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Mark E. Wojcik

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# DISCRIMINATION AFTER DEATH

MARK E. WOJCIK\*

*It took 26 phone calls to 26 different funeral directors before we finally found one who was willing to take our baby and bury her.*

*We were given all kinds of stories. They would not embalm her. They would take her only to the crematorium. It would have to be a closed casket; there would be no viewing. I even had one who told me that he would not accept her because we had her at home, and we would not properly bag her to protect his employees.*

*One who was willing to take her wanted an extra \$500 because of her diagnosis and told us if we wanted an autopsy, it would be significantly higher.*

*It was horrible. We had fought that kind of discrimination while she was alive, and I did not expect to face that kind of discrimination at death, too.<sup>1</sup>*

## I. Introduction

People of all ages, races, and religions may fall victim to discrimination at some point in their lives. People with disabilities, women, and sexual preference minorities also have had to develop mechanisms to cope with a lifetime of discrimination. A number of federal, state, and local anti-discrimination laws exist

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\* Assistant Professor of Law, The John Marshall Law School, Chicago. An earlier version of this article was presented at the 21st Annual Health Law Teachers Conference of the American Society of Law, Medicine and Ethics and the Law-Medicine Center at Case Western Reserve University School of Law, June 9, 2000, in Cleveland, Ohio. This article updates and expands my earlier work and advocacy to combat AIDS discrimination by funeral homes. See, e.g., Mark E. Wojcik, *Prohibiting AIDS Discrimination by Funeral Homes*, in TENTH INTERNATIONAL CONFERENCE ON AIDS: ABSTRACT BOOK VOLUME 1, NO. 210D (Yokohama, Japan Aug. 9, 1994); Mark E. Wojcik, *AIDS and Funeral Homes: Common Legal Issues Facing Funeral Home Directors*, 27 J. MARSHALL L. REV. 411 (1994); Mark E. Wojcik & David Austin, *Education and Advocacy to Bury AIDS Discrimination*, 3 INDIAN LAW INSTITUTE, AIDS — LAW AND HUMANITY 66 (New Delhi, India 1995). For special research assistance, I am especially indebted to David Austin, Patrick Levy, Ricardo Schneider, and Matthew B. Walker. For financial support for this article and for participation in the Health Law Teachers' Conference, I thank Dean R. Gilbert Johnston and Associate Dean John Corkery of The John Marshall Law School. For other support and assistance, I thank the AIDS Legal Council of Chicago, the Funeral Directors Service Association of Greater Chicago, and the Indian Law Institute.

1. *Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. 102-03 (1989) (statement of Betty and Emory Corey) [hereinafter *Americans With Disabilities Act of 1989: Hearings on S. 933*].

to combat and prevent various acts of discrimination in matters such as housing, employment, and access to public accommodations, such as health care facilities.

While most acts of discrimination target the living, discrimination may also occur in the context of a funeral or burial.<sup>2</sup> Hate and fear do not die simply because the target of discrimination has passed on; as long as those who discriminate continue living, so too does the potential for acts of prejudice. In the context of a funeral or burial, discrimination may arise against a person who died of AIDS-related causes or against surviving family members and others who may be presumed to carry the virus. While there are many legal protections available for the living, the law generally classifies dead bodies as "objects rather than the subjects of rights."<sup>3</sup>

Can the anti-discrimination laws that protect living persons be invoked if the act of discrimination arises in the context of a funeral or burial? If these laws can be invoked, who would have standing to do so? If these laws are invoked, what legal or equitable remedies might be appropriate to compensate for the injury? Is the emotional strain upon survivors too great and the prospects of meaningful recovery too limited to make litigation a viable option for individual plaintiffs? As a matter of preserving human dignity, how should we identify and prevent acts of discrimination that target those who are no longer alive?

This article examines the topic of discrimination after death in the specific context of funerals and burials for persons who have died of causes related to HIV or AIDS.<sup>4</sup> This article concludes that existing anti-discrimination laws should be applied to combat AIDS discrimination after death, that other legal remedies may also be invoked to combat and prevent instances of AIDS discrimination by funeral homes, and that one of the most effective means of preventing acts of discrimination is to educate funeral home directors and the public about what the law requires.<sup>5</sup>

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2. See Mark E. Wojcik & David Austin, *Education and Advocacy to Bury AIDS Discrimination*, 3 INDIAN LAW INSTITUTE, AIDS — LAW AND HUMANITY 66, 66 (New Delhi, India 1995).

3. Philippe Ducor, *The Legal Status of Human Materials*, 44 DRAKE L. REV. 195, 212 (1996) (citing article 31 of the Swiss Civil Code).

4. Strictly speaking, persons do not die of AIDS or HIV infection, but from the various opportunistic infections and diseases that may appear when the immune system has been damaged. However, people with HIV can also die of a wide variety of causes unrelated to AIDS or HIV. For example, an HIV-positive person could be killed in an auto accident, an avalanche, or be electrocuted in a bathtub. The issues that a funeral home director would have to face would be the same. The issues arise whenever a funeral home professional is faced with the "problem" of dealing with someone known to have the virus. It does not make a difference whether that person, known to have HIV, does in fact die of an AIDS-related cause or another cause.

5. Many funeral directors and embalmers have seemed to be oblivious to the potential legal liabilities they may face if they discriminate against a person who died of an illness related to HIV. See Mark E. Wojcik, *AIDS and Funeral Homes: Common Legal Issues Facing Funeral Home Directors*, 27 J. MARSHALL L. REV. 411, 411 (1994). As trained professionals, however, funeral directors and embalmers will usually comply with the law when they know what that law is and what it requires of them.

## II. Background

### A. HIV and AIDS

In 1981, the Centers for Disease Control of the U.S. Department of Health and Human Services (now known as the Centers for Disease Control and Prevention) (CDC)<sup>6</sup> began tracking deaths from mysterious causes that would later be linked to HIV.<sup>7</sup> By the end of the twentieth century, a disease entirely unknown to science just two decades earlier had claimed the lives of an estimated 18.8 million people: 7.3 million men, 7.7 million women, and 3.8 million children under the age of fifteen.<sup>8</sup> The disease struck every corner of the globe with devastating fury, killing the 18.8 million people already mentioned and infecting another estimated 33.6 million people: 17.6 million men, 14.8 million women, and 1.2 million children under the age of fifteen.<sup>9</sup> The disease is not going to disappear. Of those infected, 5.6 million were estimated to have been newly infected in 1999: 2.7 million men, 2.3 million women, and 570,000 children under the age of fifteen.<sup>10</sup> The statistics — staggering as they are — may not reflect the true number of cases.<sup>11</sup> Neither can those statistics reflect the full scope of the human tragedy of AIDS,<sup>12</sup> its direct<sup>13</sup> and indirect<sup>14</sup> economic costs, or the myriad of legal issues that have arisen since the start of the pandemic.<sup>15</sup>

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6. Professor Thomas Philipson and Judge Richard Posner correctly noted that the new name is redundant and unfamiliar. See THOMAS J. PHILIPSON & RICHARD A. POSNER, PRIVATE CHOICES AND PUBLIC HEALTH: THE AIDS EPIDEMIC IN ECONOMIC PERSPECTIVE 11 n.8 (1993).

7. Although the first reports of the disease that would later be called AIDS appeared in the *Morbidity and Mortality Weekly Report* in 1981, one group of scientists has now traced the origins of the AIDS pandemic to the 1930s. See Lawrence K. Altman, *AIDS Virus Originated Around 1930*, *Study Says*, N.Y. TIMES, Feb. 2, 2000, at A15.

8. See UNAIDS, *Report on the Global HIV/AIDS Epidemic — June 2000* (visited Nov. 13, 2000) <[http://www.unaids.org/epidemic\\_update/report/Epi\\_report\\_chap\\_glo\\_estim.htm](http://www.unaids.org/epidemic_update/report/Epi_report_chap_glo_estim.htm)>.

9. See *id.*

10. See *id.*; see also, e.g., Lawrence K. Altman, *More African Women Have AIDS Than Men*, N.Y. TIMES, Nov. 24, 1999, at A10; Michael Wines, *Needle Use Sets Off H.I.V. Explosion in Russia*, N.Y. TIMES, Nov. 24, 1999, at A10.

11. See, e.g., Kai Wright, *Statistically Insignificant: Global AIDS Figures Don't Tell the Whole Story*, WASHINGTON BLADE, Jan. 22, 1999, at 1, 10.

12. See, e.g., Patrick Cole, *Illiteracy, AIDS Continue to Plague Woman Worldwide*, UN Report Says, CHI. TRIB., June 1, 2000, § 1, at 5; Louis Weisberg, *Book Looks at AIDS in the Heartland*, CHICAGO FREE PRESS, June 14, 2000, at 24.

13. See, e.g., Gary Barlow, *Senate Passes Ryan White CARE Act by Unanimous Vote*, WINDY CITY TIMES (Chicago), June 15, 2000, at 6 (noting approval of \$1.595 billion for fiscal year 2000 under the CARE Act); Louis Weisberg, *U.S. Senate Reauthorizes Ryan White CARE Act*, CHICAGO FREE PRESS, June 14, 2000, at 30.

14. See, e.g., Elizabeth Olson, *U.N. Agency Sees AIDS Depleting the African Work Force*, N.Y. TIMES, June 13, 2000, at C4.

15. HIV disease is a global epidemic, or "pandemic." AIDS affects issues of discrimination, criminal law, prison administration, civil liability, public health, employment law, employee benefits, family law, immigration and travel, insurance and government benefits programs, privacy, education, and a host of other issues. See, e.g., AMERICAN BAR ASS'N AIDS COORDINATING COMM., PERSPECTIVES ON

Although there have been tremendous advances in the development and marketing of protease inhibitors and other antiretroviral therapies that have decreased the death rates in many industrialized nations,<sup>16</sup> those drugs are neither universally available nor universally effective.<sup>17</sup> Indeed, there have already been documented cases of transmission of new forms of HIV that are resistant to the therapies entirely.<sup>18</sup> AIDS remains fatal, killing more people worldwide than any other infectious disease.<sup>19</sup> Because of the large numbers of persons infected with HIV, funeral homes around the world must plan for the inevitable case of handling someone who dies of an illness related to AIDS.<sup>20</sup>

### B. Right to a Decent Burial

"[I]n recognition of the universal sentiment of mankind, the right to decent burial is well guarded by the law, and relatives of the deceased may insist upon legal

RETURNING TO WORK: CHANGE LEGAL ISSUES IN THE HIV/AIDS EPIDEMIC (Mark E. Rust, ed., 2000); Michael L. Closten & Mark E. Wojcik, *Living With HIV and Without Discrimination*, in INTERNATIONAL LAW AND AIDS: INTERNATIONAL RESPONSES, CURRENT ISSUES, AND FUTURE DIRECTIONS 151 (Lawrence Gostin & Lane Porter eds., 1992); David W. Webber, *HIV and Public Health Law*, in AIDS AND THE LAW 49 (David W. Webber ed., 3d ed. 1997); Mark E. Wojcik, *Global Aspects of AIDS*, in AIDS AND THE LAW, *supra*; Michael L. Closten et al., *AIDS: Testing Democracy — Irrational Responses to the Public Health Crisis and the Need for Privacy in Serologic Testing*, 19 J. MARSHALL L. REV. 835 (1986); Joseph Kelly, *The Liability of Blood Banks and Manufacturers of Clotting Products to Recipients of HIV Infected blood*, 27 J. MARSHALL L. REV. 465 (1994); Jane D. Oswald et al., *AIDS: Coping with HIV on Campus*, 27 J. MARSHALL L. REV. 449 (1994); Jean R. Sternlight, *Mandatory Non-Anonymous Testing of Newborns for HIV*, 27 J. MARSHALL L. REV. 373 (1994); J. Kelly Strader, *Criminalization as a Policy Response to a Public Health Crisis*, 27 J. MARSHALL L. REV. 435 (1994); Henri E. Cauvin, *South Africa in Quandary: Should Gays Donate Blood?*, N.Y. TIMES, June 11, 2000, § 1, at N14; American Bar Ass'n, AIDS Coordinating Comm., *HIV/AIDS and the Law: An Agenda for Beyond the Millennium* (visited Nov. 14, 2000) <<http://www.abanet.org/irr/aidsproject/home.html>>.

16. See, e.g., Roger Detels et al., *Effectiveness of Potent Antiretroviral Therapy on Time to AIDS and Death in Men With Known HIV Infection Duration*, 280 JAMA 1497 (1998); Stephanie H. Michaels et al., *Declining Morbidity and Mortality Among Patients with Advanced Human Immunodeficiency Virus Infection*, 339 NEW ENG. J. MED. 405 (1998); Bruce Jaspen, *Abbott HIV Drug Drawing Praise*, CHI. TRIB., Feb. 2, 1999, § 3, at 3.

17. See, e.g., George J. Annas, *Human Rights and Health — The Universal Declaration of Human Rights at 50*, 339 NEW ENG. J. MED. 1778, 1780 (1998); Mark E. Wojcik, *Recent Developments in International Health Law*, 33 INT'L LAW. 617, 617-18 (1999); see also Françoise Girard, *Cairo + Five: Reviewing Progress for Women Five Years After the International Conference on Population and Development*, 1 J. WOMEN'S HEALTH & L. 1, 12 (1999).

18. See Oren J. Cohen & Anthony S. Fauci, *Transmission of Multidrug-Resistant Human Immunodeficiency Virus — The Wake Up Call*, 339 NEW ENG. J. MED. 341, 342 (1998); Frederick M. Hecht et al., *Sexual Transmission of an HIV-1 Variant Resistant to Multiple Reverse-Transcriptase and Protease Inhibitors*, 339 NEW ENG. J. MED. 307 (1998); David Brown, *Researchers Find HIV Strains That Resist Most AIDS Drugs*, WASH. POST, July 1, 1998, at A3.

19. See, e.g., Catherine Petitnicolas, *AIDS Turns South*, WORLD PRESS REV., Feb. 1999, at 12; *The Impact of HIV/AIDS on Women, Children, and Development*, in 10 HIV/AIDS LEGAL LINK 10 (Sept. 1999) (Austl.).

20. See Mark E. Wojcik, *AIDS and Funeral Homes: Common Legal Issues Facing Funeral Home Directors*, 27 J. MARSHALL L. REV. 411, 411 (1994).

protection to the burial place from unnecessary disturbance or wanton violation."<sup>21</sup> Even in the time of Plato it was understood that everyone had the right to be buried, unless they had been caught stealing from a temple.<sup>22</sup> The denial of a proper burial was a serious matter and was eloquently expressed by Sophocles in the early Greek drama, *Antigone*. In that play, the title character defies King Kreon, who had forbid the burial of Antigone's brother, Polyneices. The King had ordered that Polyneices

will have no ritual, no mourners,  
will be left unburied so men may see him  
ripped for food by dogs and vultures.<sup>23</sup>

When Antigone is brought before King Kreon to explain why she defied his order and buried her brother, she declares herself incapable of obeying an unjust law prohibiting the burial:

Yes [I dared to break this law] because I did not believe  
that Zeus was the one who had proclaimed it;  
neither did Justice,  
or the gods of the dead whom Justice lives among.  
The laws they have made for men are well marked out.  
I didn't suppose your decree had strength enough,  
or you, who are human,  
to violate the lawful traditions  
the gods have not written merely, but made infallible.  
These laws are not for now or for yesterday,  
they are alive forever;  
and no one knows when they were shown to us first.  
I did not intend to pay, before the gods,  
for breaking these laws  
because of my fear of one man and his principles.  
I was thoroughly aware I would die  
before you proclaimed it [my punishment of death];  
of course I would die, even if you hadn't.  
Since I will die, and early, I call this profit.  
Anyone who lives the troubled life I do  
must benefit from death.  
No, I do not suffer from the fact of death.  
But if I had let my own brother stay unburied  
I would have suffered all the pain I do not feel now.  
And if you decide what I did was foolish,  
You may be fool enough to convict me too.<sup>24</sup>

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21. Anderson v. Acheson, 110 N.W. 335, 336 (Iowa 1907).

22. See generally Plato, *Laws* XII.

23. SOPHOCLES, *ANTIGONE* 28 (Richard Emil Braun trans., 1973).

24. *Id.* at 39.

Antigone recognized that her brother's right to a decent burial was one protected by the gods. Because King Kreon attempted to deny that right, Antigone had to defy his unjust law, even if it meant her own death.<sup>25</sup> The right to a proper burial or cremation<sup>26</sup> is universally recognized, not only in law, but also in the religious traditions of every faith.<sup>27</sup>

Attendant to the right to a decent burial is a duty upon the living to see that the dead are properly buried or cremated,<sup>28</sup> or otherwise taken care of.<sup>29</sup> "It has always been recognized as one of the first duties of the living to see that the dead are properly interred."<sup>30</sup> The right to a decent burial is a right in which both the public and the individual have an interest.<sup>31</sup> The public's interest may be sanitary.<sup>32</sup> The public may also have an interest in seeing the right respected because societies may be judged by how they treat their weakest members, among these the dying or the dead. Individuals have an interest in seeing the right respected because a decent burial is part of our collective self-expression of values, of feelings, of affection, of individual dignity, and of human worth.<sup>33</sup>

25. *See id.*; *see also* Annas, *supra* note 17, at 1780; *cf.* ACTS 5:29 ("Then Peter and the other apostles answered and said, We ought to obey God rather than men.").

26. "Cremation" is "a heating process which incinerates human remains." 16 C.F.R. § 453.1(e) (2000). A "direct cremation" is "a disposition of human remains by cremation, without formal viewing, visitation, or ceremony with the body present." *Id.* § 453.1(g).

27. *Cf.* JOHN BOWKER, *THE MEANINGS OF DEATH* (1991); *see also* KATHLEEN DOWLING SINGH, *THE GRACE IN DYING — HOW WE ARE TRANSFORMED SPIRITUALLY AS WE DIE* (1998).

28. *See, e.g., In re Estate of Medlen*, 677 N.E.2d 33, 36 (Ill. App. Ct. 1997).

29. While a person may be normally buried or cremated, a person may donate their body "to science." *But see, e.g., Mike Doring, Body Parts Trade Faces U.S. Probe — Abuse Reports Prompt Inquiry*, CHI. TRIB., June 9, 2000, § 1, at 1.

