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# DYING IN ISOLATION: PUBLIC HEALTH IMPLICATIONS OF TRANSPORTATION AND BURIAL OF HUMAN REMAINS DURING A PANDEMIC A FIFTY STATE SURVEY

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# DYING IN ISOLATION: PUBLIC HEALTH IMPLICATIONS OF TRANSPORTATION AND BURIAL OF HUMAN REMAINS DURING A PANDEMIC

## *A FIFTY STATE SURVEY*

CHRISTOPHER OGOLLA\*

And then he got sick, and then he died, by himself. That's the hard part—really hard part. It's hard to process things like this because everything is happening at a distance. And human beings—we're not set up for that. We're wired to be with each other. It makes it hard.<sup>1</sup>

### INTRODUCTION

The COVID-19 pandemic has affected all of us in different ways.<sup>2</sup> It has resulted in millions of morbidity and mortality cases.<sup>3</sup> More than one million people have died in the United States (U.S.) and more than six and half million have died worldwide.<sup>4</sup> These deaths occurred amid unique public health and

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1. Elizabeth Warren, *My Brother's Death Didn't Have to Happen*, ATLANTIC (May 17, 2020), <https://www.theatlantic.com/politics/archive/2020/05/elizabeth-warren-brother-covid/611683/>.

2. See, e.g., HARVARD T.H. CHAN SCH. OF PUB. HEALTH & ROBERT WOOD JOHNSON FOUND., THE IMPACT OF CORONAVIRUS ON HOUSEHOLDS ACROSS AMERICA (2020), <https://www.rwjf.org/en/library/research/2020/09/the-impact-of-coronavirus-on-households-across-america.html> (detailing the experiences of households across the nation during the coronavirus outbreak across different areas of their lives, including serious problems with their finances, jobs, health care, housing, transportation, caregiving, and well-being); GREGORIO MILLET ET AL., ASSESSING DIFFERENTIAL IMPACTS OF COVID-19 ON BLACK COMMUNITIES 37, 37–44 (2020) (using data on COVID-19 cases and deaths in U.S. counties to describe racial disparities in COVID-19 disease and death and associated determinants); and J. TOM MUELLERA ET AL., IMPACTS OF THE COVID-19 PANDEMIC ON RURAL AMERICA 1–6 (2020) (measuring and assessing the impact of the COVID-19 pandemic on rural well-being in the North American West).

3. *Coronavirus Resource Center*, JOHNS HOPKINS UNIVERSITY & MEDICINE, <https://coronavirus.jhu.edu> (last visited Aug. 10, 2022).

4. *Id.*

social problems. One such problem has been dying in isolation,<sup>5</sup> which became one of the pandemic's many cruelties.<sup>6</sup> This article views isolation from two vantage points: first as an epidemiological tool to control disease (medical isolation and quarantine) and second, as a social isolation construct (loneliness or the lack of social contacts). Whether one dies during medical isolation or quarantine, or dies of loneliness due to social isolation,<sup>7</sup> dying in isolation is stressful and traumatic to patients,<sup>8</sup> family members, and providers<sup>9</sup>

The pandemic has also transformed the deathcare industry.<sup>10</sup> Under normal circumstances (read before COVID-19), grieving families face many challenges: obtaining a death certificate, deciding where and how to dispose of the body, obtaining burial and transit permits, transporting the body, and handling family feuds regarding the deceased person's wishes.<sup>11</sup> These problems are compounded during a pandemic.<sup>12</sup> For example, the death toll during COVID-19 put a strain on many funeral homes in the U.S. as "[m]edical examiners, coroners, embalmers, funeral directors and other trained mortuary workers faced overwhelming challenges . . . from exploding caseloads and shortages of personal protective equipment to mental health concerns."<sup>13</sup> Additionally, many local and state government offices were either closed,

5. See, e.g., Alejandra Victoria Capozzo, *Dying Alone Due to COVID-19: Do the Needs of the Many Outweigh the Rights of the Few—or the One?*, 8 FRONTIERS IN PUB. HEALTH, Nov. 30, 2020, at 1 (pointing out that due to Covid-19, "Many have died in isolation.").

6. Ken Budd, *On the Obligation to Prevent People From Dying Alone*, WASH. POST MAG. (Dec. 8, 2021), <https://www.washingtonpost.com/magazine/2021/12/08/obligation-prevent-people-dying-alone/>.

7. In fact, one study found that there are more lonely deaths in hospitals and nursing homes due to Covid-19 than any other cause. Sarah Chuzi et al., *Distribution in Place of Death for Covid-19-Related Mortality in the United States*, 68 J. AM. GERIATRIC SOC'Y 1917 (2020).

8. See Helen T. D'Couto, *Forcing My COVID Patients to Die Alone Is Inhumane — and Unnecessary*, WBUR (Mar. 7, 2022), <https://www.wbur.org/cognoscenti/2022/03/07/covid-patients-icu-dying-alone-helen-t-dcoutho> (noting that "[w]e clearly know that depriving patients of the healing comfort of their loved ones' presence only worsens... trauma and [the] health complications of critical illness."); and Thushara Galbadage et al., *Biopsychosocial and Spiritual Implications of Patients with COVID-19 Dying in Isolation*, 11 FRONTIERS PSYCHOL. 1, 3 (2020) (noting that "[m]any patients with COVID-19 that died in hospitals or healthcare facilities, especially in the state of New York, died in isolation, among strangers, unable to be comforted by family and loved ones.").

9. Lisa K. Anderson-Shaw & Fred A. Zar, *COVID-19, Moral Conflict, Distress, and Dying Alone*, 17 J. BIOETHICAL INQUIRY 777, 778 (2020) (noting that "[t]he moral conflict among care providers when they see their patients dying alone can be unbearable and lead to ongoing grief and sadness.").

10. Kat Eschner, *How COVID has transformed the death care industry for 'last responders'*, FORTUNE (Aug. 7, 2021), <https://fortune.com/2021/08/07/covid-funerals-death-care-industry-burial-cremation-pandemic/>.

11. Eliza Griswold, *The Kids Who Lost Parents to Covid*, NEW YORKER (July 13, 2022), <https://www.newyorker.com/news/dispatch/the-kids-who-lost-parents-to-covid>.

12. Christopher J. Brooks, *Funeral home staff overwhelmed by waves of Covid-19 deaths*, CBS NEWS (Jan. 15, 2021), <https://www.cbsnews.com/news/covid-deaths-funeral-homes-overwhelmed/>; <https://www.cbsnews.com/news/covid-deaths-funeral-homes-overwhelmed/>.

13. Shantal Riley, *Last Responders — Coroners, Funeral Workers and Others — Say They Faced Risks as COVID Spread*, PBS: FRONTLINE (June 17, 2021), <https://www.pbs.org/wgbh/frontline/article/last-responders-coroners-funeral-workers-faced-risks-covid-spread/>.

operated with reduced staff and hours, or only offered services online. As a result, families struggled to obtain the paperwork necessary to bury or cremate deceased relatives.

Recognizing these challenges, this article addresses death caused by isolation and what to do with human remains after death, specifically transportation and burial.<sup>14</sup> The article proceeds as follows: part I outlines the epidemiology of COVID-19, including impacts of disease control measures such as isolation and quarantine on mortality rates.<sup>15</sup> Part I also discusses the association between the pandemic and social isolation and loneliness.<sup>16</sup> Because the pandemic was a global public health emergency, part II discusses federal laws and regulations on importation of human remains in the U.S., as well as the Federal Trade Commission's funeral rule which requires various disclosures about funeral goods and services.<sup>17</sup>

Part III then contrasts the federal rules with a survey of the rules and regulations on transportation and burial among the fifty states.<sup>18</sup> The fifty-state survey analysis is based on three factors; whether, (a) a burial/transit permit is required, (b) embalming is required, and (c) whether communicable disease requirements or procedures are specified in the state's laws.<sup>19</sup> These factors were chosen because they illuminate the intersection between the pandemic, death, and the law. Additionally, since state laws vary, each of these factors provides a straight forward binary comparison.<sup>20</sup> For example, it is easy to compare which states require burial transit permits, or which states require specific handling procedures when one dies of a communicable disease, and which ones do not. The binary comparison is also applicable to the discussion of implications for public health policy. As an example, bodies of those who die of infectious diseases tend to be treated and handled differently than those who die of non-infectious diseases.<sup>21</sup> This is an important disease control measure, and its implications can be compared across the states, showing good and not so good practices among the various jurisdictions.

In part IV, the article offers three suggested approaches for post pandemic handling of human remains.<sup>22</sup> First, the article recommends updating post

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14. The word burial is used here in its general sense to include cremation, even though cremated remains need not be buried.

15. *See infra* Part I.

16. *See infra* Part I.

17. *See infra* Part II.

18. *See infra* Part III.

19. The author concedes that this is not meant to be a systematic study with a sound methodological design, rather, it is a survey of the current state of laws in the 50 states regarding three common factors that show, on the one hand, good and not so good practices regarding the burial and transportation of the dead, and on the other hand, the intersection between the pandemic, death, and the law.

20. *See infra* Part III.

21. *See infra* Section III.C. on communicable diseases.

22. *See infra* Part IV.

pandemic state laws regarding the transportation and burial of human remains because many state laws are “outdated and completely unnecessary.”<sup>23</sup> Second, it recommends selective or “reasonable” enforcement of death laws during times of disasters.<sup>24</sup> Third, the article calls for designation of funeral workers as first responders, instead of their traditional category as last responders.<sup>25</sup> This recognition will allow funeral workers to be prioritized for health services, such as vaccines and personal protective equipment, and allow funeral workers to travel to other states to respond to disasters as needed. Fourth, the article recommends disaster preparedness, such as having adequate resources (e.g., ventilators, personal protective equipment, refrigeration capacities) as a way to mitigate the impacts of future pandemics.<sup>26</sup>

Finally, the article concludes by noting that the burdens on family members when someone dies are enormous.<sup>27</sup> These burdens are further complicated by the pandemic. Therefore, it is critical for public health practitioners to focus on the role of social isolation as a contributing factor to mortality during a pandemic, and second, understand the state laws dealing with transportation and burial of human remains, and their implications on public health law and policy.

## II. COVID-19 EMERGENCE, EPIDEMIOLOGY, AND SOCIAL ISOLATION

### A. Emergence

Determining the emergence and epidemiology of COVID-19 in the U.S. is important for understanding its impacts and “informing simulation models used to predict cases, deaths, and healthcare utilization . . . [to] guide future pandemic planning, policy development, and resource allocation.”<sup>28</sup> More importantly, understanding the emergence and epidemiology of COVID-19 also informs the legal approach to the pandemic, including laws dealing with transportation and burial of human remains, and their implications on public health law and policy.

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23. See Michael Waters, *Cremation Borrows a Page from the Direct-to-Consumer Playbook*, N.Y. TIMES (Feb. 3, 2022), <https://www.nytimes.com/2022/02/03/business/cremation-startups-direct-to-consumer.html> (citing professor Victoria Haneman and noting that “many of the state-by-state regulations are outdated and completely unnecessary.”).

24. See *infra* Part IV.

25. See *infra* Part IV.

26. See *infra* Part IV.

27. See *infra* Conclusion.

28. Keri N. Althoff et al., *Antibodies to Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) in All of Us Research Program Participants*, 2 January to 18 March 2020, CLINICAL INFECTIOUS DISEASES, June 15, 2021, at 2.

Pandemics have plagued the human race since at least the Middle Ages.<sup>29</sup> Some have been more severe than others.<sup>30</sup> In December 2019, The World Health Organization (WHO) announced the emergence of a novel coronavirus SARS-CoV-2 (Severe Acute Respiratory Syndrome-coronavirus) in Wuhan, China.<sup>31</sup> SARS-CoV-2 is the cause of the 2019 Corona virus (COVID-19) disease.<sup>32</sup> On March 11, 2020, WHO declared COVID-19 a pandemic.<sup>33</sup> Since its initial origin in China, the disease has spread rapidly all over the world, and the number of cases increased exponentially.<sup>34</sup> The first COVID-19 case in the U.S. was reported on January 19, 2020, in Snohomish County, Washington.<sup>35</sup> However, information later emerged that COVID-19 may have been present in Illinois, Massachusetts, Wisconsin, Pennsylvania, and Mississippi, weeks before the reported case in Washington.<sup>36</sup>

The spectrum of COVID-19 disease ranges from asymptomatic to critical, including mortality.<sup>37</sup> According to the CDC, “[o]lder adults are more likely to get severely ill from COVID-19. More than 81% of COVID-19 deaths occur in people over age 65 . . . and more than 95% of COVID-19 deaths occur in people older than 45.”<sup>38</sup> Additionally, “[a]s of May 30, 2020, among COVID-19 cases, the most common underlying health conditions were cardiovascular disease (32%), diabetes (30%), and chronic lung disease (18%). Hospitalizations were six times higher and deaths 12 times higher among those with reported underlying conditions compared with those with none reported.”<sup>39</sup>

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29. Phillippe Buchy et al., *COVID-19 Pandemic: Lessons Learned from More than a Century of Pandemics and Current Vaccine Development for Pandemic Control*, 112 INT’L J. INFECTIOUS DISEASE 300, 300–01 (2021).

30. Some of these pandemics include the bubonic plague (1347), smallpox (early 1500s), influenza (1833), cholera (1881), Spanish influenza (1918), Asian influenza (1957), hepatitis C (1960s), Hong Kong influenza (1981), Russian influenza (1971), human immunodeficiency virus (HIV) (1981), severe acute respiratory syndrome coronavirus (SARS-CoV-1)(2003), swine influenza (2009), Middle East respiratory syndrome coronavirus (MERS-CoV) (2012), West Africa Ebola virus (2013), Chikungunya virus (2013), Zika virus (2015), and coronavirus disease (SARS-CoV-2) (2019). *Id.*

31. Malihe Mohamadian et al., *COVID-19: Virology, Biology and Novel Laboratory Diagnosis*, 23 J. GENE MED. 1 (2021).

32. See Joydeb Majumder & Tamar Minko, *Recent Developments on Therapeutic and Diagnostic Approaches for COVID-19*, 23 AAPS J. 1, 2 (2021) (noting that “Coronavirus disease 2019 (COVID-19) is defined as a disease caused by the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).”).

33. Domenico Cucinotta & Maurizio Vanelli, *WHO Declares COVID-19 a Pandemic*, 91 ACTA BIOMEDICA 157 (2020).

34. Sudipta Dhar Chowdhury & Anu Mary Oommen, *Epidemiology of Covid-19*, 11 J. DIGESTIVE ENDOSCOPY 3, 3–7 (2020).

35. Michelle L. Holshue et al., *First Case of 2019 Novel Coronavirus in the United States*, 382 N. ENG. J. MED., 929, 929–30 (2020).

