legislation should have balanced cost concerns with anxiety about industry abuse by prohibiting funeral homes in violation of the Funeral Rule from receiving reimbursement for the burial of indigent individuals.<sup>224</sup> As written, the Expense Reimbursement Act allows funeral homes in violation of the Funeral Rule to take advantage of consumers by making money from burying indigent individuals, arguably one of the most vulnerable populations.<sup>225</sup> If these individuals wanted to spend money on traditional funeral elements instead of an expensive casket from which the funeral home profits greatly, there is no means for them to afford a funeral.

While the Expense Reimbursement Act takes an important step in recognizing the prevalence of indigent individuals needing funeral service, it lacks the consumer protections and considerations necessary for low-income funeral consumers. Future legislation must appropriately balance the needs of the low-income funeral consumer with consumer protection and overall funeral affordability.

### C. Effectiveness of Non-Regulation Cost Reducing Strategies: Is Consumer Cost Reduction Possible?

As discussed in Part II.B, there are methods consumers can take on their own to ensure a low cost funeral.<sup>226</sup> These methods include taking advantage of veteran's benefits, planning a home funeral, utilizing wholesale retailers, and donating bodies to science.<sup>227</sup> Consumer cost reduction is reasonable, but it should not be necessary. In some cases it is impossible because of state regulations or qualifying factors.<sup>228</sup> Additionally, religious or cultural concerns restrain the availability of cost reduction methods for some low-income funeral consumers. Low-income consumers should be able to bury their

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223. See Des Garennes, *supra* note 11 (discussing the availability of county burials).

224. See *supra* text accompanying notes 188–93 (analyzing the FROP program and problems with administration).

225. H.R. 1033.

226. See *supra* text accompanying notes 52–62 (pointing out consumer cost-saving mechanisms, although such methods for cost savings are not available to all consumers).

227. *Id.*

228. See *infra* text accompanying Part II.F (discussing the variety of state regulatory schemes).

loved one according to his or her personal, religious, or cultural set of customs and beliefs.

While the cost-saving mechanisms discussed above, such as purchasing a coffin online or having a military funeral, are possible for some families, they are not available to all low-income consumers. For example, low-income elders may not have access to the Internet in order to take advantage of more affordable e-commerce items. Cost-savings information should be appropriately disseminated to those individuals that would be assisted by the particular method, but it should not be relied on to help with the burial of all indigent deceased individuals. Funerals should not cost \$6,560; even a fraction of this cost is unobtainable for low-income families.<sup>229</sup> While low-income families should be aware of personal cost-saving mechanisms, there should be other cost control mechanisms outside of the responsibility of a grieving family member or loved one.

#### **IV. Resolution and Recommendation**

Regulation of the funeral industry may seem like a lost cause. The current regulation is doing little if anything to decrease the cost of the American funeral. Meanwhile, the past regulations are well intended, but they will likely fail in decreasing cost as well. Consumer cost reduction strategies may work, but only because they largely bypass the funeral industry. In order to decrease funeral costs, Congress must take a hard look at the current regulations with cost reduction and prevention of fraud and misrepresentation in mind.

This section proposes three ways funeral costs can be reduced and made more affordable for low-income elderly consumers. First, Congress should do a better job enforcing the Funeral Rule. Second, Congress should recognize that the funeral industry is made up of large corporations, not family-owned businesses, and adjust legislation and enforcement accordingly. Third, Congress should not pass new legislation without paying attention to cost-saving mechanisms.

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229. *Funeral Service Facts*, NAT'L FUNERAL DIRS. ASS'N, <http://www.nfda.org/about-funeral-service-/trends-and-statistics.html#fcosts> (last visited Apr. 2, 2013).

### A. Enforcement of the Funeral Rule

Funeral homes should face consistent penalties for violating the Funeral Rule. It is unacceptable for corporations to continue to violate aspects of the Funeral Rule.<sup>230</sup> Even more importantly, it is impossible to determine the effectiveness of the Funeral Rule without its full implementation in every sector of the funeral industry. The FTC needs to assert control over the funeral industry by fully enforcing the Funeral Rule with an eye to the ways in which the Funeral Rule can protect low-income consumers, low-income elders in particular.