30. *Lay v. Lay*, 255 S.W. 1054, 1055 (Ky. 1923). The sentiment that the dead must be properly interred is also found in matters such as the continuing concern over American soldiers who were "missing in action." For example, Captain John Dunham, who was shot down by Soviet fighters near the Kuril Islands in 1952, was not found until only recently; his 74-year-old widow told a reporter: "It does make a tremendous difference to finally know what happened . . . I don't like the word closure, because one never does stop caring. But it is very important to bury the dead." Alan S. Cullison, *Russian Archives Aid Those Seeking Fate of U.S. MIAs in Korea — Files Hold Photos and Details of Dogfights, Wreckage in Which American Airmen Died*, WALL ST. J., June 13, 2000, at A1, A10.

31. *See, e.g., Holland v. Metalious*, 198 A.2d 654, 656 (N.H. 1964); 22A AM. JUR. 2D *Dead Bodies* § 13, at 17 (1988).

32. "[C]ourts have recognized that there is a right to a decent burial, corresponding to the common-law right to bury one's dead in order to maintain public health and human decency." *Crockett v. Stewart Essex and Turpin Funeral Home, Inc.*, 19 S.W.3d 585, 589 (Ark. 2000).

33. In the context of cadavers used in anatomical study, Professor D. Gareth Jones of the Department of Anatomy and Structural Biology at the University of Otago, New Zealand, has identified three components of a "moral intuition" to respect the dead:

[A]n initial component is the close identification of people and their bodies. Our recognition of each other depends upon a recognition of an array of physical characteristics which are distinctive features during life and are not extinguished immediately on death. Hence, what is done to a dead body has relevance for our feelings about that person when alive: the cadaver and the person cannot be totally separated.

A second component concerns other people's responses to the cadaver. Those who knew the person when alive have memories of that person: what he or she was like, his

### C. Funeral Home Directors and Embalmers

Funeral home directors and embalmers are trained professionals who oversee the practical aspects of an important and fundamental part of our society. Funeral home directors are professionals who arrange all aspects of a funeral service.<sup>34</sup> Embalmers are often independent contractors who usually work for a number of funeral homes. Funeral home directors and embalmers must undergo professional training and be licensed.<sup>35</sup>

Among some funeral directors there is anecdotal evidence that an independent embalmer will be called to a funeral home only on two occasions: (1) when it is a holiday, or (2) when the person to be embalmed died of AIDS-related causes. If an embalmer is called in to work on a case of a person who died of AIDS-related causes, the embalmer will, of course, charge the funeral director for providing this service. Because this raises the cost of the funeral for a person who died of AIDS-related causes, the Americans with Disabilities Act and perhaps other state and local legislation may prohibit the funeral director from passing on an embalmer's fee to the family;<sup>36</sup> the director must instead absorb that cost.<sup>37</sup>

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or her personality, attitudes, beliefs, and hobbies. In a sense, the cadaver represents an array of built-in memories, that can never be completely separated from it. For most people these memories lead to a sense of respect for a cadaver and its enshrined associations. On the other hand, disrespect for a cadaver commonly evokes a sense of revulsion.

A third component directs attention onto the deceased person's relationships; he or she was someone's relative or friend, who is now grieving the death. Consequently, respect for the cadaver is respect for the relatives' grief. Although the depth of the grief will decrease as time passes, the reality of the cadaver may play a substantial role during the grieving process.

Taken together, these components of moral intuition suggest that there are certain ways in which cadavers are and are not [to be] treated, even if unfettered value is not bestowed upon them.

D. GARETH JONES, SPEAKING FOR THE DEAD: CADAVERS IN BIOLOGY IN MEDICINE 42 (2000).

34. Fortunately, most funeral home directors handle cases of persons who die of AIDS-related causes with dignity and respect; those who discriminate on the basis of AIDS are in the minority. *See, e.g., Wojcik & Austin, supra* note 2, at 66.

35. In Nevada, to take one example, an applicant for a license to practice embalming must have completed at least two academic years of instruction at an accredited college or university and an additional 12 full months of instruction in an embalming college or school of mortuary science accredited by the Conference of Funeral Services Examining Boards of the United States. *See* NEV. REV. STAT. § 642.080 (2000). The applicant must also have at least one year of practical experience under the supervision of an embalmer licensed in that state and have actually embalmed at least 50 bodies under the supervision of that licensed embalmer. *See id.* Other states, such as California, require two years of practical experience and assistance in embalming at least 100 bodies before being eligible to be licensed. *See* CAL. BUS. & PROF. CODE § 7643 (West 1995); *see also* *Beard v. State Bd. of Embalmers & Funeral Directors*, 295 P. 1052 (Cal. Ct. App. 1931) (affirming the constitutionality of certain statutory requirements for embalmer's license). There are also professional qualifying examinations, continuing education requirements, and other legal restrictions and requirements. *See, e.g.,* OHIO REV. CODE ANN. § 4717.04 (Anderson 1995). *See generally* R.P. Davis, Annotation, *Validity and Construction of Statute, Ordinance, or Other Regulation in Relation to Funeral Directors and Embalmers*, 89 A.L.R.2D 1338 (1963).

36. *See supra* note 1 and accompanying text.



Embalming is a chemical process that temporarily protects a body from decay. When funeral homes lacked refrigeration, the corpse of the deceased was subject to rapid decomposition. It was, therefore, necessary to embalm bodies if the family wanted to have an open-casket viewing.<sup>38</sup> Now, even with refrigeration in funeral homes, embalming is generally considered to be a routine and appropriate method of preparing a body for burial or visitation.<sup>39</sup> Complete embalming can preserve a body for up to thirty-five years.<sup>40</sup>

Although embalming is common,<sup>41</sup> the law does not generally require it for open-casket viewing — even for persons who die of causes related to HIV. In fact, many jurisdictions expressly provide that embalming is not required, except in certain circumstances.<sup>42</sup> It is also a violation of federal law for a funeral home director to tell a consumer that embalming is required, unless a state or local law actually does mandate this procedure.<sup>43</sup>

Although funeral homes should give consumers the option of being refrigerated rather than being embalmed, a survey of funeral homes in California found that many funeral homes were not giving consumers this choice.<sup>44</sup> The survey also found that many funeral homes were charging "the exact same price for refrigeration as for embalming, although refrigeration can be a far less expensive option."<sup>45</sup> These consumers end up paying the price for embalming, even when they do not desire that service.<sup>46</sup>

37. See T. Scott Gilligan, *Are Trade Embalmers Affected by the ADA?*, DIRECTOR, Apr. 1992, at 41 (Official Publication of the National Funeral Directors Association).

38. See Emanuel Parker, *'Can You Afford to Die?' Asks Report*, L.A. SENTINEL, Mar. 12, 1998, at A3, available at 1998 WL 11413277. A body may, but need not, be embalmed for a closed-casket funeral service.

39. See, e.g., *Konecny v. Hohenschuh*, 173 N.W. 901 (Iowa 1919); *Sworski v. Simons*, 293 N.W. 309, 312 (Minn. 1940) (Holt, J., dissenting); *Parker v. Quinn-McGowen Co.*, 138 S.E.2d 214 (N.C. 1964) (no liability for embalming).

40. See *Flores v. Baca*, 871 P.2d 962, 968 (N.M. 1994) (allowing damages for breach of contract in a claim of negligent embalming).

41. See, e.g., *Clark v. Smith*, 494 S.W.2d 192, 197 (Tex. Civ. App. 1973) (testimony of an undertaker to the effect that "[a]ny dead human body needs to be embalmed").

42. For example, the relevant New Mexico statute provides that "dead human bodies not disposed of within twenty-four hours after death shall be embalmed . . . or stored under refrigeration . . . , unless otherwise required by regulation of the office of the medical investigator or the secretary of health or by orders of an authorized official of the office of the medical investigator, a court of competent jurisdiction or other authorized official." N.M. STAT. ANN. § 61-32-20(A) (Michie 1978). Subsection F of that statute provides expressly that "[e]xcept as provided in Subsection A . . . embalming is not required." *Id.* § 61-32-20(F).

43. See 16 C.F.R. § 453.3(a)(1) (2000); see also Parker, *supra* note 38. Robert Ninker, Executive Director of the Illinois Funeral Directors' Association, told one newspaper that he believed that "a funeral director is within his rights to require embalming — which is not explicitly required under Illinois law — if visitation is requested." John Carpenter, *AIDS Cited in Funeral Home Suit — Lack of Wake Angers Partner*, CHICAGO SUN-TIMES, Nov. 23, 1996, at 2. Ninker's assertion to the newspaper, however, does not appear to be in accord with federal law.

44. See Parker, *supra* note 38.

45. *Id.*

46. See *id.*

Specific guidelines have been written for those who embalm bodies that may be infected with HIV.<sup>47</sup> In general, when embalming the body of a person who died of AIDS-related causes, the embalmer and any assisting personnel should be properly garbed in suits consisting of a disposable scrub suit, a plastic apron, double rubber gloves, shoe covering, hair covering, and a face mask.<sup>48</sup> After removing the body from the pouch, it should be thoroughly washed with a disinfectant soap.<sup>49</sup> Once the body is properly cleaned, the features may be set and the body embalmed with a solution strong enough to kill any organisms that may be present.<sup>50</sup> When the job is finished, the embalmer should disinfect his instruments, the sink, the underside of the embalming table, and the foot end of the table.<sup>51</sup> The floor should be mopped with a strong disinfecting solution.<sup>52</sup> The embalmer should carefully remove his suit, and place the items into a plastic bag along with the pouch and the sheets used for removal of the body.<sup>53</sup> The bag should be handled carefully to ensure that the hands do not come into contact with any surface touched by the contaminated materials in the bag.<sup>54</sup> The bag should be incinerated or else a disinfecting chemical should be applied in the plastic bag, and the bag should then be tied shut.<sup>55</sup> The embalmer and any attendants should wash thoroughly before changing into their regular clothing.<sup>56</sup>

The guidelines described in general terms here are essentially the "universal precautions" set forth by the CDC. Since 1987, the CDC<sup>57</sup> has recommended that health care workers who are exposed to bodily fluids follow universal precautions to minimize the risk of HIV transmission.<sup>58</sup> Funeral home personnel also are subject to the "Bloodborne Pathogen Rule" promulgated by the Occupational Safety and Health Administration of the U.S. Department of Labor (OSHA).<sup>59</sup> The Bloodborne Pathogen Rule requires employers to ensure that employees follow universal precautions when they are occupationally exposed to blood and other

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47. See, e.g., Robert J. Inman, *Guidelines for Embalming an AIDS Body* (n.d.).

48. See *id.* at 2.

49. See *id.*

50. See *id.* at 2-3.

51. See *id.* at 3.

52. See *id.*

53. See *id.*

54. See *id.*

55. See *id.*

56. See *id.*

57. See PHILLIPSON & POSNER, *supra* note 6.

58. In addition to protecting against the risk of HIV transmission, use of universal precautions also protects against the risk of transmission of hepatitis B virus and other bloodborne pathogens. See *Recommendations for Prevention of HIV Transmission in Health-Care Settings*, 36 [No. 2S] CENTERS FOR DISEASE CONTROL: MMWR (MORBIDITY & MORTALITY WKLY. REP.) at 2S (Supp. 1987); see also *Settlement Agreement Between the United States Department of Justice and the Vasquez Funeral Home*, No. DJ 202-23-41, available in <<http://www.usdoj.gov/crt/ada/vasquez.htm>> (visited Oct. 31, 2000) [hereinafter *Settlement Agreement*].

59. See Occupational Safety & Health Administration 1.2(a), 29 C.F.R. § 1910.1030 (1999); see also *Settlement Agreement*, *supra* note 58.

potentially infectious materials.<sup>60</sup> The universal precautions in the CDC guidelines and the OSHA Bloodborne Pathogen Rule are fundamental principles of infection control.<sup>61</sup> Essentially, the CDC and OSHA require funeral workers to wear protective gear for embalming, without regard to whether the person is known to have died of causes related to HIV or AIDS.<sup>62</sup> The concept of universal precautions stresses:

[A]ll human blood and certain bodily fluids must be assumed to be infectious for HIV, [Hepatitis B Virus], and other bloodborne pathogens, because persons who are exposed to blood and other potentially infectious bodily fluids are not always in a position to know whether such bodily fluids presently harbor or once harbored an infectious disease.<sup>63</sup>

Because funeral home workers should treat all bodies as having the potential to transmit HIV or other blood-borne pathogens, they should "adhere rigorously to the use of universal precautions" to protect themselves against these dangers.<sup>64</sup> Studies have shown that embalmers, those who perform autopsies, and other funeral service practitioners who follow these universal precautions face only "a low level of work-related risk for bloodborne infections."<sup>65</sup>

#### D. Funeral Arrangements

"There is no universal rule regarding the right of persons to bury the dead, but each case must be considered in equity on its own merits."<sup>66</sup> The right to bury or otherwise dispose of a corpse has been held to be a legal right that some courts may protect as a "quasi-property" right.<sup>67</sup> Courts and legislatures generally provide that

60. See 29 C.F.R. §§ 1910.1030(a), (d)(1)-(d)(4); see also *Settlement Agreement*, *supra* note 58.

61. See *Settlement Agreement*, *supra* note 58.

62. See Parker, *supra* note 38.

63. *Settlement Agreement*, *supra* note 58.

64. *Id.*

65. Charles W. Henderson, *Occupational Exposure Embalmers at Low Risk of Blood Infections on Job*, BLOOD WKLY., Feb. 27, 1995, available in 1995 WL 10089624 (reporting on an abstract presented at the Second National Conference on Human Retroviruses and Related Infections); *Embalmers Said Unlikely to Get HIV During Procedures*, AIDS POL'Y & L., Oct. 4, 1989, at 10-11 (describing low risk of occupational exposure to HIV).

66. *Estes v. Woodlawn Mem'l Park, Inc.*, 780 S.W.2d 759, 762 (Tenn. Ct. App. 1989).

67. As the Supreme Court of Georgia explained:

In the earlier days of the common law, so Blackstone avers, no property right existed relative to a dead body, and matters concerning corpses were left to the ecclesiastical courts. "But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently, at least, if not impiously, violate and disturb their remains, when dead and buried." Because there were no ecclesiastical courts in this country to resolve matters relating to corpses, the courts conceived the notion of "quasi-property right," when referring to the interest of relatives in the bodies of their next-of-kin. Dean Prosser noted: "It seems reasonably obvious that such 'property' is something evolved out of thin air to meet the occasion, and that in reality the personal feelings of the survivors

a lawful spouse will have the primary right to control the final disposition of a human body.<sup>68</sup> The exercise of this right is not absolute, however, and it may be waived by consent or other circumstances,<sup>69</sup> such as an inability to locate the lawful spouse in a timely manner.

If a person who has the right (and the duty) to arrange for the final disposition of a body fails to exercise that right, the right (and the duty) may then pass to another person.<sup>70</sup> If the will provides for disposition of the body, the executor named in the will may have the right (and the duty) to arrange the funeral service.<sup>71</sup> Similarly, an executor who does not exercise the right to arrange the funeral may waive that right.<sup>72</sup> In some cases, the right (and the duty) may even fall on a complete stranger, such as the owner of a house where a person dies.<sup>73</sup> In these circumstances, the stranger who arranged for the funeral service may seek reimbursement for the expenses incurred.<sup>74</sup>

Of course, persons may also arrange their own funeral and burial ahead of time.<sup>75</sup> A number of funeral homes allow individuals to arrange their own funerals by use of a "pre-pay contract."<sup>76</sup> Planning ahead can save significant amounts of money and grief for the survivors.<sup>77</sup> Additionally, persons facing a terminal illness may often gain emotional comfort by having a say in the planning of their own

are being protected, under a fiction likely to deceive no one but a lawyer."

Georgia Lions Eye Bank, Inc. v. Lavant, 335 S.E.2d 127, 128 (Ga. 1985) (citing 2 WILLIAM BLACKSTONE, COMMENTARIES THE LAW OF ENGLAND 429 (T. Cooley ed., 1899) and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 63 (5th ed. 1984)); see also, e.g., Crockett v. Stewart Essex and Turpin Funeral Home, Inc., 19 S.W.3d 585, 589 (Ark. 2000); 25A C.J.S. *Dead Bodies* § 2 (1966); John B. Winski, Note, *There Are Skeletons in the Closet: The Repatriation of Native American Human Remains and Burial Objects*, 34 ARIZ. L. REV. 187, 208 (1992).

68. See, e.g., Sacred Heart of Jesus Polish Nat'l Catholic Church v. Soklowski, 199 N.W. 81, 83 (Minn. 1924); Sullivan v. Catholic Cemeteries, Inc., 317 A.2d 430, 432 (R.I. 1974); 22A AM. JUR. 2D *Dead Bodies* § 21 (1988).

69. See, e.g., Teasley v. Thompson, 165 S.W.2d 940, 941 (Ark. 1942); Whitehair v. Highland Memory Gardens, Inc., 327 S.E.2d 438, 443 (W. Va. 1985); 22A AM. JUR. 2D *Dead Bodies* § 21 (1988).

70. See, e.g., Fischer's Estate v. Fischer, 117 N.E.2d 855, 858 (Ill. App. Ct. 1954); 22A AM. JUR. 2D *Dead Bodies* § 15 (1988).

71. See, e.g., Lay v. Lay, 255 S.W. 1054, 1055 (Ky. 1923) (duty fell on stepson); Patterson v. Patterson, 59 N.Y. 574, 574 (N.Y. 1875) (duty on executor); Wynkoop v. Wynkoop, 42 Pa. 293 (Pa. 1862); see also 22A AM. JUR. 2D *Dead Bodies* § 14, at 17 (1988); 31 AM. JUR. 2D *Executors and Administrators* §§ 320-22 (1989).

72. See, e.g., Fischer's Estate, 117 N.E.2d at 858; Spanich v. Reichelderfer, 628 N.E.2d 102, 107 (Ohio Ct. App. 1993); *In re Estate of Moyer*, 577 P.2d 108, 110-11 (Utah 1978); see also 22A AM. JUR. 2D *Dead Bodies* § 29 (1988).

