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Restricting Funeral Expense Deductions

William A. Drennan
Southern Illinois University School of Law

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Restricting Funeral Expense Deductions

William A. Drennan*

ABSTRACT

During the Middle Ages, the wealthy often requested burial in mass graves with their fellow mortals, as a sign of humility. But since the rise of the cult of the individual during the Renaissance, individual burial plots have been an expression of prestige, wealth, and social status for some. For example, Leona Helmsley, real estate baroness and “Queen of Mean,” dedicated \$3 million upon her death for the care and maintenance of her 1300 square foot, \$1.4 million mausoleum. Respectful disposition of the body is a hallmark of civilization and a common law requirement of estate administration, but an extravagant burial is a personal choice which can impose significant costs on future generations.

A tax deduction for discretionary spending is a government subsidy which shifts part of that cost to other taxpayers. The current federal estate tax deduction for funeral expenses, combined with accommodating laws for administering decedents’ estates, allow the rich to shift 40 percent of the entire cost of big-money burials to other taxpayers. These deductible big-money burials can monopolize substantial, valuable real estate and significantly contribute to environmental pollution. An analysis of current case law reveals that estate and trust law doctrines generally fail to recognize the potential dual character of burial expenses and fail to curb excesses.

This Article asserts that funeral expenses, including burial and related costs, can have a dual character. On the one hand, to the extent of the reasonable cost of a respectful burial, a federal estate tax deduction is appropriate because a decent disposition is mandated by law and social norms—those expenses are not

* Professor, Southern Illinois University School of Law. Member, American Law Institute. Partner and Associate, Husch Blackwell Sanders LLP (1985–2005). New York University School of Law, LL.M. (Executive) (2013); Washington University School of Law, LL.M. in Intellectual Property (2003); Washington University School of Law, LL.M. in Taxation (1997); St. Louis University School of Law, J.D. (1985). Professor Drennan practiced law full-time for 20 years in the areas of tax, estate planning, and business law. Special thanks to Tiffany Ketchum, Class of 2021, for her excellent research and editorial assistance. Also, special thanks to Amanda Reiter, J.D., for her excellent editorial assistance.

voluntary. In contrast, this Article asserts that excessive funeral and burial expenses are a voluntary transfer of personal wealth at death, and those expenses should not be deductible. Other taxpayers should not have to subsidize land-hoarding, environmentally-damaging burials of the wealthy.

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INTRODUCTION

Death may be the great equalizer,¹ but the law favors the wealthy by subsidizing exorbitant, land-hoarding burials. At death, an individual cannot lawfully direct that \$1,000 be thrown into the sea,² but a wealthy testator’s will can validly direct the executor to spend millions for a tomb and gravesite for his or her perpetual

1. Elizabeth Howell Boldt, Note, *Nail in the Coffin: Can Elderly Americans Afford to Die?*, 21 ELDER L.J. 149, 150 (2013).

2. See RESTATEMENT (FIRST) OF TRUSTS § 124 cmt. g (AM. L. INST. 1935).

burial.³ At death, an individual cannot direct that his or her residence remain vacant for a year,⁴ but an affluent testator can direct that a large and valuable real estate parcel containing his or her tomb shall be used for no other purpose in perpetuity.⁵ Not only do the current estate administration laws permit big-money burials, but the federal estate tax system forces other taxpayers to cover 40 percent of the cost.⁶

Extravagant burials have a notorious history from the time of the great pyramids of the ancient Egyptian pharaohs,⁷ to the Taj Mahal,⁸ to Leona Helmsley's more recent \$1.4 million mausoleum in Sleepy Hollow, New York. The latter allows the "Queen of Mean" and her husband to occupy 1,300 square feet forever—enough room for 4 New York City micro apartments on ground level, without even considering the potential multi-level uses.⁹ Ded-

3. See, e.g., *In re Baeuchle's Will*, 82 N.Y.S.2d 371 (Sur. Ct. 1948) (involving \$150,000 in 1946, which if adjusted for changes in the cost of living index would be the equivalent of approximately \$2.15 million in 2021, see *Calculate the Value of \$1.00 in 1946*, DOLLARTIMES, <https://bit.ly/3ifn7pi> [<https://perma.cc/7A8Q-F9B2>] (last visited Sept. 26, 2021)); A.W. Gans, Annotation, *Amount of Funeral Expenses Allowable Against Decedent's Estate*, 4 A.L.R.2d 995 § 7(b) (1949) ("[I]n specific holdings the courts have concluded that a testator may, in [a] will, devise the expenditure of as large a portion of [the] estate as [the testator] sees fit for funeral or burial expenses, and that such wishes shall be carried out so long as the rights of estate creditors are not jeopardized nor sacrificed."). Additionally:

It seems, as a general rule, that if, by statute or common law, a devise or bequest for [the] care of a private burial lot or monument is valid in the first instance, it will not be rendered invalid either because the amount set aside for the scheme exceeds what would ordinarily be a reasonable sum to expend for such purpose or because, in view of the decedent's position in life or the size of [the] estate, it seems excessive.

M.C. Dransfield, Annotation, *Gift for Maintenance or Care of Private Cemetery or Burial Lot, or of Tomb or of Monument, Including the Erection Thereof, as Valid Trust*, 47 A.L.R.2d 596, § 2 (1956)

4. See RESTATEMENT (FIRST) OF TRUSTS § 124 cmt. G (AM. L. INST. 1935) ("It is capricious to provide that . . . a field shall be sowed with salt or that a house shall be boarded up and remain unoccupied.").

5. See *infra* notes 152–56 and accompanying text.

6. See I.R.C. § 2053(a)(1); see *infra* notes 256–59 and accompanying text.

7. See Keith Eggener, *Building on Burial Ground*, PLACES J. (Dec. 2010), <https://bit.ly/3mEFd6L> [<https://perma.cc/3L8c-MSEC>] ("The first-known architect, the Egyptian Imhotep, is best remembered as the builder of a tomb.").

8. See *Taj Mahal Tomb*, FAMOUSWONDERS, <https://bit.ly/3AOR6vq> [<https://perma.cc/3DYN-GVTX>] (last visited Sept. 27, 2021) (housing the tombs of Emperor Shah Jahan who died in 1666 and Mumtaz Mahal, his chief consort, who died in 1638).

9. Larry McShane, *Helmsley Reserved \$1.4M Room, Forever*, SEATTLE TIMES (Aug. 22, 2007, 12:00 AM), <https://bit.ly/3F1Z9rq> [<https://perma.cc/8RZH-5M4L>]; Kim Turner, *Tiny Living, Big City: What's the Deal with Micro-Apartments*, GROUND FLOOR (Nov. 6, 2018), <https://bit.ly/3zPLL5Z> [<https://perma.cc/9EK3-JHN2>] (discussing apartments ranging from 260 to 360 square feet).

ication of valuable real estate exclusively for the burial of one or two people in perpetuity is “not the norm in much of the rest of the world,”¹⁰ but in the United States, the government subsidizes it with a tax deduction.

A combination of legal rules promote exorbitant, land-hoarding burials. While other commentators have focused on the laws and customs that shifted control of burials from families and churches before the Civil War to professional undertakers and the rest of the funeral industry by World War I,¹¹ this Article focuses on the federal estate tax deduction and the related trust and estate laws that promote expensive burials for the rich.

Part I of this Article discusses typical American burials, exorbitant burials, and the societal costs of exorbitant burials such as excessive land use, the consumption of various resources, and the environmental damage from releasing embalming fluid and other chemicals and metals into the ground. Part II discusses the federal estate tax, the deduction for funeral expenses, including burial and related costs, and the estate administration rules that intertwine with this federal tax deduction. Part III analyzes policy concerns, relevant estate and trust law doctrines, and a dubious regulatory attempt to restrain the deduction, as well as options for removing the artificial tax incentive encouraging wasteful burials of the wealthy. This Article proposes a cap on the amount of the deduction with reference to the federal gift tax annual exclusion amount.

I. EXTRAVAGANT BURIALS AND THE COSTS TO FUTURE GENERATIONS

A. *Respectful Disposition and the Average American Burial*

For tens of thousands of years, people have wanted to deal respectfully with the remains of the dead.¹² This desire has been

10. Eggener, *supra* note 7.

11. See, e.g., Tanya Marsh, *Rethinking the Law of the Dead*, 48 WAKE FOREST L. REV. 1327, 1330–36 (2013); Ann M. Murphy, *Please Don't Bury Me in that Cold, Cold Ground: The Need for Uniform Laws on the Disposition of Human Remains*, 15 ELDER L.J. 381, 387–89 (2007) (“In the period of approximately fifty years, the care of . . . the dead moved from the family to the funeral industry. By the year 2002, every state except Colorado licensed funeral directors, and most states licensed funeral homes.”); JESSICA MITFORD, *THE AMERICAN WAY OF DEATH REVISITED* (VINTAGE BOOKS 2000) (1963).

12. Murphy, *supra* note 11, at 384; SARAH MURRAY, *MAKING AN EXIT: FROM THE MAGNIFICENT TO THE MACABRE—HOW WE DIGNIFY THE DEAD* 126 (2011) (discussing how a “bison leg with the flesh still attached . . . in the tomb of a Neanderthal man that lived roughly [70] thousand years ago” was likely done as a sign of respect).

called a “mark of human civilization,”¹³ and a “defining human trait.”¹⁴ Elephants, dolphins, giraffes, killer whales, and other animals appear to mourn over a corpse, and scientists describe these behaviors as death rituals,¹⁵ but burial and cremation seem to be uniquely human responses.

Throughout much of human history, burial has been a preferred method. Neanderthals were burying their dead over 70,000 years ago.¹⁶ Stone Age homo sapiens were cremating around 3,000 B.C.E.¹⁷ In the Eighth Century B.C.E., Homer told the story of Priam, the father of Hector, petitioning Achilles to allow the dignified burial of his son.¹⁸ The Roman Empire generally cremated their dead, but “burial became the most widely accepted mode during the reign of Constantine.”¹⁹

By 400 C.E., burial was the accepted mode of disposition throughout Europe.²⁰ Historically, “[t]hose practicing the Abrahamic religions of Christianity, Judaism, and Islam bury their dead.”²¹ During the Middle Ages, wealthy people often chose to be buried in common or mass graves “to convey humility.”²² But in “the Renaissance, the new cult of the individual contributed to the spread of private tombs and monuments,”²³ and burial places, likes

13. Eggener, *supra* note 7; see also Marsh, *supra* note 11, at 1327 (using the phrase “hallmarks of humanity”).

14. Murphy, *supra* note 11, at 400.

15. Jason G. Goldman, *Death Rituals in the Animal Kingdom*, BBC (Sept. 18, 2012), <https://bbc.in/2XRILsm> [<https://perma.cc/8UX2-HUNU>] (discussing behaviors of elephants, chimpanzees, gorillas, baboons, macaques, lemurs, geladas, and western scrub jays that may be characterized as “death rituals”); Mike Baker, *Orca That Carried Dead Calf for 7 Days Gives Birth Again*, N.Y. TIMES (Sept. 6, 2020), <https://nyti.ms/3a6hXat> [<https://perma.cc/Z3UE-52EQ>] (describing “a dramatic saga of apparent mourning” that “covered about 1,000 miles”).

16. See MURRAY, *supra* note 12, at 126.

17. Murphy, *supra* note 11, at 384.

18. See *id.* at 400; HOMER: THE ILIAD, Book XXIV, 468–620 (762 B.C.E.).

19. See Murphy, *supra* note 11, at 385–86 (referring to the conversion of the Roman emperor Constantine to Christianity); see also *Constantine*, HIST. WORLD, <https://bit.ly/3pPdTET> [<https://perma.cc/QEH9-ZW9A>] (last visited Oct. 31, 2021) (reporting that Constantine reigned from 306 C.E. to 337 C.E.).

20. See Murphy, *supra* note 11, at 386.

21. Khushbu Solanki, Note, *Buried, Cremated, Defleshed by Buzzards? Religiously Motivated Excaratory Funeral Practices Are Not Abuse of Corpse*, 18 RUTGERS J.L. & RELIGION 350, 350 (2017) (“[In contrast,] Hindus, Jains, Sikhs, and Buddhists cremate and store or spread the ashes.”); see also Boldt, *supra* note 1, at 157 (“[T]he practice of Judaism ‘abhors’ cremation, as the preservation of the dead body from utter destruction is of religious importance. On the other hand, practitioners of Hinduism . . . choose cremation . . . [to] free . . . the spirit of worldly attachment.”).

22. Eggener, *supra* note 7.

23. *Id.*

homes, became “an expression of social status and individual personality.”²⁴ By the 18th century, individual burial plots and markers became the norm.²⁵

U.S. burial practices and laws trace back to the English and their ecclesiastical courts.²⁶ Historically, “Americans . . . always buried their dead, whether at home, in churchyards, potter’s fields, town commons, or municipal burying grounds.”²⁷ In the vast majority of cases, the colonists buried their dead, in simple containers,²⁸ in what might be called a “green burial” today.²⁹ In the early 19th century, some used entombment—burying above ground—but interment (burial in the ground) continued to be very common.³⁰

The U.S. Civil War death toll brought significant changes to funeral and burial costs and procedures, particularly the preference for embalming. Throughout recorded history, it seems part of treating a decedent with respect has been burying the decedent close to his or her home.³¹ With so many soldiers dying on distant battle fields, an enormous demand developed for embalming, so the corpses could be shipped long distances back home and remain suitable for public viewing.³²

Other legal commentators have discussed in detail the changes in U.S. funeral and burial practices in the late 1800s through the 1950s in connection with the development of legislative and administrative regimes to regulate embalming, license funeral directors, and expand the duties which may be performed legally only by licensed professionals.³³ These changes distanced families from the

24. *Id.*

25. *Id.*

26. See Murphy, *supra* note 11, at 397 (explaining how the English common law courts had jurisdiction over property, and the English ecclesiastical courts had jurisdiction over the human body).

27. Eggener, *supra* note 7.

28. See Marsh, *supra* note 11, at 1329 (“Corpses were washed, wrapped in a shroud or placed in a simple box, and buried in the ground.”).

29. See *infra* note 292 and accompanying text (describing the modern green burial).

30. See Murphy, *supra* note 11, at 386.

31. See MURRAY, *supra* note 12, at 181–212.

32. Marsh, *supra* note 11, at 1330; Murphy, *supra* note 11, at 386–87 (explaining that the public transportation of President Abraham Lincoln’s body from Washington D.C. to his hometown of Springfield, Illinois in 1865, passing through 180 cities, helped popularize embalming); Jeremiah Chiappelli & Ted Chiappelli, *Drinking Grandma: The Problem of Embalming*, 71 J. ENV’T HEALTH, 24, 24 (2008) (“The final train ride of Abraham Lincoln’s embalmed body from Washington D.C. to Illinois raised awareness even more.”). See generally Fred Barbash, *Lincoln’s Corpse and Its Grand Yet Ghoulish Odyssey*, WASH. POST (Apr. 17, 2015), <https://wapo.st/3EEExgEM> [<https://perma.cc/Z77V-SP6V>].

33. See, e.g., Marsh, *supra* note 11, at 1331–36; Boldt, *supra* note 1, at 153–54.

dead, placing funerals and burials in the hands of for-profit businesses.³⁴

The resulting uniformity led to what came to be described as the “American Way of Dying”³⁵ or the “typical American burial.”³⁶ This included prompt transportation of the body to the undertaker after death, embalming, a casket, open viewing of the body at an elaborate funeral, a burial vault, and an underground burial.³⁷ In addition, there developed an expectation that the tomb and surrounding real estate would be maintained and dedicated exclusively as the burial place of one person, or a couple, for all time.