36. Althoff et. al., *supra* note 17, at 1.

37. *See supra* note 38.

38. *People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (updated Oct. 19, 2022).

39. Erin K. Stokes et al., *Coronavirus Disease 2019 Case Surveillance — United States, January 22–May 30, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 759 (2020).

While there is no treatment for COVID-19, some preventive measures have been shown to reduce COVID-19 morbidity and mortality.<sup>40</sup> Early diagnosis and isolation and quarantine of suspected patients play a vital role in controlling the disease.<sup>41</sup> For those exposed to COVID-19, enhanced use of personal protective equipment (PPE) and isolation in a negative pressure room are the gold standard for management.<sup>42</sup> Additionally, the CDC recommends: vaccines, wearing masks, social distancing, avoiding crowds, frequent handwashing, cleaning surfaces, and daily health monitoring.<sup>43</sup> Vaccines, which came to market in January 2021, are the most efficient preventive measure.<sup>44</sup> However, vaccine demand has significantly reduced in the U.S., making vaccines less effective than if demand and vaccination rates remained high.<sup>45</sup> Of these preventative measures, quarantine and isolation have been the most controversial.<sup>46</sup>

### B. *Epidemiology: Medical Isolation and Quarantine*

According to the Centers for Disease Control and Prevention (CDC), isolation and quarantine help protect the public by preventing exposure to people who have or may have a contagious disease.<sup>47</sup> Specifically, isolation separates sick people with a contagious disease from people who are not sick, while quarantine separates and restricts the movement of people who were exposed to a contagious disease to see if they become sick.<sup>48</sup>

The “use of quarantine or isolation powers may create sensitive issues related to civil liberties,” such as, “impinging . . . freedom of movement, right of

40. *How to Protect Yourself and Others*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (updated Oct. 19, 2022).

41. *Id.*

42. Javier Cubillos et al., *A multipurpose portable negative air flow isolation chamber for aerosol-generating procedures during the COVID-19 pandemic*, 125 BRITISH J. ANAESTHESIA e179, e180 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7183948/pdf/main.pdf>.

43. *Id.*

44. Maria Deloria Knoll & Chizoba Wonodi, *Oxford–AstraZeneca COVID-19 Vaccine Efficacy*, 397 LANCET 72, 72–74 (2021) (reporting that since 2020, 58 vaccines against severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) have been developed and in clinical trials, with some vaccines reportedly having more than 90% efficacy against COVID-19 in clinical trials).

45. Jennifer McDermott, *As Vaccine Demand Falls, States Are Left With Huge Stockpile*, U.S. NEWS, Mar. 3, 2022, <https://www.usnews.com/news/health-news/articles/2022-03-03/as-vaccine-demand-falls-states-are-left-with-huge-stockpile> (noting that “[a]s demand for COVID-19 vaccines collapses in many areas of the U.S., states are scrambling to use stockpiles of doses before they expire and have to be added to the millions that have already gone to waste”).

46. See e.g., *Roman Catholic Diocese of Brooklyn, N.Y., v. Cuomo*, 141 S. Ct. 63 (2020); *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021).

47. *Quarantine and Isolation*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/quarantine/index.html> (reviewed Sept. 29, 2017). See also Troy Day et al., *When Is Quarantine a Useful Control Strategy for Emerging Infectious Diseases?*, 163 AM. J. EPIDEMIOLOGY 479 (2006) (“[I]solation and treatment of symptomatic individuals, coupled with the quarantining of individuals that have a high risk of having been infected, constitute two commonly used epidemic control measures.”).

48. *Id.*

free association, freedom of religion, and . . . freedom of assembly.”<sup>49</sup> More germane to this discussion, quarantine and isolation can affect the transportation and burial of human remains in three ways.<sup>50</sup> First, it affects how bodies are transported both locally and internationally.<sup>51</sup> For the former, families transporting bodies out of state must now check the myriad rules and regulations of their state of destination, particularly if their loved one dies of a communicable disease.<sup>52</sup> For the latter, when human remains are repatriated from one country to another, several restrictions are imposed, particularly if there is a public health emergency that requires isolation and quarantine.<sup>53</sup> For example, in the U.S., “CDC requirements for importing human remains depend on the purpose of importation, whether the body has been embalmed or cremated, and if the person died from a quarantinable communicable disease.”<sup>54</sup> If the cause of death is a quarantinable disease, human remains imported into the U.S. must be accompanied by a permit issued by the CDC.<sup>55</sup> If the cause of death is not a quarantinable disease, the remains can be imported if they are embalmed or cremated, and shipped in a leakproof container.<sup>56</sup>

Second, transportation of human remains may not be possible in times of quarantine and isolation.<sup>57</sup> Many countries restricted or shut down air travel during the emergence of COVID-19.<sup>58</sup> On March 11, 2020, former President Trump suspended all travel from Europe to the U.S. for thirty days.<sup>59</sup> On January 10, 2022, China ordered the cancellation of more than sixty scheduled flights from the U.S., after numerous passengers arriving in China tested positive for COVID-19.<sup>60</sup> In retaliation, the Biden Administration suspended flights from

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49. Christopher Ogolla, *Non-Criminal Habeas Corpus for Quarantine and Isolation Detainees: Serving the Private Right or Violating Public Policy?*, 14 DEPAUL J. HEALTH CARE L. 135, 136 (2011).

50. See *infra* Parts II and III.

51. See *infra* Sections II.A. and III.A.3.

52. See *infra* Section II.A.

53. *Id.*

54. *Importation of Human Remains into the United States for Burial, Entombment, or Cremation*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/importation/human-remains.html> (Reviewed Nov. 10, 2021).

55. 42 C.F.R. § 71.55 (2022).

56. *Id.*

57. See *supra* text accompanying notes 73–74.

58. Scott Neuman & Vanessa Romo, *EU Locks Down Borders As France, Germany Tighten Restrictions To Control Coronavirus*, NPR (Mar. 17, 2020), <https://www.npr.org/sections/goatsandsoda/2020/03/17/816994811/eu-to-shut-borders-as-france-germany-tighten-restrictions-to-control-coronavirus>.

59. Bobby Allyn & Vanessa Romo, *Trump Suspends All Travel From Europe For 30 Days To Combat COVID-19*, NPR (Mar. 11, 2020), <https://www.npr.org/2020/03/11/814597993/trump-set-to-deliver-address-as-coronavirus-deemed-a-pandemic>.

60. David Shepardson & Stella Qiu, *China Orders Suspension of Some U.S. Flights After COVID-19 Cases*, U.S. NEWS (Jan. 10, 2022), <https://www.usnews.com/news/world/articles/2022-01-10/china-orders-suspension-of-some-u-s-flights-after-covid-19-cases>.



China to the U.S.<sup>61</sup> Locally, some Governors instituted travel restrictions for those traveling from “hot spot” areas.<sup>62</sup>

Third, the intersection of the pandemic, death rituals, and traditions cannot be gainsaid. The pandemic has changed the rituals related to death for many religions and cultures.<sup>63</sup> Most of these death rituals and traditions require close interactions between family members, the deceased, and other mourners.<sup>64</sup> Therefore, quarantine and isolation measures are incompatible with these practices. For example, the Jewish ritual of sitting shiva is designed to bring comfort to the bereaved.<sup>65</sup> During COVID-19, it was not possible to experience a normal shiva period.<sup>66</sup>

To mitigate the impacts of disease control measures on funerals, the National Indian Health Board offered points to consider when planning burial or funeral ceremonies for tribal communities.<sup>67</sup> These considerations include limiting the number of people at a gathering to ten or fewer, cleaning and disinfecting the locations where these activities are held, and advising those who are sick to remain at home and not engage in burial or funeral practices.<sup>68</sup>

Besides epidemiological isolation and quarantine, another form of isolation, social isolation, has been precipitated by, or at least exacerbated by the pandemic.

### C. Social Isolation, Loneliness and Covid-19 Mortality

Social isolation refers to having few relationships or infrequent social contacts; objectively being alone.<sup>69</sup> Loneliness is defined as a temporary and involuntary lack of contact with others.<sup>70</sup> Because of social distancing, stay at home orders and restrictions on social activities, COVID-19 has furthered an

61. Niraj Chokshi, *The Biden Administration Suspends 44 Flights in Tit-for-Tat with China over Passengers with Coronavirus*, N.Y. TIMES (Jan. 21, 2021), <https://www.nytimes.com/2022/01/21/business/biden-china-airlines-coronavirus.html>.

62. *Travel restrictions issued by states in response to the coronavirus (COVID-19) pandemic*, 2020-2022, BALLOTPEDIA, [https://ballotpedia.org/Travel\\_restrictions\\_issued\\_by\\_states\\_in\\_response\\_to\\_the\\_coronavirus\\_\(COVID-19\)\\_pandemic\\_2020-2022#Active\\_restrictions\\_and\\_recent\\_news](https://ballotpedia.org/Travel_restrictions_issued_by_states_in_response_to_the_coronavirus_(COVID-19)_pandemic_2020-2022#Active_restrictions_and_recent_news) (last visited Aug. 10, 2022).

63. Lauren Frayer et al., *Coronavirus Is Changing The Rituals Of Death For Many Religions*, NPR (Apr. 7, 2020), <https://www.npr.org/sections/goatsandsoda/2020/04/07/828317535/coronavirus-is-changing-the-rituals-of-death-for-many-religions>.

64. Frayer, *supra* note 42.

65. Rivkah Lambert Adler, *How has COVID changed the practice of sitting shiva?*, JERUSALEM POST (Apr. 1, 2021, 10:39), <https://www.jpost.com/judaism/how-has-covid-changed-the-practice-of-sitting-shiva-663785>.

66. *Id.*

67. *Considerations for Tribal Funeral and Burial Ceremonies During the Time of COVID-19*, NATIONAL INDIAN HEALTH BOARD (2021), <https://www.nihb.org/covid-19/wp-content/uploads/2021/12/Burial-and-Funeral-Considerations.pdf>.

68. *Id.*

69. Juliane Holt-Lunstad, *A Pandemic of Social Isolation?*, 20 WORLD PSYCHIATRY 55, 55 (2021).

70. Mario Kyriazis et al., *Covid-19 Isolation and Risk of Death in Cyprus Elderly People*, 8 FRONTIERS MED. 1, 2, (2021).

epidemic of loneliness in the U.S.<sup>71</sup> “For 28 percent of Americans who live alone, this has meant little to no human contact for months.”<sup>72</sup> Many have died alone because of the pandemic.<sup>73</sup> Additionally, most hospitals and healthcare facilities instituted restrictive visitation policies that completely banned anyone from either visiting or having contact with a relative undergoing treatment for COVID-19.<sup>74</sup> As a result, many Covid-19 patients died alone or in isolation.<sup>75</sup>

While it is unknown exactly how many people died from the indirect effects of COVID-19 related social isolation or loneliness, researchers have provided some estimates.<sup>76</sup> Both social isolation and loneliness are associated with increased mortality,<sup>77</sup> or risk factors for death. According to the CDC, social isolation significantly increases a person’s risk of premature death from all causes; a risk that may rival those of smoking, obesity, and physical inactivity. Social isolation also increases a person’s risk of dementia by 50%, heart disease by 29%, and stroke by 32%.<sup>78</sup> Researchers also found that “a prolonged period of physical isolation can lead to loss of connection and perceived social isolation (“loneliness”) which is associated with suicidal behavior and psychotic disorders among persons with severe mental illness and is linked to depression in those without a preexisting psychiatric disorder.”<sup>79</sup>

71. Jaime Ducharme, *Covid 19 is Making America’s Loneliness Epidemic Even Worse*, TIME (May 8, 2020), <https://time.com/5833681/loneliness-covid-19/>.

72. Juliane Holt-Lunstad, *The Double Pandemic of Social Isolation And COVID-19: Cross-Sector Policy Must Address Both*, HEALTH AFF. BLOG (June 22, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200609.53823>;

See also Robin Wright, *How Loneliness From Corona Virus Isolation Takes Its Toll*, NEW YORKER (March 23, 2020), (noting that “In 2019, twenty-eight per cent of households were single-person—up from twenty-three per cent in 1980.”).

73. Thushara Galbadage et al., *Biopsychosocial and Spiritual Implications of Patients With COVID-19 Dying in Isolation*, 11 FRONTIERS PSYCHOL. 1, 2 (2020) (noting that “Many patients with COVID-19 that died in hospitals or healthcare facilities, especially in the state of New York, died in isolation, among strangers, unable to be comforted by family and loved ones.”).

74. D’Couto, *supra* note 8. See also CTRS. FOR MEDICARE & MEDICAID SERVS., QSO-20-14-NH, GUIDANCE FOR INFECTION CONTROL AND PREVENTION OF CORONAVIRUS DISEASE 2019 (COVID-19) IN NURSING HOMES (REVISED) (2020) (noting that “Facilities should restrict visitation of all visitors and non-essential health care personnel, except for certain compassionate care situations, such as an end-of-life situation... If a state implements actions that exceed CMS requirements, such as a ban on all visitation through a governor’s executive order, a facility would not be out of compliance with CMS’ requirements...”).

75. See *supra* note 49.

76. See Suzy Khimm, *The Hidden Covid-19 Health Crisis: Elderly People Are Dying from Isolation*, NBC NEWS (Oct. 27, 2020, 11:45 AM), <https://www.nbcnews.com/news/us-news/hidden-covid-19-health-crisis-elderly-people-are-dying-isolation-n1244853> (noting that “[w]hile there is no comprehensive tally of elderly people dying from causes linked to social isolation and confinement, evidence is mounting that restrictions related to Covid-19 are taking a toll on their health, according to a review of recent research and interviews with medical experts and dozens of families across the country”).

77. Andrew Steptoe et al., *Social Isolation, Loneliness, and All-Cause Mortality in Older Men and Women*, 110 PROC. NAT’L ACADE. SCI. U.S. 5797, 5797 (2013).

78. *Loneliness and Social Isolation Linked to Serious Health Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/aging/publications/features/lonely-older-adults.html> (last visited Aug. 10, 2022).

79. Karl Krupp et al., *Should Qualitative RT-PCR Be Used to Determine Release from Isolation of COVID-19 Patients?* 81 J. INFECTION 459, 460 (2020).