73. See, e.g., 22A AM. JUR. 2D *Dead Bodies* § 18 (1988).

74. See, e.g., *id.*

75. See, e.g., Ducor, *supra* note 3, at 232; Frank D. Wagner, Annotation, *Enforcement of Preference Expressed by Decedent as to Disposition of His Body After Death*, 54 A.L.R.3D 1037, 1040-41 (1974).

76. See generally 22A AM. JUR. 2D *Dead Bodies* § 7 (1988); Thomas G. Fischer, Annotation, *Construction and Effect of Contracts or Insurance Policies Providing Preneed Coverage of Burial Expense or Services*, 67 A.L.R.4TH 36 (1989); see also E.S. Stephens, Annotation, *Validity of Statutes Regulating Pre-Need Contracts for the Sale or Furnishing of Burial Services and Merchandise*, 68 A.L.R.2D 1251 (1959).

77. See, e.g., Parker, *supra* note 38.

funeral arrangements. Involvement in the planning stages allows family and friends the benefit of knowing the concerns that the ill person has regarding a memorial service and final disposition of the body. It also allows them the security of knowing that they are acting in accordance with the wishes of their loved ones. This collaborative effort also ensures that the dying can depart with the knowledge that their wishes will be respected.

People who have suffered the loss of a loved one operate under extreme levels of stress. For this reason, the existence of a pre-arranged funeral or burial plan can act as a safeguard and facilitate the emotional comfort level of survivors. If contact with a funeral home is made only after the loved one has died, there is a greater probability that the survivors will be disoriented and in pain. It is also more likely that they will have to rely heavily on the advice of the funeral director in arranging the details of the service. In these situations, survivors are much more emotionally and financially vulnerable.

The use of a pre-need burial contract has been especially beneficial in the context of gay and lesbian families. In cases where a gay son or lesbian daughter has been estranged from their biological families because of their sexual orientation, that son or daughter may generally want decisions about a funeral service to be made by a life partner or intimate friends rather than the estranged family. In the confusion following death, however, the family may assert contrary wishes as the "next of kin."<sup>78</sup> If the individual has already made the funeral arrangements with a pre-need contract, however, even the estranged family will generally honor those express wishes.

### *III. Discussion*

#### *A. The Spectrum of Discrimination*

Discrimination against persons with HIV may fall along a spectrum of discriminatory practices by funeral homes and individuals in the funeral industry. The most common discriminatory practices of funeral homes include direct or indirect refusals to handle the body, assessing additional charges, and making additional and improper demands on the conditions of service.

##### *1. Denial of Funeral Services*

At one end of the spectrum of discrimination is the direct denial of funeral services to a person who died of AIDS-related causes. A refusal to provide services to a person who dies of an AIDS-related illness likely arises from an unwarranted fear of transmission of AIDS or from a concern that other customers will be disinclined to use the services of a funeral home that caters to people with AIDS.<sup>79</sup>

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78. See, e.g., *Stewart v. Schwartz Brothers-Jeffer Memorial Chapel, Inc.*, 606 N.Y.S.2d 965, 969 (N.Y. Sup. Ct. 1993) (dispute between surviving gay partner of a man who died of AIDS and the man's Orthodox Jewish family was settled when the parties agreed, among other things, "to cremate Stanton's body and split the ashes").

79. See ALAN H. TERL, *AIDS AND THE LAW* 127 (1992).

The denial of services may be blatant or subtle. In the earlier years of the epidemic, it was not uncommon for persons to go from one funeral home to another looking for a place that would handle the funeral. One foster mother, for example, made "26 phone calls to 26 different funeral directors before we finally found one who was willing to take our baby and bury her."<sup>80</sup> Even in the later years of the epidemic, however, there are still cases that arise where a funeral home director simply refuses to handle a person who died of causes related to AIDS.<sup>81</sup>

The complete denial of services may also be more subtle. For example, industry employees may steer families or loved ones to another funeral home that has "more experience" in handling persons who died of AIDS-related causes. Some funeral homes did in fact develop more experience in handling these funerals because they did so with respect and dignity for the person who died. Indeed, many AIDS service organizations compiled lists of funeral homes that would handle funerals professionally and compassionately. The lists were intended to help families and loved ones avoid the nightmares of calling from funeral home to funeral home to find one that would provide professional services in an atmosphere of dignity and respect. The practice of listing friendly funeral homes may have inadvertently fostered this form of discrimination. The lists provided funeral directors the knowledge and opportunity to steer unwanted business to other funeral homes without appearing to be discriminatory.

The United States has seen a drastic decline in the frequency of blatant refusals to provide funeral services, at least in the metropolitan areas where funeral homes

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80. Mrs. Betty Corey, a foster parent who cared for a child with AIDS, testified in support of the Americans with Disabilities Act and told the incredible story of her difficulties in arranging the funeral of that child:

About a week before Kedra died, we decided to begin making arrangements for her funeral and burial. I was a member of the Baltimore County Task Force on AIDS, and at one of our meetings, the president of the Funeral Directors' Association was there, and I realized at the time we were going to face a lot of discrimination. We began to make phone calls, and we were turned down. They either would not take her, or they would not offer the full services they offered anyone else.

. . . It took 26 phone calls to 26 different funeral directors before we finally found one who was willing to take our baby and bury her.

We were given all kinds of stories. They would not embalm her. They would take her only to the crematorium. It would have to be a closed casket; there would be no viewing. I even had one who told me that he would not accept her because we had her at home, and we would not properly bag her to protect his employees.

. . . .

One who was willing to take her wanted an extra \$500 because of her diagnosis and told us if we allowed an autopsy, it would be significantly higher.

. . . .

It was horrible. We had fought discrimination while she was alive, and I did not expect to face that kind of discrimination at death, too.

*Americans With Disabilities Act of 1989: Hearings on S. 933, supra note 1, at 102-03 (statement of Betty and Emory Corey).*

81. See Phil Sneiderman, *Funeral Director's AIDS Policy Stuns Activists — His Acknowledgment That Such Deaths are Referred to Other Mortuaries Also Surprises Industry Leaders*, L.A. TIMES, Nov. 18, 1993, at 1, available in 1993 WL 2251326.

now have acquired considerable experience in handling AIDS cases. The more subtle refusals still occur, but they are necessarily harder to track, as persons who are in a state of emotional shock and distress from the loss of a loved one may never recognize the reason they are being steered to another home or recognize that the practice may violate federal and state law.<sup>82</sup> They may also simply decide to find another funeral home on their own rather than to have a service at a funeral home where they are not wanted.<sup>83</sup>

In other cases, a funeral home may appear to be providing services that it may actually not be providing. A funeral home in Pennsylvania, for example, conducted a funeral service with an empty casket so that it would not have to handle the body of a woman's son who had died of AIDS-related causes. A jury awarded the mother \$175,000 for the distress caused by the funeral home's deception.<sup>84</sup>

Denials of funeral services continue in the United States and in many other parts of the world, however. For example, in Australia funeral workers refused to carry the coffin of a man who died of an AIDS-related illness.<sup>85</sup> In Morocco, a doctor refused to sign the certification required to bury a person who died of AIDS-related causes.<sup>86</sup> In a remote town in Canada, the sole funeral director refused to embalm a man who had died of AIDS-related causes.<sup>87</sup> A funeral director in Bloomington, Illinois, simply refused to handle the burial of a person who died of AIDS-related causes,<sup>88</sup> while a funeral director in another Chicago suburb discriminated against a man who died of AIDS-related causes by denying a proper funeral service.<sup>89</sup> Other informal reports of discrimination recount similar acts of discrimination in countries such as Indonesia, Japan, the Philippines, and Russia. Jews who are buried in Israel are generally interred directly in the earth according to religious tradition that the body be placed uncovered in the soil of the Holy Land while awaiting ultimate resurrection; when persons die of AIDS-related causes, however, they are wrapped in shrouds that are conspicuously labeled with markings that indicate HIV infection.<sup>90</sup> Funeral directors in Padua, Italy, even kept a separate cemetery for persons who died of AIDS-related causes.

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82. See *infra* notes 111-48 and accompanying text.

83. See Wojcik & Austin, *supra* note 2, at 69.

84. See *Jury Pa. Awards Woman \$175,000 On Empty Casket Funeral Charges*, AIDS POL'Y & L., Jan. 21, 1994, at 3.

85. See Helen Watchirs, *HIV/AIDS Anti-Discrimination and Privacy Laws in Australia*, in 3 INDIAN LAW INSTITUTE, AIDS — LAW AND HUMANITY 54, 60 (New Delhi, India 1995).

86. See Wojcik & Austin, *supra* note 2, at 68. In another case from Morocco, a rabbi in Casablanca refused to allow the burial of a young woman who died of AIDS-related causes. See *id.*

87. See *id.* at 69. In a tremendous display of courage and love, the deceased man's brother volunteered to embalm his own brother while the funeral director stood next to him and gave instructions on what to do. See *id.*

88. See *id.* The family decided to seek out a new funeral home rather than challenge the denial of service.

89. See *Charge of Discrimination, John Doe v. Michael's Funeral Home*, No. 1994CP3153 (Ill. Dep't of Human Rights, June 20, 1994) (copy on file with the *Oklahoma Law Review*).

90. See Wojcik & Austin, *supra* note 2, at 69.

## 2. Unusual Requirements

Another way funeral homes discriminate against persons who die of HIV occurs when they make improper demands or wrongly suggest to families that persons with HIV must be cremated or buried in a closed casket in order to avoid embalming.<sup>91</sup> Although cremation is now considered to be common, some may view it as an unusual practice because their religious beliefs or family traditions have prohibited this method for disposing of the body. It is discriminatory to suggest to families that a person who died of an illness related to HIV must be cremated or that the memorial service must be held with a closed casket by reason of decedent's cause of death. Thousands of funerals across this country and others have proven that the full range of options should be offered to the families.

In one case, a funeral home director in Schaumburg, Illinois, demanded that a person who died of HIV-related causes be embalmed even for a closed casket ceremony, although there was no such legal requirement.<sup>92</sup> Another example of an "unusual requirement" arose in New York, where one funeral home at one time required a glass cover for the caskets of persons who died of AIDS-related causes.<sup>93</sup>

## 3. Overcharging

Other forms of discrimination against persons who die of HIV-AIDS may involve not a denial of service, but additional charges for funeral services. In the 1980s, some funeral homes charged an extra "handling fee" for bodies of persons who had died of causes related to AIDS.<sup>94</sup> Funeral homes continued to assess additional charges even into the 1990s, however. One funeral home in Illinois even assessed an extra fee for special cleaning of the hearse that carried the casket of a man who died of AIDS-related causes.<sup>95</sup>

Many funeral homes hire embalmers for only those cases where they know (or suspect) that a person has died of an AIDS-related illness.<sup>96</sup> Because an indepen-

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91. See, e.g., *Americans With Disabilities Act of 1989: Hearings on S. 933*, *supra* note 1, at 102-03 (statement of Betty and Emory Corey).

92. See Charge of Discrimination, *John Doe v. Michael's Funeral Home*, No. 1994CP3153 (Ill. Dep't of Human Rights, June 20, 1994) (copy on file with the *Oklahoma Law Review*); Wojcik & Austin, *supra* note 2, at 75.

93. See DiMiceli & Sons Funeral Home v. N. Y. City Comm'n on Human Rights, 1987 WL 19527/86 (N.Y. Sup. Ct. Jan. 9, 1987); Mark Barnes, *Discrimination in Places of Public Accommodation: Access to Health Care, Education, and Other Services*, in AIDS PRACTICE MANUAL: A LEGAL AND EDUCATIONAL GUIDE § 11.4, at 11-16 (Paul Albert et al. eds., 3d ed. 1991).

94. See, e.g., Parker, *supra* note 38.

95. See Charge of Discrimination, *John Doe v. Michael's Funeral Home*, No. 1994CP3153 (Ill. Dep't of Human Rights, June 20, 1994) (copy on file with the *Oklahoma Law Review*); Wojcik & Austin, *supra* note 2, at 75.

96. See, e.g., *Funeral Services by Gregory, Inc. v. Bluefield Community Hosp.* 413 S.E.2d 79, 81 (W. Va. 1991), *overruled on other grounds*, *Courtney v. Courtney* 437 S.E.2d 436 (W. Va. 1993). ("If the family had insisted on embalming, Gregory [claims he] would have taken additional steps to minimize his exposure, such as [by] . . . sending the body to an embalming service.").



dent embalmer will charge a fee for handling the person, the funeral director may then attempt to pass on the extra fee as part of the total bill for the funeral service.<sup>97</sup> Moreover, the funeral home itself may attempt to charge extra for alleged extra services or extra precautions.<sup>98</sup> However, additional charges to handle cases where a person died of causes related to HIV violate anti-discrimination laws.<sup>99</sup> Likewise, funeral directors should not charge special fees, such as a fee to clean out hearses after the funeral of a person who died of an illness related to HIV. This fee is particularly hard to justify as a special fee for AIDS cases because the body does not come into direct contact with the hearse. Consequently, this additional charge is discriminatory because it is levied only in the case where a person died of causes related to HIV. Because the body does not come into contact with the hearse, it makes no difference if the person died of simple pneumonia or a pneumonia related to HIV.<sup>100</sup>

These extra charges may be specifically prohibited under state statutes, in addition to other applicable laws. California, for example, provides that: "No funeral director or embalmer shall charge any additional fee for handling or embalming a body when death was due to a contagious or infectious disease."<sup>101</sup> Kentucky similarly provides that:

No embalmer or funeral director shall charge more for embalming the remains of a person with a communicable disease which requires blood and body fluid precautions than the price for embalming services listed on the price list funeral providers are required to maintain and provide to consumers pursuant to [the Federal Trade Commission's Funeral Home Rule].<sup>102</sup>

These statutes and those from other states thus may provide an additional basis for combating acts of discrimination.

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97. See Funeral Industry Practices, 16 C.F.R. §§ 453.2(b)(4)(ii)(F), (G) (2000) (requiring disclosure on price lists for "embalming" and "other preparation of the body"); see also *id.* § 453.3(a)(2) (requiring preventive measures against misrepresentations in embalming practices).

98. See DiMiceli & Sons Funeral Home v. New York City Comm'n on Human Rights, No. 19527/86 (N.Y. Sup. Ct. Jan. 9, 1987); Barnes, *supra* note 93, at 11-16.

99. *But see* Doe v. Kahala Dental Group, 808 P.2d 1276 (Haw. 1991). The Doe case found no violation of the Hawaii anti-discrimination law because additional precautions would be needed to treat a dental patient with HIV. The case "ignored the CDC guidelines on universal precautions and is not in line with current medical opinion." Kathleen M. Flaherty, *Insurance for People with AIDS Remains Problematic Despite ADA*, 21 J.L. MED. & ETHICS 397, 397 (1993).

100. *Pneumocystis carinii* pneumonia (PCP) was a common cause of death in the early years of the first decade of AIDS. Aerosolized pentamidine and other medications have reduced (but not eliminated) the incidence of PCP as a cause of death related to HIV.

101. CAL. BUS. & PROF. CODE § 7685.1(c) (West 1995); see also Parker, *supra* note 38.

102. KY. REV. STAT. ANN. § 213.076(8) (Michie 1991). The extensive federal rule on price disclosures can be found at 16 C.F.R. § 453.2 (2000).

### B. Common Defenses

Funeral home directors may raise several defenses to charges that they discriminated against a person who died of AIDS-related causes. To combat a charge that they either denied services to a person who died of AIDS or simply treated that person differently, the funeral home director may argue that AIDS is a different type of disease that justifies different treatment. For example, Jim Mumaw, director of the Mumaw Funeral Home in Lancaster, California, refused to provide services to persons who died from AIDS-related causes based on his own fear of contracting HIV.<sup>103</sup> Mr. Mumaw stated: "I do not wish to become one of the small percentage of persons in my profession who will die from an accidental infection of the HIV virus."<sup>104</sup> An editorial in the *Los Angeles Times* condemned Mr. Mumaw's refusal, noting that universal precautions allowed health care workers to deal safely with AIDS:

Every day in this nation, doctors and nurses assistants, lab technicians, and scientists and researchers deal intimately with this disease in an effort to find a cure, to prolong life, and to make life a little easier for its victims. The Mumaw Funeral Home's fears do not contribute to progress on that front. They only contribute to ignorance.<sup>105</sup>

The editorial did not mention that because of the nature of their work, funeral home workers often encounter more blood and other bodily fluids than most other health care workers. However, the use of universal precautions will also protect workers who are exposed to the greater quantities and varieties of these fluids. The U.S. Department of Justice, pursuing a case against the Mumaw Funeral Home under the Americans with Disabilities Act,<sup>106</sup> reached a settlement in which Mr. Mumaw agreed to undergo training on universal precautions to prevent the transmission of HIV.<sup>107</sup>

Another anticipated defense that a funeral home director might raise against an allegation that it charged more to handle "an AIDS funeral" than it would have otherwise charged for the same services, is that the funeral home actually incurred higher costs because it used the universal precautions mandated by the CDC and OSHA. Indeed, some funeral home associations even advised their members at one time that they could charge an additional "contagious disease fee" for funerals where the person died of AIDS-related causes. Universal precautions, however, are to be used universally. A funeral home cannot choose when to use these precautions and when to discard them, because it must treat all bodies as being potentially infected.

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103. See Sneiderman, *supra* note 81.

104. Editorial, *What Risks Does AIDS Pose to Funeral Home? Director's Policy Spreads Only Ignorance of the Disease*, L.A. TIMES, Nov. 21, 1993, at 14, available in 1993 WL 2250067.

105. *Id.*

106. See *infra* notes 113-28 and accompanying text.

107. See U.S. DEP'T OF JUSTICE, ENFORCEMENT HIGHLIGHTS: FIGHTING DISCRIMINATION AGAINST PERSONS WITH HIV/AIDS (Dec. 1995), available in 1995 WL 729518.