By 2010, for wealthy Americans, “burial in perpetuity [in] perpetual-care cemeteries [was] the norm.”³⁸ Things have changed a bit in the past decade. The typical American burial is still popular, but it is in decline. In 1947, only 4 percent of dead bodies in the United States were cremated, and 96 percent were buried.³⁹ In 1994, 25 percent of the American dead were cremated.⁴⁰ In 2019, it was projected that almost 55 percent would be cremated.⁴¹ The cre-

34. See Marsh, *supra* note 11, at 1330 (“As embalming became a uniquely American social norm, families and religious organizations lost control of their dead.”).

35. Marsh, *supra* note 11, at 1327 (citing MITFORD, *supra* note 11).

36. Marie, *A Green and Frugal Funeral*, PRAIRIE ECO-THRIFTER (Apr. 13, 2012), <https://bit.ly/3CNqKek> [<https://perma.cc/2DVB-HTEJ>]; Isabelle Kohn, *This Flesh-Eating Mushrooms Suit is the Coolest, Most Impactful Way to Die*, ROOSTER (Aug. 18, 2016), <https://bit.ly/2YfpqSi> [<https://perma.cc/28CS-NT94>].

37. See Megan C. Wells, *Dead Bodies Everywhere (Dun Dun Dun): Funeral Trends in the Recession and the Laws Regulating These Changes*, 2 EST. PLAN. & CMTY. PROP. L.J. 485, 491 (2010).

38. Eggener, *supra* note 7 (finding that in the United States, the cremation rate exceeded the burial rate in 2015); Sandee LaMotte, *Cremation Has Replaced Traditional Burials in Popularity in America and People Are Getting Creative with Those Ashes*, CNN HEALTH (Jan. 23, 2020), <https://cnn.it/39TladI> [<https://perma.cc/WHJ3-27MK>] (“Cremation became the top choice in 2015”); *2020 Cremation & Burial Projects Cremation Rate of 87% by 2040*, NFDA NEWS (July 6, 2020), <https://bit.ly/3zSByFH> [<https://perma.cc/FQb5-25WU>] (“[T]he national cremation rate surpassed the casketed burial rate for the first time in U.S. history [in 2015.]”).

39. AM. SOC’Y OF PLAN. OFFS., *CEMETERIES IN THE CITY PLAN 2* (1950), <https://bit.ly/3ocJ6zx> [<https://perma.cc/5CYN-HTTD>].

40. Chiappelli & Chiappelli, *supra* note 32, at 27.

41. *Statistics: Rates of Cremation and Burial*, NFDA (Aug. 31, 2019), <https://bit.ly/3BHvDUX> [<https://perma.cc/J5W8-GKTV>] (“[T]he 2019 cremation rate is projected to be 54.8% and [the] burial rate is projected to be 39.0%.”); *NFDA News Releases: Cremation Is Here to Stay: Aging Baby Boomers Provided Catalytic in Shift Beyond Traditional Burial*, NFDA (July 15, 2019), <https://bit.ly/3zVbzO1> [<https://perma.cc/H4JX-WCGY>] (“[F]or the fourth consecutive year, [cremation] has outpaced the rate of burial.”) [hereinafter *NFDA News Release: Cremation Is Here to Stay*].

mation rate varies widely from state to state⁴² and from country to country.⁴³ The National Funeral Directors Association predicts that by 2040, the cremation rate will exceed 78 percent, and the number of casketed burials will account for less than 16 percent of U.S. deaths.⁴⁴ A major reason cited is the comparatively low cost of cremation, which generally ranges from \$800 to \$4,000.⁴⁵

Nevertheless, the typical American burial remains very popular. In 2019, it was estimated that 39 percent of decedents were buried.⁴⁶ Many families favor burial for religious reasons.⁴⁷ As of December 2019, the National Funeral Directors Association calculated the median cost of a funeral and burial at \$9,135.⁴⁸ Add the cost of the cemetery plot (perhaps \$1,500), a tombstone (perhaps \$1,500), flowers, and the cost of publishing the obituary, and the average total cost may be approximately \$12,500. While burial and cremation are popular, today consumers can choose from several other disposition methods.⁴⁹ One commentator states, “[T]here is

42. See *List of Countries by Cremation Rate*, WIKIPEDIA, <https://bit.ly/3zVoBLi> [<https://perma.cc/PY3M-VVEW>] (last visited Aug. 25, 2021) (listing the cremation rate in 2014 for the following states: Nevada 75.9%; Washington 75.2%; Florida 62.7%; California 61.65; Illinois 42.6%; New Jersey 41.2%; New York 40.1%; Texas 39.5%; Tennessee 30.3%; Utah 29.7%; Kentucky 24.6%; Alabama 22.9%, and Mississippi 19.7%).

43. See *id.* (listing the cremation rates for Japan 99.97%; South Korea 90.5%; India 84%; United Kingdom 77.05%; Canada 68.4%; China 48.5%; France 32%; Ireland 20%; Spain 16%).

44. *NFDA News Releases: Cremation Is Here to Stay*, *supra* note 41 (“By 2040 . . . the cremation rate in the U.S. is projected to be 78.7% while the burial rate is predicted to be just 15.7%.”).

45. Jane Thompson, *Cremation Costs Breakdown Guide: How You Can Save \$2450*, CREMATION INST. (Aug. 2, 2020), <https://bit.ly/3B8nc5L> [<https://perma.cc/Z6HY-JUD3>] (listing the “maximum” costs in a few of the most expensive cities as New York \$10,200, Washington, D.C. \$7,600, Houston \$6,800, Chicago \$4,600, Nashville \$4,400); see also Chiappelli & Chiappelli, *supra* note 32, at 27. But see Sara Marsden, *Cremation Costs in 2020: How Cremation Is Disrupting the Funeral Industry*, DFS MEM’LS (Aug. 1, 2020), <https://bit.ly/3D0BMMP> [<https://perma.cc/4LLD-5N7Z>] (listing the cost of basic cremation (also called “direct cremation”) in 18 major U.S. cities, with Chicago having the most expensive rate at \$1,165 and Tucson, Arizona having the lower rate with a rate of \$455).

46. *Statistics*, NFDA <https://bit.ly/3BHvDUX> [<https://perma.cc/J5W8-GKTV>] (“According to the 2021 NFDA Cremation & Burial Report, in 2021, the projected burial rate is 36.6% and projected cremation rate is 57.7%.”).

47. See *infra* notes 296–309.

48. *2019 NFDA General Price List Study Shows Funeral Costs Not Rising as Fast as Rate of Inflation*, NFDA (Dec. 19, 2019), <https://www.bit.ly/2Y3IXW1> [<https://perma.cc/9KWH-86U6>] (including the transfer of remains to the funeral home, embalming, use of facilities and staff for viewing and the funeral ceremony, hearse, service car, printed material, the metal burial casket, and a vault).

49. See *infra* notes 288–89, 291–94 and accompanying text.

no limit to the human imagination, especially when it comes to getting rid of dead bodies.”⁵⁰

B. *Exorbitant Burials of the Rich*

“Life is fleeting . . . and . . . [p]eople engage in numerous activities to transcend death.”⁵¹ For the affluent, a parting attempt at permanence may be arranging an extravagant perpetual burial.⁵² It has been said, “The choice of burials accord . . . [a way of] immortalizing their memories.”⁵³

History is replete with stories about the human desire for outrageous tombs and the expansive real estate dedicated to them. The ancient Egyptian pyramids of the pharaohs vividly demonstrate the possible extravagance when big resources are available for burial. These tombs have been described as the “most magnificent man-made structures in history.”⁵⁴ Early step-pyramids date as early as 2950 B.C.E and rose over 200 feet.⁵⁵ The most famous step-pyramid “was surrounded by a complex of courtyards, temples, and shrines where Dsojer could enjoy his afterlife.”⁵⁶ The largest pyramid, the Great Pyramid at Giza, was built as the tomb of Pharaoh Khufu who reigned from 2589 to 2566 B.C.E. It is over 450 feet high with sides averaging over 755 feet.⁵⁷ “Approximately 2.3 million blocks of stone (averaging about 2.5 tons each) had to be cut, transported, and assembled to build Pharaoh Khufu’s Great Pyramid.”⁵⁸

50. KATHY BENJAMIN, *FUNERALS TO DIE FOR* 15 (2013).

51. See RAY D. MADOFF, *IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD* 152 (2010) [hereinafter MADOFF, *IMMORTALITY*] (discussing “having children . . . creating art, building skyscrapers, adding a link in the chain of knowledge, and fighting for causes they believe in”).

52. See *id.* (observing that the “most tangible [attempt at immortality] is the common practice of placing a stone marker at the location of a person’s physical remains”).

53. Lisa Dingman, *Rest in Peace: 10 Expensive Locations to Lay Down the Dead*, RICHEST (Jan. 4, 2014), <https://www.bit.ly/3CYnqg9> [<https://perma.cc/XC2X-6RT2>].

54. *Egyptian Pyramids*, HIST., <https://www.bit.ly/3zSDfmz> [<https://perma.cc/R24R-3RW7>] (Sept. 30, 2019).

55. *Id.* (“[R]oyal tombs were carved into rock and covered with flat-roofed rectangular structures known as ‘mastabas’ which were precursors to the pyramids.”).

56. *Id.*

57. *Id.*

58. *Id.* The next largest pyramid, built as a tomb for Pharaoh Khufu’s son, included the statue of the Great Sphinx, which is 240 feet long and 66 feet high. *Id.* (“The ancient Greek historian Herodotus wrote that it took 20 years to build and required the labor of 100,000 men, but later archeological evidence suggests . . . 20,000.”). “The last of the great pyramids was built during the reign of Pepy II” who reigned for 94 years from 2278 to 2184 B.C.E. *Id.* There were at least 118

The word “mausoleum” descends from the tomb of Mausolus, a governor of the Persian Empire in an area of present-day Turkey.⁵⁹ He died in 353 B.C.E., and his mausoleum “stood 145 feet high, topped with a bronze statue of a chariot drawn by [4] horses. It was surrounded by [36] columns with a statue in between each pair. The walls were covered in great friezes of mythical battles. Huge sections were made of solid marble.”⁶⁰ Mausolus’s widow employed hundreds of the best craftsmen, “including the four most famous Greek sculptors of the day.”⁶¹

An Anglo-Saxon king was buried in a “[90]-foot wooden vessel containing priceless treasures.”⁶² In the late 1800s, Henry Scarlett of Upton, Georgia “selected a mound of granite that was 100 feet by 250 feet and . . . professionally engraved” as his tombstone.⁶³

C. Cost to Future Generations

“[B]urial [can be] selfish for the impact it has”⁶⁴ because of the real estate it monopolizes, and the environmental consequences of what is buried with the decedent.

Burial in perpetuity can tie up valuable real estate, rendering it unproductive. Normally, to allow future generations to use land productively, the law greatly restricts the ability of the dead to impair the future use of real estate. A court likely would declare a testamentary direction to destroy the testator’s residence void as against public policy.⁶⁵ A farmer’s directions to sow his field with salt upon his death likely would be unenforceable.⁶⁶ And the rule

great pyramids constructed. Jeffrey Fleishman, *Egypt: Make That 118 Pyramids*, L.A. TIMES (Nov. 11, 2008), <https://lat.ms/3usvliB> [<https://perma.cc/X3PD-T62Q>].

59. See BENJAMIN, *supra* note 50, at 47.

60. *Id.*

61. *Id.*

62. MURRAY, *supra* note 12, at 116.

63. BENJAMIN, *supra* note 50, at 129.

64. Mic Max Planke, *Traditional Burials Are Ruining the Planet—Here’s What We Should Do Instead*, INSIDER (APR. 7, 2016), <https://bit.ly/3F4hEvf> [<https://perma.cc/Q7XH-CXCE>] (quoting Kate Kalanick, executive director of the Green Burial Council); see also Becky Gillette, *Kick the Formaldehyde Habit—Be a Sour Cherry*, ES INDEP. (Sept. 20, 2017), <https://bit.ly/3imeEAJ> [<https://perma.cc/SFQ7-PV6U>] (“It is arrogance to think we should take up a permanent spot on earth that is perpetually marked instead of just being returned to the earth from which we came.” (quoting Vickie Kelley of the National State Burial Association)).

65. See, e.g., *Eyerman v. Mercantile Tr. Co.*, 524 S.W.2d 210, 213 (Mo. Ct. App. 1975) (ruling that the testator’s direction, in her will, to destroy her historic residence, with a current value of \$40,000 and which likely would have cost \$200,000 to replace, was void); see also RESTATEMENT (FIRST) OF TRUSTS § 124 cmt. g (AM. L. INST. 1935) (declaring unenforceable a decedent’s direction that a “house shall be boarded up and remain unoccupied”).

66. RESTATEMENT (FIRST) OF TRUSTS § 124, cmt. g (AM. L. INST. 1935).

against perpetuities, when applicable, will render otherwise legitimate directions regarding property void if they would extend beyond the specified period, often approximately 100 years.⁶⁷

Nevertheless, in *Traditional Burials Are Ruining the Planet—Here’s What We Should Do Instead*, the director of a nonprofit organization comments that when it comes to burial, “Americans . . . [feel] they own a 4[-foot]-by-8[-foot] plot for eternity.”⁶⁸ The wealthy often claim much more.⁶⁹

If exclusive, land-hoarding burials truly were perpetual, Malthusian-type projections would suggest dire land-use consequences. “In the last 50,000 years . . . around 101 billion people have . . . died on planet Earth. Like it or not, everyone alive today—seven billion of us—is likely to join them within the next century. So what will we do with all the bodies?”⁷⁰ “If the idea of ‘perpetual’ care were pursued far enough, we should eventually use all our land for the interment of the dead and have no land left for the living.”⁷¹ Writing in 1950, one group stated, “[W]e have already reached the point at which the distribution of land between the living and the dead is a serious problem.”⁷²

67. See Mark Glover, *A Social Welfare Theory of Inheritance Regulation*, 2018 UTAH L. REV. 411, 448 (2018) (“After this period, the donor can no longer exert control over her property.”).

68. Planke, *supra* note 64 (quoting Kate Kalanick, executive director of the Green Burial Council).

69. See e.g., Dingman, *supra* note 53 (referring to a 756-square foot mausoleum site at Green-Wood Cemetery in New York); Daniel Trotta, *New York’s Helmsley to Rest in \$1.4 Mln Mausoleum*, REUTERS (AUG. 21, 2007, 8:20 PM), <https://reut.rs/3ivR7gG> [<https://perma.cc/5ZAG-FS4D>] (“[She] will be lavishly laid to rest in a mausoleum worth \$1.4 million—more than the average Manhattan apartment.”); Gerry W. Beyer, *Leona Helmsley’s Will—A Detailed Analysis*, LAW PROFESSOR BLOGS NETWORK: WILLS, TRUSTS & ESTS. PROF BLOG (Aug. 30, 2007), <https://bit.ly/3zVisPb> [<https://perma.cc/G77X-MHRU>] (describing a \$3 million “Helmsley Perpetual Care Trust” to maintain her mausoleum and the “burial places of various other family members”); McShane, *supra* note 9 (reporting that the Helmsley mausoleum is 1,300 square feet).

70. Zoria Gorvett, *The Buildings Designed to House the Dead*, BBC (Nov. 28, 2017), <https://bbc.in/3uzen23> [<https://perma.cc/MAL8-ZEX5>]. Every year, approximately 2.5 million people die in the United States alone. Marsh, *supra* note 11, at 1338.

71. AM. SOC’Y OF PLAN. OFFS., *supra* note 39, at 1; see also Gorvett, *supra* note 70 (“One study predicted that if burials remain as popular in 2050 as they were in 2014, the world will need to set aside around another 2,059 square miles (6,500 sq km) of land—an area more than 5 times the size of New York City.”).