As discussed in Part III of this Note, self-regulation, as carried out through the FROP program, has failed.<sup>231</sup> The FROP program should be abandoned or made more transparent. The FTC should operate the program, not the NFDA.<sup>232</sup> It is unacceptable for regulatory boards to be filled with people from the funeral industry.<sup>233</sup> Low-income consumers with limited means need the ability to compare funeral service providers quickly and efficiently. Older Americans who may not have the mobility to visit multiple funeral homes in person are especially in need of accurate pricing information by phone and in person. Persons seeking funeral information about cultural- or religion-specific funeral rituals should be able to easily obtain information. Only stronger enforcement of the Funeral Rule will improve the information that is currently available to low-income consumers.

Violators of the Funeral Rule should face harsher penalties for improperly disclosing prices or refusing to disclose prices. A list of violators should be available to consumers. The list should include the funeral homes' attachment to a larger corporation, so consumers have accurate information about which large national and multinational corporations are violating the rules. Action should be taken in court to penalize Funeral Rule offenders, and offenders with repeat violations should be subject to harsher penalties. The Department of Justice has taken two funeral homes to court, but if widespread abuse continues, litigation must increase.<sup>234</sup> The current compliance rates unveiled by state inspection indicate an unacceptable level of abuse.<sup>235</sup> An industry-run education and compliance program is not appropri-

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230. See *supra* text accompanying notes 117–22.

231. *Id.*

232. See Press Release, *supra* note 114.

233. Brienza, *supra* note 26, at 16.

234. See Press Release, *supra* note 119.

235. See *supra* text accompanying notes 117–18.

ate; funeral homes know the rules and should practice education and compliance to prevent fraud and misrepresentation.<sup>236</sup> Funeral homes that repeatedly violate the Funeral Rule should not be allowed to continue their operations.

Finally, the Funeral Rule should continue to focus on the areas of price disclosure, misrepresentation, required purchases, unapproved services, and retention of documents and disclosure, but pay attention to the way in which the policies behind the rule may favor high-income consumers. In the implementation of the law, the needs of low-income consumers should be considered by the FTC. Better industry regulation is meaningless if it increases the costs to low-income consumers.

In order to make funerals more affordable for low-income, elderly Americans, funeral industry self-regulation must end. New regulations or policies will be rendered ineffective if regulation is left to the industry. The industry should not be allowed to continue their opaque FROP practices. Any new regulation should be government monitored and not left up to the industry. Additionally, it should include an analysis of the effect of high funeral costs on low-income consumers.

#### **B. Recognition of Industry Transition**

Consumers, particularly low-income consumers, should have information as to the true ownership of funeral homes. Communities should have this knowledge, as the interests of a large corporation might be different than those of a small, family-owned funeral home. Communities and consumers should be armed with information about the true identity of the company they are paying when purchasing funeral services.

A low-income elder should not be faced with meaningless choices between funeral homes where pricing is the same because each funeral home is "secretly" owned by the same multinational corporation. Disclosure of true funeral home ownership is necessary. Not only would it benefit the consumer, but also true "mom and pop" local funeral homes not under multinational corporation ownership.

The government has a duty to stop protecting the funeral industry and start policing the industry. As discussed above, self-

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236. See *supra* text accompanying note 120.

regulation is no longer an effective means of dealing with violation of the Funeral Rule. The industry has grown larger and larger, and consolidation of funeral home ownership is occurring at a rapid rate. The state protectionism of the funeral industry needs to end in recognition of these powerful industry corporations, such as Service Corporation International.<sup>237</sup>

### C. Cost-Saving Mechanisms

Consumers should be allowed to use cost-saving mechanisms as they choose, so long as public health and safety is not endangered. While the Expense Reimbursement Act and Bereaved Consumer's Bill noted important problems in the funeral industry, neither successfully balanced problems of fraud and misrepresentation against consumer protection and cost control. New legislation must take into account fraud, misrepresentation, and consumer protection, while ensuring there are adequate cost controls in the funeral industry.

Elders and other Americans purchasing funerals have a plethora of concerns when saying goodbye to a loved one. New legislation needs to validate religious and cultural rituals, traditions, and customs, which are important to bring closure after death.<sup>238</sup> Cremation is not the answer for cost saving. It is favored by white, educated, upper class populations and should not be imposed on those whose cultural or religious beliefs dictate otherwise.<sup>239</sup> Legislation must introduce methods of real cost savings to the consumer.