First, the funeral home will not always be told when a person died of AIDS. It is true that funeral homes may expect a hospital to tell them when a person died of AIDS-related causes; indeed, the existence of statutory exceptions from AIDS privacy laws<sup>108</sup> has helped foster a climate where funeral home directors expect to be told that a person died of AIDS-related causes. The funeral home may expect to find a color-coded "toe tag" on a body that is "hot."<sup>109</sup> A funeral home may alternatively expect that hospital personnel, family members, or clergy will inform them when a person died of AIDS-related causes. The funeral home may be disappointed in these expectations, however, and should not rely upon them. Funeral home personnel must assume that all bodies are potentially infectious and they must use universal precautions universally. Additionally, a hospital's failure to inform a funeral home that a person died of AIDS-related causes normally will not give rise to a cause of action.<sup>110</sup> In fact, the hospital or family members may not even know that a person had HIV.

### C. Domestic Legal Framework

A spectrum of possible legal remedies exists to combat various forms of AIDS discrimination by funeral homes. Some remedies are statutory rights that may be enforced either in a federal or state court or by a federal agency; other remedies may be common law causes of action that sound in tort or contract; and still other remedies may involve state or local remedies that must first be brought before specialized administrative agencies. The following discussion of the domestic legal framework considers:

- (1) federal, state, and local anti-discrimination laws;
- (2) tort law;
- (3) contract law;
- (4) federal trade commission law;
- (5) consumer protection law;
- (6) criminal law;
- (7) licensing laws;
- (8) wills; and
- (9) durable powers of attorney for health care.

These various areas present a spectrum of possible legal rights and remedies to combat the spectrum of AIDS discrimination by funeral homes.

#### 1. Anti-Discrimination Laws

##### a) Federal Anti-Discrimination Law

The Rehabilitation Act of 1973, as amended,<sup>111</sup> and the Americans with

108. See, e.g., 410 ILL. COMP. STAT. 305/9(c) (West 1997); see also 210 ILL. COMP. STAT. 85/6.08 (West 1993).

109. A statement that a body is "hot" is sometimes used to indicate that the person died of causes related to HIV. See, e.g., Wojcik & Austin, *supra* note 2, at 75.

110. See, e.g., *Funeral Services by Gregory, Inc. v. Bluefield Community Hosp.*, 413 S.E.2d 79, 81 (W. Va. 1991), *overruled on other grounds by Courtney v. Courtney*, 437 S.E.2d 436 (W. Va. 1993).

111. See 29 U.S.C. § 794 (1994). In order to fall under the amended Rehabilitation Act of 1973,

Disabilities Act (ADA)<sup>112</sup> prohibit certain forms of discrimination against persons who either have a disability or who are perceived as having a disability. Section 302 of title III of the ADA provides that:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.<sup>113</sup>

The list of places of public accommodation is broader under the ADA than under other federal non-discrimination statutes.<sup>114</sup> A "funeral parlor" is included in the list of examples of "places of public accommodation" under the ADA,<sup>115</sup> provided that the funeral parlor's operations affect interstate "commerce."<sup>116</sup> The requirement stems, of course, from the federal constitution's limit on congressional power.<sup>117</sup> Given that the U.S. Supreme Court has now struck down two federal statutes for failing to meet the constitutional requirement of affecting commerce,<sup>118</sup> it may be worthwhile for litigators to review at least some of the effects on commerce that funeral home discrimination may have.<sup>119</sup>

the funeral home must receive federal funds. *Id.*

112. See 42 U.S.C. §§ 12101-12213 (1994). The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), extended coverage of the ADA to U.S. citizens employed in foreign countries by U.S. employers. See Jay W. Waks, *Workers' Rights Now Extend Overseas*, NAT'L L.J., Dec. 23, 1991, at 16.

113. 42 U.S.C. § 12182(a).

114. See, e.g., *Halton v. Great Clips, Inc.*, 94 F. Supp. 2d 856, 870 (N.D. Ohio 2000).

115. "The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce:

a (f) laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, *funeral parlor*, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment . . . .

42 U.S.C. § 12181(7)(F) (emphasis added); see also *Americans With Disabilities Act of 1989: Hearings on S. 933*, *supra* note 1, at 102-03 (legislative history showing express testimony on funeral home discrimination against persons who died of AIDS-related causes).

116. 42 U.S.C. § 12181(7)(F).

117. See U.S. CONST. art. I, § 8.

118. See *United States v. Morrison*, 120 S. Ct. 1740 (2000) (striking civil remedy provision of the Violence Against Women Act of 1994); *United States v. Lopez*, 514 U.S. 549, 567 (1995) (holding that the Gun-Free School Zones Act was unconstitutional because the possession of a gun in a local school zone was not an economic activity that substantially affected interstate commerce).

119. The ADA broadly defines the term "commerce" as "travel, trade, traffic, commerce, transportation, or communication — (A) among the several States; (B) between any foreign country or any territory or possession and any State; or (C) between points in the same State but through another State or foreign country." 42 U.S.C. § 12181(1). A discussion of how the operations of a funeral home may affect interstate commerce appears in Mark E. Wojcik, *AIDS and Funeral Homes: Common Legal Issues Facing Funeral Home Directors*, 27 J. MARSHALL L. REV. 411, 414-15 (1994). For a comparative definition of "commerce" under a state statute, see 815 ILL. COMP. STAT. 505/1(f) (West 1999) (defining "trade" and "commerce" under a state Consumer Fraud and Deceptive Business Practice statute).

A funeral home director who denies service to a person who dies of causes related to HIV, or who attempts to charge more for those services, may violate several provisions of the ADA, including:

- (1) the duty to afford the goods and services of a place of public accommodation on an equal basis;<sup>120</sup>
- (2) the duty to eliminate discriminatory eligibility criteria;<sup>121</sup>
- (3) the duty to make reasonable modifications of policies, practices, and procedures;<sup>122</sup> and
- (5) the duty not to deny equal goods or services because of the known disability of an individual.<sup>123</sup>

Complaints of funeral home discrimination can be enforced privately<sup>124</sup> or else they can be filed with the Public Access Section of the Civil Rights Division of the U.S. Department of Justice.<sup>125</sup> The Justice Department is authorized to bring a civil action under title III, enforcing the ADA in any situation where a pattern or practice of discrimination is believed to exist or a matter of general public importance is raised.<sup>126</sup> Under this authority, the Justice Department has undertaken a number of enforcement actions against funeral homes that discriminated against persons who died of causes related to HIV. In one such case, the Justice Department settled a complaint against a California funeral home director who refused to provide funeral services to persons who died from AIDS-related complications because of his own fear of contracting HIV.<sup>127</sup> After being contacted by the Justice Department, the owner agreed to provide funeral services and to undergo training regarding universal precautions to prevent the transmission of HIV.<sup>128</sup>

Other cases brought by the U.S. Department of Justice have involved acts of discrimination such as overcharging for a funeral of a person who died of AIDS-related causes. One advantage of having the Justice Department bring these cases is that the funeral home cannot challenge the statutory standing of the Department to bring a case, while it might be able to challenge the standing of an unmarried, surviving life partner of a person who died of AIDS-related causes.

120. See 42 U.S.C. § 12182(b)(1)(A)(ii); 28 C.F.R. § 36.202(b).

121. See 42 U.S.C. § 12182(b)(2)(A)(i); 28 C.F.R. § 36.301.

122. See 42 U.S.C. § 12182(b)(2)(A)(ii); 28 C.F.R. § 36.302(a).

123. See 42 U.S.C. § 12182(b)(1)(E); 28 C.F.R. § 36.205; see also, e.g., *Settlement Agreement*, *supra* note 58.

124. See also Sandra Swift Parrino & A. Kent Waldrep, Letter to the Editor, *Minus Tough Penalty ADA Law is Toothless*, WALL ST. J., June 14, 2000, at A27 (noting that disabled persons can enforce the ADA without any personal monetary gain, and that the purpose of attorneys' fees to support those private causes of action under the ADA is to provide legal representation for those who would not otherwise have it to enforce their rights).

125. See, e.g., Wojcik & Austin, *supra* note 2, at 73.

126. 42 U.S.C. § 12188(b)(1)(B).

127. See *infra* notes 103-07 and accompanying text.

128. See Civil Rights Div., U.S. Dep't of Justice, *Enforcement Highlights: Fighting Discrimination Against Persons With HIV/AIDS*, available at <<http://www.usdoj.gov/crt/ada/hivreprt.txt>> (visited Oct. 31, 2000).

*b) State and Local Anti-Discrimination Law*

In addition to the federal anti-discrimination law, state and local laws afford additional protection for disabled and human rights. These disability and human rights laws prohibit certain forms of discrimination in areas such as employment,<sup>129</sup> real estate transactions,<sup>130</sup> financial credit,<sup>131</sup> and access to places of public accommodation.<sup>132</sup> Moreover, these laws provide administrative and judicial remedies for persons who suffer discrimination by places of public accommodation.<sup>133</sup>

Under state disabilities laws, which are similar in scope to the ADA, funeral homes are places of public accommodation. This is true even though funeral homes may not be expressly listed in the state statutes. For example, the definition of a "place of public accommodation" in the Illinois Human Rights Act is "a business, accommodation, . . . or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public."<sup>134</sup> As illustrations of public accommodations covered under this definition, the Illinois statute includes "funeral hearses, crematories, [and] cemeteries."<sup>135</sup> Because this list is not meant to be exhaustive, it would likely also include "funeral homes" or "funeral parlors."<sup>136</sup>

As places of public accommodation, funeral homes may not discriminate on the basis of a disability or perceived disability.<sup>137</sup> It is undisputed that AIDS, HIV, and the perception that someone has been infected with HIV are all covered under anti-discrimination laws.<sup>138</sup> A person who dies of an illness related to HIV is, thus, a

129. See, e.g., 725 ILL. COMP. STAT. 5/2-101 (1992); OHIO REV. CODE ANN. § 4112.02(G) (Anderson Supp. 1999); VT. STAT. ANN. tit. 21, §§ 495- 495e (1987 & Supp. 1992).

130. See, e.g., 725 ILL. COMP. STAT. 5/3-101 (1992); see also 42 U.S.C. § 12901 (1994) (incentives to devise long-term comprehensive strategies for meeting the housing needs of persons with AIDS and their families).

131. See, e.g., 725 ILL. COMP. STAT. 5/4-101 (1992).

132. See, e.g., 725 ILL. COMP. STAT. 5/5-101 (1992); MASS. GEN. L. ch. 272, § 98 (1991).

133. The ADA does not preempt these state and local laws. See 42 U.S.C. § 12201(b) (1994); H.R. REP. NO. 485, 101st Cong. 48, 135 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 418.

134. 725 ILL. COMP. STAT. 5/5-101(A)(1).

135. *Id.* 5-101(A)(2) (stating that the list of the different types of public accommodation is "by way of example, but not limitation").

136. See *id.*; see also Wojcik & Austin, *supra* note 2, at 74.

137. Remedies for discrimination include court actions and administrative proceedings, including the possible awards of attorneys' fees, litigation expenses and the costs of trial. See H.R. REP. NO. 101-485(II), at 140 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 423. Where there is an issue of general public importance in discrimination issues arising in entities such as funeral homes, the Attorney General of the United States may also initiate civil actions to collect penalties of up to \$50,000 for a first violation and \$100,000 for any subsequent violation. See 42 U.S.C. § 12188(b) (1994). The legislative history encourages active enforcement by the Attorney General. See H.R. REP. NO. 101-485(III), at 67 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 490.

138. See, e.g., H.R. REP. NO. 101-485(II), at 51-52 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 330, 333-34; H.R. REP. NO. 101-485(III), at 39 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 451, 461; *Doe v. Attorney Gen.*, 941 F.2d 780, 797 (9th Cir. 1991) (finding doctor with AIDS "handicapped" under

person who dies of an illness related to a perceived disability. Therefore, a refusal to handle a person who has died of AIDS-related causes is discrimination against a person with a perceived disability. The refusal would constitute discrimination even though a funeral home may argue that someone who has died no longer has a disability after death.

The view that funeral homes are places of public accommodation that are prohibited from discriminating against persons with HIV under disability and human rights laws was confirmed in *DiMiceli & Sons Funeral Home v. New York City Commission on Human Rights*.<sup>139</sup> The Human Rights Commission issued a complaint against a funeral home that not only charged inflated fees when persons died of causes related to AIDS, but also insisted that family members purchase costly extras such as glass-sealed caskets.<sup>140</sup> The funeral home argued that discrimination against the "physically handicapped" did not extend to those who have died of causes related to HIV.<sup>141</sup> The funeral home also argued that funeral homes were not places of public accommodation under the human rights code.<sup>142</sup>

The *DiMiceli* court rejected both arguments. The court found that the term "physically handicapped" extended "to those individuals who have died due to complications associated with the AIDS virus and to their family members who have been stigmatized by their association with the deceased."<sup>143</sup> The court also

section 504 of the Rehabilitation Act); *Severino v. North Fort Myers Fire Control Dist.*, 935 F.2d 1179, 1182 n.4 (11th Cir. 1991) (finding fire fighter with HIV "handicapped" under section 504 of Rehabilitation Act); *Glanz v. Vernick*, 756 F. Supp. 632, 635 (D. Mass. 1991) (finding patient with HIV "handicapped" under section 504 of the Rehabilitation Act); *Cain v. Hyatt*, 734 F. Supp. 671, 678 (E.D. Pa. 1990) (finding attorney with HIV "handicapped" under Pennsylvania Human Relations Act); *Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1*, 714 F. Supp. 1377, 1385 n.4 (E.D. La. 1989), *aff'd*, 909 F.2d 820 (5th Cir. 1990).

139. No. 19527/86 (N.Y. Sup. Ct. Jan. 9, 1987), reprinted in MICHAEL L. CLOSEN ET AL., AIDS: CASES & MATERIALS 490-93 (1989) [hereinafter CLOSEN ET AL., AIDS: CASES & MATERIALS]; N.Y. L.J., Jan. 14, 1987, at 12.

140. See CLOSEN ET AL., AIDS: CASES & MATERIALS, *supra* note 139, at 491.

141. See *id.* at 491-92.

142. See *id.*

143. See *id.* at 492. The court reasoned that:

The phrase "substantially limits one or more major life activities" serves only to define "physical or mental impairment" and does not imply that statutory protection is afforded only to those who are discriminated against while alive. There is adequate precedent for affording the individual dignity and freedom from discrimination not only in those activities and services performed during one's life, but also in those activities and services performed at one's death. The moral precepts and public policy that dictates the elimination of discrimination based solely upon one's color, creed, race, nationality or handicap, are not extinguished with the end of a life, but continue through the final services administered in death. There is statutory precedent for extending protection from discriminatory practices by facilities that provide services for the dead. Additionally, the party aggrieved in the situation is the family or life partner of the individual who has died from AIDS. It is the remaining life partner or family members who suffer discrimination. Traditionally, family members have received compensation where they have sued for the negligent handling of a body. The legal theory incorporated is based upon the family's quasi-property right in the body. The Court of Appeals has advised that "such a property

found that the human rights laws included funeral homes as places of public accommodation. The court noted that the human rights code did not expressly cover or exclude funeral homes from coverage.<sup>144</sup> Moreover, the *DiMiceli* court followed the reasoning of the Supreme Court of Pennsylvania in which it held that nonsectarian cemeteries were places of public accommodation under the Pennsylvania Human Relations Act. That court reasoned that the "public need for the services made available by cemeteries is irrefutably all inclusive — all of us, at one time or another, will be entrusted unto their care. All of those factors bring cemeteries squarely into the public domain and give them a special status."<sup>145</sup> Following this reasoning, the *DiMiceli* court held the basic premise of "special status" to be "equally applicable to funeral homes because of the similarity in the care and services provided."<sup>146</sup> Thus, the court held that funeral homes were places of public accommodation.<sup>147</sup>

Although federal and state law provide anti-discrimination protection for individuals with HIV who seek access to funeral homes, the actual filing of a discrimination claim against funeral homes may prove more complicated because of problems relating to standing. The deceased individuals themselves are unable to bring discrimination claims. Furthermore, the representatives of the estate are often too emotionally distraught to pursue litigation or administrative remedies<sup>148</sup> that would challenge discriminatory practices so widespread that they appear to define industry practice. As a result, many acts of discrimination have gone unchallenged.

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right is little more than a fiction, in reality the personal feelings of the survivors are being protected." Thus, the courts have extended legal protections to remaining family members when improper services are rendered to the deceased. Different treatment should not be afforded family members where discrimination is extended from the victim of the disease to family members who are already suffering from the loss of a loved one.

*Id.*

144. *See id.* at 493.

145. Pennsylvania Human Relations Comm'n v. Alto-Reste Park Cemetery Ass'n, 306 A.2d 881, 886-87 (Pa. 1973).

146. CLOSEN ET AL., AIDS CASES & MATERIALS, *supra* note 139, at 490, 493. The court could additionally have found that funeral homes are places of public accommodation because funeral homes are specifically empowered by state statutes to provide funeral services to the public. Persons who die of illness related to HIV are thus entitled to be protected from discrimination in funeral services. This protection extends to the provision of or securing of the life partners and families of those who die of illnesses related to HIV.

147. *See id.*; *see also* Sattler v. New York Comm'n on Human Rights, 554 N.Y.S.2d 763, 767 (N.Y. Sup. Ct. 1990), *aff'd*, 580 N.Y.S.2d 35 (N.Y. App. Div. 1992); Hurwitz v. New York City Comm'n on Human Rights, 535 N.Y.S.2d 1007, 1013 (N.Y. Sup. Ct. 1988), *aff'd*, 553 N.Y.S.2d 323 (N.Y. App. Div. 1990).

148. In Chicago, for example, administrative remedies may be available from the Chicago Commission on Human Relations, the Cook County Commission on Human Rights, and the Illinois Department of Human Rights.



## 2. Tort Law

Tort law has traditionally protected various aspects of human dignity. In the mid-twentieth century, a better understanding of "the realities of emotional life, and perhaps a more aspirational attitude on the part of courts, led to a belief . . . that the law should give further protection to emotional interests than the traditional theories provided."<sup>149</sup> As part of this development in the law, "courts permitted recovery for anguish caused by the mishandling of dead bodies."<sup>150</sup> As one commentator noted, "the affectional bonds [between the relative and the decedent] serve as a conceptual incorporation of the decedent's body into the person of the relative."<sup>151</sup> Under tort law, a funeral home director or other person who prevents a proper burial or cremation of a person who dies of AIDS-related causes may face civil liability.