72. AM. SOC’Y OF PLAN. OFFS., *supra* note 39, at 1.

Currently, cemetery land shortages occur in major cities⁷³ because people usually wish to be buried where they lived.⁷⁴ This desire traces back to ancient times.⁷⁵ Today, as so many people live in cities “where land is not in oversupply,”⁷⁶ metropolitan situations highlight how perpetual burials can monopolize valuable land.

A 2010 article titled *City Cemeteries Face Gridlock*⁷⁷ reports that “the heart of [New York] [C]ity . . . is fast running out of graveyard space.” Some 60,000 New Yorkers die each year, and only 25 percent are cremated, so cemeteries are “squeezing coffins into every barren inch, narrowing paths [and] stacking coffins nine-deep.”⁷⁸ The demand has also driven up prices to the point that “burial plots in centrally located cemeteries rival the most expensive real estate in the city.”⁷⁹ Also, even disregarding the need for future cemeteries, “[t]he problem with traditional cemeteries is you can’t do anything else with the land once bodies are under the ground, [and] . . . ‘dead’ cemeteries that are a few hundred years old [turn] into eyesores.”⁸⁰ Several cities facing real estate shortages are using high-rise buildings designed to house the dead, including “Oslo, Verona, Mexico City, Mumbai . . . Paris,” Santos, Brazil, and Tel Aviv.⁸¹

A potentially mitigating factor regarding land use is that even when a burial plot is sold as perpetual, or the consumer is promised perpetual care of the burial plot, the burial may not be perpetual. “Ever since humankind started burying [the dead] . . . people have worried about their bodies being moved from those same graves. History has shown that the idea of a ‘final’ resting place was little

73. See Marc Santora, *City Cemeteries Face Gridlock*, N.Y. TIMES (AUG. 13, 2010), <https://nyti.ms/3orX3eD> [<https://perma.cc/S8BS-BPYN>]; see also Chloe Hadjimatheou, *Why Greeks Are Exhuming Their Parents*, BBC NEWS (Nov. 26, 2015), <https://bbc.in/3zY1Jeg> [<https://perma.cc/Q8WJ-36A4>] (“Cemeteries in Greek cities are so overcrowded that bodies are often only kept in the ground for three years.”).

74. See, e.g., MURRAY, *supra* note 12, at 181–211; BENJAMIN, *supra* note 50, at 130–33.

75. This desire traces at least back to the days of Alexander the Great. He “died in present-day Iraq [in 323 B.C.E.] . . . 1,800 miles away [from] his home country of Macedonia.” BENJAMIN, *supra* note 50, at 133. Despite extensive planning and preparation, Alexander’s body apparently never made it back to Macedonia and ended up in Egypt. *Id.* at 134. An even further journey was necessary for Genghis Khan. “[M]any historians believe [he] died in Egypt [around 1227], [and his funeral] procession had to walk 4,000 miles to Mongolia.” *Id.* at 131.

76. AM. SOC’Y OF PLAN. OFFS., *supra* note 39, at 2.

77. Santora, *supra* note 73.

78. *Id.*

79. *Id.*

80. Planke, *supra* note 64, at 4.

81. Gorvett, *supra* note 70.

more than a nice lie people told themselves during a difficult time.”⁸² “In reality, [the practical need for] space meant that after a decent interval had passed (and everyone who cared had died) the fight for the space where a person was buried became a free-for-all.”⁸³

Generally, under state law, cemeteries that offer perpetual care must put aside 5 to 15 percent of the lot sale price into a maintenance fund for perpetual care, but typically there is “no guarantee the cemetery will be properly maintained forever. [There has been] a rise in the number of cemeteries going broke and defunct from either mismanagement, theft of the maintenance funds, or low returns because of poor investments.”⁸⁴ Also, a court can declare a cemetery in disrepair a nuisance,⁸⁵ and the government can acquire cemetery property through its power of eminent domain.⁸⁶

In addition to impairing land use, there is the environmental impact of everything buried with the corpse, specifically the formaldehyde and related embalming chemicals,⁸⁷ the casket, and the burial vault. In *Drinking Grandma: The Problem of Embalming*, the authors point out, “Despite the casket, the body’s fluids will inevitably leach into the groundwater.”⁸⁸ Studies dating to the late 19th century demonstrated leaching. In those days, embalmers used arsenic⁸⁹ instead of formaldehyde, and groundwater downstream from cemeteries had elevated arsenic levels “as well as higher levels of copper, zinc, and lead, all elements associated with caskets.”⁹⁰ Attempts to make caskets air-tight and water-tight have led to a phenomenon termed “exploding casket syndrome.”⁹¹ Basically, efforts to make caskets air-tight and water-tight lead to a disturbing

82. BENJAMIN, *supra* note 50, at 59.

83. *Id.*

84. *Consumer’s Guide to Cemetery Purchases*, FUNERAL CONSUMER ALL. (Nov. 19, 2010), <https://bit.ly/3uMacjT> [<https://perma.cc/SJ99-XXK2>].

85. *See* AM. SOC’Y OF PLAN. OFFS., *supra* note 39, at 5.

86. *Id.*

87. Julia Calderone, *Burying Dead Bodies Takes a Surprising Toll on the Environment*, INSIDER (Nov. 4, 2015), <https://bit.ly/3itUXXH> [<https://perma.cc/6DBP-VSLT>] (listing phenol, methyl alcohol, and glycerin).

88. Chiappelli & Chiappelli, *supra* note 32, at 24.

89. *See id.* (explaining that arsenic was banned because of harmful health effects and because it interfered with criminal cases when arsenic poisoning was suspected).

90. *Id.*

91. Josh Slocum, *What You Should Know About Exploding Caskets*, WASH. POST (Aug. 11, 2014), <https://wapo.st/3urrgeE> [<https://perma.cc/FZV2-9JK7>] (“The dead will naturally decompose [from the work of anaerobic bacteria], no matter how much money we spend on bags and boxes,” and a sealed above ground casket in a mausoleum will eventually become a “pressure cooker and burst[] from accumulated gases and fluids of the decomposing body.”).

conclusion because heat, gas, and liquid build up inside the coffin as the body decomposes, eventually causing an explosion.⁹²

An embalmer typically pumps approximately 1 gallon of formaldehyde mixed with other chemicals into a corpse for every 50 pounds of body weight.⁹³ The goal is to delay the body's bacteria from decomposing the decedent's flesh long enough for the public viewing,⁹⁴ but if excess formaldehyde is used, the body will appear stiffer and less lifelike.⁹⁵ If two million Americans were being embalmed each year, "roughly seven million gallons of formaldehyde [were] being deliberately placed in the soil each year."⁹⁶ In weight, "[a]bout 800,000 tons of formaldehyde-based embalming fluid is buried annually in U.S. graveyards,"⁹⁷ and there appears to be no benefit to embalming after the public viewing. It does not "delay the natural decomposition of human remains for a long-term or indefinite time."⁹⁸

In 2004, the International Agency for Research on Cancer classified formaldehyde as a known carcinogen,⁹⁹ and the National Cancer Institute has reported that formaldehyde increases the risks of brain cancer and leukemia.¹⁰⁰ The Occupational Safety and Health Administration lists formaldehyde as a toxic chemical.¹⁰¹ In 1987, the Environmental Protection Agency described formaldehyde as a "probable carcinogen."¹⁰² In the article titled *Drinking Grandma: The Problem of Embalming*, an environmental consult-

92. *Id.*

93. See Planke, *supra* note 64; see also Chiappelli & Chiappelli, *supra* note 32, at 24 (stating it takes roughly 3.5 gallons of formaldehyde to embalm the average adult).

94. See Shannon Palus, *How to Be Eco-Friendly When You're Dead*, ATL (Oct. 30, 2014), <https://bit.ly/3kVVsvd> [<https://perma.cc/8EC9-FD88>]; Chiappelli & Chiappelli, *supra* note 32, at 24 (describing how embalming fluid was used because it was effective in killing the microorganisms responsible for decomposition).

95. Chiappelli & Chiappelli, *supra* note 32, at 25.

96. *Id.*

97. William Reville, *Which to Choose: Burial or Cremation?*, IRISH TIMES (Jan. 15, 2018, 2:16 PM), <https://bit.ly/2XXL5hv> [<https://perma.cc/SS4K-8AJ7>].

98. 16 C.F.R. § 453.3(e)(1) (1994) (prohibiting funeral directors from representing to customers that embalming will delay decomposition). A court has ruled that these regulations are enforceable. *Harry and Bryant Co. v. FTC*, 726 F.2d 993, 996 (4th Cir. 1984) (discussing investigations and public hearings finding that a significant number of funeral providers had misrepresented the extent to which their services have "preventative and protective value"); see also Chiappelli & Chiappelli, *supra* note 32, at 25 (stating that embalming is designed to keep a cadaver looking fresh for the funeral service, but not much longer).

99. Chiappelli & Chiappelli, *supra* note 32, at 25.

100. *Id.*

101. *Id.*

102. *Id.*

ant noted that the release into the groundwater likely will be slower than the article's inflammatory title suggests; "we're probably drinking great-grandma" rather than grandma.¹⁰³

Nevertheless, even critics of formaldehyde embalming admit that the adverse effect of its eventual leaching into the ground has never been adequately assessed.¹⁰⁴ "A 1980s White House groundwater task force report raised the possibility that cemeteries would be a potential pollution source, but concerns were dismissed because of the lack of studies about the problem." Also, formaldehyde defenders argue, "There is a lot of uncertainty in the data,"¹⁰⁵ and the classification of formaldehyde as a carcinogenic was based on inadequate research.¹⁰⁶ Formaldehyde is used in a variety of products including asphalt shingles, paints, and varnishes, as well as numerous car parts.¹⁰⁷ Its supporters assert that the "use of formaldehyde is not a major environmental issue."¹⁰⁸

In regard to caskets and burial vaults, one commentator remarked, "Yes, loved ones need to be memorialized. But who's to say thousands of pounds of metal is still the best way to do it."¹⁰⁹ Based on approximately 1.2 million people being buried each year in the United States, the amount of material buried every year is staggering—"30 million pounds of hardwood, 2,700 tons of copper and bronze, 104,272 tons of steel, and 1,636,000 tons of reinforced concrete for burial vaults and caskets."¹¹⁰ Other commentators note that 10 acres of a cemetery may contain 1,000 tons of "highly environmentally impactful" casket steel,¹¹¹ and enough wood to build 40 houses.¹¹² The Green Burial Council reports that traditional burials in the United States each year result in burying 20 million feet of wood, 1.6 million tons of reinforced concrete, 17,000 tons of

103. *Id.* at 27 (quoting Julie Weatherington-Rice, an environmental consultant).

104. See Reville, *supra* note 97; Chiappelli & Chiappelli, *supra* note 32, at 25.

105. Maureen Robinson, *The Strange Case of Dr. Jekyll and Formaldehyde: Is It Good or Is It Evil?*, DODGE MAG., Fall 2009, at 4, 4, <https://bit.ly/3ii5bu8> [<https://perma.cc/8BZH-L8QH>].

106. *Id.* at 14 ("Recent literature reviews . . . of the . . . data conducted . . . have cast considerable doubt on the validity of NCI's findings and [the International Agency for Research on Cancer's] reclassification.").

107. *Id.* at 10.

108. *Id.* at 4.

109. Planke, *supra* note 64.

110. *Environmental Impact of Burial Funerals, What Funeral Homes Don't Want You to Know*, SAFE PASSAGE URNS, <https://bit.ly/3kYWh6J> [<https://perma.cc/3U8K-VZV6>] (last visited Nov. 3, 2021).

111. *Environmental Impact of Death*, SEVEN PONDS, <https://bit.ly/3JCZO51> [<https://perma.cc/ANP6-USPB>] (last visited Dec. 29, 2021).

112. Reville, *supra* note 97.

copper and bronze, and 64,500 tons of steel.¹¹³ The funeral industry has drawn special criticism for the sale of expensive caskets.¹¹⁴ Studies dating back to the 19th century showed “higher levels of copper, zinc, and lead, all elements associated with caskets”¹¹⁵ in the groundwater downstream from cemeteries.

In addition to the buried material, “[t]he whole burial process is a CO2 emissions nightmare. So much energy is required to manufacture a casket and to transport it.”¹¹⁶ Emissions come from cutting down trees, manufacturing the caskets, and transporting the wood and the caskets. Each year “[t]he amount of wood needed to create caskets is equivalent to [4] million square acres of forest, which contains enough trees to sequester 65 million tons of carbon dioxide a year.”¹¹⁷

II. ESTATE TAX DEDUCTION FOR BIG-MONEY BURIALS

A. *Federal Estate Tax Generally and “Swollen” Fortunes*

The federal estate tax is a transfer tax,¹¹⁸ effectively imposed at a flat 40 percent rate,¹¹⁹ generally on the amount of the decedent’s transferable property at death. A deduction is allowed for certain involuntary transfers the decedent’s estate must make at death, such as amounts needed to pay the decedent’s debts, claims against the estate, and administrative expenses required to administer the estate.¹²⁰ Deductions are also allowed for transfers to charity¹²¹ and to a surviving spouse.¹²²

As the federal estate tax effectively applies at a high flat rate, namely 40 percent, a deduction from the federal estate tax is very

113. Sonya Vatomsky, *Thinking About Having a “Green Funeral”? Here’s What to Know*, N.Y. TIMES (Mar. 22, 2018), <https://nyti.ms/2YdxvHi> [<https://perma.cc/3D9Z-LQPZ>].

114. See Slocum *supra* note 91 (describing deceptive sales tactics used in the funeral industry).

115. Chiappelli & Chiappelli, *supra* note 32, at 24.

116. See *Environmental Impact of Burial Funerals, What Funeral Homes Don’t Want You to Know*, *supra* note 110; see also Calderone, *supra* note 87 (listing the many materials that go into a burial).

117. SAFE PASSAGE URNS, *supra* note 110.

118. See NEWMAN ET AL., *infra* note 124, at 148.

119. I.R.C. § 2001(c) (setting forth a graduated “rate schedule” but the amounts of tax that would have been imposed at the rates below 40% listed in the schedule generally will be avoided because of the exemption equivalent under IRC § 2010(c)); Ashlea Ebeling, *IRS Announces Higher Estate and Gift Tax Limits for 2020*, FORBES, <https://bit.ly/3ooyH5m> [<https://perma.cc/4U2D-S7XA>] (Oct. 28, 2020) [hereinafter Ebeling 2020] (referring to “today’s flat 40% rate”).

120. I.R.C. § 2053(a).

121. *Id.* § 2055(a).

122. *Id.* § 2056(a).

valuable. For every dollar deducted, a family saves 40¹²³ cents in federal estate taxes. In effect, a federal estate tax deduction is a subsidy¹²⁴—for every dollar deducted, the family shifts 40 cents of the cost of the item to other U.S. taxpayers.¹²⁵

Historically, the federal government used the estate tax to raise significant tax revenue during times of public crisis or great public need.¹²⁶ Although the federal estate tax recently has applied only to the very wealthy,¹²⁷ the federal government has applied the federal estate tax more broadly in the past to raise substantial revenue.¹²⁸ For example, in 1977, decedents dying with a net estate over \$120,667 paid the estate tax, and decedents dying from 1987 through 1997 paid the federal estate tax if their net estate exceeded \$600,000.¹²⁹ The federal government could reverse the 2017 tax changes and expand the reach (and rate) of the federal estate tax in the future to raise revenue for important public purposes, such as dealing with pandemics.¹³⁰

123. For example, a \$1,000 deduction would reduce the amount of tax otherwise payable by \$400.

124. See JOEL S. NEWMAN, DOROTHY A. BROWN & BRIDGET J. CRAWFORD, *FEDERAL INCOME TAXATION: CASES, PROBLEMS, AND MATERIALS* 485 (7th ed. 2019) (discussing a tax deduction as a “subsidy”).