Various studies have linked these risk factors to COVID-19.<sup>80</sup> For example, in 2018, there were 5,768 deaths (all causes) in Cyprus.<sup>81</sup> Of these, 3,829 were people aged 75 years and older.<sup>82</sup> COVID-19 likely exacerbated<sup>83</sup> some of these deaths due to other effects of the lockdowns such as delayed diagnoses and lack of appropriate medical consults for conditions other than COVID-19.<sup>84</sup> In Sweden, researchers found that living alone was associated with high COVID-19 mortality rates.<sup>85</sup> In another study, researchers in India reviewed sixty-nine cases of suicide from newspaper reports to determine their correlation to COVID-19.<sup>86</sup> The most common causative factor reported was fear of COVID-19 infection, followed by financial crisis, loneliness, social boycott and pressure to be quarantined.<sup>87</sup> At least six of the cases were directly attributed to loneliness and isolation.<sup>88</sup>

A study conducted in Latin American Countries analyzed the relationship between social isolation and COVID-19 death rates, using government stringency index (GSI); an index representing the strictness of government policies.<sup>89</sup> The researchers found that the countries with the strictest social distancing and isolation measures had the fewest number of people die per country.<sup>90</sup> At first, this study would seem to support the proposition that greater social isolation is beneficial during a pandemic because it reduces mortality.<sup>91</sup> However, the researchers acknowledged that “GSI alone may not entirely represent the reality regarding social isolation and the death rate from COVID-19, because this condition depends on other factors, such as the infrastructure of the countries’ public hospitals, government management, and the population’s compliance with the rules...”<sup>92</sup>

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80. See *infra* text accompanying notes 92-100.

81. Kyriazis et al., *supra* note 46, at 2.

82. Kyriazis et al., *supra* note 46, at 2.

83. See, e.g., Juliane Holt-Lunstad, *The Double Pandemic of Social Isolation and Covid-19: Cross Sector Policy Must Address Both*, HEALTH AFF.: FOREFRONT (June 22, 2020), <https://www.healthaffairs.org/doi/10.1377/forefront.20200609.53823/full/> (noting that “[w]hile social isolation and loneliness were prevalent in the population prior to COVID-19, efforts to reduce the virus’ spread via stay-at-home orders, quarantine, and social distancing recommendations have exacerbated an already serious problem”).

84. Kyriazis et al., *supra* note 46, at 2.

85. Maria Brandén et al., *Residential Context and COVID-19 Mortality Among Adults Aged 70 Years and Older in Stockholm: A Population-Based, Observational Study Using Individual-Level Data*, 1 LANCET e80, e83 (2020).

86. Deena Dimple Dsouza et al., *Aggregated COVID-19 Suicide Incidences in India: Fear of COVID-19 Infection is the Prominent Causative Factor*, 290 PSYCHIATRY RSCH. 17, 18 (2020).

87. *Id.*

88. *Id.*

89. Rafael André da Silva et al., *Statistical Modeling of Deaths from COVID-19 Influenced by Social Isolation in Latin American Countries*, 106 AM. J. TROPICAL MED. HYGIENE 1486, 1487, 1489 (2022).

90. *Id.*

91. *Id.* at 1487.

92. *Id.* at 1488.

In the U.S., researchers analyzed county-level mortality data from the National Center for Health Statistics to study direct COVID-19 and all-cause mortality from January 1, 2020, to December 31, 2020 and reported before March 12, 2021.<sup>93</sup> They found that direct COVID-19 death counts in the U.S. in 2020 substantially underestimated total excess mortality attributable to COVID-19. Excess mortality includes deaths assigned to COVID-19 in official statistics as well as deaths that were not assigned to COVID-19, but are directly or indirectly attributable to COVID-19.<sup>94</sup> The researchers explained that “C[OVID]-19 death counts do not take into account the indirect consequences of the C[OVID]-19 pandemic.”<sup>95</sup> “Indirect effects may include increases in mortality resulting from reductions in access to and use of healthcare services and psychosocial consequences of stay-at-home orders,”<sup>96</sup> this suggests an association between social isolation and COVID-19 deaths. Finally, according to Minnesota state death records from June 2020 to September 2020, social isolation/ failure to thrive related to COVID-19 restrictions was listed as a contributing cause of death for at least ten Minnesotans — almost all long-term care residents.<sup>97</sup>

In sum, both medical isolation (quarantine) and social isolation are correlated with mortality. Both made death and mourning difficult for many people during the pandemic. Despite the actions taken to stanch the spread of the virus, including legal ones like mask mandates, social distancing, and travel restrictions, the law has little to say on how one dies, or how one should deal with grief and the deceased.<sup>98</sup> However, the law does speak on transportation and burial of the dead.<sup>99</sup> On a national level, the federal government regulates importation of human remains into the United States for burial, entombment, or cremation.<sup>100</sup>

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93. Andrew Stokes et al., *COVID-19 and Excess Mortality in the United States: A County-Level Analysis*, PLOS MED. 1, 3 (2021).

94. *Id.*

95. *Id.*

96. *Id.*

97. Suzy Khimm, *The Hidden Covid-19 Health Crisis: Elderly People Are Dying from Isolation*, NBC NEWS (Oct. 27, 2020), <https://www.nbcnews.com/news/us-news/hidden-covid-19-health-crisis-elderly-people-are-dying-isolation-n1244853>.

98. *See infra* Section II.

99. *See infra* Section II.

100. *Importation of Human Remains into the United States for Burial, Entombment, or Cremation*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Nov. 10, 2021), <https://www.cdc.gov/importation/human-remains.html>.

## II. TRANSPORTATION AND BURIAL

### A. Federal Laws: Transportation

"If a person dies in a country other than his own, there are no global rules or guidance that dictates the manner in which his [or her] remains could be transported back to his [or her] country, with dignity and care."<sup>101</sup> Generally, each country has its own requirements for transporting human remains.<sup>102</sup> Federal law, which governs importation in the U.S., defines human remains as "a deceased human body or any portion of a deceased human body," excluding bones, hair, teeth, nails.<sup>103</sup> Cremated remains and "cells, tissues, cellular or tissue-based products intended for implantation, transplantation, or infusion . . . into a human recipient" are also excluded from the definition.<sup>104</sup>

In the U.S., importation and transportation of human remains is governed by Sections 361 and 362 of the Public Health Service Act.<sup>105</sup> Section 361 provides in pertinent part: "The Surgeon General, with the approval of the Secretary is authorized to make and enforce such regulations as . . . necessary to prevent the introduction, transmission, or spread of *communicable diseases* (emphasis added) from foreign countries into the States or possessions, or from one State or possession into any other State or possession."<sup>106</sup>

In turn, the CDC regulations define "communicable disease" as "an illness due to a specific infectious agent or its toxic products which arises through transmission of that agent . . . from an infected person or animal or a reservoir."<sup>107</sup> A quarantinable disease is defined as any of the communicable diseases listed in an Executive Order, as provided under section 361 of the Public Health Service Act.<sup>108</sup>

Under 42 C.F.R. §§71.54 and 71.55, importation or transportation of the remains of a person who dies from a quarantinable communicable disease, must meet the following requirements:

[b]e consigned directly to a licensed mortuary, cemetery, or crematory for immediate and final preparation prior to burial, entombment, or cremation; and unless embalmed, be accompanied by a death certificate or, if the death certificate is

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101. Ruwantissa Abeyratne, *Acceptance of Human Remains for Carriage by Air—Some Concerns in Security and Safety*, 5 J. TRANSP. SEC. 305, 305–06.

102. Christopher Ogolla, *Death Be Not Strange, The Montreal Convention's Mislabeling of Human Remains as Cargo and Its Near Unbreakable Liability Limits*, 124 DICK. L. REV. 53, 64 (2019).

103. 42 C.F.R. § 71.50(b) (2022).

104. *Id.*

105. 42 U.S.C. §§ 264–65.

106. *Id.* at § 264.

107. 42 C.F.R. §§ 70.1, 71.1.

108. *Id.* at § 70.1.

incomplete or missing, an importer certification statement confirming that the human remains are not known to contain or stating why the human remains are not reasonably suspected of containing an infectious biological agent.<sup>109</sup>

Additionally, human remains imported for medical examination or autopsy must “be consigned directly to an entity authorized to perform such functions . . . be accompanied by a death certificate or . . . an importer certification statement confirming that the human remains are not known [or not reasonably suspected] to contain . . . an infectious biological agent.”<sup>110</sup>

According to the Centers for Disease Control and Prevention (CDC), “[t]here are no requirements for importation of human remains consisting entirely of [c]lean, dry bones or bone fragments; human hair; teeth; fingernails or toenails; or [a] deceased human body and portions thereof that have already been fully cremated before importation.”<sup>111</sup>

### *B. Federal Laws: Burial*

Traditionally, regulation of burial practices is not within the purview of the federal government. However, there are a few exceptions. The first is the Federal Trade Commission Funeral Rule, a consumer protection rule enacted in 1984 and amended in 1994.<sup>112</sup> The Rule requires a funeral provider to give consumers accurate, itemized price information and various other disclosures about funeral goods and services.<sup>113</sup> The Rule also prohibits the provider from: misrepresenting legal, crematory, and cemetery requirements;<sup>114</sup> requiring the purchase of a casket for direct cremation;<sup>115</sup> embalming for a fee without permission;<sup>116</sup> requiring consumers to buy certain funeral goods or services as a condition for furnishing other funeral goods or services; and engaging in other deceptive or unfair practices.<sup>117</sup> The FTC has filed several lawsuits against funeral homes which failed to provide consumers with important pricing and other disclosures when making funeral arrangements.<sup>118</sup>

109. 42 C.F.R. § 71.55.

110. *Id.*

111. *Supra* note 65.

112. Funeral Industry Practices Trade Regulation Rule, 59 Fed. Reg. 1592, 611 (Jan. 11, 1994) (to be codified at 16 C.F.R. pt. 453).

113. 16 C.F.R. § 453.2 (2022).

114. *Id.* § 453.3.

115. *Id.* § 453.4.

116. *Id.* § 453.5.

117. *Complying With the Funeral Rule*, FED. TRADE COMM’N, 1, [https://www.ftc.gov/system/files/documents/plain-language/565a-complying-with-funeral-rule\\_2020\\_march\\_508.pdf](https://www.ftc.gov/system/files/documents/plain-language/565a-complying-with-funeral-rule_2020_march_508.pdf) (last visited Aug. 10, 2022).

118. *See, e.g.*, Complaint at 2, Fed. Trade Comm’n v. Ross-Clayton Funeral Home, Inc., No. 2:13-cv-00851-MHT-CSC (M.D. Ala. Nov. 21, 2013); Complaint at 3, United States v. Harrison Funeral

Second, federal law provides for the care, removal, and burial of indigents,<sup>119</sup> and regulates the burial and disposal of the remains of some federal employees who die in the line of duty<sup>120</sup> and persons in federal custody.<sup>121</sup> For example, 10 U.S.C.A. § 1483 authorizes the Secretary of Defense to provide for the care and disposition of prisoners of war by providing that,

The Secretary... may provide for the care and disposition of the remains of prisoners of war and interned enemy aliens who die while in his custody and, incident thereto, pay the necessary expenses of: (1) notification to the next of kin or other appropriate person; (2) preparation of the remains for burial, including cremation; (3) furnishing of clothing; (4) furnishing of a casket or urn, or both, with outside box; (5) transportation of the remains to the cemetery or other place selected by the Secretary; and (6) interment of the remains.<sup>122</sup>

Third, other federal rules cover the medical and burial expenses of federal employees located in isolated situations,<sup>123</sup> expenses for transporting remains of officers and employees who die outside of the U.S.,<sup>124</sup> and the expenses of certain autopsies or other postmortem operations.<sup>125</sup> Finally, the Native American Graves Protection and Repatriation Act<sup>126</sup> ("NAGPRA") of 1990 requires federal agencies and institutions that receive federal funds to repatriate or transfer Native American human remains and other cultural items to the appropriate Native

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Home, Inc., No. 7:12-cv-03733-ER (S.D.N.Y. Oct. 9, 2012); Complaint at 2, *United States v. Carter*, No. 1:11-cv-04801(N.D. Ill. July 15, 2011).

119. 54 U.S.C.A. § 104903 (West 2022) ("The Secretary may provide... for the temporary care and removal from a System unit of indigents, and in case of death to provide for their burial in System units not under local jurisdiction for these purposes. This section does not authorize transportation of indigents or deceased for a distance of more than 50 miles from the System unit.").

120. 42 U.S.C.A. § 238(c) (West 2022) (providing that "Appropriations available for traveling expenses of the Service shall be available for meeting the cost of preparation for burial and of transportation to the place of burial of remains of commissioned officers, and of personnel specified in regulations, who die in line of duty.").

121. 10 U.S.C.A. § 1483 (West 2022).

122. 10 U.S.C.A. § 1483 (West 2022).

123. 54 U.S.C.A. § 101303(b) (West 2022) (providing in pertinent part that "The Secretary may provide... medical attention for employees of the Service located at isolated situations, including— (1) moving the employees to hospitals or other places where medical assistance is available; and (2) in case of death, to remove the bodies of deceased employees to the nearest place where they can be prepared for shipment or for burial.").

124. 8 U.S.C.A. § 1353 (West 2022).

125. See 42 C.F.R. § 35.16 (providing in pertinent part that "Autopsies, or other post-mortem operations, including removal of tissue for transplanting, may be performed on the body of a deceased patient only by direction of the officer in charge and only if consented to in writing by a person authorized under the law of the State in which the station or hospital is located to permit an autopsy or such other post-mortem operation under the circumstances of the particular death involved.").

126. 25 U.S.C. § 3001-13.

tribes.<sup>127</sup> The regulations pertain to the identification and appropriate disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony.<sup>128</sup>

Notably, none of these federal rules or regulations focus on, or even tangentially address, deaths from natural disasters such as pandemics. That may be because the magnitude of the COVID-19 pandemic was unprecedented and we were unprepared.<sup>129</sup> However, this rationale is inexcusable. History has taught us that a failure to prepare for a disaster leads to a nation's failure to protect people during an emergency, be it public health or otherwise.<sup>130</sup> While the federal government took an active role in preventing the spread of the pandemic through free vaccine distribution, once death occurred, state law governed the disposal of the corpses,<sup>131</sup> to which this article now turns.

### III. STATE LAWS AND REGULATIONS ON TRANSPORTATION AND BURIAL OF HUMAN REMAINS

The COVID-19 pandemic overwhelmed funeral establishments. During the height of the pandemic, many hospital morgues, funeral homes, and mortuaries ran out of space and started storing dead bodies in mobile trailers and warehouses.<sup>132</sup> One funeral home in New York City, unable to handle the massive number of bodies, resorted to storing them on ice in rented

127. *Id.* § 3005(a).

128. 43 C.F.R. § 10.1 (2022).