The *Restatement (Second) of Torts* provides, "One who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body."<sup>152</sup> Thus, a person "who is entitled to the disposition of the body of a deceased person" may sue a person who "intentionally, recklessly, or negligently mistreats or improperly deals with the body, or prevents its proper burial or cremation."<sup>153</sup> The American Law Institute took no position on whether this liability would extend "to persons other than family members who have an interest in the body,"<sup>154</sup> such as a gay or lesbian partner who might not traditionally be recognized under state law as having an "interest" in the body.<sup>155</sup>

149. MARSHALL S. SHAPO, BASIC PRINCIPLES OF TORT LAW ¶ 13.01, at 38 (1999).

150. *Id.*

151. Ducor, *supra* note 3, at 231.

152. RESTATEMENT (SECOND) OF TORTS § 868 (1977).

153. *Id.* § 868 cmt. a. Under this section of the *Restatement*, liability attaches:

[N]ot only to an intentional interference with the body itself or with its proper burial or cremation, but also to an interference that is reckless or merely negligent. Thus an undertaker who negligently embalms the body, a carrier that negligently transports it or an automobile driver who negligently collides with the hearse and dumps the corpse out into the highway will be subject to liability, if the result is harm to the body or prevention of its proper burial or cremation.

*Id.* § 868 cmt. d.

154. *Id.* § 868 caveat. The Institute noted that the decisions that had allowed recovery for interference with a corpse:

[H]ave thus far been those in which the plaintiff has been the person entitled to disposition of the body or one of a group, such as children of the deceased, who have equal right of disposition. In the absence of decisions, the Institute expresses no opinion on whether one who is not entitled to the disposition [of the body] may not, under some circumstances, have a cause of action for his [or her] own mental distress under the principle stated in this Section.

*Id.* § 868 cmt. g.

155. The American Law Institute noted that it was not within the scope of the *Restatement of Torts* to determine who should be entitled to the disposition of a dead body. *Id.* § 868 cmt. b. The Institute

A comment to this section of the *Restatement (Second)* explains that the "technical basis" for recognizing the tort of mishandling a body relates to the interference with a person's "exclusive right" to control disposition of the body:

The technical basis of the cause of action is the interference with the exclusive right of control of the body, which frequently has been called by the courts a "property" or "quasi-property" right. This does not, however, fit very well into the category of property, since the body ordinarily cannot be sold or transferred, has no utility and can be used only for the one purpose of interment or cremation. In practice the technical right has served as a mere peg upon which to hang damages for the mental distress inflicted upon the survivor; and in reality the cause of action has been exclusively one for the mental distress.<sup>156</sup>

The observation in the comment that the utility of a corpse is essentially limited to the single purpose of "interment or cremation" may need to be re-evaluated in light of recent developments in the scientific and medical uses of dead bodies. It may also be necessary to examine the rationale underlying many court decisions that have found that survivors "have no property rights in the remains of a decedent."<sup>157</sup> Although some courts see no monetary value in a dead body, new information on the economics of dead bodies and developments in state and federal law<sup>158</sup> may require a second look at the rationale underlying this section of the *Restatement*. For example, one report found that a dead body "can yield more than 130 pieces of tissue once it is extracted, sterilized, cut up, packaged and sold."<sup>159</sup> An estimate

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noted that various state statutes and common law rules would govern the issue, and that "[n]ormally the right of disposition is in the surviving spouse, if any; or if none, then in the next of kin in order of succession. It may, however, be in the executor or administrator of the deceased." *Id.*

156. *Id.* § 868 cmt. a. The *Restatement* notes that because "[t]here is no need to show physical consequences of the mental distress," the rule in section 868 has much in common with the rules of *Restatement* sections 46, 312, and 313. *Id.*

157. See, e.g., *Perry v. Saint Francis Hosp. & Med. Ctr.*, 886 F. Supp. 1551, 1563 (D. Kan. 1995) ("Kansas common law on this matter is no different from the position universally held by other states which recognizes no property right, commercial or material, in the corpse itself but only a right of possession in order to dispose of the corpse appropriately."); *State v. Powell*, 497 So. 2d 1188, 1191 (Fla. 1986) ("All authorities generally agree that the next of kin have no property right in the remains of a decedent"). But compare *Dougherty v. Mercantile-Safe Deposit & Trust Co.*, 387 A.2d 244, 246 n.2 (Md. 1978) ("It is universally recognized that there is no property in a dead body in a commercial or material sense") with *Travelers Ins. Co. v. Smith*, 991 S.W.2d 591, 595 (Ark. 1999) ("A quasi-property right in dead bodies vests in the nearest relatives of the deceased, arising out of their duty to bury the dead.") and *Crockett v. Stewart Essex & Turpin Funeral Home, Inc.*, 19 S.W.2d 585, 589 (Ark. 2000).

158. As one court notes:

[O]rgan donation is a matter of both state and federal law. In 1986, Congress directed that in order to remain eligible for any federal Medicare or Medicaid funds, hospitals must establish written protocols to ensure that the families of potential donors are informed of their option to donate their deceased kin's organs and to carry out any donation.

*Ramirez v. Health Partners of S. Ariz.*, 972 P.2d 658, 661 (Ariz. Ct. App. 1998) (citing Budget Reconciliation Act of 1986 § 9318(a), Pub. L. No. 99-509, 100 Stat. 1874, 2009, codified as amended at 42 U.S.C.A. § 1320b-8 (West 1991 & Supp. 1998)).

159. Stephen J. Hedges & William Gaines, *Donor Bodies Milled Into Growing Profits: Little*

of the potential "total worth of all the usable tissue" from the various pieces taken from a human body is "more than \$230,000."<sup>160</sup> However, not all of the usable tissue is taken from each body. "Because not all the tissue from a single donor is usually taken, the average market yield per cadaver is closer to \$80,000," according to "industry executives."<sup>161</sup> It is a lucrative business overall in the United States and other countries.<sup>162</sup> In 1999, the estimated revenues for four of the leading tissue companies totaled \$173.3 million.<sup>163</sup> While dead bodies may have been economically "worthless" in the past, advances in technology have altered that reality.<sup>164</sup>

The *Restatement* comment did not anticipate the medical and scientific advances; it is no longer true that a dead body "can be used only for the one purpose of interment or cremation."<sup>165</sup> Although the law might appear to be well-settled from the pronouncements of some courts and scholars, it is probably more accurate to state that "[t]he present legal position toward property rights in the human body is unsettled and reflects no consistent philosophy or approach."<sup>166</sup> While there are a number of statutes that touch aspects of this issue, "[t]he statutes that address individuals' control over their bodies delineate the extent of that control in specific situations, but do not establish a general principle."<sup>167</sup> In any event, future cases may find it easier to recover for interference with a burial or funeral service, especially if the interference was for private commercial gain.

The first version of the *Restatement of Torts* limited liability for wrongful interference with a dead body to those cases where there was wanton or intentional misconduct.<sup>168</sup> It provided that, "[a] person who wantonly mistreats the body of

*Regulated Industry Thrives on Unsuspecting Families*, CHI. TRIB., May 21, 2000, § 1, at 1. The lucrative nature of this business has also led to a growing, and largely unregulated, trade in body tissue and organs. See, e.g., Stephen J. Hedges, *Tissue Imports Pose Hazards — Deadly Contamination Found in Shipments From Abroad*, CHI. TRIB., May 22, 2000, § 1, at 1; Mike Doring, *Body Parts Trade Faces U.S. Probe — Abuse Reports Prompt Inquiry*, CHI. TRIB., June 9, 2000, § 1, at 1, 26.

160. Hedges & Gaines, *supra* note 159, at 1.

161. *Id.*

162. See, e.g., Sean R. Fitzgibbons, *Cadaveric Organ Donation and Consent: A Comparative Analysis of the United States, Japan, Singapore, and China*, 6 ILSA J. INT'L & COMP. L. 73, 101 (1999) (describing horrific practice in China of harvesting organs from executed prisoners and selling them to the highest bidder).

163. See Hedges & Gaines, *supra* note 159, at 16.

164. See, e.g., Doring, *supra* note 159, at 26. The organs and tissues of persons who die of AIDS-related causes are unlikely to be used for transmission purposes for fear of transmitting HIV infection to the recipients, but the point here, however, is to reexamine the rationale of the *Restatement* comment in light of subsequent economic developments.

165. RESTATEMENT (SECOND) OF TORTS § 868 cmt. a (1977). The *Restatement* notes that because "[t]here is no need to show physical consequences of the mental distress," the rule in section 868 has much in common with the rules of *Restatement* sections 46, 312, and 313. *Id.*

166. *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 281 (Cal. Ct. App. 1993) (addressing the confused state of the law as to various body parts and fluids).

167. *Id.* (citing Michelle Bourianoff Bray, Note, *Personalizing Personalty: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 220 (1990)).

168. See, e.g., *Ramirez v. Health Partners of S. Ariz.*, 972 P.2d 658, 665-66 (Ariz. Ct. App. 1998).

a dead person or who without privilege intentionally removes, withholds or operates upon the dead body is liable to the member of the family of such person who is entitled to the disposition of the body."<sup>169</sup> A comment to that first *Restatement* provided that "[t]his right exists although there has been no harm except such harm to the feelings as is inseparable from the knowledge of the defendant's conduct."<sup>170</sup> Furthermore, "[t]he right to maintain an action for intentional interference with the body exists although there was no intent to do a tortious act, as where a body is misdelivered by the railroad or where a surgeon performs an autopsy mistakenly believing that he is privileged to do so."<sup>171</sup> However, there was no liability under the first *Restatement* "for mere negligence in dealing with the body."<sup>172</sup> Liability for "unintentional harms to the body" arose "only if wantonly caused."<sup>173</sup>

The *Restatement (Second) of Torts* expanded the liability expressed in the first *Restatement* by including liability for negligent acts.<sup>174</sup> A small but growing group of jurisdictions appear to have accepted the new expanded view of liability for the negligent treatment of a dead body. Those jurisdictions include California,<sup>175</sup> Idaho,<sup>176</sup> Michigan,<sup>177</sup> New Jersey,<sup>178</sup> New York,<sup>179</sup> North Carolina,<sup>180</sup>

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169. RESTATEMENT OF TORTS § 868, at 402-03 (1939).

170. *Id.* cmt. a.

171. *Id.*

172. *Id.*

173. *Id.* Comment b noted that "[t]he cause of action is primarily for mental suffering caused by the improper dealing with the body. It includes also the right to recover damages for physical harm resulting from such mental suffering." *Id.* cmt. b.

174. See RESTATEMENT (SECOND) OF TORTS § 868 (1977). The *Restatement (Second)* represented a change from the first *Restatement*, "in which recovery for mental anguish caused by interference with the right to burial of a body was limited to those cases in which wanton or malicious conduct was shown." Robert A. Brazener, Annotation, *Civil Liability of Undertaker in Connection With Embalming or Preparation of a Body for Burial*, 48 A.L.R.3d 261, 271 (1973) (commenting on a draft of the *Restatement (Second)*).

175. See *Christensen v. Superior Court*, 820 P.2d 181, 192-93, 204 (Cal. 1991) (mortuary sold body parts to a biological supply company and otherwise mishandled human remains). In that case, the California Supreme Court stated that "[t]he next of kin, while not in the full proprietary sense of 'owning' the body of the deceased, have property rights in the body which will be protected, and for a violation of which they are entitled to indemnification." *Id.* at 193; see also *Aguirre-Alvarez v. Regents of the Univ. of Cal.*, 79 Cal. Rptr. 2d 580, 583, 585, 587 (Cal. Ct. App. 1998) (alleging that failure of hospital to notify family prevented proper disposition of his remains).

176. See *Brown v. Matthews Mortuary, Inc.*, 801 P.2d 37, 38, 43-44 (Idaho 1990) (adopting the *Restatement (Second)* and allowing emotional distress damages for the negligent cremation of the wrong body).

177. See *Allinger v. Kell*, 302 N.W.2d 576, 579 (Mich. Ct. App. 1981), *modified on appeal*, 309 N.W.2d 547 (Mich. 1981) (parents sued funeral home and county deputy medical examiner for mental distress arising from alleged mutilation of daughter's corpse for criminal investigation); see also *Vogelaar v. United States*, 665 F. Supp. 1295, 1306 (E.D. Mich. 1987) ("One who . . . negligently . . . withholds . . . the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body.").

178. See *Strachan v. John F. Kennedy Mem'l Hosp.*, 538 A.2d 346, 353 (N.J. 1988) (recognizing "the obvious" proposition that section 868 involved the tort of intentional infliction of emotional distress).

179. See *Thompson v. Duncan Bros. Funeral Homes, Inc.*, 455 N.Y.S.2d 324, 326 (N.Y. Civ. Ct. 1982) (awarding \$35,000 to mother whose son was negligently embalmed; the court noted that the law

Ohio,<sup>181</sup> Vermont,<sup>182</sup> and West Virginia.<sup>183</sup> Jurisdictions that recognize this cause of action under the *Restatement (Second)* do not require that a person seeking recovery have a "contemporaneous sensory perception of the negligent act."<sup>184</sup>

The majority of jurisdictions continue to adhere to the first *Restatement* and impose liability only for interference that is "intentional or malicious," as opposed to "negligent interference." Jurisdictions apparently in that majority include Alaska,<sup>185</sup> Arkansas,<sup>186</sup> and Colorado,<sup>187</sup> the District of Columbia,<sup>188</sup>

in New York has not been primarily concerned with the extent of physical mishandling or injury to a dead body, but rather how much the improper handling affected the feelings and emotions of the survivors); see also 18 N.Y. Jur. 2d *Cemeteries and Dead Bodies* § 91 (1999). For a case involving the first *Restatement* in New York, see *Cercelli v. Wein*, 303 N.Y.S.2d 316, 318 (N.Y. City Civ. Ct. 1969) (citing, among other sources, the first *Restatement* in a case involving the failure of a hotel to check on a guest who had died in his room). See also *Baumann v. White*, 234 N.Y.S.2d 272, 273 (N.Y. Sup. Ct. 1962) (allowing damages against a funeral home for failing to properly prepare a body for burial).

180. See *Dumouchelle v. Duke Univ.*, 317 S.E.2d 100, 102-03 (N.C. Ct. App. 1984) (noting that a person entitled to possess a body may recover damages for mental suffering caused by intentional or negligent or mishandling or mutilation of the body).

181. See *Carney v. Knollwood Cemetery Ass'n*, 514 N.E.2d 430, 435 (Ohio Ct. App. 1986) ("The law is not primarily concerned with the extent of physical injury to the bodily remains but with whether there were any improper actions and whether such actions caused emotional or physical suffering to the living kin."); *Wallin v. University of Cincinnati Hosp.*, 698 N.E.2d 530, 531-32 (Ohio Ct. Cl. 1998) (denying a cause of action for wrongfully reporting that a woman's son had HIV); see also *Brotherton v. Cleveland*, 173 F.3d 552 (6th Cir. 1999) (litigation for improper removal of corneas); *Grill v. Abele Funeral Home, Inc.*, 42 N.E.2d 788, 789 (Ohio Ct. App. 1940) (denying liability under the first *Restatement* against a mortician who removed jewelry from a corpse because it did not involve willful or malicious conduct on the part of the mortician).

182. See *Jobin v. McQuillen*, 609 A.2d 990, 994 (Vt. 1992) ("[I]n cases involving the negligent mishandling of family members' corpses, plaintiffs need not allege additional elements of damage in order to recover for mental suffering.").

183. See *Whitehair v. Highland Memory Gardens, Inc.*, 327 S.E.2d 438, 443 (W. Va. 1985) (adopting section 868 and acknowledging a quasi-property right in a dead body).

184. See, e.g., *Jaynes v. Strong-Throne Mortuary, Inc.*, 954 P.2d 45, 51 (N.M. 1997).

185. See *Burns v. Anchorage Funeral Chapel*, 495 P.2d 70, 73 (Alaska 1972) (citing the first *Restatement* in an unsuccessful claim against a funeral home for embalming a body without first obtaining the consent of the next of kin); see also *Edwards v. Franke*, 364 P.2d 60, 63 (Alaska 1961) ("It is generally the law in this country that the right to possess, preserve and bury, or otherwise dispose of, a dead body belongs to the surviving spouse and, if none such, then to the next of kin in the order of their relation to the decedent; that a violation of that right is a tort; and that damages for mental suffering are recoverable for a willful invasion of the rights relating to dead bodies.").

186. See *Travelers Ins. Co. v. Smith*, 991 S.W.2d 591, 596 (Ark. 1999); *Crockett v. Stewart Essex and Turpin Funeral Home, Inc.*, No. 00-136, 2000 WL 730250 (Ark. June 8, 2000).

187. See *Culpepper v. Pearl Street Bldg., Inc.*, 877 P.2d 877, 880-81 (Colo. 1994) (reviewing section 868 but declining to adopt it, in part because it had not been raised by the parties at the trial court level and was raised *sua sponte* by the Colorado Court of Appeals); *Kimelman v. City of Colorado Springs*, 775 P.2d 51, 52 (Colo. Ct. App. 1988) ("We therefore decline to adopt the *Restatement (Second) of Torts* § 868 . . ."). In earlier cases, Colorado allowed recovery when the mishandling of a body was willful and wanton. See, e.g., *Culpepper*, 877 P.2d at 880 n.4 (citing *Spomer v. City of Grand Junction*, 355 P.2d 960 (Colo. 1960), and *Fitzsimmons v. Olinger Mortuary Ass'n*, 17 P.2d 535 (Colo. 1932)); see also *Schwab v. Connely*, 179 P.2d 667, 671 (Colo. 1947) (citing the first *Restatement* in an action to recover damages for an unauthorized autopsy).