There are a variety of approaches Congress could take in allowing low-income consumers to provide their family member or loved one with the funeral of his or her choice at an affordable cost. One possibility, discussed in Part II.B, is disseminating information about low-cost options such as body donation and veterans' funerals.<sup>240</sup> If a county burial option or reimbursement funds are available, consumers should be able to easily access this information.

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237. See *supra* text accompanying notes 26–28. Note that these statistics are subject to change as multinational and national corporations continue to acquire more funeral homes.

238. See *supra* text accompanying section II.C (discussing the importance of ritual, tradition and custom).

239. See *supra* Part II.C (indicating some cultural and religious groups are opposed to cremation).

240. See *supra* text accompanying notes 59–60.

Another possibility is to introduce legislation that reimburses a consumer for funeral costs. This would give consumers control over where to spend their money. This could help low-income consumers that favor traditional funerals despite the costs. It would prevent funeral directors from using state money to reimburse themselves for large service fees that do nothing to benefit low-income consumers.

Still another possibility is to instigate price minimums. One way of doing this is to legislate that every funeral home must make at least one coffin and one urn available at the lowest viable market price. For example, if funeral homes can provide \$200 coffins and similarly affordable urns, they should be required to present clients with this information, particularly if the potential client is low-income. Another option would be to require funeral providers to include the prices of funeral goods, which can be specially ordered at the time of price disclosure. These methods would allow consumers to pay less than the \$7,000 to \$10,000 for a traditional funeral and \$800 to \$1,000 for cremation.<sup>241</sup>

Additionally, Congress should take into account state regulations. Congress should continue the practice that the Funeral Rule will not preempt a state regulation if the state regulation provides a greater protection for the consumer. Meanwhile, Congress should consider changes, such as allowing e-commerce or limiting license requirements that encourage aggressive sales tactics and prevent market competition, which may allow states to lower overall funeral costs. It is important for Congress to consider the pros and cons of state regulations and take note of methods that are effective in reducing costs.

In passing new legislation and in implementing the Funeral Rule, Congress must take note of cost-saving mechanisms. Congress should not pass new legislation without paying attention to effects on low-income consumers. This will allow low-income consumers to choose between the traditional full-service funeral, direct burial funeral, and direct cremation without being forced into choosing direct cremation because of cost concerns.

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241. Wells, *supra* note 6, at 491 (demonstrating likely cost ranges, not the average cost of a funeral).

#### D. Specific Considerations for Elderly Consumers

There are some specific funeral planning considerations for low-income elders in particular. Low-income elders preparing an estate should consider the effect funeral planning costs will have on their finances and the finances of their family and other loved ones. An elderly person could draw up a funeral plan, similar to a health care directive, to give her or his family guidance in funeral planning.<sup>242</sup> It may be easier for a family encouraged to plan a low-cost, economic funeral to feel like they are honoring the dead, if the explicit wishes of the deceased include low-cost options. While this is not a solution to the problem of unaffordable funerals, it is a proactive way for low-income elderly to prevent future dilemma within their families.

#### V. Conclusion: Can the American Elderly Afford to Die?

If the current and proposed regulations stay the same, elderly Americans will not be able to bury their loved ones in a dignified way, as their culture, ethnicity, or religion dictates. Congress must consider policies that truly make death “the great equalizer.” It is important for individuals to be allowed to practice religious or cultural funeral rituals to say goodbye to loved ones in a way that gives meaning to life and death. Otherwise, low-income individuals will be forced to abandon bodies, and morgues will continue to have problems with the accumulation of unclaimed bodies.

The current funeral legislation favors wealthy Americans and the funeral industry, which is now composed of large corporations, not small town, family-owned businesses. It is not enough for funeral homes to be held accountable for their fraud and misrepresentation. They must be held accountable for their unnecessary, unidentified costs as well.

Congress must revamp current funeral regulation with the low-income consumer in mind or enforce current rules while taking note of the various needs of low-income consumers. Congressional deferment to the funeral industry cannot continue. Only legislation with

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242. See e.g., Kim Tophen, *Industry Sample Forms*, SENIOR OPTIONS: ADVOCATE FOR THE VULNERABLE AND ELDERLY, [http://www.senioroptionsinc.com/industry\\_sample\\_forms.html](http://www.senioroptionsinc.com/industry_sample_forms.html) (last visited Mar. 15, 2012).

cost-saving mechanisms at the forefront will allow low-income, and often elderly, Americans to bury their loved ones in peace.