125. See Allan J. Samansky, *Nonstandard Thoughts About the Standard Deduction*, 1991 UTAH L. REV. 531, 546 (1991) (“The government generally bears part of the cost of any deductible expenditure.”); John S. Lowe, *Severance Taxes as an Issue of Energy Sectionalism*, 5 ENERGY L.J. 357, 357 (1984) (“[T]he deductions [have been viewed] as unnecessary subsidies to the oil industry . . . that increase the tax burden . . . citizens must bear.”).

126. See Debra R. Silberstein, *A History of the Death Tax: A Source of Revenue, or a Vehicle for Wealth Redistribution?*, 17 PROB. & PROP. 3 (2003) (discussing the enactment of a “legacy tax” in 1797 to pay for the construction of the U.S. Navy, and the use of an inheritance tax to finance and recover from the Civil War, and the enactment of an estate tax to finance World War I).

127. The threshold for paying federal estate tax has risen at an amazing pace. The threshold (also called the “exemption equivalent”) rose from \$120,608 in 1977, to \$275,000 in 1982, to \$600,000 for 1987 through 1997, to \$1 million in 2002, to \$3.5 million in 2009, to \$5 million in 2010, and to \$10 million in 2017. See RAY D. MADOFF, CORNELIA R. TENNEY, MARTIN A. HALL & LISA N. MINGELLA, *PRACTICAL GUIDE TO ESTATE PLANNING* § 5.02[A], at 5006 (2014) [hereinafter MADOFF, *PRACTICAL GUIDE*] (listing the exemption equivalents before 2013); see also Ashlea Ebeling, *Final Tax Bill Includes Huge Estate Tax Win for the Rich: The \$22.4 Million Exemption*, FORBES (Dec. 21, 2017, 8:46 AM), <https://bit.ly/3uG7Ra7> [<https://perma.cc/W7SN-YJ6R>]. See generally I.R.C. § 2010(c).

128. See Silberstein, *supra* note 126.

129. See MADOFF, *PRACTICAL GUIDE*, *supra* note 127, § 5.02, at 5006.

130. See Ebeling 2020, *supra* note 119 (“Democratic presidential hopefuls say they’ll bring the [exemption equivalent] back to its 2009 level of \$3.5 million, with a graduated rate up to 77%, compared to today’s flat 40% rate”); see also Jeffrey M. Glogower, Stephen J. Bahr & Adam W. Randle, *Impact of President Biden’s Tax Plan on Estate Planning*, 6 NAT’L. L. REV. 275 (2021) (noting that the Biden Administration’s 2022 revenue proposals would not change the federal estate tax,

The federal estate tax has the potential to redistribute wealth and promote equal opportunity.¹³¹ Industrialist Andrew Carnegie proposed that at least 50 percent of a large estate should be collected in taxes at death because the excess wealth would “deaden the talents and energies” of the surviving family members and “tempt them to lead a less useful and worthy life.”¹³² President Theodore Roosevelt asserted that the federal estate tax “should . . . put a constantly increasing burden on the inheritance of those swollen fortunes which it is certainly of no benefit to this country to perpetuate.”¹³³

B. *Funeral Expense Deduction—Uncle Sam Pays 40 Percent*

One of the deductions from the gross estate in calculating federal estate tax liability is funeral expenses.¹³⁴ Some amount of funeral expenses are unavoidable, and a corresponding deduction is necessary so that only the amount the decedent can pass to family or other beneficiaries is taxable.¹³⁵ The key statutory language for the deduction has remained unchanged since at least 1916,¹³⁶ providing as follows: a deduction is permitted for “funeral expenses . . . as are allowable by the laws of the jurisdiction . . . under which the estate is being administered.”¹³⁷ Thus, the federal statute effectively provides that as long as the funeral expenses may be paid from the estate under the applicable state probate laws, then the funeral expenses will be deductible in calculating the federal estate tax. Al-

but adding that the “absence of any proposed changes . . . currently does not mean that such changes will not be proposed by the Biden Administration at a later date”).

131. See generally Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 469, 470 (2007) (“[T]he present estate tax . . . only weakly track[s] the equal opportunity principle.”).

132. Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223, 226 (1956) (citing ANDREW CARNEGIE, *THE GOSPEL OF WEALTH* xxii (1933)).

133. *Id.* at 229 (emphasis added) (quoting 17 WORKS OF THEODORE ROOSEVELT 432–34 (mem’l ed. 1925)).

134. I.R.C. § 2053(a)(1).

135. RICHARD B. STEPHENS ET AL., *FEDERAL ESTATE AND GIFT TAXATION* ¶ 5.03, §§ 5–6, 5–7 (9th ed. 2013); see also *Estate of Cafaro v. Comm’r, T.C.M. (CCH) 1002* (1989) (“[The estate tax is imposed only on] what actually passes in value from the dead to the living.”); *infra* note 259.

136. Michael H. Tow, Note, *Estate of Love and 2053(a)(2): Why State Law Should Control the Determination of Deductible Administrative Expenses*, 12 VA. TAX REV. 283, 290 (1992); see also *Iglehart v. Comm’r, 77 F.2d 704, 712* (5th Cir. 1935) (referring to § 303(a)(1) of the Revenue Act of 1926).

137. See I.R.C. § 2053(a)(1); see also *Estate of Cardeza v. Comm’r, 5 T.C. 202, 203* (1945) (referring to “section 812(b) of the Internal Revenue Code,” which is the predecessor of current I.R.C. § 2053(a)(1)) *aff’d*, 173 F.2d 19 (3d Cir. 1949)).

though the statute refers to any amount that is “allowable,” it is clear that the estate must actually pay the amount to deduct it.¹³⁸

*Estate of Cardeza v. Commissioner*¹³⁹ demonstrates the importance of state probate law in calculating the federal deduction. Upon her death in 1939, Charlotte Cardeza “bequeathed \$25,000 in trust for the perpetual maintenance” of a mausoleum previously erected where she, her son, and her daughter-in-law would be interred.¹⁴⁰ Based solely on changes to the consumer price index, \$25,000 in 1939 would be the equivalent of \$492,026.98 in 2021.¹⁴¹

The executors claimed the full amount as an immediate funeral expense deduction on Charlotte’s federal estate tax return. The Internal Revenue Service (“IRS”) challenged the deduction, arguing that the cost of perpetual care of a grave was not a “funeral expense,” in part, because the Pennsylvania inheritance tax statute listed amounts for perpetual care of a grave separately from funeral expenses.¹⁴² The Tax Court rejected the IRS position and stressed that the federal funeral expense deduction statute (current I.R.C. § 2053(a)¹⁴³) focused on whether the amount would be “allowed” as a funeral expense under the applicable state probate law,¹⁴⁴ and treatment under state tax law did not control.¹⁴⁵

138. FEDERAL ESTATE AND GIFT TAXATION, *supra* note 135, ¶ 5.03(2)(b), §§ 5–15.

139. *Est. of Cardeza*, 5 T.C. 202.

140. *Id.* at 207–08 (“She directed in her will that the [trust’s] net income be used for perpetual care, upkeep, maintenance, repairs and replacements of the mausoleum, and that flowers or other emblems be placed thereon on Christmas Day, New Year’s Day, April ninth, and Easter Day each year thereafter.”). The will also provided that if her son had any children in the future, those grandchildren could be buried in the mausoleum. *Id.* at 208. The testator’s only son was 64-years old. Presumably the son’s wife was 59-years old because she was born on March 27, 1880, and the decedent passed away on August 1, 1939. They had no children at the time. *Id.* at 202. The court noted a urologist’s opinion, based on examinations performed in 1939 and 1944, that the 64-year old son could procreate. *Id.* at 208.

141. See Ian Webster, INFLATION CALCULATOR, <https://bit.ly/39PXu9V> [<https://perma.cc/Y3PW-L2PC>] (last visited Sept. 19, 2021) (stating that \$1 in 1939 would be worth \$19.73 in 2021).

142. 5 T.C. at 220 (describing the Pennsylvania statute).

143. I.R.C. § 812(b)(1) .

144. 5 T.C. at 220; see also FEDERAL ESTATE AND GIFT TAXATION, *supra* note 135, ¶ 5.03(1)(a), § 5–8 (“This is a classic example of [an] express reference to local law for a principle to be applied in the implementation of a federal statute.”).

145. The Tax Court relied upon two Pennsylvania probate law cases. One of the Pennsylvania probate cases held that a \$5,000 bequest to a trust for the maintenance of the testator’s cemetery plot and the structures therein was a “funeral expense” (and therefore not subject to the inheritance tax) because it “may be said to belong to the original expenses” of buying along with the cost of the burial lot and the tombstone. 5 T.C. at 220 (discussing *In re Dingee’s Est.*, 14 Pa. D. 225 (Orphans’ Ct. 1905)). The other Pennsylvania probate case held that \$700 set aside

The Third Circuit affirmed stating that the funeral expense deduction is an “instance where Congress, rather than attempting uniformity [by enacting a federal standard] specifically has contemplated that local law determines the quantum of the deduction.”¹⁴⁶ Leading commentators have explained this reliance on local probate law: “[The possible] state-to-state disparities might seem unwarranted [since this is a federal tax deduction], but they reflect differences in the amounts available for distribution to the beneficiaries of the estate—the base on which the estate tax is imposed.”¹⁴⁷ In other words, executors will pay allowable funeral expenses before making payments to any will or trust beneficiaries, and therefore the amount of the funeral expenses will reduce the amounts the decedent’s estate pays to those beneficiaries.¹⁴⁸ Thus, funeral expenses reduce what the decedent transfers to beneficiaries and should be treated the same as debts owed by the decedent or claims against the decedent’s assets.

C. *Promoting Big-Money Burials with State Probate Laws*

Under state probate laws, courts will allow the wealthy to spend enormous amounts on land-hoarding burial plots and mausoleums, and their maintenance.¹⁴⁹ This hands-off approach when the wealthy specify their wishes in their will is in sharp contrast to what happens for many of the less-affluent dead. Funeral

for the “care of a grave [were] almost as essential” as the cost of purchasing the burial lot, and therefore those amounts were part of the funeral expenses. 5 T.C. at 221 (discussing *In re Middleton’s Est.*, 13 Pa. D. 811 (Orphans’ Ct. 1904)).

146. *Comm’r v. Cardeza’s Est.*, 173 F.2d 19, 23 (3d Cir. 1949) (emphasis added). The Pennsylvania statute referred to “reasonable and customary funeral expenses,” 5 T.C. at 220, and neither the Tax Court nor the Third Circuit in *Cardeza’s Estate* made an attempt to apply a federal “reasonableness” test. Indeed, the Third Circuit stated that Congress rejected such an approach. *See* 173 F.2d at 23.

147. BORIS B. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS*, ¶ 131.2, at 131–36 (2d ed. 1993) (“Amounts the executor spends, without regard to the wishes of the beneficiaries but with the approval of the probate court, differ from amounts the beneficiaries voluntarily spend from their own resources, even if they use funds inherited from the decedent.”).

148. *See infra* note 204 and accompanying text.

149. *See Gans, supra* note 3, § 7(a) noting:

Where a decedent leaves a will in which he expresses his desires with respect to the amount of funeral expenses, the courts generally attempt to carry out his wishes. This is so whether he authorizes unusually large funeral expenses . . . although in unusual circumstances, the courts may vary his expressed desires.

Id.

expenses¹⁵⁰ of the less wealthy are severely restricted if the payment of the funeral expenses would prevent any of the decedent's creditors from being paid.¹⁵¹

When a decedent is solvent and specifies in his or her will the type of funeral and burial, or the expected funeral and burial costs, the court may allow the payments even when the amount is excessive. In these situations, no creditor is harmed; it simply means that the voluntary transfers to one or more beneficiaries will be smaller. For example, in *In re Baeuchle's Will*,¹⁵² a 77-year-old widow died with approximately \$175,000 in personal property. She was survived by two sisters, three brothers, and three nieces (the children of a predeceased sister). Her will left only \$100 to each brother and sister, \$2,700 to various friends, and the rest of her estate (amounting to approximately \$150,000 after the payment of administrative expenses and other miscellaneous funeral expenses) for (i) a cemetery plot, (ii) a new mausoleum for herself and the remains of her predeceased husband, and (iii) the perpetual care of her cemetery plot and mausoleum.¹⁵³ The will specified that the executor purchase a plot in the Woodlawn Cemetery, located in the Bronx, New York.¹⁵⁴ Woodlawn Cemetery has been described as the most expensive graveyard in the world.¹⁵⁵ Based solely on changes in the cost-of-living index since 1946, the \$150,000 for these burial expenses would be worth almost \$2.15 million in 2021.¹⁵⁶

Her surviving brothers and sisters sued and argued that only a reasonable amount should be allowed as funeral expenses and that the excess should be paid to them as her next of kin under the intestacy laws. The court stressed that the language of the decedent's will was unambiguous in specifying that she wished the entire resi-

150. Under the catch-all phrase "funeral expenses," courts tend to lump together all the various expenses involved, including costs of transporting the corpse, embalming, the undertaker's other services, the funeral ceremony, the flowers, the casket, the burial vault, the monument, the cemetery plot, the tomb or mausoleum, and the cost of perpetual care for the cemetery plot, tomb or mausoleum. *See, e.g., In re Colton's Est.*, 38 Pa. D. & C. 123 (Orphans' Ct. 1940); *In re Baeuchle's Will*, 82 N.Y.S.2d 371 (Sur. Ct. 1948); *In re Churchill's Est.*, 223 N.Y.S. 846 (Sur. Ct. 1927) (including the costs of the minister, sexton, and janitor).

151. *See infra* notes 206–15 and accompanying text.

152. *In re Baeuchle's Will*, 82 N.Y.S.2d 371.

153. *Id.* at 373–74.

154. *Id.* at 374.

155. BENJAMIN, *supra* note 50, at 115 ("While even the cheapest plots in [Woodlawn] cemetery will run you more per square foot than you paid for your home, the kicker is the cost for enough land to build a family mausoleum . . . [a] cool \$1.5 million.").

156. *See* DOLLARTIMES, <https://bit.ly/3orkzbm> [<https://perma.cc/V5UW-9J26>] (last visited Oct. 1, 2021) (stating that \$1 in 1946 would be worth \$14.31 in 2021).

due of her estate to accomplish the three purposes specified—“the purchase of a burial plot, the erection of a mausoleum thereon, and . . . the perpetual care of both.”¹⁵⁷ “It is clear that she did not intend to leave any part of her residuary estate undisposed of,”¹⁵⁸ which would allow it to pass to her family by intestacy. As a matter of policy, the court stressed the importance of testamentary freedom, observing that the only restrictions on a testator’s ability to direct where his or her property should go under applicable state law were limitations on the portion of an estate that could pass to charity,¹⁵⁹ and restrictions on the ability to disinherit a surviving spouse.¹⁶⁰ Beyond these two restrictions, “a person may will his property as he pleases, and the courts are to carry out the directions, [and] not add to, or take from them.”¹⁶¹

In response to the argument that the amount spent was totally unreasonable when considering the decedent’s status in life and the family background, the court replied, “It does not seem that the folly or the wisdom of [the testatrix’s] directions are the concern of her kin or the court.”¹⁶² Furthermore, the court observed, “[W]here a testator gives a clear direction to expend her residuary estate, and there are no prior interests requiring protection, the court . . . lacks power to reduce the amount and award the excess to the next of kin.”¹⁶³

Also, in *In re Houston’s Estate*,¹⁶⁴ a court endorsed this approach in dicta stating, “A testator may provide for any extravagant exhibitions at his funeral he chooses, and those to whom his estate passes will not be denied the pleasure of contributing to the cost of most any kind of spectacle that catches their fancy.”¹⁶⁵

157. 82 N.Y.S.2d at 375.