129. Excluding the Spanish Flu of 1918-1919 which killed about 50 million worldwide with about 675,000 occurring in the United States. CTRS. FOR DISEASE CONTROL AND PREVENTION, 1918 PANDEMIC (H1N1 VIRUS), (2019), <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html>.

130. Chris Edwards, *Hurricane Katrina: Remembering the Federal Failures*, CATO INST. (Aug. 27, 2015, 2:56 PM), <https://www.cato.org/blog/hurricane-katrina-remembering-federal-failures> (“The government was unprepared for Katrina even though it was widely known that such a hurricane was probable, and weather forecasters had accurately predicted the advance of Katrina before landfall. A year prior to Katrina, government agencies had performed a simulation exercise—‘Hurricane Pam’—for a hurricane of similar strength hitting New Orleans, but governments ‘failed to learn important lessons’ from the exercise.”).

131. The exception being Federal Emergency Management Agency (FEMA) Covid-19 funeral assistance program. See Press Release, *FEMA Tops \$2 Billion of COVID-19 Funeral Assistance, Announces New Campaign to Increase Program Awareness*, FEMA (Mar. 15, 2022), <https://www.fema.gov/press-release/20220315/fema-tops-2-billion-covid-19-funeral-assistance-announces-new-campaign> (announcing FEMA’s campaign to reach underserved communities most affected by funeral financial burdens, low registration in assistance programs, and high COVID-19 death rates in California, New York, Pennsylvania, and Texas).

132. See, e.g., Alan Feuer & William K. Rashbaum, *‘We Ran Out of Space’: Bodies Pile Up as N.Y. Struggles to Bury Its Dead*, NY TIMES (Nov. 18, 2020), <https://www.nytimes.com/2020/04/30/nyregion/coronavirus-nyc-funeral-home-morgue-bodies.html> (describing use of trailers and tow trucks as “makeshift mobile morgues” to store bodies in New York City during pandemic); Christine Willmsen & Beth Healy, *Hospital Morgues Temporarily Store Deceased in Trailers*, WBUR NEWS (Apr. 17, 2020), <https://www.wbur.org/news/2020/04/17/hospital-morgue-trailers> (discussing hospitals in Massachusetts); Derek Hawkins, *Idaho Morgues are Running out of Space for Bodies as Covid-19 Deaths Mount*, WASH. POST (Sept. 25, 2022, 1:27pm), <https://www.washingtonpost.com/health/2021/09/25/idaho-funeral-homes-coronavirus/> (reporting Idaho funeral home use of refrigerated trailers to account for a lack of capacity for corpses).



unrefrigerated U-Haul trucks, resulting in an overwhelming stench in the neighborhood.<sup>133</sup>

Because states were unprepared for such high rates of mortality, there were no official rules or guidelines on what to do with all the bodies. Additionally, transporting dead bodies between states is not uniform and regulations vary greatly.<sup>134</sup> For example, some states require that the body be embalmed or refrigerated while others do not.<sup>135</sup> Others specifically regulate transportation and burial of human remains when the cause of death is a contagious disease.<sup>136</sup> Corpses can be moved in a number of ways including, but not limited to, private vehicles, planes, trains, boats, or transportation companies which specialize in dead body transportation.<sup>137</sup> However, with the pandemic, most of these modes of transport were restricted. The following is a survey of the state laws and regulations on transportation and burial of human remains, with regards to whether: (a) a burial/transit permit is required; (b) embalming is required; (c) communicable disease requirements or procedures are specified in the state's laws.<sup>138</sup> The results are summarized in Appendix 1.<sup>139</sup>

## A. Burial

### 1. Permit Required

In many states, a permit is required to dispose of human remains. States refer to this permit as a disposition permit or burial-transit permit.<sup>140</sup> Thirty-eight states require a burial permit for the disposition of a corpse, regardless of whether death occurs in-state or out-of-state.<sup>141</sup> Among these states, there are notable variations.

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133. *NYC funeral home stored dozens of bodies in U-Haul trucks, producing "overwhelming" stench*, CBS NEWS (Apr. 30, 2020, 12:23 PM), <https://www.cbsnews.com/news/bodies-u-haul-trucks-new-york-funeral-home-covid-19/>.

134. *See infra* Section III.A.

135. *See infra* Section III.B.

136. *See infra* Section III.C.

137. *See generally*, *Transporting mortal remains from one state to another, or to another country – What you need to know*, US FUNERALS ONLINE, <https://www.us-funerals.com/when-death-occurs-away-from-home/#.Y1KKyHbMI2w> (Last visited 10/21/22).

138. *See infra* Sections III.A., III.B., III.C.

139. *See infra* App'x I.

140. *See e.g.*, N.D. CENT. CODE ANN. § 23-02.1-21 (West 2021) (referencing a disposition permit); ALASKA. ADMIN. CODE tit. 7, § 05.460 (2022) (requiring a burial-transit permit).

141. These states are Alabama (ALA. CODE § 22-9A-16 (2021)); Alaska (ALASKA. ADMIN. CODE tit. 7, § 05.460 (2022)); Arizona (ARIZ. REV. STAT. ANN. § 36-326(A) (2022)); Arkansas (ARK. CODE ANN. § 20-18-604 (West 2022)); California ((CAL. HEALTH & SAFETY CODE § 103050 (West 2022)); Colorado (COLO. REV. STAT. ANN. § 25-2-111 (West 2022)); Connecticut (CONN. GEN. STAT. ANN. §§ 7-62b(a), 7-65 (West 2022)); Delaware (DEL. CODE ANN. Tit. 16, § 3151 (West 2022)); Florida (FLA. STAT. ANN. § 382.006 (West 2022)); Hawaii (HAW. CODE R. § 11-22-5(b)(1) (LexisNexis 2022)); Illinois (ILL. ADMIN. CODE Tit. 77, § 500.50(d) (2022)); Indiana (IND. CODE ANN. § 16-37-3-10 (West 2022)); Iowa (IOWA CODE ANN. § 144.32 (West 2022)); Kentucky (KY. REV. STAT. ANN. § 213.076 (West 2022)); Louisiana (LA. STAT. ANN. § 40:52 (2022)); Maine (ME. REV. STAT. ANN. Tit. 22, § 2843 (West 2022)); Maryland (MD. CODE ANN., HEALTH-GEN. § 4-215 (West 2022));

First, some states that require a burial permit offer a number of exceptions. For example, in Arizona, the law allows a funeral establishment or responsible person to move human remains from a place other than a hospital, nursing care institution or hospice inpatient facility where death occurred without obtaining a disposition-transit permit if the funeral establishment or responsible person does not remove the human remains from the state and provides notice to the local registrar or deputy local registrar in the registration district where death occurred, within seventy-two hours after moving the human remains.<sup>142</sup> Additionally, “[a] hospital or abortion clinic is not required to obtain a disposition-transit permit if a fetus is expelled or extracted at the hospital or abortion clinic,” where certain conditions are met.<sup>143</sup> In Illinois, “[n]o permit for disposition of dead human body is required for the disposition of ashes from cremation, unless the ashes are to be buried in a cemetery.”<sup>144</sup> Additionally, a permit is not required for “disposal of a part of a living human body, such as an amputated arm or leg, except when the part is to be interred in a cemetery.”<sup>145</sup>

Second, some states impose a time limit for obtaining a burial permit.<sup>146</sup> Alaska provides that

[a] dead body or fetus of 20 weeks or more gestation may not be finally disposed of, or removed from the state, until a burial-transit permit has been issued by the proper local registrar or other agent duly authorized by the state registrar. A burial-transit permit shall be obtained in any case within 72 hours after death or delivery, unless an extension of time is granted...<sup>147</sup>

In order to obtain a burial permit in Connecticut, a death certificate must be completed and filed in the town in which the death occurred no later than five business days after death, if filing a paper certificate, and no later than three

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Massachusetts (MASS. GEN. LAWS ANN. Ch. 114, § 45 (West 2022)); Minnesota (MINN. STAT. ANN. § 149A.94 subd.3 (West 2022)); Mississippi (15 MISS. CODE R. § 5-85-4.6.3 (LexisNexis 2022)); Missouri (MO. ANN. STAT. § 193.175 (West 2022)); Nebraska (NEB. REV. STAT. ANN. § 71-605 (West 2022)); Nevada (NEV. REV. STAT. ANN. § 440.500 (West 2021)); New Hampshire (N.H. CODE. ADMIN. R. ANN. JUS 2001.04 (2021)); New York (N.Y. COMP. CODES R. & REGS. Tit. 10, § 13.1 (2022)); North Carolina (N.C. GEN. STAT. ANN. § 130A-113 (West 2022)); North Dakota (N.D. CENT. CODE ANN. § 23-02.1-21 (West 2021)); Ohio (OHIO. REV. CODE ANN. § 3705.17 (West 2021)); Pennsylvania (35 PA. STAT. AND CONS. STAT. ANN. §§ 450.504, 450.505 (West 2021)); South Carolina, (S.C. CODE ANN. REGS. 61-19-901 (West 2022)); South Dakota, (S.D. CODIFIED LAWS 34-25-24 (2019)); Vermont (VT. STAT. ANN. Tit. 18, § 5201 (West 2022)); Washington (WASH. REV. CODE ANN. § 70.58A.210 (West 2022)); West Virginia (W. VA. CODE ANN. § 16-5-23 (West 2022)); Wisconsin (WIS. STAT. ANN. § 69.18(3) (West 2022)); and Wyoming (WYO. STAT. ANN. § 35-1-420 (West 2022)).

142. *Id.* § 36-326(D).

143. *Id.* § 36-326(F).

144. ILL. ADMIN. CODE. tit. 77, § 500.50(d)(3) (2022).

145. *Id.* § 500.50(d)(4).

146. *See* text accompanying notes 159-169.

147. ALASKA. ADMIN. CODE tit. 7, § 05.460(a) (2022).

calendar days after death if filing through an electronic death registry system.<sup>148</sup> Delaware also requires a burial permit for disposition of human remains,<sup>149</sup> but the regulations do not specify when the permit should be obtained before burial. Rather, “[i]f the person in charge of the burial premises does not receive the burial permit from the funeral director within a period of ten (10) days after burial takes place, he” or she is required to notify the State Registrar of Vital Statistics.<sup>150</sup> In Florida, “[t]he funeral director who first assumes custody of a dead body or fetus must obtain a burial-transit permit before final disposition and within 5 days after death.”<sup>151</sup> Hawaii requires

[t]he person in charge of the disposition of the body to file with the department of health in Honolulu or with the local agent of the department of health in the district in which the death or fetal death occurred, or a dead body was found, a certificate of death or fetal death within three days after the occurrence.<sup>152</sup>

The regulations then provide that “[i]t shall be unlawful for any person to bury any human body unless he has first obtained a burial-transit permit from the local agent of the department.”<sup>153</sup>

A burial permit is required in Maine, but the time period is not explicitly stated. However, the person in charge of a burying ground or crematory is required to endorse “and provide the date the body was disposed of on the burial permit and return it to the State Registrar of Vital Statistics or to the clerk of the municipality in which such burying ground or crematory is located within 7 days after the date of disposition.”<sup>154</sup> In Maryland, the mortician who first takes custody of the body or fetus is required to obtain a burial-transit permit “within 72 hours after death or after delivery in a fetal death and before final disposition or removal of the body or fetus from the State.”<sup>155</sup> Similarly, Michigan requires the person who first assumes custody of the dead body to obtain a permit within 72 hours after death.<sup>156</sup> Mississippi does not provide a time period for obtaining a permit but requires “[a] dead body or fetus to be buried, cremated or otherwise disposed of within 48 hours of death unless the body has been embalmed by a

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148. CONN. GEN. STAT. ANN. §§ 7-62(b) (a), 7-65 (West 2022).

149. DEL. CODE ANN. tit. 16, § 3151 (West 2022).

150. 16 DEL. ADMIN. CODE § 4204-2.0 (2022).

151. FLA. STAT. ANN. § 382.006(1) (West 2022).

152. HAW. REV. STAT. ANN. § 338.9(a) (West 2022).

153. HAW. CODE R. § 11-22-5(b)(1) (LexisNexis 2022).

154. ME. REV. STAT. ANN. tit. 22, § 2843(3) (West 2022).

155. MD. CODE ANN., HEALTH-GEN. § 4-215(b)(1) (West 2022).

156. MICH. COMP. LAWS ANN. § 333.2848(1) (West 2022).

licensed embalmer or unless the body is kept under refrigeration.”<sup>157</sup> Alabama<sup>158</sup>, California<sup>159</sup>, Illinois<sup>160</sup>, Indiana<sup>161</sup>, Iowa<sup>162</sup>, Kentucky<sup>163</sup>, Louisiana<sup>164</sup>, Massachusetts<sup>165</sup>, and Minnesota<sup>166</sup>, are some of the States that do not prescribe a time period for obtaining burial permits.

## 2. *Private Property Burials*

Most bodies are buried in established cemeteries or burial grounds, but burial on private property is allowed in several states. For example, Florida law allows families to establish their own cemeteries if the cemetery is less than two acres and the families do not offer burial spaces or merchandise for sale.<sup>167</sup> Colorado permits burial on private property, as long as it is recorded in the county.<sup>168</sup> Kentucky allows cemeteries to be maintained by the legal owners,

157. See 15 MISS. CODE R. § 5-85-4.6.3 (LexisNexis 2022).

158. See ALA. CODE § 22-9A-16(a) (2022) (providing only that, “The funeral director or person acting as the funeral director who first assumes custody of a dead body shall, prior to final disposition of the body, or prior to removal of the dead body from the state, obtain authorization for final disposition of the body or removal of the body from the state,” but not prescribing any time period).

159. See CAL. HEALTH & SAFETY CODE § 103050(a)(2) (West 2022) (providing that a person shall not dispose of human remains unless a permit for disposition has been obtained from a local registrar without prescribing a time period).

160. ILL. ADMIN. CODE tit. 77, § 500.50(c), (d) (2022) (“a permit for disposition of a dead human body authorizing disinterment is required prior to the disinterment of a dead human body or fetus.”).

161. See IND. CODE ANN. § 16-37-3-10 (West 2022) (“upon receipt of a properly executed certificate of death or stillbirth or, when authorized by rule of the state department, a provisional certificate of death, a local health officer in the county in which the death occurred shall issue a permit for the disposal of the body.”).

162. IOWA CODE ANN. § 144.32 (West 2022).

163. In Kentucky, a provisional certificate of death is equivalent to a burial-transit permit. For example, the statute provides that “A burial-transit permit for the final disposition issued under the law of another state which accompanies a dead body or fetus brought into the Commonwealth shall be the authority for final disposition of the body or fetus in the Commonwealth and may be accepted in lieu of a certificate of death.” KY. REV. STAT. ANN. § 213.076(8) (West 2022).