188. See *Washington v. John T. Rhines Co.*, 646 A.2d 345, 349 (D.C. 1994) (denying recovery for

Florida,<sup>189</sup> Georgia,<sup>190</sup> Illinois,<sup>191</sup> Indiana,<sup>192</sup> Kansas,<sup>193</sup> Maryland,<sup>194</sup> Massachusetts,<sup>195</sup> New Mexico,<sup>196</sup> Oklahoma,<sup>197</sup> Pennsylvania,<sup>198</sup> South Dakota,<sup>199</sup>

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a widow who attempted to sue funeral home for negligent infliction of emotional distress for the alleged mishandling of her husband's corpse). A dissenting opinion would have adopted the *Restatement (Second)*. See *id.* at 351 (Schwelb, J., dissenting); see also *Plummer v. District of Columbia Bd. of Funeral Dir.*, 730 A.2d 159 (D.C. 1999); *District of Columbia v. Smith*, 436 A.2d 1294, 1299 (D.C. 1981) (refusing to adopt the *Restatement (Second)*).

189. See *Gonzalez v. Metropolitan Dade County Pub. Health Trust*, 626 So. 2d 1030, 1033 (Fla. Dist. Ct. App. 1993), *aff'd*, 651 So. 2d 673 (Fla. 1995). In declining to adopt the *Restatement (Second)*, the Florida Supreme Court stated that "[a]n action for mental anguish based on negligent handling of a dead body requires proof of either physical injury or willful or wanton misconduct." *Id.* at 676; see also *State v. Powell*, 497 So. 2d 1188, 1191 n.3 (Fla. 1986), *cert. denied.*, 481 U.S. 1059 (1981); *Williams v. City of Minneola*, 575 So. 2d 683, 689, 695 (Fla. Dist. Ct. App. 1991) (involving a police officer who took home a videotape of a dead body and showed the video in his home; the family of the murder victim sued for tortious interference with the body, but the court found that a videotape of the body was not the body itself and denied recovery), *review denied*, 589 So. 2d 289 (Fla. 1991). At least one judge has stated his belief that the *Restatement (Second)* represents "the better rule," but that its adoption must come from the Florida Supreme Court. See *Gonzalez*, 626 So. 2d at 1033 (Cope, J., specially concurring).

190. See *Pyle v. Pyle*, 531 S.E.2d 738 (Ga. Ct. App. 2000).

191. "Illinois does not recognize a cause of action for emotional distress arising from the negligent mishandling of a corpse." *Courtney v. Saint Joseph Hosp.*, 500 N.E.2d 703, 707 (Ill. App. Ct. 1986) (believing that Illinois Supreme Court precedent required a "physical injury" or "impact," the court rejected section 868 and a negligence claim brought by a widow whose husband's body was rendered unfit for viewing in an open casket). The Illinois Appellate Court did not foreclose the possibility of a future change in the law, stating that it did not believe that "recognizing a cause of action for the negligent mishandling of a corpse would open the door for fraudulent claims or encourage frivolous litigation." *Id.* at 705.

192. See *Schuler v. Posey County, Ind.*, 927 F. Supp. 1127, 1130 (S.D. Ind. 1996).

193. See *Burgess v. Perdue*, 721 P.2d 239, 245 (Kan. 1986) (finding that a physician who mistakenly performed an autopsy could be liable only if his actions were intentional or malicious, rather than merely negligent); see also *Perry v. Saint Francis Hosp. & Medical Ctr.*, 865 F. Supp. 724, 728-29 (D. Kan. 1994) (family sued Red Cross and hospital for improper removal of bones and eyes from the deceased without their consent).

194. See *Walser v. Resthaven Memorial Gardens, Inc.*, 633 A.2d 466, 471-73, 475 (Md. Ct. Spec. App. 1993) (in an action involving disinterment of a body without notification of all family members, the court noted that section 868 of the *Restatement (Second)* was most frequently invoked in cases arising before burial or in cases arising from wrongful burials, including negligence in conducting burials or in the manner of interment).

195. See *Sackett v. Saint Mary's Church Soc'y*, 464 N.E.2d 956, 957-58 (Mass. App. Ct. 1984) (denying a claim for mishandling a casket because the plaintiffs suffered no physical injury and the mishandling was neither intentional nor reckless); see also *Kelley v. Post Publ'g Co.*, 98 N.E.2d 286, 287 (Mass. 1951) (noting that Massachusetts had adopted the first *Restatement* but finding that it did not apply to showing merely the photograph of a body).

196. See *Jaynes v. Strong-Thorne Mortuary, Inc.*, 954 P.2d 45, 51 (N.M. 1998) (declining an opportunity to determine whether to recognize a cause of action in tort for a funeral director's negligent infliction of emotional distress).

197. See *Dean v. Chapman*, 556 P.2d 257, 262 (Okla. 1976) (noting that daughter sued state medical examiner for failing to timely deliver her father's body; the court stated that "facts sufficient to allege . . . a willful wrong were not present . . .").

198. See *Papieves v. Lawrence*, 263 A.2d 118, 121 (Pa. 1970) (noting that parents filed for mental anguish and emotional disturbance caused by a defendant who withheld the body of their son after he

Washington,<sup>200</sup> and Wisconsin.<sup>201</sup> Other jurisdictions, such as Arizona,<sup>202</sup> may apply section 868 of the *Restatement (Second)* to "claims of wrongful disinterment, burial, and disposal of a decedent's remains," but not to actions arising in the context of organ donations.

The overall principle is that liability will generally attach for tortious interference with a dead body<sup>203</sup> — the only question between the majority and minority views is whether the level of interference is sufficient. As Prosser notes:

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hit him with his car and then burying him to avoid prosecution for the crime); *Hackett v. United Airlines*, 528 A.2d 971, 974, 975 (Pa. Super. Ct. 1987) (expressly rejected section 868 of the *Restatement (Second)* and denied a daughter's claim for negligent infliction of emotional distress against an airline that mishandled the casket of her father), *appeal denied*, 544 A.2d 961 (Pa. 1988); *see also Kearney v. City of Philadelphia*, 616 A.2d 72, 74 (Pa. Commonwealth Ct. 1992) (noting only the Pennsylvania Supreme Court can change the law and adopt the *Restatement (Second)*).

199. *See Chisum v. Behrens*, 283 N.W.2d 235, 239-40 (S.D. 1979); *see also Galvin v. McGilley Memorial Chapels*, 746 S.W.2d 588, 591-92 (Mo. Ct. App. 1987) (purporting to apply South Dakota law, but stating wrongly that the *Restatement* view was the majority view).

200. *See Corrigal v. Ball & Dodd Funeral Home, Inc.*, 577 P.2d 580, 582 (Wash. 1978) (allowing recovery to a woman who sued a funeral home for negligent infliction of emotional distress when she discovered that the material she was sifting through was the cremated remains of her son. The court held that the woman had alleged objective physical manifestations and could maintain a cause of action). The case arose before the *Restatement (Second)* had been promulgated.

201. *See Scarpaci v. Milwaukee County*, 292 N.W.2d 816, 822 (Wis. 1980) (denying recovery for negligent performance of autopsy because the plaintiff suffered no physical injury).

202. *See Ramirez v. Health Partners of S. Ariz.*, 972 P.2d 658, 665-66 (Ariz. Ct. App. 1998) (noting also that the Arizona Supreme Court "has cautioned against mindlessly following the *Restatement* in lock step fashion 'when to do so would result in the recognition of a new cause of action in this jurisdiction.'" (citation omitted); *see also Hale v. Brown*, 323 P.2d, 955 963 (Ariz. 1958) (Phelps and Struckmeyer, JJ., dissenting) (in a case arising before the *Restatement (Second)*, using the first *Restatement* to clarify that wrongful embalming is a willful tort for which a plaintiff may recover damages even without proving actual damages); *Morton v. Maricopa County*, 865 P.2d 808, 812 (Ariz. Ct. App. 1993) (the family of a murder victim successfully alleged negligence against the county coroner and county sheriff for cremating the body before properly identifying it).

203. *See, e.g., Travelers Ins. Co. v. Smith*, 991 S.W.2d 591, 596 (Ark. 1999) ("Courts have, to a great extent, based civil liability for wrongful acts with regard to a dead body on the interference with the right of burial . . ."). *Compare Doxtator v. Chicago & W.M. Ry. Co.*, 79 N.W. 922, 922 (Mich. 1899) ("[I]t has been held in a number of well-considered American cases that the one whose duty it is to care for the body of the deceased is entitled to possession of the body, as it is when death comes, and that it is an actionable wrong for another to interfere with that right by withholding the body or mutilating it in any way") *with Dampier v. Grace Hosp. Corp.*, 592 N.W.2d 809, 816 (Mich. Ct. App. 1999) (denying liability for mishandling of body by hospital). Where the right of burial is not involved, however, but the case involves disturbing a body buried years earlier, some courts may not always recognize a separate cause of action. *See also Walser v. Resthaven Memorial Gardens, Inc.*, 633 A.2d 466, 472 (Md. Ct. Spec. App. 1993). An additional caveat to the general rule is found in *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. Dist. Ct. App. 1991), where the court denied a cause of action for tortious interference with a body after a police officer had videotaped an autopsy and later played the tape for a friend who was visiting his home. The court denied a cause of action to the family of the deceased because "[a]n invariable component of the tort is some action affecting the physical body itself, such as removing it, withholding it, mishandling it, mutilating it, or preventing its proper burial." *Id.* at 689. The court found that showing a videotape of the body did not involve mishandling of the body itself. *See id.*

Finally, there are a great many cases involving the mishandling of dead bodies, whether by mutilation, disinterment, interference with proper burial, or other forms of intentional disturbance. In most of these cases the courts have talked of a somewhat dubious "property right" to the body, usually in the next of kin, which did not exist while the decedent was living, cannot be conveyed, can be used only for the one purpose of burial, and not only has no pecuniary value but is a source of liability for funeral expenses. It seems reasonably obvious that such "property" is something evolved out of thin air to meet the occasion, and that in reality the personal feelings of the survivors are being protected, under a fiction likely to deceive no one but a lawyer.

Some cases have avoided all of these difficulties by recognizing what is sufficiently obvious, that the tort is in reality merely the intentional infliction of mental distress.<sup>204</sup>

In addition to a cause of action for negligent or intentional mishandling of a body, the survivors may have additional tort claims on their own behalf, depending on the actions that the funeral home director may have taken against the living individuals. These claims might include outrage or intentional infliction of emotional distress, invasion of privacy, and possible complaints under the range of federal, state, and local anti-discrimination laws.

### 3. Contract Law

A person who makes a contract with a funeral home for services may have an action for breach of contract if those services are not performed according to the contract. The funeral home, if it even admits that a contract has been breached, will likely argue in such a case that the damages should be limited to the value of the contract.<sup>205</sup> Damages for a breach of contract are normally limited to "injuries which may reasonably be considered as arising naturally from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties, at the time of contracting, as the probable result of the breach."<sup>206</sup> Damages for emotional distress for breach of contract, for example, are normally not available.<sup>207</sup> In the context of a funeral, however, the law recognizes that special damages may be available for breach of contract. As one court stated:

Contracts for funeral and burial services are imbued by the very nature of their subject with certain expectations to be implied in fact unless specifically disclaimed. It is to be expected that damages for cognizable

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204. W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 63 (5th ed. 1984).

205. For example, if a person makes a pre-need contract with a funeral home and the funeral home later refuses to perform those services because the person died of causes related to AIDS, the funeral home may argue that the damages for its breach be limited to the amount paid for the original pre-need contract.

206. Meyer v. Nottger, 241 N.W.2d 911, 920 (Iowa 1976) (citing, inter alia, 5 CORBIN ON CONTRACTS § 1007, at 70 (1964) and Hadley v. Baxendale, 9 Exch. 34, 156 Eng. Rep. 145 (1854)).

207. See, e.g., Lamm v. Shingleton, 55 S.E.2d 810, 813 (N.C. 1949).



harm to the ordinary emotional sensibilities of any family member, in general, and known emotional sensibilities, in particular, will be recoverable for a breach of the funeral provider's obligation to exercise reasonable skill and care.<sup>208</sup>

The *Restatement (Second) of Contracts* provides: "Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result."<sup>209</sup> The *Restatement* acknowledges that the breach of a contract for the proper disposition of a dead body is a breach that is "particularly likely to cause serious emotional disturbance."<sup>210</sup>

The *Restatement* also gives the following illustration of the rule that allows special damages for breach of a funeral contract:

A makes a contract with B to conduct the funeral for B's husband and to provide a suitable casket and vault for his burial. Shortly thereafter, B discovers that, because A knowingly failed to provide a vault with a suitable lock, water has entered it and reinterment is necessary. B suffers shock, anguish and illness as a result. In an action by B against A for breach of contract, the element of emotional disturbance will be included as loss for which damages may be awarded.<sup>211</sup>

As authority for that illustration of the rule, the *Restatement* authors cited a North Carolina decision that reversed the dismissal of a widow's breach of contract claim against a funeral home.<sup>212</sup> The funeral home buried the woman's husband in what was meant to be a watertight casket and vault that the funeral home had promised would protect his body for years.<sup>213</sup> After a "very rainy spell of weather," the top of the vault rose about six inches above ground level.<sup>214</sup> As the funeral home employees and the cemetery authorities were preparing to reinter the body, they found that water and mud had entered the vault and that the casket was wet.<sup>215</sup> In finding that the funeral home should be liable for breach of contract, the court stated that the funeral home employees had

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208. *Flores v. Baca*, 871 N.M. 962, 967 (N.M. 1994). Thus, "because of the nature of a funeral and burial contract, an emotional distress claim for the breach of such a contract would be within the contemplation of the parties." *Id.* at 970; *see also, e.g., Chelini v. Nieri*, 196 P.2d 915, 916 (Cal. 1948); *Meyer v. Nottger*, 241 N.W.2d 911, 921 (Iowa 1976); *Lamm v. Shingleton*, 55 S.E.2d 810, 813 (N.C. 1949); *Clark v. Smith*, 494 S.W.2d 192, 198 (Tex. Civ. App. 1973); Jack Leavitt, *The Funeral Director's Liability for Mental Anguish*, 15 HASTINGS L.J. 464, 466 (1964).

209. RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981).

210. *Id.* § 353 cmt. a.

211. *Id.* § 353 illus.3.

212. RESTATEMENT (SECOND) OF CONTRACTS § 853 (1981) (citing *Lamm v. Shingleton*, 55 S.E.2d 810 (N.C. 1949)).

213. *See Lamm* 55 S.E.2d at 811.

214. *Id.* at 811.

215. *See id.*

held themselves out as specially qualified to perform the duties of an undertaker. When they undertook to conduct the funeral of plaintiff's deceased husband they impliedly covenanted to perform the services contemplated by the contract in a good and workmanlike manner. Any breach of the duty thus assumed was a breach of the duty imposed by the contract and not by law.<sup>216</sup>

In further holding that the funeral home should be liable for damages for emotional distress suffered by the widow for the breach of contract, the court stated:

The tenderest feelings of the human heart center around the remains of the dead. When the defendants contracted with plaintiff to inter the body of her deceased husband in a workmanlike manner they did so with the knowledge that she was the widow and would naturally and probably suffer mental anguish if they failed to fulfil [sic] their contractual obligation . . . . The contract was predominantly personal in nature and no substantial pecuniary loss would follow its breach. Her mental concern, her sensibilities, and her solicitude were the prime considerations for the contract, and the contract itself was such as to put the defendants on notice that a failure on their part to inter the body properly would probably produce mental suffering on her part. It cannot be said, therefore, that such damages were not within the contemplation of the parties at the time the contract was made.<sup>217</sup>

A second case cited by the drafters of the *Restatement* also acknowledged that in "cases involving services furnished in connection with deaths and funerals, the courts, recognizing the special nature of the situation, have created special exceptions to the ordinary rules disallowing damages for mental suffering only."<sup>218</sup> Those damages can be quite significant. In one trial, a New Mexico jury returned

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216. *Id.* at 812. Furthermore,

[w]here the contract is personal in nature and the contractual duty or obligation is so coupled with matters of mental concern or solicitude, or with the sensibilities of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, and it should be known to the parties from the nature of the contract that such suffering will result from its breach, compensatory damages therefor may be recovered.

*Id.* at 813; *see also* *Meyer v. Notger*, 241 N.W.2d 911, 921 (Iowa 1976) (stating that "[w]here one holds himself out as specially qualified to perform the services incident to a funeral and burial, unless there is express contrary agreement, it is implied in a contract for such services that such person will exercise proper skill and perform the contract in a workmanlike manner.").

217. *Lamm*, 55 S.E.2d at 813-14; *see also* *Pat H. Foley & Co. v. Wyatt*, 442 S.W.2d 904, 905 (Tex. Civ. App. 1969) (mother sued funeral home for mental suffering brought on when the casket of her son was opened near the conclusion of the funeral service and the body emitted a grossly offensive odor, indicating that the body may not have been properly embalmed; the defendant failed to advise the mother against opening the casket at the funeral service).

218. *Hirst v. Elgin Metal Casket Co.*, 438 F. Supp. 906, 908 (D. Mont. 1977). In that case, the court stated that "[a] casket manufacturer who sells as leakproof a casket that leaks has failed to meet the very need that formed the incentive to buy." *Id.*

a verdict of \$500,000 in compensatory damages to a woman whose husband was not properly embalmed as he had requested in a pre-need burial contract.<sup>219</sup> The trial court granted a defense motion for a new trial limited to the issue of damages, and in the second trial the jury returned a verdict of \$100,000.<sup>220</sup> The judgments are especially significant given that New Mexico does not recognize a cause of action for negligent infliction of emotional distress, except for bystander liability.<sup>221</sup>

While recovery might be had for actions that relate directly to the treatment of the body contracted for, that liability might not extend to a matter such as late delivery of a funeral marker. In a case from Maine, the court denied recovery to a woman who claimed emotional distress damages from the failure of a company to deliver her son's grave marker in time for her son's memorial service.<sup>222</sup> Although she claimed that damages for late delivery of the memorial stone were "reasonably within the contemplation of the contracting parties when the agreement was made," the court found that the exception allowing special damages for breach of contract was not as broad as the mother claimed.<sup>223</sup> The court stated that "[i]t would strain the exception for disposition of bodies and delivery of death messages to include untimely delivery of a memorial stone."<sup>224</sup> The court's decision illustrates that special damages for breaching a contract for funeral services must be directly related to how the body is handled.