158. *Id.*

159. *Id.* The court’s reference likely was to so-called “mortmain statutes” which traditionally prevented a decedent from leaving more than a certain percentage of his or her total wealth to charity. See Jeffrey G. Sherman, *Can Charitable Influence Ever Be “Undue” Influence*, 73 BROOK. L. REV. 579, 606 (2008) (discussing New York’s 50% approach); ROGER W. ANDERSEN & IRA MARK BLOOM, FUNDAMENTALS OF TRUSTS AND ESTATES 344 (5th ed. 2017) (“Mortmain statutes took either or both of two approaches. They limited the percentage of property which [the] testator could give to charity, or they prohibited (or limited) charitable gifts made in a set period before death.”).

160. 82 N.Y.S.2d at 375.

161. *Id.* But see Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273 (discussing public policy as a possible restriction on testamentary freedom).

162. 82 N.Y.S.2d at 377.

163. *Id.* at 378.

164. *In re Houston’s Est.*, 21 Pa. D. 395 (Orphans’ Ct. 1911).

165. *Id.* at 396.

In contrast, when the decedent's will is equivocal about the funeral expenses, courts will "retain control over the amount that will be allowed to be expended."¹⁶⁶ For example, in *In re Carney*, the decedent's will stated that the executors shall use the residue of her estate, which came to approximately \$5,000, "for the keeping of my grave and to use the money as they should see fit for same."¹⁶⁷ The cemetery quoted a price of \$1,000 for perpetual care, and the court authorized the executors to pay the cemetery only \$1,000 for perpetual care and directed the executors to distribute the balance to the decedent's intestate takers. Also, in *In re Zerneck*,¹⁶⁸ the decedent in her will "direct[ed] that approximately \$8,000 of my estate . . . be devoted to my funeral expenses," including the purchase of a "deluxe crypt where my remains shall be permanently interred."¹⁶⁹ The court concluded that the word approximately gave the executor discretion, and the court authorized the executor's proposal to spend only \$3,000 on the decedent's funeral and pay the balance to the residuary beneficiary.

One case addressing whether a corpse that had been buried for ten months should be exhumed speculates, in dicta, that a court could refuse to enforce "absurd or preposterous directions" in a will regarding the disposition of the decedent's body.¹⁷⁰ In *In re Estate of Moyer*,¹⁷¹ Thomas Milton Moyer's will stated his "desire to be cremated as directed by the executor."¹⁷² After his death, his mother had him buried. Later, the executor petitioned the court to have the body exhumed and then cremated. The communications between the executor and the decedent's mother at the burial time were in dispute. The trial court ordered the corpse to be exhumed, and cremated, and the mother appealed. The Utah Supreme Court observed, "The matter of the disposition of the dead, and what happens after death, have always been among the serious concerns of mankind, [and] that it is not subject entirely to the desires, or the whim or caprice of the individual, but is subject to control by law."¹⁷³ Generally, "so long as [the method of disposing of the body is] within the limits of reason and decency as related to the accepted customs of mankind,"¹⁷⁴ then a clear direction in the testator's will

166. *In re Carney's Est.*, 132 N.Y.S.2d 196, 197 (Sur. Ct. 1954).

167. *Id.* (emphasis added).

168. *In re Estate of Zerneck*, 174 N.Y.S.2d 212 (Sur. Ct. 1958).

169. *Id.* at 213 (emphasis added).

170. *In re Estate of Moyer*, 577 P.2d 108, 110 (Utah 1978).

171. *In re Estate of Moyer*, 577 P.2d 108.

172. *Id.* at 109.

173. *Id.* at 110.

174. *Id.*

should be binding. But the court stated that a decedent does not have an absolute right to direct an “absurd or preposterous” disposition of the corpse “that would require extravagant waste of useful property or resources or be offensive to the normal sensibilities of society in respect of the dead.”¹⁷⁵ Nothing in the opinion indicated that the court would consider burial in perpetuity within a separate tomb an “absurd or preposterous disposition.” In resolving the dispute between the parties, the court referred to the well-established policy of not exhuming the dead “except for the most compelling of reasons,”¹⁷⁶ and the Utah Supreme Court reversed the lower court and directed that the deceased “should remain buried where he is.”¹⁷⁷

III. RECHARACTERIZING BIG-MONEY BURIALS AND REFORMING THE TAX LAW

This Article asserts that the amounts paid for big-money burials actually are two types of expenses. First, a reasonable amount is an involuntary expense because payment of those amounts are mandated by law¹⁷⁸ and social custom, and a tax deduction is appropriate from the federal estate tax. Second, the excess portion of burial expenses represents a personal choice that should not be deductible because it is a voluntary choice by which the decedent is choosing funeral over family.

The federal statute allowing a deduction for funeral expenses fails to recognize this distinction; instead, it defers to state probate laws, allowing a tax deduction for any amount that is allowable under state probate law.¹⁷⁹ When dealing with big-money burials, provided that all of the decedent’s creditors will be paid, state probate law merely considers the desires of the decedent on the one hand with the interests of the surviving family or other beneficiaries for a bigger inheritance on the other hand. Not surprisingly, state probate laws allow a decedent great testamentary freedom,¹⁸⁰ which in turn allows for an unrestrained tax deduction.

A. *Policies for Recharacterizing—Motives for Burials*

In evaluating whether funeral expenses can have a dual character, it is appropriate to consider the reasons for burials or other

175. *Id.*

176. *Id.* at 110–11.

177. *Id.* at 111.

178. *See infra* note 258 and accompanying text.

179. I.R.C. § 2053(a).

180. *See supra* notes 149–65 and accompanying text.

respectable dispositions. Four frequent motivations involved when disposing of a corpse are (i) a desire to treat the decedent with respect,¹⁸¹ (ii) a wish to help survivors deal with their grief, including providing closure, (iii) a need to prevent the spread of disease, and (iv) a wish to minimize the unpleasantness associated with death.¹⁸² People can feel strongly about these matters, but one may still ask whether a resource-intensive, government-subsidized, big-money burial for the wealthy is a necessary response to these concerns and motivations.

First, the desire to treat the decedent with respect raises questions about whether, and for how long, the corpse is the decedent. Many ancient peoples stressed the importance of the corpse. Some believed a decedent's spirit separated at death but lingered near the corpse post-mortem, and the ultimate peace or comfort of the spirit could depend on the treatment of the body after death.¹⁸³ The ancient Egyptians believed the preservation of the body was necessary for the decedent to enjoy the afterlife.¹⁸⁴ These beliefs inspired great concerns about the treatment of the corpse and led to such practices as mummifying the corpses of the pharaohs and other wealthy individuals. The Egyptians also filled their pyramids and other burial spaces with food and drink, and other items, which the corpse and the spirit might need after death.¹⁸⁵

In contrast, today, many people associate a person's identity more with his or her conscious brain activity than his or her physical

181. See PEACEFUL RETURN <https://bit.ly/31nl2C1> [<https://perma.cc/V7CP-UQP4>] (last visited Sept. 27, 2021) (“By burying our deceased loved ones, we show our love and respect for their bodies—and thus their lives.”).

182. See Marsh, *supra* note 11, at 1330 n.22 (“[T]he body . . . [is a] physical representation of death.”); Chiappelli & Chiappelli, *supra* note 32, at 24 (“[P]eople [have] a desire to render death more aesthetically pleasing.”).

183. See Murphy, *supra* note 11, at 385 (“The Egyptians believed the body must be preserved . . .”). *But see id.* (“The Greeks . . . burned the body . . . [to] set the soul free.”).

184. Erich Brenner, *Human Body Preservation—Old and New Techniques*, 224 J. ANAT. 316, 317 (2014) (“In several ancient cultures, not only the Egyptian culture, eternal life was associated with a preserved body; those whose body decayed would be excluded from the afterlife.”); PERCIVAL E. JACKSON, *THE LAW OF CADAVERS AND OF BURIAL AND BURIAL PLACES* 4 (1937) (“[I]n Egypt [if the body was not] preserved . . . the [person] might lose the prospect of life beyond the grave.”).

185. Joshua J. Mark, *Grave Goods in Ancient Egypt*, WORLD HIST. ENCYCLOPEDIA, (Apr. 27, 2017), <https://bit.ly/2XNwiWz> [<https://perma.cc/7UD9-REJ3>] (“The primary purpose of grave goods [was] . . . to provide the dead with what they would need in the afterlife . . . [including their] [f]avorite foods . . . and drink,” such as beer).

body.¹⁸⁶ They sometimes speculate about preserving that consciousness after death with technology.¹⁸⁷ If a person's identity is the person's conscious brain function, that identity terminates promptly after death because all brain function will cease within minutes after respiratory and circulatory failure.¹⁸⁸ One article states, "It doesn't take long before your body starts to lose what makes you you. Just a few minutes after death, one of the first things to go is your brain."¹⁸⁹ Perhaps consistent with this view, the National Conference of Commissioners on Uniform State Laws revised their definition of death in 1980 to include that a person is dead when all of his or her brain function ceases.¹⁹⁰ Previously, "death" was defined solely as the cessation of respiratory and circulatory functions.

For those who believe the corpse is at least part of the person's identity after brain death, that view may change at some point in the decomposition process.¹⁹¹ Various sources describe decomposition in gruesome detail.¹⁹² For these purposes, it is sufficient to point out that even if the corpse is embalmed and buried under-

186. See, e.g., George Northoff, *Brain and Self—a Neurophilosophical Account*, CHILD & ADOLESCENT PSYCHIATRY MENTAL HEALTH, July 13, 2013, at 1, 1 ("Another concept of self . . . starts from what we can experience in our consciousness.").

187. See, e.g., Michael Graziano, *Why You Should Believe in the Digital Afterlife*, ATL. (July 14, 2016) <https://bit.ly/3CTgMaN> [<https://perma.cc/QVE2-BS6M>] ("A professor of neuroscience says it will one day be possible to live on in a computer after death."); Antonio Regalado, *A Startup is Pitching a Mind-Uploading Service That is "100 Percent Fatal,"* MIT TECH. REV. (Mar. 13, 2018), <https://bit.ly/3q0bl6V> [<https://perma.cc/F36M-YJFD>] (discussing the concept of "transhumanism").

188. See Gina Echevarria & Shira Polan, *What Happens to a Human Body After 100 Years Inside a Coffin*, INSIDER (Aug. 16, 2019, 9:00 AM), <https://bit.ly/3CFoTrA> [<https://perma.cc/K5VB-LLNX>].

189. *Id.* ("Just a few minutes after death," the brain cells collapse and release water.)

190. UNIF. DETERMINATION OF DEATH ACT § 1 (amended 2008), 12A U.L.A. 781 ("An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the stem, is dead."); Frederick J. White III & J. Kelly Elrod, *Organ Donation After Cardiac Death: A Louisiana Hospital Ethics Committee Perspective*, 39 S.U. L. REV. 71, 77 (2011) ("A [2007] review of statutory definitions of death found that [14] states and the District of Columbia have adopted the Uniform Determination of Death Act, [18] have adopted a modification of the UDDA, [14] have adopted other statutory provisions defining death, and [4] have adopted no statute doing so.").

191. See Goldman, *supra* note 15 ("When an infant chimpanzee dies, his or her mother will carry the lifeless body around for days . . . weeks or months. . . . She only stops interacting with the corpse when it has decomposed so much that it is no longer recognizable.").

192. See, e.g., Echevarria & Polan, *supra* note 188, at 3 ("By 50 years in your tissue will have liquefied and disappeared . . . and after 80 years in that coffin, your bones will crack . . .").

ground in a casket, inside a burial vault, and in a relatively cold climate, the body usually will undergo substantial changes within hours, days, and weeks as the body's own microbes break down the internal organs and other flesh.¹⁹³ Even in such an excellent preservation situation, generally after 50 years, merely a skeleton (and perhaps some tendons) will remain intact.¹⁹⁴ As the collagen in the bones deteriorates, even the skeleton will collapse into bits of bone fragment.¹⁹⁵ After another 5 decades, or a total of 100 years, even under these favorable preservation conditions, the only thing preserved would likely be the decedent's teeth and some bone fragments.¹⁹⁶ With above ground burial, the body will decompose much faster; in a warm climate, a body entombed above ground may substantially decompose within just a year or two.¹⁹⁷ Some people may wish to honor the life or memory of a relative or family friend more than 100 years after his or her death, but perhaps a photo, an item of jewelry, genealogical records, or an online tribute,¹⁹⁸ might suffice instead of a substantial parcel of real estate and a tomb essentially holding only the decedent's teeth. It should be noted that with so many factors involved, rates of decomposition vary.¹⁹⁹

193. AHMET S. UEISIK & PHILIP RUSHBROOK, WORLD HEALTH ORG. REG'L OFF. FOR EUR., *THE IMPACT OF CEMETERIES ON THE ENVIRONMENT AND PUBLIC HEALTH: AN INTRODUCTORY BRIEFING 2* (1998) <https://bit.ly/3pyuyfe> [<https://perma.cc/K9LX-T7A5>]; Echevarria & Polan, *supra* note 188, (explaining that when organs and tissue are deprived of oxygen because blood has stopped flowing, the cells making up those organs and tissue die, releasing a great deal of water as those organs and tissues are roughly 70% water; also, the trillions of microbes in the gut will no longer be contained by the immune system).

194. Echevarria & Polan, *supra* note 188, at 3 (“By 50 years in, your tissues will have liquefied and disappeared . . .”).

195. *Id.* (“[A]fter 80 years in that coffin, your bones will crack . . .”)

196. *Id.* (“A century in, the last of your bones will have collapsed into dust. And only the most durable part of your body, your teeth, will remain.”).

197. See Wendy Deng, *Cemeteries in New Orleans*, LAKE FOREST COLL., <https://bit.ly/3uhWvJ6> [<https://perma.cc/UF25-DDG7>] (last visited Sept. 28, 2021) (observing that in New Orleans, when the temperature is 100 degrees Fahrenheit outside the tomb, it can reach 200 or 300 degrees Fahrenheit inside the tomb).

198. See Jim T. Miller, *How to Make an Online Memorial for a Departed Loved One*, HUFFPOST, <https://bit.ly/3ue9TOo> [<https://perma.cc/852B-F28G>] (Dec. 6, 2017).

199. See *Facts: What Happens to a Body After Death*, MEMORIAL PAGES, <https://bit.ly/39OxZpo> [<https://perma.cc/9HL9-K8X5>] (last visited Sept. 28, 2021) (“People who are dead for decades could still look fine while others of the same era completely decomposed. There are just too many factors that affect the rate of decomposition to give a definite answer.”); Colin Dwyer, *Salvador Dalí's Remains Exhumed, Revealing a Perfectly Arranged Mustache*, NPR (July 21, 2017, 1:33 PM), <https://n.pr/3iicvG5> [<https://perma.cc/M247-KCDD>]; Gorvett, *supra* note 70 (discussing “40-year old corpses in Germany that remain mysteriously fresh after decades in the ground”).

Second, helping survivors deal with their grief and providing closure is certainly a personal topic about which reasonable people can have different beliefs that all deserve respect. Some people feel a need to see the corpse; others do not. With the rise of embalming since the U.S. Civil War,²⁰⁰ a large segment of the U.S. population expects an opportunity to view a recently deceased's corpse. One can certainly appreciate parents, a spouse, and other relatives and close friends of a Civil War soldier killed on a distant battlefield wanting to see the corpse of that person who was so healthy and vibrant just weeks, months, or a year or two earlier. On one hand, it could help provide closure when death was distant and unexpected. On the other hand, perhaps the need for public viewing is diminished if everyone interested had seen the physical deterioration of the deceased either from disease or simply old age before his or her death. Also, one may question whether a large grave site is necessary to deal with grief, and provide closure, after the decedent's corpse has been buried for over 100 years.