164. See LA. STAT. ANN. 40:52 (2022) (providing without prescribed time period that “When a death or spontaneous fetal death (stillbirth) occurs in this state or when a dead human body is found, the deceased, stillborn child, or dead human body shall not be interred, deposited in a vault or tomb, removed from the state, cremated, or otherwise disposed of until a burial transit permit has been issued by a local registrar.”).

165. MASS. GEN. LAWS ANN. ch. 114, § 45 (West 2022). See also *Issues to consider in preparing for disposition of decedents*, MASS.GOV <https://www.mass.gov/guides/issues-to-consider-in-preparing-for-disposition-of-decedents> (last visited Aug. 10, 2022) (noting that “There is no requirement to hold a body for a period of time before burial. Burial can take place as soon as a permit is issued and the cemetery is ready.”).

166. MINN. STAT. ANN. § 149A.94 3 (West 2022) (“No dead human body shall be buried, entombed, or cremated without a disposition permit. The disposition permit must be filed with the person in charge of the place of final disposition.”).

167. See Florida Funeral, Cemetery, and Consumer Services Act, FLA. STAT. ANN. § 497.260(1)(g) (West 2022) (providing in pertinent part that the provisions of the Act do not apply to family cemeteries of less than two acres which do not sell burial spaces or burial merchandise.).

168. *Id.*

including private burial grounds.<sup>169</sup> In Mississippi the board of supervisors can “establish or designate the location of any private family cemetery” if requested to do so.<sup>170</sup> In Missouri, a private burial ground may be established by a deed to the county,<sup>171</sup> or set aside by dedication.<sup>172</sup> In Montana, there are no state laws prohibiting home burials, but local governments may have rules governing private burials.<sup>173</sup> The same applies to Alaska.<sup>174</sup>

In Texas, the laws regarding the establishment of family cemeteries are vague.<sup>175</sup> The law prohibits an individual, corporation, partnership, firm, trust, or association from establishing or operating a cemetery, or using any land for the interment of remains if it is located within specific miles and populations of the nearest municipality.<sup>176</sup> However, the prohibition does not apply to a private family cemetery that: (1) was established and operating on or before September 1, 2009; or (2) is established and operating on land outside the boundaries of a municipality that has been owned or occupied by members of the same family for at least three generations and is within ten miles of the largest prison cemetery in the state.<sup>177</sup> Additionally, the Texas Cemeteries Association provides information on how to establish a family cemetery on private property.<sup>178</sup> In sum, private property burials seem to be fairly common and legal in a number of states.<sup>179</sup>

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169. See KY. REV. STAT. ANN. § 381.697(4) (2016) (“The governing authorities of any city within whose corporate limits any public or private burial grounds lie may require the owner or those having claims to the grounds to properly care for them.”).

170. MISS. CODE ANN. § 41-43-1(2) (2022).

171. See MO. ANN. STAT. § 214.090 (West 2021) (“Any person desirous of securing family burying ground or cemetery on his or her lands, may convey to the county commission of the county in which the land lies any quantity of land not exceeding one acre... when so conveyed, shall be held in perpetuity as burying grounds or cemeteries for the use and benefit of the family and descendants of the person making such conveyance.”).

172. *Abrams v. Lakewood Park Cemetery Ass’n*, 196 S.W.2d 278, 283 (Mo. 1946) (“One of the accepted methods by which land may be ‘set apart’ as a cemetery is by dedication.”).

173. See, e.g., MADISON CNTY., MONT., RES. 41-2013 (2013), <https://madisoncountymt.gov/Archive/ViewFile/Item/986> (noting that although the State does not prohibit burial of human remains on private property, unregulated burial of human remains upon private property can lead to health concerns, law enforcement concerns, land planning concerns and property disputes within neighbors).

174. See SOLID WASTE PROGRAM, ALASKA DEP’T ENV’T CONSERVATION, DIV. ENV’T HEALTH, BURIAL ON PRIVATE PROPERTY GUIDANCE DOCUMENT (Aug. 2021), <https://dec.alaska.gov/eh/solid-waste/how-do-i-dispose-of/burial-on-private-property/> (“In Alaska, state laws and regulations are relatively silent on the matter of burying human remains on private property. However, many communities in the State of Alaska have local ordinances that address this issue. . . .”).

175. TEX. FUNERAL SERV. COMM’N, CONSUMER INFORMATION, (last visited July 15, 2022).

176. TEX. HEALTH & SAFETY CODE ANN. § 711.008(a) (West 2021).

177. *Id.* § 711.008 (c) (West 2021).

178. TEX. CEMETERIES ASS’N, ESTABLISHING A FAMILY CEMETERY, <https://www.txcca.us/wp-content/uploads/2019/11/ESTABLISHING-A-FAMILY-CEMETERY.pdf>.

179. Bill Drabble & Gray Reed, *Dying to Get In: Cemeteries on Private Property*, JD SUPRA (Oct. 28, 2019), <https://www.jdsupra.com/legalnews/dying-to-get-in-cemeteries-on-private-60676/> (“As with most Western states, private property burials were fairly common in Texas and are still legal here — if compliant with the Texas Health and Safety Code and any local rules and regulations.”).

### 3. *Permit Not Required*

Although most states require a burial permit, a few do not,<sup>180</sup> and instead offer other options in lieu of the permits.<sup>181</sup> For example, in Idaho, a person who first assumes possession of a dead body or stillborn fetus<sup>182</sup> is required to make a written report to the registrar of the district in which death or stillbirth occurred.<sup>183</sup> The written report serves as permit to transport, bury, or entomb the body or stillborn fetus within the state.<sup>184</sup> But the written report cannot serve as a permit to remove a body or stillborn fetus from the state or cremate the body or stillborn fetus.<sup>185</sup> In Kansas the filing of a death certificate with the state registrar also serves as a burial permit if the dead body is not transported or moved to a destination outside the state.<sup>186</sup>

In Montana, “embalming” is defined as obtaining burial or removal permits or assuming other duties incidental to the practice of embalming.<sup>187</sup> However, a burial permit is not required.<sup>188</sup> Rather, “a dead body may be removed from the place of death” with the written authorization (or oral if reduced to writing within twenty-four hours) of the physician in attendance at death or the physician's designee, the advanced practice registered nurse in attendance at death, the coroner having jurisdiction, or a mortician.<sup>189</sup> The written authorization permits removal, transportation, and final disposition of a dead body.<sup>190</sup> In New Mexico, for deaths which have occurred in the state, no burial-transit permit is required for final disposition of the remains if the disposition occurs in the state and is performed by a funeral service practitioner or direct disposer.<sup>191</sup>

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180. *See, e.g.*, MO. REV. STAT. ANN. §193.175 (West 2022).

181. These states are Georgia (GA CODE ANN., § 31-10-20 (West 2022)); Idaho (IDAHO CODE ANN. § 39-268 (West 2022)); Kansas (KAN. STAT. ANN. § 65-2412 (West 2022)); Missouri, (MO. ANN. STAT. 193.175 (West 2022)); Montana (MONT. CODE ANN. §50-15-405(4) (West 2021)); New Mexico (N.M. STAT. ANN. § 24-14-23 (West 2022)); Oklahoma (OKL. ST. ANN. tit. 63, § 1-317(a) (West 2022)); Oregon (OR. REV. STAT. ANN. § 432.158 (West 2020); Tennessee (TENN. CODE ANN.. § 68-3-510 (West 2022)); Utah (UTAH CODE ANN. § 26-2-17(2)(a) (West 2020)); and Virginia (VA. CODE ANN.. § 32.1-265(D) (West 2022)).

182. IDAHO CODE ANN. § 39-268(5) (“A permit for disposal shall not be required in the case of a dead fetus of less than twenty (20) weeks gestation and less than three hundred fifty (350) grams or twelve and thirty-five hundredths (12.35) ounces where disposal of the fetal remains is made within the institution where the delivery of the dead fetus occurred.”).

183. *Id.* § 39-268(1) (West 2022).

184. *Id.*

185. *Id.* § 39-268(2).

186. KAN. STAT. ANN. § 65-2428(a) (West 2022) (“No dead body located in this state shall be transported to a location outside the boundaries of this state, either by commercial or private conveyance, without a permit issued by a funeral director or the state registrar on a form provided by the state registrar.”).

187. MONT. CODE ANN. §37-19-101(19)(a) (West 2021).

188. *Id.*

189. *Id.* §50-15-405(1).

190. *Id.* §50-15-405(4).

191. N.M. STAT. ANN. § 24-14-23 (West 2022).

Oklahoma requires a burial-transit permit from the medical examiner for shipment of a dead body.<sup>192</sup> However, because this is a burial transit permit, if the body is not moved, no special permit is needed.<sup>193</sup> Oregon requires a person who takes the custody of the dead body to obtain written authorization before disposition.<sup>194</sup> Disposition of a dead body without a burial permit is allowed, so long as it is authorized by the medical examiner.<sup>195</sup> However, if the body is to be moved out of state, the person in charge of the body is required to submit a written notice of removal to the county registrar.<sup>196</sup> A copy of the written notice of removal serves as a permit for transporting the remains of a decedent named on the notice.<sup>197</sup>

Similarly, Tennessee does not require burial permits, but other certification may be required. For example, if a dead body is disposed of by the institution, it need only keep a record of the “name of the deceased, date of death, name and address of the person to whom the body is released, date of removal from the institution, or if finally disposed of by the institution, the date, place and manner of disposition.”<sup>198</sup> A similar record is required if the body were to be transported outside the state.<sup>199</sup>

In Texas, a copy of the death report serves as a permit to transport and bury a body within the state.<sup>200</sup> If the body is transported out of the state for final disposition, shipped by common carrier, or cremated, the local registrar must issue a burial-transit permit after filing the death certificate.<sup>201</sup> In Utah, for deaths which occur in-state, a burial transit permit is not required for final disposition if: (1) disposition occurs in the state, (2) is performed by a funeral service director, (3) takes place with authorization of the next of kin, and (4) occurs in a hospital or pathology laboratory operated under contract with the hospital.<sup>202</sup> Finally, in Virginia, a permit is not required if disposal of the body occurs in-state.<sup>203</sup> However, if a body were to be moved out of the state, an out-of-state transit permit is required.<sup>204</sup>

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192. OKLA. STAT. ANN. tit. 63 § 101 (West 2022).

193. OKLA. STAT. ANN. tit. 63, § 1-317 (West 2022) (“A death certificate for each death which occurs in this state shall be filed with the State Department of Health, within three (3) days after such death.”).

194. OR. REV. STAT. ANN. § 432.158(3) (West 2020).

195. *Id.* (“[if the person] is unable to obtain written authorization before the final disposition of the dead body, the funeral service practitioner or person acting as a funeral service practitioner may authorize . . . the final disposition of the dead body on a form prescribed and furnished by the state registrar.”)

196. *Id.* § 432.158(9) (“[S]hall submit written notice to the county registrar in the county in which death occurred or in which the dead body . . . was found.”).

197. *Id.*

198. TENN. CODE ANN. § 68-3-510(a) (West 2022).

199. *Id.* § 68-3-510(b).

200. 25 TEX. ADMIN. CODE § 181.2(a) (West 2022).

201. *Id.* § 181.2(b).

202. UTAH CODE ANN. 1953 § 26-2-17(2)(a) (West 2020).

203. VA. CODE ANN. § 32.1-265(D) (West 2022).

204. *Id.* § 32.1-265(A).

In sum, while individual rules and regulations vary by state, two overarching themes emerge from this discussion. First, even where burial permits are not required in-state, several states require a burial permit when transporting bodies out-of-state.<sup>205</sup> Second, some states use death certificates or written reports in lieu of burial permits.<sup>206</sup>

### B. Embalming

Some states require either freezing or embalming of the corpse.<sup>207</sup> Embalming means “the disinfecting, preparing or preserving for final disposition of dead human bodies, in whole or in part . . . by the use or application of chemical substances, fluids or gases on the body.”<sup>208</sup> Many states do not require routine embalming.<sup>209</sup> For example, there are no embalming requirements in Connecticut,<sup>210</sup> Georgia,<sup>211</sup> Illinois,<sup>212</sup> Indiana,<sup>213</sup> Kentucky,<sup>214</sup> Maryland,<sup>215</sup>

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205. See GA. CODE ANN., § 31-10-20(a) (West 2022). KAN. STAT. ANN. § 65-2428a (West 2022). VA. CODE ANN. § 32.1-265(D) (West 2022).

206. OR. REV. STAT. ANN. § 432.158(3) (West 2020). TENN. CODE ANN. § 68-3-510(a) (West 2022).

207. See, e.g., FLA. STAT. ANN. § 497.386 (West 2022); OHIO. REV. CODE ANN. § 2108.84 (West 2022); COLO. REV. STAT. ANN. § 12-135-106 (West 2022).

208. IDAHO CODE ANN. § 54-1102 (West 2022). See also NEB. REV. STAT. ANN. § 38-1409 (West 2022) (“[Embalming is] the practice of preparing a dead human body for burial or other final disposal by a licensed funeral director and embalmer or an apprentice, requesting and obtaining burial or removal permits, or assuming any of the other duties incident to the practice of embalming.”).

209. See, e.g., *Embalming*, FUNERAL CONSUMER ALLIANCE OF GA., INC., <https://fcaga.org/planning/burial/embalming/> (last visited Aug. 10, 2022), (“Embalming is rarely required by law. In fact, the Federal Trade Commission and many state regulators require that funeral directors inform consumers that embalming is not required except in certain special cases.”).

210. Although Connecticut does not require embalming, a licensed embalmer must handle disposition if the person died of a communicable disease. CONN. GEN. STAT. ANN. § 7-64 (West 2022).

211. See GA. DEP’T HUMAN SERVICES, DIV. OF AGING SERVS., GUIDE TO FUNERAL HOMES, CREMATORIES AND CEMETERIES (2019) (noting that “embalming is not always required”); and *Funeral Services*, GA. CONSUMER PROT. DIV., <https://consumer.georgia.gov/consumer-topics/funeral-services> (last visited August 10, 2022), (noting that “for a direct cremation, embalming and casket are not legally required.”).

212. See IL. DEPT FIN. & PRO. REG., FUNERAL SERVS., 10 QUESTIONS YOU SHOULD ASK (Nov. 2019), <https://idfpr.illinois.gov/Forms/DPR/FuneralServices.pdf>.