#### 4. Federal Trade Commission Laws

A funeral home director may also violate Federal Trade Commission (FTC) rules that regulate the funeral industry.<sup>225</sup> Until recently, the cost of a funeral generally depended on the price of the casket.<sup>226</sup> The casket price would include not only

219. See *Flores v. Baca*, 871 P.2d 962, 964 (N.M. 1994).

220. See *id.* "Burial cases furnish the most obvious example of cases in which the contract for decent treatment of a body seems to guarantee not merely a price but proper respect for feelings of survivors, so that emotional distress damages would seem to be recoverable . . ." *Id.* at 967.

221. See *id.* at 966.

Contracts for funeral and burial services are imbued by the very nature of their subject with certain expectations to be implied in fact unless specifically disclaimed. It is to be expected that damages for cognizable harm to the ordinary emotional sensibilities of any family member, in general, and known emotional sensibilities, in particular, will be recoverable for a breach of the funeral provider's obligation to exercise reasonable skill and care.

*Id.* at 967.

222. See *Rubin v. Matthews Int'l Corp.*, 503 A.2d 694, 695 (Me. 1986).

223. *Id.* at 696.

224. *Id.* at 696-97. The court noted that "[m]ost of the actions in this area of the law, whether sounding in contract or in tort, involve mishandling of the corpse, incidents occurring prior to or at burial, or wrongful disinterments." *Id.* at 697. Given that those other cases directly involved the body itself rather than just the grave marker, the court stated that it was "not persuaded . . . that the general rule precluding damages for emotional or mental distress for breach of contract should be abandoned." *Id.* at 698.

225. See 16 C.F.R. § 453 (2000).

226. See California Public Interest Research Group (CALPIRG), *Can You Afford to Die?: A*

the cost of the casket, but also the cost of other basic necessities of a funeral service, including transportation of the deceased and embalming of the body.<sup>227</sup> With a pricing system that included so many extra costs, consumers found that they could purchase coffins from independent dealers at much lower prices.

In 1984, a rule adopted by the FTC required funeral directors to permit consumers to use these less expensive coffins, although the directors could charge an extra fee to cover the costs that would have otherwise been included.<sup>228</sup> While this lowered the cost of many funerals, in some cases there was no difference in the overall price because the funeral homes that allowed consumers to use outside caskets were charging additional fees for doing so.

In 1994, in an effort to protect consumers from these fees, the FTC amended the Funeral Home Rule to ban the additional fee for using outside caskets.<sup>229</sup> The overall cost to consumers reportedly rose, however, as funeral directors were allowed to charge a non-declinable fee to cover overhead costs.<sup>230</sup> In 1999, the FTC requested comments on further amendments to the Funeral Home Rule, as part of its systematic review of all current rules and regulations.<sup>231</sup> Those comments are currently under administrative review.

Because funeral homes must now provide an itemized list of expenses for the services performed,<sup>232</sup> a consumer may be able to identify suspect fees that may be charged for the funerals of persons who die of AIDS-related causes. These charges may be labeled as a "contagious disease fee" or a "special handling fee." Funeral directors have attempted to justify these fees as covering the expenses of the gloves, gowns, and disinfectants used as part of the universal precautions mandated by OSHA and the CDC. However, because universal precautions must be used universally, there should be no additional fees for cases where a person died of AIDS-related causes. A funeral home that expressly lists additional fees for handling a funeral of a person who died of AIDS-related causes may violate the ADA and any applicable state statutes or local ordinances.<sup>233</sup> Conversely, a funeral home that attempts to disguise additional fees for handling a funeral of a person who died of AIDS-related causes may be failing to furnish accurate price information as required by the Funeral Industry Practices rule,<sup>234</sup> in addition to possible violations of the ADA and any applicable state statutes or local ordinances.

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*CALPIRG Report on the Prices, Practices, and Oversight of the Funeral Industry* (last modified Feb. 18, 1998) <<http://www.pirg.org/calpirg/consumer/funeral>> [hereinafter *CALPIRG Report*].

227. *See id.*

228. *See* 16 C.F.R. § 453; *see also* *CALPIRG Report*, *supra* note 226.

229. *See* 16 C.F.R. § 453; *see also* *CALPIRG Report*, *supra* note 226.

230. *See* *CALPIRG Report*, *supra* note 226.

231. *See* Comment Request, 64 Fed. Reg. 24,250 (1999), comment period extended, 64 Fed. Reg. 35,965 (1999).

232. *See* 16 C.F.R. § 453.2 (2000).

233. *See, e.g.*, CAL. BUS. & PROF. CODE § 7685.1(c) (West 1995).

234. *See* 16 C.F.R. § 453.2.

### 5. Consumer Fraud and Deceptive Business Practices Act

Acts of discrimination may also fall under state statutes such as the Illinois Consumer Fraud and Deceptive Business Practices Act.<sup>235</sup> The Act may be enforced by the State Attorney General or by a private cause of action.<sup>236</sup> To prove liability under the Act, the plaintiff must show:

- (a) a deceptive act or practice by the defendant;
- (b) the defendant's intent that the plaintiff rely on the deception; and
- (c) that the deception occurred during a course of conduct involving trade or commerce.<sup>237</sup>

Courts have liberally construed this Act to effectuate the legislature's intent to provide broader protection than that given under common law fraud.<sup>238</sup> The Act may be particularly useful in combating discrimination by funeral homes, given that plaintiffs invoking the Act do not need to prove that anyone "has in fact been misled, deceived or damaged thereby."<sup>239</sup> While a plaintiff must still prove that "the defendant's consumer fraud proximately caused [the] injuries,"<sup>240</sup> it is not necessary to satisfy the "but for" standard of causation.

In the context of a funeral for a person who died of AIDS-related causes, a number of statements may give rise to a cause of action under the Consumer Fraud and Deceptive Business Practice Act. In one case brought against a funeral home director in Schaumburg, Illinois, the director was alleged to have made false statements that a person who died from AIDS-related causes could not be removed from the hospital for twenty-four to forty-eight hours after death, that the person would have to be embalmed even for a closed-casket ceremony, and that there were

235. 815 ILL. COMP. STAT. ANN. 505/2 (West 1993). The Act describes an unlawful practice as follows:

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact . . . in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby.

*Id.*

236. When brought as a private cause of action, the Act allows for attorney's fees. 815 ILL. COMP. STAT. 505/2AA(M) (West 1993); *see also* Sandra Swift Parrino & A. Kent Waldrep, *Minus Tough Penalty ADA Law is Toothless*, WALL ST. J., June 14, 2000, at A27 (letter noting that the purpose of attorneys' fees for actions under the federal disability law is that "without legal representation, most disabled persons would not be able to enforce the law."). For a sample complaint including a cause of action under the Illinois Consumer Fraud and Deceptive Business Practices Act, *see* MARK E. WOJCIK, INTRODUCTION TO LEGAL ENGLISH 223-24 (International Law Inst. 1998).

237. *See* 815 ILL. COMP. STAT. ANN. 505/2; *see also, e.g.,* *Oliveira v. Amoco Oil Co.*, 726 N.E.2d 51, 57 (Ill. App. Ct. 2000).

238. *See Oliveira*, 726 N.E.2d at 57.

239. 815 ILL. COMP. STAT. ANN. 505/2; *see also, e.g., Oliveira*, 726 N.E.2d at 57. As noted in *Oliveira*, the Illinois Supreme Court stated that "no actual reliance is required to state a cause of action under the Act." *Id.*

240. *Oliveira*, 726 N.E.2d at 57.

"heightened risks" in holding a wake for a person who died of AIDS-related causes.<sup>241</sup> The funeral home director making those misrepresentations convinced the life partner of a man who died of AIDS-related causes to forgo a wake and service at the funeral home in favor of a "quick service" at the cemetery. The funeral director used his position to misrepresent the legal requirements of a burial for a person who died of AIDS-related causes, and effectively denied to the surviving partner any chance to cope with the loss.

### 6. Criminal Law

"The proper method for disposal of the dead has been regulated by law from earliest times, on the continent of Europe by the canon law, and in England by the ecclesiastical law."<sup>242</sup> That regulation has sometimes included various provisions under the criminal law. Prosecutions for mistreatment of a body have a long history in the United States. In 1821, for example, the Supreme Judicial Court of Maine stated:

From our childhood we all have been accustomed to pay a reverential respect to the sepulchres of our fathers, and to attach a character of sacredness to the grounds dedicated and inclosed as the cemeteries of the dead. Hence, before the late statute of Massachusetts was enacted, it was an offence at common law to dig up the bodies of those who had been buried, for the purpose of dissection. It is an outrage upon the public feelings, and torturing to the afflicted relatives of the deceased. *If it be a crime thus to disturb the ashes of the dead, it must also be a crime to deprive them of a decent burial*, by a disgraceful exposure, or disposal of the body contrary to usages so long sanctioned, and which are so grateful to the wounded hearts of friends and mourners. If a dead body may be thrown into a river it may be cast into a street: — if the body of a child — so, the body of an adult, male or female. Good morals — decency — our best feelings — the law of the land — all forbid such proceedings. It is imprudent to weaken the influence of that sentiment which gives solemnity and interest to everything connected with the tomb.

Our funeral rites and services are adapted to make deep impressions and to produce the best effects. The disposition to perform with all possible solemnity the funeral obsequies of the departed is universal in our country; — and even on the ocean, where the usual method of sepulture is out of the question, the occasion is marked with all the respect which circumstances will admit. Our legislature, also, has made it an offence in a civil officer to arrest a dead body by any process in

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241. See Charge of Discrimination, *John Doe v. Michael's Funeral Home*, No. 1994CP3153 (Ill. Dep't of Human Rights, June 20, 1994) (copy on file with the *Oklahoma Law Review*)

242. *State v. Bradbury*, 9 A.2d 657, 658 (Me. 1939).

his hands against the party while living: — it is an affront to a virtuous and decent public, not to be endured.<sup>243</sup>

Although it may be difficult to imagine the criminal prosecution of a funeral director for discriminatory acts against a person who died of causes related to HIV, some criminal statutes may apply even to funeral directors or others who work in the funeral home industry.<sup>244</sup> Two statutes examined here are for (a) "abuse of a corpse"; and (b) disorderly conduct, a misdemeanor that may be the basis of a hate crime based on disability.

*a) Abuse of a Corpse*

The *Model Penal Code* provides that unless authorized by law, "a person who treats a corpse in a way that he knows would outrage ordinary family sensibilities commits a misdemeanor."<sup>245</sup> The prohibition against conduct that would "outrage ordinary family sensibilities" is

sufficiently broad to preclude gaps in coverage and yet sufficiently precise in its statement of the ultimate question to provide a meaningful standard of decision. Any possible problems of indeterminacy and lack of notice to the actor are resolved by the requirement of knowledge with respect to the outrageous character of his conduct. Thus, the person who is not aware that his acts would offend family sensibilities does not commit an offense under this section, even though precisely that reaction obtains. Of course, the actor's idiosyncratic view of what is outrageous does not matter. The standard is objective; it does not vary either to exculpate on the basis of the actor's unusual callousness or to condemn for outraging an excessively delicate relative of the deceased.<sup>246</sup>

A number of states have adopted this provision of the *Model Penal Code* or have adopted a similar provision in their state criminal codes. A Colorado statute, for example, provides that:

(1) A person commits abuse of a corpse if, without lawful authority, he:

243. *Kanavan's Case*, 1 Me. 226, 227 (Me. 1821) (emphasis added) (providing an eight-month sentence for the secret disposal of the body of a child born out of wedlock).

244. See Jocelyn Y. Stewart, *Officials Fail to Quell Anger at Conditions in Cemetery*, L.A. TIMES, June 11, 2000, at B1 (quoting Deputy District Attorney Ralph Plumer as saying, "If there's a crime, we're going to prosecute," in a case where investigators found pieces of bones and fragments of caskets scattered around the grounds of the Woodlawn Cemetery in Compton, California).

245. MODEL PENAL CODE § 250.10 (1980).

246. *Id.* § 250.10 cmt.2; see also *Dougan v. State*, 912 S.W.2d 400, 403-04 (Ark. 1995); John S. Herbrand, Annotation, *Validity, Construction, and Application of Statutes Making it a Criminal Offense to Mistreat or Wrongfully Dispose of Dead Body*, 81 A.L.R.3d 1071 (1977).

(a) Removes the body or remains of any person from a grave or other place of sepulcher without the consent of the surviving relatives or surviving intimate friends; or

(b) Treats the body or remains of any person in a way that would outrage normal family sensibilities.<sup>247</sup>

Paragraph (a) allows either "surviving relatives" or the "surviving intimate friends" to consent to the removal of a body from its final resting place. While episodes of grave robbery or disinterment are unusual, there have been prosecutions for violating this provision and ones similar to it. Paragraph (b) may be more likely to arise in the context of a person who has died of AIDS-related causes. A funeral home director who mistreats the body of a person who has died of AIDS-related causes may be found guilty under this statute, if the treatment of the body would "outrage" normal sensibilities.

Other states that have adopted this provision of the *Model Penal Code* or a provision similar to it include Alabama,<sup>248</sup> Arkansas,<sup>249</sup> Delaware,<sup>250</sup> Hawaii,<sup>251</sup> Kentucky,<sup>252</sup> Ohio,<sup>253</sup> Pennsylvania,<sup>254</sup> and Tennessee.<sup>255</sup> While the crime is a misdemeanor in most jurisdictions, some states such as Oregon regard it as a felony.<sup>256</sup>

New Hampshire does not follow the *Model Penal Code* but makes it a misdemeanor if a person "unlawfully removes, conceals or destroys a corpse or any part thereof."<sup>257</sup> Other states, such as Maine and Texas,<sup>258</sup> define the crime more specifically. Maine describes the crime of "abuse of corpse" as occurring when a person "intentionally and unlawfully disinters, digs up, removes, conceals, mutilates

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247. COLO. REV. STAT. ANN. § 18-13-101(1) (West 1999). In Colorado, violation of the statute is a class 2 misdemeanor. See *id.* § 18-13-101(2).

248. See ALA. CODE § 13A-11-13 (1994).

249. See ARK. CODE ANN. § 5-60-101 (Michie 1997); *Dougan v. State*, 912 S.W.2d 400, 403-04 (Ark. 1995).

250. See DEL. CODE ANN. tit. 11 § 1332 (1995).

251. See HAW. REV. STAT. § 711-1108 (Lexis 1993).

252. See KY. REV. STAT. ANN. § 525.120 (Banks-Baldwin 1997).

253. See OHIO REV. CODE ANN. § 2927.01 (Anderson 1996).

254. See 18 PA. CONS. STAT. ANN. § 5510 (West 1983); *Commonwealth v. Smith*, 567 A.2d 1070, 1072-73 (Pa. Super. Ct. 1989). This section of the Pennsylvania statute survived a constitutional challenge for vagueness, because "it is susceptible of a reasonable construction and provides sufficient warning to a man of ordinary intelligence as to what is forbidden." *Commonwealth v. Browne*, 74 Pa. D. & C.2d 724 (1976).

255. See TENN. CODE ANN. 39-17-312 (1997) (defining the crime as mistreating a corpse "in a manner offensive to the sensibilities of an ordinary person").

256. See ORE. REV. STAT. §§ 166.085, 166.087 (1999).

257. N.H. REV. STAT. ANN. § 644:7 (1996)

258. Texas defines "Abuse of Corpse" when a person "intentionally or knowingly: (1) disinters, disturbs, removes, dissects, in whole or in part, carries away, or treats in a seriously offensive manner a human corpse; (2) conceals a human corpse knowing it to be illegally disinterred; (3) sells or buys a human corpse or in any way traffics in a human corpse; or (4) transmits or conveys, or procures to be transmitted or conveyed, a human corpse to a place outside the state." TEX. PENAL CODE ANN. § 42.08 (West 1994).



or destroys a human corpse, or any part or the ashes thereof."<sup>259</sup> The Maine statute does not apply to "a physician, scientist or student who had in his possession, or used human bodies or parts thereof lawfully obtained, for anatomical, physiological or other scientific investigation or instruction."<sup>260</sup>

Still other states do not have particular statutes on "abuse of a body" as such, but may punish other behavior, such as attempts to have sex with a corpse.<sup>261</sup> Indiana law also punishes a person who "mutilates" a corpse or opens a casket intending to do so,<sup>262</sup> but that law includes an express exception for a funeral director, embalmer, or an employee of a funeral home director or embalmer who is "engaged in the individual's normal scope of practice and employment."<sup>263</sup>

Where there is no express exception, a funeral home director might raise three possible defenses to such a prosecution. First, the funeral home director would certainly claim a statutory defense of having "lawful authority" to handle the body. While the director would be authorized to handle the corpse of the decedent, the director would not have legal authority to treat it with disrespect or reckless negligence.

Second, a funeral home director may claim that the standard of liability in determining "normal family sensibilities" is too vague. This argument has been raised unsuccessfully in some jurisdictions. For example, an Ohio statute makes it a misdemeanor to treat a human corpse in a way that the person knows would outrage "reasonable family sensibilities."<sup>264</sup> Another provision of the same Ohio statute makes it a felony to treat a human corpse in a way that would outrage "reasonable community sensibilities."<sup>265</sup> In rejecting a constitutional challenge to the broader language, an Ohio court determined that its state statute prohibiting unauthorized persons from treating human corpses in a manner that would outrage "reasonable community sensibilities" was not unconstitutionally vague and does not violate due process.<sup>266</sup> While the Ohio decision is not binding on other jurisdictions, it does offer some indication that other jurisdictions would be unlikely to find similar provisions void for vagueness.

#### *b) Hate Crime Statute*

Where a person died of AIDS-related causes, a funeral home director might discriminate in more active ways than overcharging or refusing certain services. If the acts taken are especially extreme or outrageous, a funeral home director might

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259. ME. REV. STAT. ANN. tit. 17-A § 508(1) (West 1983)

260. *Id.* § 508(2).

261. See IOWA CODE § 709.18 (West Supp. 2000); see also *Workman v. State*, 716 N.E.2d 445 (Ind. 1999) (concluding that the abuse of a corpse was an aggravator for imposing an enhanced sentence for murder).