Third, in regard to the need to prevent the spread of disease, the World Health Organization ("WHO") states,

The risk from dead bodies after disasters due to natural hazards is misunderstood by many professionals and the media. . . . Dead bodies from natural disasters generally do not cause epidemics. The risk of disease from dead bodies is real only in cases where the deceased has died of a highly infectious disease or has died in an area where such infectious disease is endemic. . . . The rapid mass burial of victims on public health grounds is not justified. Rushing to dispose of bodies . . . traumatizes families and communities.²⁰¹

Also, with most infectious diseases, the risks will diminish quickly over time.²⁰²

200. See Marsh, *supra* note 11, at 1330.

201. *Emergencies: Management of Dead Bodies*, WHO (Dec. 11, 2019), <https://bit.ly/3GAp09H> [<https://perma.cc/XH4B-LQEJ>]; see also PETER N. HOFFMAN & T.D. HEALING, *GUIDE TO INFECTION CONTROL IN THE HEALTHCARE SETTING: THE INFECTION HAZARDS OF HUMAN CADAVERS* (2018), <https://bit.ly/3EYAjZj> [<https://perma.cc/8DYV-H69C>].

202. AILEEN MARIA MARTY, ELENA MARIA MARTY-NELSON & ELOISA C. RODRIGUEZ-DOD, *The Intersection of Law, Religion, and Infectious Disease in the Handling and Disposition of Human Remains*, in *LAW, RELIGION & HEALTH IN THE UNITED STATES* 399, 401 (Holly Fernandez Lynch et al. eds, 2017) ("In the case of non-infectious catastrophes [*e.g.*, hurricanes, floods, and earthquakes] cadavers pose only a limited health risk because most of the common communal organisms on the body die quickly as the internal temperature drops and the body desiccates.") (citing Sarah Tomkins, *Priam's Lament, The Intersection of Law and Morality in Post-Katrina New Orleans*, 12 UDC/DCSL L. REV. 93, 106 (2009)).

Fourth, family and friends may be concerned about the unpleasantness associated with the corpse, particularly because current practices often delay disposition for days and days. As one commentator observed, “Dead bodies are . . . displeasing to look at, and emit a foul odor.”²⁰³ But the degree of unpleasantness could be reduced by prompt disposition; generally, embalming may be avoided by burying within 24 hours after death.²⁰⁴

B. *A Hint of Bifurcation in State Probate Laws*

Although state probate laws generally impose no restraint on funeral expenses directed in a wealthy individual’s will, they often indicate which portion of funeral expenses are an unavoidable obligation, and which portion is a discretionary, personal choice, when dealing with an insolvent estate. When a decedent died insolvent, because his or her debts exceeded his or her assets, the payment of the funeral expenses necessarily will prevent some creditors from being paid, or at least will cause one or more creditors to receive less than the amount owed.²⁰⁵ Arguably, this is disturbing because, in general, the law seeks to pay creditors before allowing the estate to follow the decedent’s wishes.²⁰⁶

Nevertheless, persons performing autopsies on decedents who had tuberculosis or certain other diseases can be at serious risk. See HOFFMAN & HEALING, *supra* note 201. Additionally:

Opening cadavers of individuals infected with tuberculosis is dangerous and workers in morbid anatomy, pathologists, mortuary technicians, and medical students have a comparatively high rate of tuberculin conversion . . . Post mortems or autopsies should be carried out with appropriate personal protective equipment and in a negative pressure or well ventilated room.”)

Id.

203. Belinda McLeod, *What’s a Pauper’s Funeral? History and Why They Exist Today*, CAKE, <https://bit.ly/3uhKSlc> [<https://perma.cc/VFF2-U6QS>] (June 24, 2021).

204. See *How Long Can You Delay a Funeral?*, BEYOND THE DASH (May 12, 2021), <https://bit.ly/39JrhRG> [<https://perma.cc/EM8N-Z3MJ>] (“[A]fter 24 hours the body will need some level of embalming.”); Josh Slocum & Lee Webster, *Quick Guide to Home Funerals by States*, NAT’L HOME FUNERAL ALL., <https://bit.ly/3idtk55> [<https://perma.cc/S9HH-2ZFR>] (last visited Sept. 27, 2021) (listing the following states and time periods for when refrigeration or embalming would be required: Arizona [24 hours], California [24 hours], Colorado [24 hours], Delaware [24 hours], Hawaii [30 hours], Iowa [72 hours], Kansas [24 hours], Louisiana [30 hours], Minnesota [72 hours], Mississippi [24 hours], Montana [48 hours], New Hampshire [24 hours], New Mexico [24 hours], North Dakota [24 hours], Texas [24 hours], and Virginia [48 hours]).

205. MADOFF, *IMMORTALITY*, *supra* note 51, at 20 (“[T]he funeral expenses [are] allowed to be paid before the other claims . . .”).

206. See, e.g., JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 48 (9th ed. 2013) (“Creditors must be identified and paid.”).

Some states have enacted specific statutory maximum amounts when the decedent was insolvent.²⁰⁷ For example, a statute may provide that funeral expenses up to a specific dollar amount can be paid before any creditors;²⁰⁸ excess funeral expenses would not be entitled to the same preference,²⁰⁹ and the executor could be personally liable for any excess spent if creditors are not paid because of the excessive funeral expenses.²¹⁰

Other states take a more flexible approach, allowing the estate to pay a reasonable amount for funeral expenses before paying any creditors,²¹¹ or as one court stated, an amount within the “extreme limit of reasonableness in view of all the pertinent attendant circumstances.”²¹² This vague approach has led to conflicts between undertakers, executors, and creditors.²¹³ Courts observe that family members or executors must act quickly after death to make the funeral arrangements, and they may be under emotional stress.²¹⁴ The family or the executor may make poor choices under these circumstances. Courts may use a facts-and-circumstances approach to decide what is reasonable, and key factors courts customarily consider

207. See, e.g., *Nat'l Metro. Bank v. Joseph Gawler's Sons Inc.*, 168 F.2d 571 (D.C. Cir. 1948) (discussing a \$600 statutory limitation); *Watson v. Cook*, 184 A. 908 (Md. 1936) (applying a \$300 restriction); *Succession of Burns*, 7 So. 2d 359 (La. 1942) (considering a \$200 limit).

208. The statute may provide that expenses of administration must be paid first—so that there is an incentive for the executor to administer the estate—then funeral expenses will be paid second, followed by statutory allowances for the surviving spouse and minor children, and then finally creditors. See *Abbott v. Dep't. of Pub. Welfare*, 189 N.E.2d 417 (Ind. 1963).

209. See *In re Estate of Schwarz*, 416 P.2d 760, 763 (Kan. 1966) (concluding that funeral expenses up to the statutory amount of \$400 were entitled to priority above all claims, and the excess amount could be treated as a non-priority claim against the estate because it was still reasonable).

210. See *In re Estate of Churchill*, 223 N.Y.S. 846 (Sur. Ct. 1927); see also *Nat'l Metro. Bank*, 168 F.2d at 572 (demonstrating that if the executor did not agree to be liable for the funeral expenses, and the estate does not have sufficient assets, the undertaker or other provider may not get paid; undertaker billed \$3,863; executors paid only \$1,000, but that was “accepted on account of the funeral bill”).

211. *Gans*, *supra* note 3, § 8, at 1011 (“In some jurisdictions there are statutes . . . [which] provide, in essence, that the estate is chargeable with ‘reasonable’ funeral expenses.”).

212. *In re Will of Van Valkenburgh*, 298 N.Y.S. 819, 822 (Sur. Ct. 1937).

213. See, e.g., *In re Estate of Malgor*, 176 P.2d 66 (Cal. Dist. Ct. App. 1947); *Pinkham v. Cent. Farmers' Tr. Co.*, 159 So. 289 (Fla. 1935); *In re Will of Van Valkenburgh*, 298 N.Y.S. at 822 (“[T]he position of Green-Wood Cemetery is wholly unsound . . .”).

214. *In re Estate of Primmer*, 99 N.Y.S. 830, 832 (Sur. Ct. 1906) (referring to the “desire of the undertaker . . . to furnish as expensive a funeral as he can induce [and the family's] grief . . . [which together can lead the family] to incur expenses which . . . they have no legal right to contract”).

are the size of the estate, the “decedent’s station in life,” and the extent to which the decedent’s wishes will conflict with creditor claims.²¹⁵

C. *The Dubious Regulatory Attempt to Restrain Funeral Expense Deductions*

As discussed earlier, the only restraint in the statute authorizing the funeral expense deduction²¹⁶ is the applicable state probate laws. This was emphasized in the case of *Cardeza v. Commissioner*,²¹⁷ discussed earlier in this Article.²¹⁸

In 1954,²¹⁹ the IRS issued related regulations. If a regulation is contrary to a statute, the regulation is invalid.²²⁰ The IRS regulations provide: “A reasonable expenditure for a tombstone, monument, or mausoleum, or for a burial lot, either for the decedent or his [or her] family, including a reasonable expenditure for its future care, may be deduct[ible] under this heading, provided such an expenditure is allowable by the local law.”²²¹ The final clause (“provided such an expenditure is allowable by the local law”) indicates the IRS, without a change in the statute, wished to impose a “reasonable” requirement in situations when local probate law might allow unreasonable funeral expenses. A disallowance would require drawing a negative inference from the language of the regulation.

The regulations provide no guidance on whether this asserted reasonable requirement would be evaluated under a federal or state standard, or why this separate reasonable requirement would be consistent with the statute. The statute merely provides that funeral expenses must be allowable under the local probate laws and says nothing about the amount having to be reasonable. It appears that no court case regarding the funeral expense deduction has directly addressed the enforceability of this regulatory reasonableness re-

215. See Gans, *supra* note 3, § 2, at 997 (1949); see, e.g., *Foley v. Brocksmit*, 93 N.W. 344 (Iowa 1903) (emphasizing the decedent’s “status in life”); *In re Estate of Primmer*, 99 N.Y.S. at 830 (referring to the decedent’s “style of living and [the] value of the estate”).

216. I.R.C. § 2053(a)(1).

217. *Estate of Cardeza v. Comm’r*, 5 T.C. 202 (1945), *aff’d* 173 F.2d 19 (3d Cir. 1949).

218. See *supra* notes 139–47 and accompanying text.

219. See Rev. Rul. 57-530, 1957-2 C.B. 621 (referring to the initial publication of the regulations in T.D. 6091, at 1954-2 C.B. 47).

220. See *Ballance v. United States*, 347 F.2d 419, 423 (7th Cir. 1965) (“[The treasury regulations] cannot serve to override the statutory provision”); *Estate of Smith v. Comm’r*, 510 F.2d 479, 484 (2d Cir. 1975) (“[I]f the Regulation conflicts with the Code . . . [it] is therefore invalid.”).

221. Treas. Reg. § 20.2053-2 (1954) (emphasis added).

quirement,²²² and no case indicates that the IRS has ever attempted to allow part of a funeral expense and disallow the excess under this regulation.

Although the courts have not considered the validity of this particular funeral expense regulation yet, the courts have vigorously debated the validity of another IRS regulation that has some similarities to the IRS's funeral expense regulation. In addition to allowing a deduction for funeral expenses, IRC § 2053(a) also allows a deduction for an estate's administrative expenses.²²³ As with funeral expenses, the language of IRC § 2053(a) applicable to administrative expenses provides that the expenses are deductible if they are allowable under the probate laws. In the case of administrative expenses, an IRS regulation states an additional requirement—that the administrative expenses must be necessary to be deductible.²²⁴

A Sixth Circuit case asserts that the majority of courts have ruled that this regulation on administrative expenses is valid,²²⁵ but a subsequent Congressional Joint Committee Report identifies this as an important tax law conflict among the circuit courts.²²⁶ An especially articulate discussion of when a regulation adding a requirement for deductibility is invalid is Judge Mulligan's dissenting

222. *See, e.g., Estate of Davenport v. Comm'r*, 92 T.C.M. (CCH) 324, 332 (2006) (observing that “both Michigan law and the Federal regulations suggest a standard of reasonableness in examining the amount of funeral expenditures”); *Inglehart v. Comm'r*, 77 F.2d 704, 712 (5th Cir. 1935) (disallowing a deduction for \$1,500 paid for perpetual care of the decedent's mausoleum and cemetery plot because nothing indicated the Florida statute allowing reasonable charges for “funeral expenses” included expenditures for care and maintenance of a cemetery plot after burial); *Audenried v. Comm'r*, 26 T.C. 120, 124–25 (1956) (mentioning a possible “reasonable” restriction, but the court failed to discuss it because any excessive amount for maintenance of the cemetery plot would have been deductible as a charitable contribution to the religious organization operating the cemetery).

223. I.R.C. § 2053(a)(2).

224. Treas. Reg. § 20.2053–3(d)(2) (1958).

225. *See Estate of Millikin v. Comm'r*, 125 F.3d 339, 344 (6th Cir. 1997) (“Our decision is consistent with the decision of all the other circuits, with one possible exception, that have considered this issue.”).

226. *See* STAFF OF JOINT COMM. ON TAX'N, STUDY OF THE OVERALL STATE OF THE FEDERAL TAX SYSTEM AND RECOMMENDATIONS FOR SIMPLIFICATION, PURSUANT TO SECTION 8022(3)(B) OF THE INTERNAL REVENUE CODE OF 1986 75 (Comm. Print 2001), <https://bit.ly/3BKKT3v> [<https://perma.cc/LE7L-PURX>] (“[T]he Federal courts have not always agreed on the appropriate balance. . . . [T]he Federal circuit courts currently disagree over the question whether State law alone determines the deductibility of estate administrative expenses under section 2053.”).

opinion in *Estate of Smith v. Commissioner*,²²⁷ which involves the administrative expense regulation.

During his life, David Smith was a struggling New York artist creating large, abstract, sculptures. “During the last 25 years of his life, Smith sold only 75 of his sculptures, and [2] years before he died, of necessity, [he had] entered into a 33-1/3% commission arrangement with a gallery for a [5]-year period.”²²⁸ He “died owning 425 pieces, 185 of which were more than [7] feet high.”²²⁹

After his death, his sculptures became more popular. Because of the sculptures, his estate was highly illiquid—“approximately 93% of his total estate” was sculptures.²³⁰ After his death, his executors “began an orderly process of gradual liquidation of the Estate’s holdings” through the gallery, and after 8 years, the estate had paid over \$1.5 million in commissions to the gallery. The probate court (the New York Surrogate Court) allowed all of these commissions as valid expenses against the estate, and the estate claimed a deduction for the entire \$1.5 million in commissions paid on its federal estate tax return.

On audit, the IRS disallowed the estate’s deduction of the commissions in excess of \$750,447, arguing in part that after selling about half the sculptures, and paying the related commissions, the estate had enough money to pay the estate tax and other expenses, so that the estate then could have distributed the remaining sculptures, in kind, to the beneficiaries. The IRS argued that the additional sales, and the commissions paid on those additional sales, were not necessary under the IRS regulations. The Tax Court agreed.

On appeal, the estate argued that the regulation imposing the necessary requirement was invalid because the statute merely required that an expense be allowable under the applicable probate law.²³¹ The two-judge majority refused to decide if the regulation was valid²³² because “there was some question as to whether the [excess commissions] were in fact incurred for the benefit of the estate . . . [or] the individual beneficiaries.”²³³ As a result, the ma-

227. See *Estate of Smith v. Comm’r*, 510 F.2d 479, 483 (2d Cir. 1975) (Mulligan, J., dissenting).

228. *Id.* at 484. The estate renewed the commission agreement with the gallery in 1968 and 1970, but the court’s opinion fails to state the gallery’s percentage commission under the renewal agreements. *Id.* at 480 (majority opinion).