213. IND. CODE ANN. § 23-14-54-1 (West 2022).

214. 901 KY. ADMIN. REGS. 5:090 (2022) on burial and disinterment of dead bodies does not even mention embalming. But see KY. REV. STAT. ANN. § 316.030 (West 2022) (“No person shall engage in, or attempt to engage in, embalming or funeral directing in the Commonwealth of Kentucky unless the person is licensed...”).

215. See MD. CODE REGS. § 10.29.19.09(D) (2022) (“A permit holder may not require that human remains be subjected to embalming before cremation.”).



Massachusetts,<sup>216</sup> Missouri,<sup>217</sup> New York,<sup>218</sup> North Carolina,<sup>219</sup> Ohio,<sup>220</sup> South Carolina,<sup>221</sup> Tennessee,<sup>222</sup> Vermont,<sup>223</sup> West Virginia,<sup>224</sup> and Wisconsin.<sup>225</sup>

### 1. Included in The Laws and Regulations

The remaining states require embalming under certain circumstances. For example, Alabama only requires embalming if a body is transported out-of-state.<sup>226</sup> In California<sup>227</sup> and Maine,<sup>228</sup> embalming is only required if the body is transported by a common carrier. Alaska,<sup>229</sup> Arizona,<sup>230</sup> Arkansas,<sup>231</sup> Delaware,<sup>232</sup> Florida,<sup>233</sup> Idaho,<sup>234</sup> Kansas,<sup>235</sup> Nebraska,<sup>236</sup> New Mexico,<sup>237</sup>

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216. MASS. GEN. LAWS ANN. ch. 114, § 43M (West 2022). *See also Issues to Consider in Preparing for Disposition of Decedents*, MASS.GOV, <https://www.mass.gov/guides/issues-to-consider-in-preparing-for-disposition-of-decedents> (last visited June 30, 2022) (“[T]here is no law requiring a body to be embalmed, but one should be aware that decomposition sets on quickly.”).

217. MO. ANN. STAT. § 194.100 (West 2022).

218. N.Y. PUB. HEALTH LAW § 4200 (McKinney 2022).

219. 10A N.C. ADMIN. CODE 41A.0212 (2022).

220. *See* OHIO REV. CODE ANN. § 2108.84 (West 2022) (providing in pertinent part that a funeral service provider or other person may embalm or refrigerate and shelter the remains of a person if a dispute relating to right of disposition is pending.).

221. S.C. CODE ANN. REGS. 61-19 (2022).

222. TENN. CODE ANN. § 62-5-313 (West 2022).

223. VT. STAT. ANN. tit. 18, § 5319 (West 2022).

224. W. VA. CODE ANN. § 16-5-23 (West 2022).

225. WIS. STAT. ANN. § 157.01 (West 2022).

226. ALA. CODE § 22-19-2 (2022) (“It shall be unlawful for any person, firm or corporation to take, carry, transport or remove from within the confines of this state any dead human body unless said body has been embalmed or cremated.”).

227. CAL. HEALTH & SAFETY CODE § 7355 (West 2022).

228. 10-146-001 ME. CODE R. § 4 (LexisNexis 2022).

229. ALASKA. ADMIN. CODE tit. 7, §35.100(c) (2022) (“When the human remains cannot reach the intended destination within 24 hours after the death, the department may embalm the remains, upon receiving permission from the deceased’s family, next of kin, or a person legally responsible for the burial of the deceased, and place the remains in a suitable container accommodating the entire body for transport.”).

230. ARIZ. ADMIN. CODE § R4-12-303(A)(1) (2022) (prohibiting a funeral establishment, funeral director, embalmer, or agents or employees of a funeral establishment from representing that state or local law requires a deceased person be embalmed when such is not the case, *or fail to disclose that embalming is not required by law except where burial or cremation will not occur within 24 hours* or where the body is not refrigerated immediately after death) (emphasis added). *See also id.* § R4-12-302(A)(3) (prohibiting funeral directors, embalmers or employees of a funeral establishment from embalming a deceased human body unless State or local law or regulation requires embalming or prior approval has been obtained from a family member or other authorized person or the funeral establishment is unable to contact a family member or other authorized person after exercising due diligence.).

231. ARK. CODE ANN. § 17-29-311 (2022).

232. DEL. CODE ANN. tit. 16, § 4204-3.0 (West 2022).

233. FLA. STAT. ANN. § 497.386(2) (West 2022).

234. IDAHO. ADMIN. CODE r. 24.08.01.452 (2022). Additionally, In Idaho, a health official “may order a dead human body to be embalmed or prohibit embalming to prevent the spread of infectious or communicable diseases or exposure to hazardous substances. *Id.* 16.02.10.068(01(a) (2022).

235. KAN. ADMIN. REGS. § 63-3-11(d) (2022).

236. 172 NEB. ADMIN. CODE, 68-006 (2022).

237. N. M. STAT. ANN. § 61-32-20 (West 2022).

Oklahoma,<sup>238</sup> Oregon,<sup>239</sup> Pennsylvania,<sup>240</sup> and South Dakota<sup>241</sup> require embalming or refrigeration if human remains either cannot reach the intended destination or are not buried or disposed of within twenty-four hours after death. In Michigan, embalming is required if the body will not reach the intended destination within forty-eight hours from the time of death.<sup>242</sup> Michigan also requires embalming if a person who dies of diphtheria, meningococcal infections, plague, polio, scarlet fever, or smallpox is transported.<sup>243</sup>

In Iowa, embalming is not required if “cremation is performed within seventy-two hours after death or within twenty-four hours of taking custody [of the body].”<sup>244</sup> Likewise, in Minnesota, embalming or refrigeration is required if the body will be transported by public transportation, or if final disposition is more than seventy-two hours after death.<sup>245</sup> In Mississippi, a body must be disposed of within forty-eight hours of death unless the body has been embalmed or kept under refrigeration.<sup>246</sup> If the dead body is transported within or out of the state and the destination cannot be reached within twenty-four hours after death, the body must be embalmed or kept under refrigeration.<sup>247</sup> Similarly, New Jersey law states that a body cannot remain unburied or uncremated for a period longer than forty-eight hours unless the body has been embalmed or refrigerated.<sup>248</sup> A body must also be embalmed if it will not reach its destination within twenty-four hours from the time of death.<sup>249</sup>

Montana requires embalming or refrigeration if a body is transported by a private conveyor and the body will not reach its destination within forty-eight hours from the time of death.<sup>250</sup> If the body is transported by a common carrier, the required period is thirty-six hours after death.<sup>251</sup> North Dakota, also requires embalming if the body cannot reach its destination within forty-eight hours, or if the death was due to communicable diseases and the body needs to be transported.<sup>252</sup> Rhode Island also places a forty-eight hour limit on holding human remains without embalming or without refrigeration.<sup>253</sup> Similarly, in Virginia, if a body is to be stored for more than forty-eight hours prior to

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238. OKLA. ADMIN. CODE § 235:10-11-1(a)(13) (2022).

239. OR. ADMIN. R. 830-030-0010 (2022).

240. 28 PA. CODE § 1.23 (2022).

241. S.D. ADMIN. R. 20:45:05:11 (2022).

242. *Id.* r. 325.2.

243. MICH. ADMIN. CODE r. 325.1 (2022).

244. IOWA ADMIN. CODE r. 645-100.6(156) (2022).

245. MINN. STAT. ANN. § 149A.91(3) (West 2022).

246. 15-4 MISS. CODE R. 4.6.3 (LexisNexis 2022).

247. *Id.*

248. N.J. ADMIN. CODE § 8:9-1.1 (2022).

249. *Id.* § 8:9-1.7.

250. MONT. ADMIN. R. 37.116.103(2) (2022).

251. *Id.*

252. N.D. ADMIN. CODE 33-06-15-01 (2022).

253. 5 R.I. GEN. LAWS § 5-33.2-12(a) (West 2022).

disposition, a funeral services provider must either refrigerate or embalm the body.<sup>254</sup>

New Hampshire and Oklahoma have unique rules. In New Hampshire, if a body will not be exposed to the public, or will be exposed to the public for a period less than twenty-four hours, embalming is not required.<sup>255</sup> In Oklahoma, “[n]o public viewing of unembalmed bodies shall be permitted twenty-four hours after death has occurred.”<sup>256</sup> This is problematic because the law equates “unembalmed” with a health risk, which is not entirely accurate for reasons explained in the public health policy section below.<sup>257</sup>

In Washington, embalming is only required under certain conditions “determined by rule by the state board of health.”<sup>258</sup> Finally, Wyoming provides that “[a]ll bodies in possession of the funeral service practitioner or funeral director must be properly refrigerated, cremated, chemically disposed, buried, or embalmed within thirty-six hours after receipt thereof...”<sup>259</sup>

In sum, about one third of states do not require embalming under any circumstances.<sup>260</sup> Those that require embalming do so under limited circumstances, such as when the body will not be disposed of in a certain period of time, if it is to be transported by a common carrier, or if the person died of certain communicable diseases.<sup>261</sup>

## 2. Implications for Public Health Policy

The prevailing view in the public health community is that embalming does not meaningfully reduce the risk of infection from dead bodies.<sup>262</sup> Even during a

254. VA. CODE ANN. § 54.1-2811.1(B) (West 2022).

255. N.H. REV. STAT. ANN. § 325:40-a (2022).- Repealed, need new source or to delete sentence

256. OKLA. ADMIN. CODE § 235:10-11-1(a)(13) (2022).

257. See *infra* Section III.B.1.

258. WASH. REV. CODE ANN. § 18.39.215(1) (West 2022).

259. 035-4 WYO. CODE R. § 5 (LexisNexis 2022).

260. David Foos, *State Ready-to-Embalm Laws and the Modern Funeral Market: The Need for Change and Suggested Alternatives*, 2012 MICH. ST. L. REV. 1375, 1388 (2012).

261. VICKI L. SCHMALL & CLARA PRATT, WHEN DEATH COMES: FUNERALS AND ALTERNATIVE ARRANGEMENTS 20 (Oregon State University Extension Service, Oct. 1993).

262. See, e.g., PAN. AM. HEALTH. ORG., RISK OF DEAD BODIES ASSOCIATED WITH DEATH (2009), <https://www.paho.org/en/health-emergencies/risk-dead-bodies-associated-epidemic> (“Epidemics that have generated a large number of victims have been caused by diseases such as plague, cholera, typhoid fever, tuberculosis, anthrax, smallpox, and influenza. Even though these are highly contagious diseases, their causing agents do not survive long in the human body after death, making it unlikely that these epidemics can be transmitted by dead bodies.”). Nevertheless, in its 2020 recommendation for dead body management regarding Covid-19, PAHO notes that, “Transmission of infectious diseases associated with management of dead body can occur and can be enhanced by non-compliance to standard and transmission-based precautions, especially in healthcare settings.” PAN. AM. HEALTH. ORG., DEAD BODY MANAGEMENT IN THE CONTEXT OF THE NOVEL CORONA VIRUS DISEASE (COVID-19) (2020), [https://iris.paho.org/bitstream/handle/10665.2/52001/PAHOPHEIHMCovid1920002\\_eng.pdf?sequence=5&isAllowed=y](https://iris.paho.org/bitstream/handle/10665.2/52001/PAHOPHEIHMCovid1920002_eng.pdf?sequence=5&isAllowed=y). But cf. Occupational Safety and Health Administration (OSHA) Guidance requiring that postmortem care workers, such as coroners, medical examiners, autopsy technicians, funeral directors, and other mortuary workers who have contact with the remains of people who have died

pandemic, embalming is unnecessary.<sup>263</sup> According to the World Health Organization (WHO), “there is no evidence that corpses pose a risk of epidemic disease after a natural disaster. Most agents do not survive long in the human body after death.”<sup>264</sup> However, the belief that embalming is necessary as a public health measure lingers.<sup>265</sup>

While a few states require embalming if a person dies of communicable disease, most states do not have this requirement.<sup>266</sup> In fact, some states specifically prohibit the procedure where death results from a communicable disease.<sup>267</sup> Other considerations, like cultural and religious beliefs, may also affect embalming. The World Health Organization (WHO) recommends respecting the families' needs and social customs for funerals.<sup>268</sup> This is particularly important where religious beliefs are implicated.<sup>269</sup> For example, embalming is not permitted in Judaism or Islam.<sup>270</sup> As a result, some states provide personal or religious accommodations.<sup>271</sup> However, religious services may present the risk of conglomeration, which increases the risk of

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of COVID-19, or complications resulting from it, must be protected from exposure to infected blood and body fluids, contaminated objects, or other contaminated environmental surfaces. U.S. DEP'T OF LABOR, POSTMORTEM CARE WORKERS AND EMPLOYERS (2022), <https://www.osha.gov/coronavirus/control-prevention/postmortem-care> (last visited August 22, 2022).

263. WORLD HEALTH ORGANIZATION, RISKS POSED BY DEAD BODIES AFTER DISASTERS, (2013), <https://www.who.int/publications/m/item/risks-posed-by-dead-bodies-after-disasters>.

264. *Id.*

265. Tanya D. Marsh, *Ebola, Embalming and the Dead. Controlling the Spread of Infectious Diseases*, 4 WAKE FOREST L. REV. ONLINE 43, 48 (2014). See also 225 ILL. COMP. STAT. ANN. 41/1-5 (West 2022) (“The practice of funeral directing and embalming in the State of Illinois is declared to be a practice affecting the public health, safety and welfare and subject to regulation and control in the public interest”); (review denied Nov. 14, 2012) (finding that statute allowing licensed funeral directors, but not crematory operators, to transport dead human bodies for profit is rationally related to legitimate state interests in protecting the public health and welfare due to the inherent dangers that transporting dead human bodies presents to the general public, such as the spread of communicable diseases).

266. See *infra* note 173.

267. See *infra* Section III C.1.

268. See *Risks Posed by Dead Bodies After Disasters supra* note 231\*.

269. Susan Lowey, *Diversity in Dying: Death Across Cultures*, MILNE PUBL'G (2012), <https://milnepublishing.geneseo.edu/nursingcare/chapter/diversity-in-dying-death-across-cultures/>.

270. *Id.*

271. KAN. ADMIN. CODE § 63-3-11(c) (2022) (“A body dead from any cause other than infectious or contagious disease may be interred or cremated without embalming if embalming would violate personal or religious beliefs and a health hazard or nuisance will not result”); N.J. STAT. ANN. § 26:13-7 (West 2022) (“To the extent possible, religious, cultural, family, and individual beliefs of the deceased person or his family shall be considered when determining disposition of any human remains.”); TENN. CODE ANN. § 62-5-102 (West 2022) (“Nothing in this chapter shall be constituted to prevent or interfere with the ceremonies, customs, religious rites or religion of any people, denomination or sect, to prevent or interfere with any religious denomination, sect or any body composed of persons of a denomination, or to prevent or interfere with any church or synagogue from having its committee or committees prepare human bodies for burial or to the families, friends or neighbors of deceased persons who prepare and bury their dead without charge.”).

transmission.<sup>272</sup> The Pan American Health Organization therefore recommends quick, private funeral services.<sup>273</sup>

### *C. Communicable Disease Requirement or Procedures*

Most states have special requirements or procedures pertaining to deaths resulting from communicable diseases. However, some do not. The lack of consistency among the states has serious public health implications.