262. See IND. CODE ANN. § 35-45-11-2 (Michie 1998).

263. IND. CODE ANN. § 35-45-11-1 (Michie 1998).

264. OHIO REV. CODE ANN. § 2927.01(A) (Anderson 1996).

265. See *id.* § 2927.01(B).

266. See *State v. Hopfer*, 679 N.E.2d 321, 344 (Ohio Ct. App. 1996); *State v. Gardner*, 582 N.E.2d 1014, 1016-17 (Ohio Ct. App. 1989); *State v. Glover*, 479 N.E.2d 901, 904 (Ohio Ct. App. 1984).

even be charged with "disorderly conduct," a misdemeanor that can sometimes be elevated to a felony by virtue of state hate crime statutes. Although there have been no reported criminal prosecutions of funeral home directors for such extreme acts of discrimination, given the emotional and sometimes highly charged nature of funerals, an appropriate future case may arise to charge a funeral home director or employee under a hate crime statute. In the United States there are more than forty states with some form of hate crime legislation,<sup>267</sup> with attempts to introduce legislation in the remaining states<sup>268</sup> and on the federal level.<sup>269</sup>

The Illinois Hate Crime Statute, to take one state example, provides in part:

A person commits hate crime when, by reason of the actual or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin of another individual or group of individuals, he [or she] commits assault, battery, aggravated assault, misdemeanor theft, criminal trespass to residence, misdemeanor criminal damage to property, criminal trespass to vehicle, criminal trespass to real property, mob action or disorderly conduct . . . .<sup>270</sup>

A "physical disability" under this Illinois statute would include HIV infection and AIDS, whether that disability is "actual" or only "perceived."<sup>271</sup> For a criminal conviction of hate crime under this statute, the prosecutor must prove beyond a reasonable doubt that the defendant committed a predicate offense "by reason of" the actual or perceived membership in a protected classification.<sup>272</sup> The Illinois statute does not require that bias be the sole reason for the predicate offense, because the statute is primarily "intended to be directed towards the biased motivation of the perpetrator."<sup>273</sup> Thus, prosecution may be appropriate when the defendant's acts are even only partially motivated by prohibited bias. As other states have noted, "[t]he deprivation of civil rights . . . does *not* have to be the *predominant* purpose of the defendant's acts."<sup>274</sup>

267. See Editorial, *Attacking Hate Crimes*, N.Y. TIMES, June 9, 2000, at A30.

268. See, e.g., *id.* (urging New York to enact a state hate-crime statute, stating that "[i]t has been a source of shame that year after year New York State has failed to enact a meaningful hate-crime law even as violence against gays and minority groups has become more common."); Lisa Neff, *N.Y. Senate Approves Hate Crimes Bill*, CHICAGO FREE PRESS, June 14, 2000, at 20; Tony Peregrin, *Landmark N.Y. Bias Crime Bill Clears a Key Hurdle*, WINDY CITY TIMES, June 15, 2000, at 1 (both stories reporting that the New York State Senate passed a hate crimes prevention law that had been passed in the New York State Assembly every year for the previous ten years).

269. See, e.g., Adam Clymer, *Senate Expands Hate Crimes Bill to Include Gays*, N.Y. TIMES, June 21, 2000, at A1; Adam Clymer, *Federal Law on Hate Crime Is Scheduled for a Vote in the Senate*, N.Y. TIMES, June 20, 2000, at A17; see also Mark Flanigan, *Coming Out of Hatred*, ADVOCATE, July 4, 2000, at 9 (former neo-Nazi who is now urging that "Americans of all races, religions, and sexual orientations must work together to ensure the passage of the Hate Crimes Prevention Act").

270. 720 ILL. COMP. STAT. ANN. A5/12-7.1(a) (West Supp. 2000).

271. See *id.*

272. See *id.*

273. *In re B.C.*, 680 N.E.2d 1355, 1360 (Ill. 1997).

274. See JACK O'MALLEY, COOK CO. STATE'S ATTORNEY'S OFFICE, A PROSECUTOR'S GUIDE TO

A hate crime is often difficult to prosecute successfully. For example, the use of only one explicit reference to a protected classification may not provide much indication that a particular offensive act was motivated by bias.<sup>275</sup> Some facts, however, may help establish liability. For example, if a funeral home director refuses to allow visitors to attend the funeral of a person who died of AIDS-related causes because he believes that the visitors are also infected with HIV, the director may do so in a way that could rise to the level of "disorderly conduct." That misdemeanor may be one of the predicate offenses for statutory hate crime. Illinois defines "disorderly conduct" to occur when a person knowingly "[d]oes any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace . . . ."<sup>276</sup> If a funeral director became belligerent toward the family and friends of the deceased to such an extreme degree as to warrant a charge of disorderly conduct, it would be possible to charge the funeral director with a hate crime based on the fact that his bias is motivated by the perceived or physical disability of the deceased.

In addition to a possible criminal prosecution, state statutes may permit a civil cause of action for hate crime. For example, the Illinois hate crime statute provides:

Independent of any criminal prosecution or the result thereof, any person suffering injury to his person or damage to his property as a result of hate crime may bring a civil action for damages, injunction or other appropriate relief. The court may award actual damages, including damages for emotional distress, or punitive damages. A judgment may include attorney's fees and costs.<sup>277</sup>

It may be easier for a plaintiff to prevail in a civil action under the hate crime statute, as the defendant will not be entitled to a presumption of innocence and the plaintiff must prove the allegations only by a preponderance of the evidence.

### 7. Licensing Laws

Funeral directors and embalmers "are usually licensed by a state authority, and complaints of inflated prices or of denials of service based on HIV infection should be reported to the proper [state] authorities."<sup>278</sup> In Illinois, for example, a complaint against a funeral home director or an embalmer can be made to the

HATE CRIME VI-5, 6 (1994) (citing *Commonwealth v. Stephens*, 515 N.E.2d 606, 610-11 (Mass. App. Ct. 1987)) (emphasis added). In *Stephens*, the court affirmed a conviction where a defendant's conduct was in part motivated by retaliation against the victim for having thrown a marble earlier in the day; the court held that the jury could reasonably find that the defendant was also acting out of hatred for Cambodians. Compare also, e.g., Linda Greenhouse, *The Justices Make It Easier to Win Suits for Job Bias*, N.Y. TIMES, June 13, 2000, at A21.

275. See *People v. Davis*, 674 N.E.2d 895, 897-98 (Ill. App. Ct. 1996) (white defendant attacked a black man outside of a bar; the defendant used explicit reference to racial animus, but the court stated that although there was no doubt a battery was perpetrated, "whether [defendant] did so 'by reason of [victim's] race is less clear.'").

276. 720 ILL. COMP. STAT. ANN. 5/26-1(a)(1) (West 1993).

277. 720 ILL. COMP. STAT. 5/12-7.1(c) (West 2000).

278. Barnes, *supra* note 93, at 11-17.

Illinois Department of Professional Regulation, which allows members of the public to file complaints by electronic mail through its website.<sup>279</sup>

The remedy of pursuing a professional complaint has several advantages, provided it is done in good faith and not threatened in order to gain an unfair advantage in civil litigation. First, the funeral home director is likely to act quickly and professionally when there is a danger of losing a professional license. Second, the administrative proceedings are done without cost to the individual, so there is no financial hurdle to pursuing a complaint against an unscrupulous funeral home director. Third, the departments enforcing the professional regulations have no agenda other than to protect the public and encourage professional behavior.

#### 8. Wills

The status of dead bodies has been said to be generally well defined in the law.<sup>280</sup> At common law there was no "property right" in a dead body and the body was not part of the decedent's estate.<sup>281</sup> Although a body is not "property" that can pass under a will, courts have nevertheless enforced the clearly expressed wishes of testators as to the dispositions of their bodies — even over objections from family members and personal representatives of the estates. In one case from Florida, for example, a man who died in 1997 included an express request in his will that he should be cremated and have his ashes strewn by his wife.<sup>282</sup> Unfortunately, the man's wife died three months before he died, and the personal representatives objected to the cremation for reasons of conscience.<sup>283</sup> The probate court ordered the man to be cremated according to his will.<sup>284</sup> The Florida District Court of Appeals affirmed that holding and stated that "Florida courts have long held that testamentary directions are to be complied with to the fullest extent possible."<sup>285</sup> Indeed, "[t]here is no higher duty nor greater responsibility on the courts than that of seeing to it, in proper cases, that the will of the dead is honored."<sup>286</sup>

Courts have noted when a will fails to expressly designate a method of disposing of a body or fails to delegate that power to the executor.<sup>287</sup> Attorneys preparing wills for clients with HIV may thus want to include express provisions as to final disposition of the body, even though the body technically does not pass under the will. Including an express provision in the will may increase the likelihood that the

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279. See *Illinois Department of Professional Regulation* (visited Oct. 31, 2000) <<http://www.dpr.state.il.us/>>.

280. See, e.g., Philippe Ducor, *The Legal Status of Human Materials*, 44 *DRAKE L. REV.* 195, 212 (1996).

281. See, e.g., *In re Estate of Medlen*, 677 N.E.2d 33, 35 (Ill. App. Ct. 1997).

282. See *Kasmer v. Guardianship of Limner*, 697 So. 2d 220, 220 (Fla. Dist. Ct. App. 1997).

283. See *id.*

284. See *id.* at 220-21.

285. *Id.*

286. *Id.* at 221 (quoting *Morgenthaler v. First Atlantic Nat'l Bank of Daytona Beach*, 697 So. 2d 446, 452 (Fla. 1995)).

287. See, e.g., *Stewart v. Schwartz Brothers-Jeffery Memorial Chapel, Inc.*, 606 N.Y.S.2d 965, 966 (N.Y. Sup. Ct. 1993).

funeral services and disposition of the body will comply with the wishes of the testator.

### 9. Power of Attorney for Health Care

While there is no property right in a body, the "next of kin" have been said to have a "personal"<sup>288</sup> right or "quasi-property"<sup>289</sup> right in a body, which arises from their duty to bury the dead. This quasi-property right has been construed to confer upon the next of kin the right to determine the time, manner, and place of burial.<sup>290</sup> In some states, however, the durable power of attorney for health care will survive the principal's death and empower the named agent to make necessary funeral arrangements (unless the principal specifically excludes the agent from that power when filling out the durable power of attorney).<sup>291</sup> The named agent may thus have the legal right to make funeral arrangements in jurisdictions where the health care power of attorney survives the death. In a dispute with estranged family members, the named agent would have the right to decide upon the disposition of the body.<sup>292</sup> This is only true, however, in jurisdictions where the health care power of attorney survives the death of the principal. In many jurisdictions the durable powers of attorney — for both health care and for property — cease at the time of death.<sup>293</sup>

288. *E.g.*, *Stewart*, 606 N.Y.S.2d at 967 ("[A]s there is merely a personal and not a proprietary right in the decedent's body, it is not subject to delegation under the will and, therefore, not within the executor's control.").

289. *E.g.*, *Pyle v. Pyle*, 531 S.E.2d 738, 740 (Ga. Ct. App. 2000); *In re Estate of Medlen*, 677 N.E.2d 33, 35-36 (Ill. App. Ct. 1997).

290. *See In re Estate of Medlen*, 677 N.E.2d 33, 36 (Ill. App. Ct. 1997); *Stewart*, 606 N.Y.S.2d at 967.

291. *See, e.g.*, 755 ILL. COMP. STAT. 45/2-1 (West 1993) (stating "that each individual has the right to appoint an agent to deal with property or make personal and health care decisions for the individual").

292. The members of the traditional family may, however, have the money needed for appropriate burial services. Funeral home directors are often called upon to mediate disputes in these circumstances where a person with the legal right to make the arrangements lacks the money to do so. Compromises are common, yet funeral home directors are seldom trained to mediate these disputes effectively.

293. *See, e.g.*, NEB. REV. STAT. § 30-3410 (1995) (providing that the health care power of an attorney expires at death). As one funeral director in Silver Spring, Maryland, explained:

A lot of people don't realize their durable powers of attorney cease at time of death, says Paul Lee. A lot of attorneys don't know that. And technically, that means the lover can't sign a required authorization to cremate. Only the next of kin is authorized to sign it. And a lot of times, as soon as someone dies, you'll see a complete 180-degree turn in some family attitudes. That happens quite a bit.

That 'turn' in the family's attitude, he explains, is often a hostile one, against the surviving lover. Even if there is no family, there can be additional problems for Gays.

If there's no next of kin, says Lee, the medical examiner won't let us pick up the body for as much as 30 days. That, of course, delays any ceremonies for burial or cremation and prolongs the grieving of the lost person's lover and friends.

CLOSEN ET AL., AIDS CASES & MATERIALS, *supra* note 139, at 70-71 (Supp. 1992) (summary of Lisa M. Keen, *Preparing for the Final Goodbye*, WASHINGTON BLADE, Apr. 10, 1992, at 1).

#### IV. Conclusion

This article reaches five primary conclusions. First, because it is unlawful to discriminate against persons with HIV, and because funeral services are places of public accommodation, it is unlawful to refuse to handle the body of a person who dies of an illness related to HIV. Funeral homes that charge more to handle a person who died of HIV violate the human rights laws and, in some jurisdictions, specific statutes make it illegal to charge more to embalm the remains of a person with a communicable disease.

Second, as the number of deaths related to HIV continues to increase, funeral homes must educate their employees as to proper infection control procedures and must ensure that appropriate protective measures are available to comply with the universal precautions. It should not be a future defense to a charge of discrimination that the funeral home simply did not know how to handle a person who died of an illness related to HIV. Neither should it be a defense that other funeral homes may be better suited, or have more experience, in providing services to persons who die of illnesses related to HIV.

Third, the appropriate protective gear should be made available to all embalmers called to work at the funeral home, whether or not the funeral home considers the embalmer to be an independent contractor. If the funeral home provides the work space and work materials for an embalmer working as an independent contractor, the funeral home may still face lawsuits for failing to provide appropriate materials.

Fourth, it is discriminatory to suggest to families that a person who died of an illness related to HIV must be cremated or that the memorial service must be held with a closed casket by reason of decedent's cause of death. Thousands of funerals across the country (and in other countries) have proven that the full range of options should be offered to the families.

Fifth, it is discriminatory to charge more simply because a person died of an illness related to HIV. The universal precautions should not be used only when a funeral home director knows (or suspects) that a person died of an illness related to HIV. Funeral home directors must provide a full range of services to persons who die of illnesses related to HIV. They must unilaterally implement the universal precautions to safeguard themselves and their employees in all instances. And they cannot discriminate in the services offered or the fees charged when a person dies of an illness related to HIV.

Conclusions can also be drawn about family members and loved ones who survive the death of a person with AIDS. Survivors will often passively accept the discrimination against themselves and against their loved ones.<sup>294</sup> For the survivors, the need for a quiet period of grief and mourning far outweighs the need to assert legal rights or to protest against any acts of perceived or actual discrimination.<sup>295</sup> It is also often the case that because few survivors have

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294. See Wojcik & Austin, *supra* note 2, at 78.

295. See *id.*

experience in arranging a funeral, they may not even realize that they or their loved ones are the victims of discrimination.<sup>296</sup> In the case of overcharging, for example, a person may not recognize that an extra charge is illegal or that charges for services or materials provided are higher than they would be if the cause of death was not related to AIDS.<sup>297</sup> Yet even when people are aware of discrimination, they may not see the larger social benefit of pursuing cases that may alleviate future discrimination for others.<sup>298</sup> They may also decide that the emotional and psychological drain of having to participate in litigation against a funeral home is simply too great, because the litigation process of depositions and in-court testimony will force them to relive not only the experiences of that funeral, but the thought that they "could have done more" to recognize and protest the acts of discrimination as they were happening.

Given the understandable hesitancy of survivors and personal representatives to litigate cases of funeral home discrimination — as well as the reluctance of private attorneys to undertake complex cases that may appear to lack the potentially large judgments of other types of civil rights or torts litigation — the most effective solution to the problem of funeral home discrimination may lie not in actually litigating these cases but in educating funeral home professionals, mortuary students, and health care advocates about what the legal requirements are.<sup>299</sup> The laws must also be enforced, however, lest the educational message ring hollow for lack of effective enforcement or penalty for acts of discrimination. An appropriate educational model will also do much to combat funeral home discrimination in other

296. *See id.*

297. *See id.*

298. *See id.*

299. Many jurisdictions already require continuing education seminars as a condition of licensing, so the concept of attending a special seminar on a topic such as "AIDS Law for Funeral Directors" would not be a foreign concept to the funeral industry itself. Indeed, as the topic has not been frequently discussed in existing continuing education seminars, many funeral directors would welcome the opportunity to learn about the legal (and medical) aspects of AIDS. A "syllabus" for these seminars could include the following elements:

(1) General medical aspects of HIV and HIV transmission, including specific aspects about the survival of HIV after the host has died;

(2) Review of "universal precautions";

(3) Overview of the federal (and state or local) anti-discrimination laws, including information on how those anti-discrimination laws have been applied to funeral homes; including enforcement measures taken by the U.S. Department of Justice, other agencies, and private lawsuits;

(4) Information about related subjects such as sexual orientation and about measures to reduce homophobia, which may affect the professional delivery of services to affected population groups, and including information about how the funeral home director can negotiate, if necessary, between competing demands of a traditional family and an alternative family, including an understanding of alternative funeral arrangements;

(5) Explanations of the need and often legal right of non-traditional family members to make the appropriate funeral arrangements;

(6) Review of social aspects of mourning and grief, including "bereavement overload" when countless friends die of AIDS-related causes; and

(7) Encouraging only the highest professional behavior and courtesy from funeral service providers, who should be models to guide societal responses to HIV and AIDS.

countries. Education is superior to litigation in the long-term battle against discrimination. Funeral home professionals behave professionally when they know what is expected of them. Their professional behavior, in turn, sets an example for others for how to handle persons with HIV with dignity and respect. When that treatment is available to persons who fight discrimination while they are alive, they will not "face that kind of discrimination at death, too."<sup>300</sup>

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300. *Americans With Disabilities Act of 1989: Hearings on S. 933, supra* note 1, at 103 (statement of Betty and Emory Corey).