229. *Id.* at 484 (Mulligan, J., dissenting).

230. *Id.* at 485.

231. *Id.* at 482 (majority opinion).

232. *Id.* at 483.

233. *Id.* at 482.

jority decided the excess commissions were not truly “administrative expenses” of the estate, and therefore they were not deductible under IRC § 2053(a)(2).²³⁴

The dissenting judge (Judge Mulligan) rejected the majority’s assertion that it did not rely on the necessary requirement of the regulation in disallowing the deduction. Instead, the dissenting judge said the majority was “focusing” on it,²³⁵ and that “I cannot agree that the issue can be . . . circumvented.”²³⁶ Further, the dissent pointed out that the statute “unambiguously” and “explicitly left the matter in the hands of the [state] probate court,”²³⁷ and cited a series of cases holding that “the plain meaning of the statute controls and . . . Congress intended deductibility to be determined by state law.”²³⁸ The dissenting judge concluded that because the regulation conflicted with the statute and was contrary to Congressional intent, it was invalid.²³⁹

The Seventh Circuit found the same IRS regulation invalid in *Ballance v. United States*.²⁴⁰ In that case, the estate did not promptly pay some of the decedent’s debts after his death because cash was not available. The estate consisted largely of leasehold and partnership assets which could only be sold quickly at a sacrifice.²⁴¹ As a result, the estate sold the assets over time in an orderly fashion. Because it failed to pay the decedent’s debts promptly, it paid interest on the amounts due. The estate sought to deduct those interest payments as administrative expenses, and the IRS challenged. The Seventh Circuit observed that the interest payments were allowable under the applicable probate laws, and therefore were deductible under IRC § 2053 because Congress left the determination of deductibility to the applicable state law.²⁴² The court concluded that the IRS’s attempt to add a separate necessary requirement in the regulations was invalid as it was contrary to the statute. Subse-

234. *Id.* at 482–83.

235. *Id.* at 484. As part of its opinion, the Second Circuit majority recited the lower court’s conclusion that the excess commissions were not necessary, and the Second Circuit majority said that conclusion was not clearly erroneous. 510 F.2d at 482 (majority opinion).

236. *Id.* at 484.

237. *Id.* at 483 (Mulligan, J., dissenting).

238. *Id.*

239. *Id.* at 484.

240. *Ballance v. United States*, 347 F.2d 419, 423 (7th Cir. 1965).

241. *Id.* at 420.

242. *Id.* at 423.

quently, the IRS issued a formal notice that it would “not accept the decision in *Ballance*.”²⁴³

A different circuit court, the Sixth Circuit, initially concluded that the IRS’s attempted regulatory addition of the necessary requirement was invalid. In *Estate of Park v. Commissioner*,²⁴⁴ the executors sold the decedent’s residence and separate cottage for \$78,000 and incurred \$2,350 in selling costs. The IRS challenged the deduction of the selling costs as administrative expenses under the regulation arguing they were not necessary because the estate could have distributed the property to the beneficiaries, in kind, so the sales were merely to benefit the beneficiaries.²⁴⁵ The Tax Court agreed with the IRS, relying on the Second Circuit’s majority opinion in the *Smith* case.²⁴⁶ The Sixth Circuit reversed and agreed with the taxpayer that the regulation was invalid, stating “Congress has left the deductibility of administrative expenses to be governed by state law.”²⁴⁷

However, subsequently, in *Estate of Millikin v. Commissioner*,²⁴⁸ the Sixth Circuit concluded that *Estate of Park* was “no longer good law, and [overturned] that decision.”²⁴⁹ In *Millikin*, the IRS argued that the “statutory phrase ‘administrative expenses’ is not self-defining, and that the Treasury Regulation . . . provides a permissible construction of the statute to which [the court] must defer.”²⁵⁰ The Sixth Circuit agreed with the IRS arguments,²⁵¹ and then asserted that its conclusion on the issue was consistent with opinions from five other circuits and was contrary to only one circuit.²⁵² This generalization of the cases seems contrary to a subse-

243. *In re Union Com. Bank, Transferee v. Comm’r. of Internal Revenue*, 339 F.2d 163 (6th Cir. 1964), *action on dec.*, 1968 WL 16304 (Feb. 23, 1968).

244. *Estate of Park v. Comm’r*, 475 F.2d 673 (6th Cir. 1973).

245. *Id.* at 675.

246. *Id.*; *see supra* notes 227–39 and accompanying text (discussing the *Smith* case).

247. *Park*, 475 F.2d at 676.

248. *Estate of Millikin v. Comm’r*, 125 F.3d 339 (6th Cir. 1997).

249. *Id.* at 343.

250. *Id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)) (establishing a two-part test for determining the validity of a regulation: (1) if Congress has “directly spoken to the precise question at issue . . . that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress;” (2) but “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

251. *Id.* at 343.

252. *Id.* at 344.

quent Congressional Joint Committee on Taxation report²⁵³ and appears to overstate the courts' approvals of the regulation.²⁵⁴

While the regulation for the deductibility of administrative expenses shares some features with the regulation for the deductibility of funeral expenses, there are important differences. On the one hand, the regulations involve the same statutory language, and in each case the IRS is trying to impose an extra requirement for deductibility even though IRC § 2053(a) bases deductibility exclusively on the state probate law determination. On the other hand, funeral expenses and administrative expenses have some fundamental differences. As demonstrated in the cases discussed above, the executor often has discretion with certain administrative expenses; with funeral expenses, the executor can choose to follow the decedent's instructions in the will or seek a court order invalidating the decedent's instructions. Also, with funeral expenses, the executor often must act quickly and perhaps courts should be less likely to second-guess their decisions. Finally, the IRS regulations assert that funeral expenses must be reasonable, in contrast to the IRS regulations on administrative expenses that seek to impose a necessity test; a reasonable test seems more vague and intrusive—is it an objective or subjective test? Is it a federal standard or a state standard? Can every funeral expense be nit-picked for reasonableness if the executor or family member making the arrangements fails to obtain multiple bids and fails to choose the low bidder?

253. See STAFF OF JOINT COMM. ON TAX'N, *supra* note 226, at 12 (“[T]he Federal courts have not always agreed on the appropriate balance. . . . [T]he Federal circuit courts currently disagree over the question whether State law alone determines the deductibility of estate administrative expenses under section 2053.”).

254. The Sixth Circuit in *Millikin* relies on *Estate of Smith v. Comm’r* even though the two-judge Second Circuit majority in that case refused to rule on the validity of the regulation. See *Millikin*, 125 F.3d at 344 (citing *Smith*, 510 F.2d 479, 482–83 (2d Cir. 1975)). Also, in three of the other four cases relied upon by the Sixth Circuit in *Millikin*, the circuit courts did not analyze whether the amount of the expenses were appropriate. See *Estate of Love v. Comm’r.*, 923 F.2d 335, 336 (4th Cir. 1991) (involving a payment under a foal-sharing agreement; the decedent was “involved in the business of breeding and racing thoroughbred horses”); *Marcus v. DeWitt*, 704 F.2d 1227, 1229 (11th Cir. 1983) (regarding expenses of \$1,881.80 in selling property for \$24,450); *Hibernia Bank v. United States*, 581 F.2d 741, 743 (9th Cir. 1978) (involving interest paid on loans, and there was “no dispute in this case as to whether the interest rate was reasonable or as to the total amount of interest payments”).

D. *Reform Options and Considering Cremation and Other Approaches*

Death is unlike any other experience,²⁵⁵ so analogies to other types of expenses will be imperfect. This Article asserts that big-money burials have a dual nature which the current federal tax approach fails to recognize.

This dual nature of funeral expenses, being part obligatory and part personal, poses challenges for determining proper tax treatment. On the one hand, few things are more personal than choosing the disposal method for your corpse, and in general, the tax law does not allow a deduction for personal expenses.²⁵⁶ If an item is deductible, the government effectively subsidizes the purchase based on the taxpayer's tax rate (for decedents dying in 2021, the estate tax is a flat rate of 40 percent).²⁵⁷ For example, if a taxpayer taxed at a 40 percent rate could deduct the cost of non-business meals, the after-tax cost for the taxpayer of a \$100 gourmet meal would be only \$60 because the tax deduction would save the taxpayer \$40 in taxes otherwise due. Presuming the government needs a specific amount of revenue to operate, the government would then need to raise an extra \$40 from other taxpayers.²⁵⁸ Thus, in the absence of countervailing policy reasons, personal expenses should not be tax deductible because the deduction would promote profligate spending and would allow an individual to manipulate his or her tax liability with personal choices.²⁵⁹

On the other hand, the common law imposes an affirmative obligation on the estate to pay for the respectful disposition of the corpse.²⁶⁰ Thus, to some extent, paying funeral expenses is not a

255. See Brian L. Josias, *Burying the Hatchet in Burial Disputes: Applying Alternative Dispute Resolution to Disputes Concerning the Interment of Bodies*, 79 NOTRE DAME L. REV. 1141, 1144 (2004).

256. See NEWMAN ET AL., *supra* note 124, at 147–48.

257. I.R.C. § 2001(c) (setting forth a graduated “rate schedule” but the amounts of tax that would have been imposed at the rates below 40% listed in the schedule generally will be avoided because of the exemption equivalent under IRC § 2010(c)); Ebeling 2020 *supra* note 119 (referring to “today’s flat 40% rate”).

258. See Jeffery L. Yablon, *As Certain as Death—Quotations About Taxes (2006 Edition)*, 110 TAX NOTES 103, 139 (2006) (“When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious ‘donors.’” (quoting Warren E. Burger)); see also *id.* at 159 (“The more successfully [taxpayers] escape what they owe, the more the rest of us have to pay.” (quoting Elliot L. Richardson, former U.S. Attorney)).

259. NEWMAN ET AL., *supra* note 124, at 148.

260. See e.g., *Nat’l Metro. Bank v. Joseph Gawler’s Sons*, 168 F.2d 571, 573 (D.C. App. 1948) (“The common law imposed a duty upon an executor or administrator to bury the decedent in a manner suitable to his estate . . .”).

personal choice, but is involuntary, like paying binding obligations, debts, or claims against the estate. The federal estate tax is a transfer tax²⁶¹ that should be calculated on only the decedent's transferable wealth. To the extent funeral expenses are involuntary, the amount paid should be tax deductible.

Given this dual nature of funeral expenses and the various applicable tax policies, there are at least three options for reform. First, Congress could repeal the funeral expense deduction completely. Second, the funeral expense deduction could be capped at a specified dollar amount designed to approximate the cost of a reasonable disposition,²⁶² and any funeral expenses in excess of the dollar amount would not be deductible. Third, the funeral expense deduction could be made subject to more robust facts-and-circumstances doctrines, such as allowing deductions for only reasonable or non-capricious funeral expenses.

One option would be to simply repeal I.R.C. § 2053(a)(1) and preclude an estate from deducting any funeral expenses. Whether the decedent requested a \$3,000 cremation, or a \$1.4 million mausoleum and a \$3 million fund for perpetual care like Leona Helmsley,²⁶³ there would be no deduction. Under this approach, those buying a modest funeral rightly could complain they are paying estate tax on money that the decedent could not have transferred to his or her surviving family, and this is contrary to the notion that the estate tax is a tax on the opportunity to transfer wealth. However, the unfairness might be justified because it would simplify tax compliance and administration,²⁶⁴ and it would not represent a significant monetary burden on those particular taxpayers. Recently,

261. *West v. Okla. Tax Comm'n.*, 334 U.S. 717, 727 (1948) (“An . . . estate tax is not levied on the property of which an estate is composed. Rather it is imposed on the . . . privilege of transmitting . . . such benefits.”); *Sharp v. United States*, No. 3:95-CV-217, 1997 WL 364475, at *8 (E.D. Tenn. Feb. 27, 1997) (“[T]he estate tax is a ‘transfer’ tax imposed on the privilege of transferring property. The estate tax is imposed on the transferor (*i.e.*, the estate), and the focus is on the value of the property in the transferor’s hands.”).

262. See *supra* note 48 and accompanying text (indicating a cost of \$12,500 for the typical American burial); Thompson, *supra* note 45 and accompanying text (indicating a cost of \$3,000 for some cremations).

263. See McShane, *supra* note 9; Dingman, *supra* note 53 and accompanying text.

264. The Congressional Joint Tax Committee specifically identified conflicts between federal and state law under I.R.C. § 2053(a) as a source of tax complexity. See STAFF OF JOINT COMM. ON TAX’N, *supra* note 226, at 12 (“[T]he Federal courts have not always agreed on the appropriate balance. . . . [T]he Federal circuit courts currently disagree over the question whether State law alone determines the deductibility of estate administrative expenses under section 2053.”).

the estate tax has only applied to the very wealthy.²⁶⁵ Requiring those wealthy families which spend a reasonable amount for burial (perhaps \$12,500) to pay an extra amount (\$5,000)²⁶⁶ in taxes may be an acceptable price for simplification and reform, especially in response to prior abuses. Clearly, this approach would be less desirable if the federal government chooses to impose the estate tax on the less wealthy.

An interesting issue is whether wealthy taxpayers could circumvent a disallowance approach by pre-paying funeral expenses during lifetime. For example, an individual could pay \$1.4 million in cash for a mausoleum during lifetime, which would eliminate \$1.4 million of cash that otherwise would be included in his or her gross estate at death. However, in that situation, it might be argued that the individual now owns rights to a \$1.4 million mausoleum—a right which must be included as a separate asset on the estate tax return at its fair market value.²⁶⁷ This strategy would result in no estate tax savings because the \$1.4 million in cash would be replaced with another \$1.4 million asset, namely the right to use the mausoleum.

A second option, capping the funeral expense deduction at a specific dollar amount, could address the dual nature of funeral expenses. It would allow an estate to deduct funeral expenses up to a designated dollar amount for a respectable disposition and prohibit deduction of higher amounts. The designated dollar amount could be based on the approximate amount most families spend disposing of a loved one's corpse. Because more decedents are cremated than buried these days,²⁶⁸ a case could be made that the cap should be set based on the average cost of a cremation.²⁶⁹ However, according to a 2019 survey, almost 40 percent of U.S. decedents are still buried,²⁷⁰ sometimes for religious reasons,²⁷¹ so perhaps the cap should be based on the average cost of a typical American burial.²⁷² The

265. See *supra* note 127 and accompanying text.

266. If the estate paid \$12,500 for a typical American burial, see *supra* note 48 and accompanying text, and the estate could deduct that amount, an estate taxed at a 40 percent rate would save \$5,000 in taxes otherwise payable. [$\$12,500 \times 40\% = \$5,000$].

267. See I.R.C. § 2031(a) (“The value of the gross estate of the decedent shall be determined by including . . . the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.”).

268. See *supra* note 41 and accompanying text.

269. See *supra* note 45 (indicating a cost of \$800 to \$4,000).

270. See *supra* note 46 and accompanying text.

271. See *infra* notes 296–309 and accompanying text.

272. See *supra* note 48 and accompanying text (indicating a cost of \$12,500).

cap could be adjusted for inflation over time in increments of a round number, such as \$500.²⁷³

Under this approach, an estate could deduct funeral costs actually paid, and allowable under state probate laws, up to a maximum dollar amount.²⁷⁴ Any funeral expenses exceeding the cap would be treated like a nondeductible personal expense. Although taxpayers desiring exorbitant, land-hoarding burials might argue this would impose estate tax on amounts the decedent did not transfer to his or her beneficiaries, it could be argued that the decedent could have transferred that money to his or her beneficiaries by foregoing the excessive spending—the decedent made a personal choice for funeral over family (or other beneficiaries).