#### *1. Included in The Laws and Regulations*

Forty-three states include communicable disease requirements or procedures in their laws and regulations. Requirements vary, but there are some common themes such as labeling requirements, communication protocols, and transportation limitations.

Alabama forbids the conveyance of bodies of people who died of infectious, contagious, or communicable diseases within, into, or through the state.<sup>274</sup> Alaska, during a public health disaster, grants wide authority to its Department of Health including, but not limited to, the power to take possession or control of any human remains and the power to order the disposal of the remains of an individual who has died of a contagious disease or transmissible agent through burial or cremation within 24 hours after death.<sup>275</sup> The Alaska Department of Health requires that the remains of a deceased individual with a contagious disease or transmissible agent have an external, clearly visible tag indicating that the remains are infected. If known, the contagious disease or transmissible agent must be listed on the tag.<sup>276</sup>

Arizona empowers its health director to prescribe reasonable measures for the “preparation, embalming, cremation, interment, disinterment and transportation of dead human bodies and the conduct of funerals, relating to and restricted to communicable diseases and regarding the removal, transportation, cremation, interment or disinterment of any dead human body.”<sup>277</sup> California health and safety code bars the local registrar from issuing a permit for disposition of a body if the death occurred from a disease declared by the state department to be infectious, contagious, or communicable and dangerous to the public health.<sup>278</sup>

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272. PAN. AM. HEALTH ORG., RISK OF DEAD BODIES ASSOCIATED WITH AN EPIDEMIC (2009), <https://www.paho.org/en/health-emergencies/risk-dead-bodies-associated-epidemic> (last visited Aug. 10, 2022).

273. *Id.*

274. ALA. CODE § 22-19-1 (2022) (“The State Board of Health shall prescribe the rules and regulations under which the bodies of deceased persons may be brought into, or transported through [the state] . . .”).

275. ALASKA STAT. ANN. § 18.15.390 (West 2022).

276. *Id.*

277. ARIZ. REV. STAT. ANN. § 36-136 (2022).

278. CAL. HEALTH & SAFETY CODE § 103055 (West 2022).

Colorado law broadly declares that the state will not interfere with any private funeral rites, so long as the human remains are refrigerated, frozen, embalmed, interred, or cremated within seven days after death, or the process of natural reduction is begun within seven days after death.<sup>279</sup> However, if the human remains contain a serious contagious disease, the state Department of Public Health and Environment, the state Board of Health, or a local department of health may issue an order overriding the individual families' rights of burial.<sup>280</sup>

In Connecticut, if a deceased person had a communicable disease at the time of death, the burial permit must certify that the body was prepared according to the Public Health Code requirements.<sup>281</sup> Additionally, a licensed embalmer must handle disposition if the person died of a communicable disease.<sup>282</sup> Delaware law instructs the Director of the Division of Public Health to designate communicable diseases determined to be high-risk when handled after death.<sup>283</sup> Additionally, Delaware bars embalming if a person dies of a specific communicable disease.<sup>284</sup>

Georgia requires notification to persons who handle bodies that had been diagnosed with an infectious or communicable disease at time of death.<sup>285</sup> Hawai'i<sup>286</sup> and Idaho<sup>287</sup> bar embalming if a person dies of a specific communicable disease. Illinois requires the labeling of a body who had or is suspected of having an infectious or communicable disease, so that anyone who will be in contact with the body, including any funeral director or embalmer, may take suitable precautions.<sup>288</sup>

Iowa prohibits anyone other than a funeral director from obtaining a burial transit permit when the cause of death is or is suspected to be a communicable disease.<sup>289</sup>

Kansas has specific handling procedures when someone dies from infectious or contagious disease.<sup>290</sup> These procedures include preparation of the

279. COLO. REV. STAT. ANN. § 12-135-109 (West 2022).

280. *Id.*

281. CONN. GEN. STAT. ANN. § 7-69 (West 2022); CONN. AGENCIES. REGS. §§ 19a-36-A36 to 44 (2022).

282. CONN. GEN. STAT. ANN. § 7-62(b) (West 2022).

283. 16 DEL. ADMIN. CODE §4204-6.1 (2022).

284. 16 DEL. ADMIN. CODE §4204-6.7.1 (2022) ("Neither embalming nor autopsy shall be performed on such bodies unless specifically authorized by the Chief Medical Examiner or designee.").

285. GA. CODE ANN. § 31-21-3 (West 2022).

286. HAW. CODE R. § 11-22-4(3) (LexisNexis 2022) ("No embalming fluid, or substitute therefor, shall be injected into any dead body if the death was from plague, asiatic cholera, smallpox, epidemic typhus fever, yellow fever, or louse-borne relapsing fever, or any approved term indicating such diseases. Permission to embalm in case (A) above must be secured from the officer of the coroner or medical examiner and in case (B) from the director.").

287. IDAHO ADMIN. CODE r. 16.02.10.068 (2022) ("The dead human body of a person suspected of or confirmed as having a viral hemorrhagic fever at the time of death must not be embalmed, but wrapped in sealed leak-proof material and cremated or buried.").

288. 20 ILL. COMP. STAT. ANN. 2305/7 (West 2022).

289. IOWA CODE ANN. § 144.32(4) (West 2022).

290. KAN. ADMIN. REGS. § 63-3-10 (2022).

body by a licensed embalmer, or burial within twenty-four hours of death if the body is unembalmed.<sup>291</sup>

In Kentucky, if the death occurred from a disease declared by the Cabinet for Health and Family Services to be infectious, contagious, or communicable and dangerous to the public health, the local registrar cannot issue a permit for the removal or disposition of the body, except under conditions prescribed by the Cabinet for Health and Family Services and the local health department.<sup>292</sup>

Louisiana follows a similar pattern by requiring state health officers to promulgate rules necessary to ensure that all hospitals identify and report corpses that are infected with a contagious disease.<sup>293</sup>

In Maine, when death is caused by a reportable communicable disease, the dead body will only be delivered to an authorized person after suitable precautionary measures are taken, consistent with the regulations of the Department of Health, to prevent the spread of infection.<sup>294</sup> In Massachusetts, a dead body cannot be cremated within forty-eight hours from death unless the person died of a contagious or infectious disease.<sup>295</sup> Massachusetts also provides guidance on preparing for the disposition of a body.<sup>296</sup> In Michigan a body must be embalmed before being transported, if the cause of death was diphtheria, a meningococcic infection, plague, poliomyelitis, scarlet fever, or smallpox.<sup>297</sup>

Minnesota requires any person who comes in direct contact with an unembalmed body, or who enters a room where bodies are embalmed, to use universal precautions and exercise all reasonable precautions to minimize the risk of transmitting communicable diseases from the body.<sup>298</sup> Additionally, everyone present in a preparation and embalming room while a body is being prepared for final disposition must be attired in accordance with all applicable state and federal regulations regarding the control of infectious disease and occupational and workplace health and safety.<sup>299</sup> Moreover, the health commissioner can order that a body be embalmed for the control of infectious disease and the protection of the public health.<sup>300</sup>

Mississippi<sup>301</sup> requires remains of an individual who died of, or had a diagnosis of, a communicable disease to be tagged. Missouri has a specific rule

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291. *Id.*

292. KY. REV. STAT. ANN. § 213.076 (West 2022).

293. LA. STAT. ANN. § 40:4 (2022)

294. 10-146-001 ME. CODE R. § 3 (LexisNexis 2022).

295. MASS. GEN. LAWS ANN. ch. 114, § 44 (West 2022).

296. *Issues to consider in preparing for disposition of decedents*, MASS.GOV, <https://www.mass.gov/guides/issues-to-consider-in-preparing-for-disposition-of-decedents> (last visited August 10, 2022).

297. MICH. ADMIN CODE r. 325.1(1) (2022).

298. MINN. STAT. ANN. § 149A.91 (West 2022).

299. *Id.*

300. *Id.*

301. MISS. CODE. ANN. § 41-39-13 (West 2022) (“The tag . . . shall include the words ‘BLOOD/BODY FLUID PRECAUTIONS REQUIRED.’”).

delineating procedures to be followed when a person dies while infected with a communicable disease.<sup>302</sup> These procedures include requiring the body to be buried or cremated within twenty-four hours of death unless the body is properly embalmed, prohibiting direct physical contact with the body, restricting public funeral services unless the body is properly embalmed and the external surfaces are disinfected, or if the body is encased in a sealed casket.<sup>303</sup>

Montana also requires a notification procedure. When a person dies, the designated facility must notify the mortuary receiving the person's body, at the time of transfer, whether or not the person had or was suspected of having an infectious disease at the time of death.<sup>304</sup> If the person had or was suspected of having an infectious disease, the notice must include what infectious disease the deceased individual.<sup>305</sup>

Nebraska requires immediate reporting of persons who have died of specific communicable diseases, including but not limited to Anthrax, Hepatitis A and B, Influenza, Severe Acute Respiratory Syndrome, and Viral hemorrhagic fevers.<sup>306</sup> Additionally, such bodies must either be embalmed and held in isolation from the public for a period of twenty-four hours, encased in a sealed container, or cremated.<sup>307</sup>

Nevada bars a local health officer from granting a burial permit for the removal or disposition of a person that died of a disease held by the board of health to be infectious, contagious, or communicable and dangerous to the public health.<sup>308</sup> However, the permit may be issued under conditions prescribed by the board.<sup>309</sup> In addition, the board requires embalming if the person died of a communicable disease.<sup>310</sup>

New Hampshire, a crematory cannot accept a body for cremation if, at the time of delivery, that person is known to have died from a communicable disease, unless the body is embalmed or enclosed in 2 leak proof pouches and the cause of death is clearly marked on the outside of the pouches.<sup>311</sup>

In New Jersey, the Commissioner of the Department of Health, the Commissioner of the Department of Environmental Protection, and the Chief State Medical Examiner are empowered to issue and enforce orders to provide for the safe disposition of human remains during a public health emergency.<sup>312</sup> These measures include determining whether human deaths related to the public

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302. MO. CODE REGS. ANN. tit. 19, § 20-24.010 (2022).

303. *Id.*

304. MONT. ADMIN. R. 37.116.102 (2022).

305. *Id.*

306. 173 NEB. ADMIN. CODE § 1-004.01 (2022).

307. 172 NEB. ADMIN. CODE § 68-006.01 (2022).

308. NEV. REV. STAT. ANN. § 440.500 (West 2021).

309. *Id.*

310. NEV. ADMIN. CODE § 451.010 (2022).

311. N.H. CODE ADMIN. R. ANN. FRL. 801.13 (2022).

312. N.J. STAT. ANN. § 26:13-7 (West 2022).



health emergency need to be investigated, and enforcing the requirement that any remains of a deceased person with a contagious disease be clearly tagged.<sup>313</sup> Additionally, the funeral director handling the disposition of the body must be notified if the person died from a contagious, infectious, or communicable diseases.<sup>314</sup>

New Mexico prohibits out-of-state transportation of a body by a common carrier, when the person knows or has reason to believe that a body carries a notifiable communicable disease.<sup>315</sup> There is an exception if the body has been prepared or embalmed as provided by the law or approved for transportation by the appropriate health authorities.<sup>316</sup>

New York follows the same trend of prohibiting the issuance of a permit by the registrar for the removal or other disposition of the body in cases where the death occurred from a disease which is designated in the sanitary code as a communicable disease, except under such conditions as may be prescribed in the sanitary code.<sup>317</sup> Interestingly, New York's public health law on deaths, burial, and disposition of human remains is bereft of any mention of communicable disease.<sup>318</sup> Likewise, regulations on transportation of bodies by a common carrier,<sup>319</sup> and other than common carrier,<sup>320</sup> do not mention communicable diseases. Rather, communicable diseases are only recorded on the deaths and registration section discussed above.<sup>321</sup>

In North Carolina a funeral service personnel must be notified if the person died of and is known to have smallpox, plague, HIV infection, hepatitis B infection, rabies, or Jakob-Creutzfeldt Disease (CJD).<sup>322</sup> Virginia also requires that healthcare providers, including those at correctional facilities, notify funeral service providers at the time of transfer, if the individual had an infectious disease which may be transmitted through exposure to any bodily fluids.<sup>323</sup> Additionally, North Carolina<sup>324</sup> bars embalming if a person dies of a specific communicable disease. The designated diseases include anthrax, smallpox, plague, and various hemorrhagic fevers.<sup>325</sup>

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313. *Id.*

314. N.J. ADMIN. CODE § 8:70-6.2 (2022).

315. N.M. STAT. ANN. § 61-32-25 (West 2022).

316. *Id.*

317. N.Y. PUB. HEALTH LAW § 4140 (McKinney 2022).

318. *Id.* § 4145.

319. N.Y. COMP. CODES R. & REGS. tit. 10, § 13.1 (2022).

320. *Id.* § 13.2.

321. N.Y. PUB. HEALTH LAW § 4140 (McKinney 2022).

322. N.C. GEN. STAT. ANN. § 130A-395 (West 2022).

323. VA. CODE ANN. § 32.1-37.1 (West 2022).

324. 10A N.C. ADMIN. CODE § 41A.0212(d) (2022) ("The body of any person who died and is known or reasonably suspected to be infected with smallpox or severe acute respiratory syndrome (SARS) or any person who died and is known to be infected with plague shall not be embalmed.").