Caps to limit tax benefits are common. The gift tax annual exclusion is capped at \$15,000 per individual donee per year for 2021, indexed for inflation in increments of \$1,000.²⁷⁵ The deduction for contributions to health savings accounts generally are capped at \$2,250 (for self-only coverage) or \$4,500 (for family coverage).²⁷⁶ The annual exclusion for amounts contributed to a 401(k) plan generally is capped at \$19,500 in 2021.²⁷⁷ The home mortgage interest deduction is capped at the amount of interest on \$1 million (\$500,000 in the case of a married individual filing a separate return) of home mortgage acquisition indebtedness.²⁷⁸

A third option might be to strengthen existing doctrines that may apply to funeral expenses under current law. As discussed above,²⁷⁹ the “reasonableness” test under IRS regulations may be invalid as imposing an additional requirement not stated in the statute. In addition, under the precise language of the regulations, it is unclear whether the IRS even intended the reasonableness test to apply to all types of funeral expenses. The regulations specifically refer to “a tombstone, monument or mausoleum . . . a burial lot . . . [and an] expenditure for its future care,”²⁸⁰ but conspicuously, there is no mention of other types of funeral expenses. As a result, commentators indicate that even if the regulation is valid, an estate

273. Other dollar thresholds under tax rules are adjusted for inflation over time. *See, e.g.*, I.R.C. § 2503(b)(2) (rounding inflation adjustments “to the next lowest multiple of \$1,000” for the gift tax annual exclusion).

274. At a 40 percent tax rate, a \$12,500 deduction would save the taxpayer \$5,000 in estate taxes.

275. I.R.C. § 2503(b)(2).

276. *Id.* § 223(b)(2).

277. I.R.S. News Release IR-2019-179 (Nov. 6, 2019).

278. I.R.C. § 163(h)(3)(B)(ii).

279. *See supra* notes 219–52 and accompanying text.

280. Treas. Reg. § 20.2053-2 (1958).

could purchase, and deduct the cost of, a fabulously expensive casket as long as the expenditure is allowed under the applicable probate law.²⁸¹

Congress could correct these deficiencies by amending I.R.C. § 2053(a)(1) to allow a deduction for only reasonable funeral expenses. However, this could create more complexity, and a slew of new issues. In particular, would the reasonableness test be an objective or subjective test? What facts and circumstances would be considered when deciding if an expenditure was reasonable? Would the deduction depend on the size of the estate, the social status of the decedent, or the religious beliefs of the decedent? Would reasonableness depend on the region of the United States involved and the cost-of-living? Would it be a question of law or fact?

Also, the Restatement of Trusts (First) § 124 comment g provides that in the case of a trust, a trustee need not follow a “capricious” direction, and in fact may be surcharged for so doing. It provides the following illustration: “A bequeaths \$1,000 to B ‘in trust’ to throw that money into the sea. B holds the money upon a resulting trust for the estate of A and is liable to the estate of A if he throws the money into the sea.”²⁸² The Restatement comment provides, “A purpose is not capricious merely because no living person benefits from its performance, provided it satisfies a natural desire which normal people have with respect to the disposition of their property.”²⁸³ The only reference to funeral expenses is that, “[S]uch purposes as the erection or maintenance of tombstones . . . is not capricious unless the value of the property to be devoted to these purposes is unreasonably large.”²⁸⁴

This approach leaves many questions unanswered. Does this test apply if the decedent did not create a trust? Will courts adopt this Restatement approach? Does this apply to funeral expenses other than the cost of erecting or maintaining a tombstone? Does it apply to the acquisition of a burial plot, mausoleum, and arrangements for perpetual care of the plot and mausoleum? How should the “capriciousness” test apply to particular circumstances? When the estate tax only applies to the very wealthy, does it make any sense to apply a test based on the “natural desires which normal people have?” As Restatement provisions are not binding on the

281. STEPHENS ET AL., *supra* note 135, ? 5.03[1][a] (discussing in sentence 6–7, a “solid silver casket”).

282. RESTATEMENT OF TRUSTS (FIRST) § 124, cmt. g, illus. 5 (AM. L. INST. 1935).

283. *Id.* at cmt. g.

284. *Id.*

courts,²⁸⁵ it seems unlikely that any modification of the Restatement provision would bring certainty to this area.

E. Choosing a Reform Option

The most viable and appropriate reform approach may be to impose a monetary cap on the amount of funeral expenses that may be deducted. The dollar amount could approximate the cost of a typical American burial.

Other disposal methods may be cheaper, or more expensive, so the cost of a typical American burial may function as a middle ground. Cremation is among the cheaper alternatives. Although chosen for only 4 percent of the dead in 1947,²⁸⁶ cremation rates surpassed burial rates for the first time in 2015,²⁸⁷ and experts predict that 78 percent will choose cremation by 2040.²⁸⁸ Cremation tends to be substantially cheaper than burial, typically ranging from \$800 to \$3,000.²⁸⁹ It is possible to make cremation expensive with a costly urn, or other exotic distribution method for the ashes, such as having one's ashes blasted into orbit, or placed in a solid jade urn costing \$60,000,²⁹⁰ but these are outliers. Among other cheaper alternatives are so-called green burials that by-pass one or more of the elements of the typical American burial such as embalming, the lacquered wood, steel, or brass casket, and the concrete grave liner.²⁹¹ Also, in several geographic areas, it is the custom to re-use burial plots, greatly reducing land-use.²⁹²

On the other hand, some available disposal methods can be significantly more expensive. An organization in Utah offered

285. See *In re Wright Med. Tech. Inc., Conserve Hip Implant Product Liability Litig.*, 178 F. Supp. 3d 1321, 1349 n.17 (N.D. Ga. 2016) (“The [R]estatement serves an appropriate advisory role . . . in approaching unsettled areas of law. We emphasize, however, that . . . the Restatement . . . is not binding . . . except in so far as we explicitly adopt its various doctrinal principles.”).

286. See *supra* note 39 and accompanying text.

287. See *supra* note 38 and accompanying text.

288. See *supra* note 44 and accompanying text.

289. Marsden, *supra* note 45.

290. See Simon Stewart, *Burial Alternatives—23 Ultimate Ways To Check Out*, Lexikin (Feb. 15, 2017), <https://bit.ly/2WG5Eii> [<https://perma.cc/VT23-PNBS>] (regarding blasting your ashes into outer space); BENJAMIN, *supra* note 50, at 117 (regarding the jade urn).

291. See Vatomsky, *supra* note 113; Palus, *supra* note 94.

292. *Burial Styles & Traditions*, LAFAYETTE CEMETERY RSCH. PROJECT, <https://bit.ly/3A4SAR5> [<https://perma.cc/2DA9-86GQ>] (last visited Oct. 3, 2021) (“This is a common tradition around the world . . . [it] originated in the Mediterranean region thousands of years ago,” inspired by the rocky soil).

mummification, advertising a basic price of \$67,000 in 2014.²⁹³ Costs for cryogenic freezing can run upwards of \$80,000, although there seems to be wide variation in prices and services.²⁹⁴ And as discussed earlier,²⁹⁵ the cost of a burial can greatly exceed the normal \$12,500 or so for a typical American burial.

Basing the cap on the typical American burial may be appropriate because many groups are prevented from using cremation or cheaper alternatives because of religious beliefs. The Eastern Orthodox Church prohibits its members from using cremation.²⁹⁶ Also, “[f]ollowers of Islam disavow cremation . . . [and] must bury the body ‘within the day of the death.’”²⁹⁷

For members of the Jewish faith, the rules on cremation vary depending on the degree of orthodoxy. Traditional Jewish custom calls for burial in a wooden casket, with no embalming, within 24 hours of death, or at least within 48 hours of death.²⁹⁸ Orthodox

293. Ella Morton, *Modern Mummification for You and Your Pet*, SLATE: ATLAS OBSCURA (Mar. 28, 2014, 11:49 AM), <https://bit.ly/3DnJYHx> [<https://perma.cc/37U2-ZKRE>].

294. *Frequently Asked Questions*, CRYONICS INST., <https://bit.ly/10321dlr> [<https://perma.cc/X5FE-PFR3>] (last visited Oct. 3, 2021) (quoting a price of \$28,000, and noting that competitors may charge up to \$80,000 for head-only preservation and \$200,000 or more for “whole body cryopreservation”); see also *Other Lesser-Used Disposition Options*, SEVEN PONDS, <https://bit.ly/2WAdF8e> [<https://perma.cc/K7TJ-NDXX>] (last visited Oct. 3, 2021) (reporting “cost as little as \$30,000 and as much as \$200,000,” and stating that about 250 people have been cryogenically frozen and “significantly more are enrolled in preneed plans”); see also Madoff, IMMORTALITY, *supra* note 51, at 49 (reporting that 150 people have been cryogenically frozen).

295. See *supra* notes 9 and 69 and accompanying text (regarding Leona Helmsley).

296. *What Religions Do Not Allow Cremation and Which Do*, METROPOLITAN FUNERAL SERVS., <https://bit.ly/3ovnakA> [<https://perma.cc/39UV-7KJA>] (last visited Oct. 3, 2021) (“Eastern Orthodox Church find[s] cremation unappealing because it is a ‘departure from the belief in resurrection.’”); see also *New Greek Law Permits Cremation*, N.Y. TIMES (Mar. 2, 2006), <https://nyti.ms/2YfRCUJ> [<https://perma.cc/79SW-DCJJ>] (“In a country where more than 95 percent of the population is Orthodox For decades the Greek Orthodox Church had strongly opposed cremation.”); *Religion and Cremation*, CREMATION.COM, <https://bit.ly/3FblSRQ> [<https://perma.cc/4WK8-YPRY>] (last visited Oct. 3, 2021) (recognizing Eastern Orthodox Church “does not grant funerals . . . to those who have chosen to be cremated.”); *13 Different Religious Perspectives on Cremation*, EVERPLANS, <https://bit.ly/3mlNWtf> [<https://perma.cc/HP88-D6UL>] (last visited Oct. 4, 2021).

297. In the Islamic religion, embalming is prohibited, autopsies should be avoided, and the body is wrapped in a shroud, normally without a casket. *What Religions Do Not Allow Cremation and Which Do*, *supra* note 296; see also, Helen T. Gray, *How Different Religions Bury Their Dead*, WICHITA EAGLE (May 13, 2011), <https://bit.ly/3oCfywP> [<https://perma.cc/GL43-H88T>] (discussing how a Muslim cemetery director stated, “The 24-hour burial is not in the Qur’an but is a cultural practice from the faith’s desire to respect the body and avoid decay.”).

298. Gray, *supra* note 297.

Jews prohibit cremation. A “[c]onservative Jewish rabbi may still perform a funeral for a person who has been cremated, [h]owever . . . the rabbi [usually] will not be present for the interment of the ashes. [And] [f]or Reform Jews . . . cremation is becoming an increasingly common practice.”²⁹⁹

At least three major religions allow cremations but seem to tip the scales in favor of burial. Before 1963, the Catholic Church prohibited cremation and would excommunicate anyone who was cremated.³⁰⁰ The Catholic Church lifted its prohibition on cremation in 1963 but “strongly urges that the full body be present during the funeral rite, and [should be] cremated only after the rites are completed.”³⁰¹ Presuming that the funeral is not going to occur within a day or two of death, this effectively requires refrigeration or embalming even if the decedent will be cremated.³⁰² The Catholic Church requires that in the case of a cremation, the ashes must be buried rather than being scattered or being retained by the family in an urn.³⁰³ Although cremation is allowed, “entombment or burial still remains the preferred method for final disposition.”³⁰⁴ For members of the Church of Latter Day Saints, “[c]remation is not prohibited . . . [but] it is not encouraged, and the Church prefers that bodies be buried.”³⁰⁵ “Presbyterians generally do not support cremation, and instead prefer that the body remain intact and be buried in the ground.”³⁰⁶

Other religious faiths seem to give their members an unrestrained choice. “Despite the fact the spiritual founder of Buddhism [was cremated] . . . cremation among Buddhists is acceptable but not mandated.”³⁰⁷ Many Protestant denominations allow a traditional funeral if a member is cremated, including the Anglican/Episcopal, Baptist, Lutheran, and Methodist churches.³⁰⁸

Thus, several major religious faiths or denominations prohibit cremation or encourage burial. As a result, a tax rule based on the

299. *13 Different Religious Perspectives on Cremation*, *supra* note 296.

300. *Religion and Cremation*, *supra* note 296.

301. *Id.*

302. *See supra* note 203 and accompanying text.

303. *Religion and Cremation*, *supra* note 296.

304. *Id.*

305. *13 Different Religious Perspectives on Cremation*, *supra* note 296.

306. *Id.*

307. *What Religions Do Not Allow Cremation and Which Do*, *supra* note 296.

308. *13 Different Religious Perspectives on Cremation*, *supra* note 296 (noting also that “Quakers may be buried or cremated”); *see also Religion and Cremation*, *supra* note 296 (“Protestant churches as a whole are neutral toward cremation,” although “there may be an indicated preference for burial in some of the more conservative denominations.”).

typical cost of cremation might be considered unfair for many guided by their religious beliefs.

In regard to mechanics, it may be appropriate to link the maximum funeral expense deduction with the gift tax annual exclusion amount (\$15,000 in 2021).³⁰⁹ This is already an extremely important benchmark for the U.S. transfer tax system. Each individual, each year, is entitled to transfer an amount equal to the annual gift tax exclusion to any other person without paying gift or estate tax on the transfer.³¹⁰ This gift tax annual exclusion frequently is used for planning wealth transfers to younger-generation family members.³¹¹ Since the transfer tax system already embraces the exclusion of this amount from the tax base, a new statutory provision could allow the decedent to, in effect, make a final gift to himself or herself in the form of respectable burial. The amount is adjusted for inflation periodically, in \$1,000 increments.³¹²

CONCLUSION

The funeral expense deduction under the federal estate tax encourages the wealthy to spend excessively on burials by subsidizing 40 cents of every dollar spent. Thus, the question posed is whether we should provide this artificial tax incentive to encourage this behavior. As this Article demonstrates, burials, particularly extravagant burials, tend to monopolize valuable property in metropolitan areas, expend valuable resources in maintaining manicured grounds, destroy forests to create caskets, and contribute to environmental pollution from the release of formaldehyde, cement, and various metals into the ground.

This Article describes an array of other methods for disposing of a corpse, and many of them are substantially cheaper and more environmentally-friendly than perpetual burial. Extravagant burials are a personal choice, not a necessity. While society may be comfortable allowing people to choose extravagant burials, a strong case can be made that we should not artificially incentivize this behavior through a generous tax break.

This Article discusses multiple options for reform and recommends capping the estate tax funeral expense deduction at an amount approximating the average cost of a typical American bur-

309. I.R.C. § 2503(b); Ashlea Ebeling, *IRS Announces Higher Estate and Gift Tax Limits for 2021*, FORBES (Oct. 26, 2020), <https://bit.ly/3mlWksD> [<https://perma.cc/2T9G-D98P>].

310. MADOFF, PRACTICAL GUIDE, *supra* note 127, § 8.03, at 8012–13.

311. See *Id.* at 8012–14.

312. I.R.C. § 2503(b)(2).

ial.³¹³ This amount could equal the federal transfer tax annual exclusion amount, which currently allows all taxpayers to transfer a designated amount to younger generation family members and others each year, free of transfer taxes. Melding the funeral expense deduction with this long-standing exclusion would aid implementation.

Most important, this bifurcated approach would recognize that funeral expenses, to an extent, are involuntary costs needed to respectfully deal with the dead, and should be deductible. But excess expenditures reflect a personal choice with high costs to future generations, and that choice is unworthy of a 40 percent federal government subsidy.

313. The average cost is approximately \$12,500. *See supra* note 48 and accompanying text.