325. *Id.*

North Dakota prohibits the local registrar, known as sub-registrar, from issuing a final disposition-transit permit if the death occurred from some disease that is held to be communicable by the state department of health, except as prescribed by the state department of health and the local board of health.<sup>326</sup> Additionally, North Dakota, just like Nevada, requires embalming if a person died of a communicable disease, to wit, anthrax, cholera, meningococcal meningitis, plague, smallpox, or tuberculosis.<sup>327</sup>

In Ohio the body of a person who has died of a communicable disease declared by the state Department of Health must be buried or cremated within twenty-four hours from death.<sup>328</sup> No public or church funeral can be held in connection with the burial of such person, and the body cannot be taken into any church, chapel, or other public place.<sup>329</sup>

Oklahoma empowers public health authorities to adopt and enforce measures providing for the safe disposal of human remains as may be reasonable and necessary to respond to the catastrophic health emergency. This broad authority includes ordering the disposal of any remains of a person who has died of a transmissible disease through burial or cremation within twenty-four hours after death, and clearly labeling remains prior to disposal with all available information to identify the decedent and the circumstances of death.<sup>330</sup> For remains of a deceased person with a transmissible disease, the tag must indicate that the human remains are infected and, if known, the transmissible disease.<sup>331</sup>

Oregon, during a public health emergency, empowers the public health director to: (1) prescribe measures (e.g., embalming, burial, cremation, interment, disinterment); (2) provide for the safe disposal of human remains as may be reasonable and necessary to respond to the public health emergency; (3) require human remains of a deceased person with a communicable disease or transmissible agent, to be clearly labeled.<sup>332</sup>

In Rhode Island, the body of a deceased person cannot be cremated within twenty-four hours after death unless he dies of a contagious or infectious disease.<sup>333</sup> Rhode Island's rule seems to be permissive. Additionally, if the dead person were to be cremated, Rhode Island requires a cremation authorization form, containing notification as to whether the death occurred from a disease declared by the Department to be infectious, contagious, communicable or dangerous to the public health.<sup>334</sup>

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326. N.D. CENT. CODE ANN. § 23-06-07 (West 2022).

327. N.D. ADMIN. CODE 33-06-15-01 (2022).

328. OHIO REV. CODE ANN. § 3707.19 (West 2022).

329. OHIO REV. CODE ANN. § 3707.19 (West 2022).

330. OKLA. STAT. ANN. tit. 63, § 6502 (West 2022).

331. *Id.*

332. OR. REV. STAT. ANN. § 433.449 (West 2022).

333. 216-40-05 R.I. CODE R. § 25.6.4(A)(1) (LexisNexis 2022).

334. *Id.*

In South Carolina, before transporting human remains known to be infected by any contagious or infectious disease, the healthcare provider, or other entity in possession of the human remains, must inform the person or entity transporting the remains that the remains are infected.<sup>335</sup> The remains must be clearly labeled as infected.<sup>336</sup> The Department of Health and Environmental Control (DHEC) can order the burial or cremation of the remains of a person who died of an infectious disease within twenty-four hours after death. DHEC is also empowered to take measures to provide for the safe disposal of human remains as may be reasonable and necessary for emergency response.<sup>337</sup> These measures include death certificates, autopsies, embalming, burial, cremation, interment, disinterment, transportation, and disposal of human remains.<sup>338</sup>

South Dakota also prohibits cremation within twenty-four hours after the time of death, unless the death was a result of an infectious, contagious, or communicable and dangerous disease, and the time requirement is waived in writing by the coroner or the attending physician.<sup>339</sup>

Texas<sup>340</sup> requires remains of an individual who died of, or had a diagnosis of, a communicable disease to be tagged.

In Utah, a funeral service establishment may not cremate human remains until it has received a cremation authorization form containing “notification as to whether the death occurred from a disease declared by the department of health to be infectious, contagious, communicable, or dangerous to the public health.”<sup>341</sup> Similarly, a funeral service establishment may not perform alkaline hydrolysis<sup>342</sup> on human remains until the establishment has received notification as to whether the death occurred from a disease declared by the Department of Health to be infectious, contagious, communicable, or dangerous to the public health.<sup>343</sup>

Vermont also prohibits the municipal or county clerk, a deputy registrar, a funeral director, a crematory owner or manager, or a law enforcement officer from issuing a burial-transit permit in cases of death by certain communicable diseases as defined by the Commissioner, except in accordance with instructions

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335. S.C. CODE ANN. § 44-29-20 (2022).

336. *Id.* § 44-4-320 (“[A]ny human remains of a deceased person with an infectious disease must have an external, clearly visible tag indicating that the human remains are infected and, if known, the infectious disease.”).

337. *Id.*

338. *Id.*

339. S.D. CODIFIED LAWS § 34-26A-13 (2022).

340. 25 TEX. ADMIN. CODE § 97.13 (2022) (“The tag shall include the words “COMMUNICABLE DISEASE--BLOOD/BODY SUBSTANCE PRECAUTIONS REQUIRED” in letters no smaller than six millimeters in height.”).

341. UTAH CODE ANN. § 58-9-607(2)(a)(iii) (West 2022).

342. Alkaline Hydrolysis (AH) is a new process for disposition of human remains. It is a chemical process where a heated or pressurized solution of water and strong alkali are used to dissolve dead bodies, resulting in liquid waste that can be disposed through the sewer systems, and brittle bone matter that can be dried, crushed and returned to the decedent’s family. Olson, *supra* note 14, at 667-68.

343. UTAH CODE ANN. § 58-9-613(2)(a)(iii) (West 2022).

issued by the Commissioner.<sup>344</sup> Additionally, crematory facilities are prohibited from cremating a body within twenty-four hours after death, unless the decedent died from a virulent, communicable disease, or a Department of Health rule or order requires the cremation to occur prior to the end of that period.<sup>345</sup>

Washington prohibits reducing the dead body by natural organic reduction if the human remains are confirmed to have or are suspected of having prion disease infection, mycobacterium tuberculosis infection, Ebola, or a contagious disease infection which may be a public health hazard as identified by the local health officer or medical examiner.<sup>346</sup>

In West Virginia, an embalmer who knows that a body is affected with infections or contagious diseases is required to supervise, treat, and disinfect body cavities.<sup>347</sup> The embalmer must also provide written disclosure regarding the potential hazards to individuals who wish to view an unembalmed body.<sup>348</sup> Additionally, “if a crematory has made legitimate attempts to contact the next of kin or authorized representative without success and has reasonable belief that a body could be infected with a contagious or communicable disease, the crematory may contract with an embalmer to have the body embalmed immediately upon receipt of certification by a public health officer that the body is infected with a contagious or communicable disease.”<sup>349</sup>

Wisconsin, during a public health emergency, a public health authority may “issue and enforce orders that are reasonable and necessary to provide for the safe disposal of human remains,” including “the remains of an individual who has died of a communicable disease.” Remains from an individual who has died of a communicable disease must be labeled “before disposal with all available identifying information and information concerning the circumstances of death and.” Additionally a record must be kept of all “human remains that are disposed of, including all available identifying information and information concerning the circumstances of death and disposal.”<sup>350</sup>

In Wyoming “[i]f the person has died from a potentially infectious disease, the funeral service practitioner shall follow the recommendations of the state health officer in regards to permissible types of disposition.” The person “caring for the body of a person who had died of a potentially infectious disease” must “cause the dead human body to be placed in a container which is resistant to the flow of air and fluids.”<sup>351</sup>

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344. VT. STAT. ANN. tit.18, § 5201 (West 2022).

345. *Id.*

346. WASH. ADMIN. CODE § 246-500-030 (2022).

347. W. VA. CODE R. § 6-1-7 (2022).

348. *Id.*

349. *Id.* § 6-2-17.

350. WIS. STAT. ANN. § 157.055 (West 2022).

351. 035-4 WYO. CODE R. § 9 (LexisNexis 2022).

In sum, there is no consistency among the states regarding regulations controlling disposal of human remains where death is caused by communicable or infectious disease. Nevertheless, a few patterns can be discerned. First, many jurisdictions prescribe a twenty-four hour time period for burial of a body infected with a contagious disease.<sup>352</sup> Second, precautionary measures are generally required for handling infectious corpses, such as exercising universal precautions when handling blood and body fluids.<sup>353</sup> Third, some states specifically list the type of infectious diseases that trigger specialized handling of corpses.<sup>354</sup> Finally, some states require embalming as a means of reducing infection and preserving the body, either for viewing or transportation out of the state.<sup>355</sup>

## 2. *Not included in the Laws and Regulations*

Arkansas<sup>356</sup>, Florida<sup>357</sup>, Indiana<sup>358</sup>, Maryland<sup>359</sup>, Pennsylvania<sup>360</sup>, and Tennessee<sup>361</sup> do not have specific communicable disease requirements or procedures for the disposition of infected human remains. Although Florida has no formal regulations for such disposition, the Florida Department of Health in conjunction with Florida Medical Examiners Commission and the Florida Emergency Mortuary Operations Response System has issued guidelines for professionals involved with postmortem care in hospitals, medical examiner offices, and funeral homes.<sup>362</sup> These guidelines outline appropriate handling of human remains infected with pathogens responsible for viral hemorrhagic fevers (VHF) such as Ebola Virus Disease (EVD).<sup>363</sup>

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352. See e.g., KAN. ADMIN. REGS. §63-3-10 (2022); MO. CODE REGS. ANN. tit. 19 §20-24.010 (2022).

353. MINN. STAT. ANN. § 149A.91 (West 2022); 10-146-001 ME. CODE R. § 3 (LexisNexis 2022).

354. 173 NEB. ADMIN. CODE § 1-004.01 (2022); MICH. ADMIN. CODE r. 325.1(1) (2022).

355. 172 NEB. ADMIN. CODE § 68-006.01 (2022).

356. ARK. CODE ANN. § 17-29-304 (e)(2) (West 2022) (“The funeral establishment shall comply with the rules of the department and standards and regulations of the United States Occupational Safety and Health Administration for the prevention of the spread of contagious, infectious, or communicable diseases.”).

357. FLA. STAT. ANN. § 497.162 (West 2022) (requiring only that all individuals who intend to work for a direct disposal establishment and who have direct contact with human remains shall complete one course approved by the licensing authority on communicable diseases, within 30 days after the date their employment).

358. See IND. CODE ANN. § 35-45-19-3 (West 2022) (making it a crime to knowingly fail to report to a funeral service provider, coroner, public safety officer, physician, or 911 call center a dead body when it appears that the person died as the result of a disease that may constitute a threat to public health).

359. MD. CODE ANN., HEALTH-GEN. § 5-513 (West 2022).

360. 35 PA. STAT. AND. CONS. STAT. § 450.506 (West 2022).

361. TENN. CODE ANN. § 68-4-101 (West 2022).

362. See Florida Department of Health et al., *Handling of Human Remains Infected With Viral Hemorrhagic Fevers, A Quick Reference Guide For: Health Care Workers, Medical Examiners, Funeral Services*, <https://www.fdle.state.fl.us/MEC/Documents/Handling-of-Human-Remains-Infected-with-Viral-Hemo.aspx> (last visited Aug. 23, 2022).

363. *Id.*

Similarly, Maryland statutes on the disposition of human remains do not mention communicable diseases. However, a health regulation states that “[e]xcluding a deceased person with a known communicable infection, human remains shall be properly identified before cremation by verifying that the documentation accompanying the human remains is consistent with a visual observation of the human remains.”<sup>364</sup> This sentence seems to be the sole reference to communicable diseases and human remains in Maryland law.

In the same vein, Pennsylvania’s statute simply provides that “[t]he Advisory Health Board shall make and may amend or repeal regulations governing disposal, transportation, interment and disinterment of dead bodies and fetal remains, in order to protect the public health and promote the integrity and efficacy of death and fetal death registration.”<sup>365</sup> None of these statutes refer to the handling and disposition of human remains resulting from communicable diseases.

Tennessee’s statute regulating dead bodies is silent on communicable diseases. However, the licensing rule for funeral directors and embalmers states that before an applicant can be issued a license to practice, he or she must take an examination and demonstrate that he or she “has a reasonable knowledge of sanitation and disinfection of premises, clothing, bedding and other articles subject to contagion and infection, has a reasonable knowledge of the sanitation and disinfection of bodies of diseased persons where death was caused by infectious diseases or communicable diseases” and comply with all the rules and regulations of the board applying to funeral directors.<sup>366</sup>

### 3. *Implications for Public Health*

Death caused by communicable diseases impacts public health in three important ways. First, what is written on the death certificate can fuel family and community controversy.<sup>367</sup> For example, confusion exists as to whether people die “of” COVID-19 or “with” COVID-19.<sup>368</sup> Because of our partisan divide, some family members may not want their loved one listed as having died of COVID-19, perhaps fueled by conspiracy theories about the pandemic.<sup>369</sup>

364. MD. CODE REGS. 10.29.18.02(D)(7) (2022).

365. 35 PA. STAT. AND CONS. STAT. § 450.506 (West 2022).

366. TENN. CODE ANN. § 62-5-306(c) (West 2022).

367. Sally Aiken, *Death Certification in the United States*, 111 AM. J. PUB. HEALTH, Suppl. 2, S55 (2021).

368. Patrick Boyle, *How are COVID-19 Deaths Counted? It's Complicated*, AAMC (Feb. 18, 2021), <https://www.aamc.org/news-insights/how-are-covid-19-deaths-counted-it-s-complicated>.

369. See, e.g., Colette, Bordelon, *Conspiracies attack coroner: Families demand COVID-19 diagnoses be removed from loved one's death certificates* (koaa News5.com, Jan 12, 2021) <https://www.koaa.com/news/coronavirus/conspiracies-attack-coroner-families-demand-covid-19-diagnoses-be-removed-from-loved-ones-death-certificates>, and

Concomitantly, other family members may want the communicable disease, such as COVID-19, listed on the death certificate to qualify for funeral assistance.<sup>370</sup> Similarly, others may want the communicable disease, such as HIV, AIDS, or any other sexually transmitted diseases, omitted for religious or moral reasons.<sup>371</sup> This is because death certificates become part of family history; certificates are used for proof of death, certification for insurance companies, social security administration, banks, and probate court records.<sup>372</sup>

Second, situations in the processing, handling, and disposal of human remains can cause an increased risk of exposure to infection.<sup>373</sup> Researchers have found that funeral service providers risk exposure to bacterial and viral pathogens as well as to prion-mediated diseases.<sup>374</sup> Any process involving contact with body fluids or the use of sharp instruments, especially relating to embalming, is associated with increased risk.<sup>375</sup> Therefore, training and protecting people working in the funeral industry is important.<sup>376</sup> In a study to determine the training and educational needs of death care industry workers, researchers found that only one-third of respondents had been trained on how to manage highly infectious remains, and more than 40% of respondents did not know the correct routes of transmission for viral hemorrhagic fevers.<sup>377</sup>

In light of the health risks that diseased bodies may present, standard precautions for infection control should be implemented by anyone handling human remains.<sup>378</sup> In fact there may be a need for infection control activities in

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Andrew C. Stokes et al., *Excess Deaths During the COVID-19 Pandemic: Implications for US Death Investigation Systems*, 111. *AM. J. PUB. HEALTH*, Supp. 2, S53-S54 (2021) (“Thus, partisan differences could affect the likelihood that an individual or their family members seek COVID-19 testing while alive and whether coroners pursue postmortem testing.”).

370. *Coronavirus (COVID-19) Funeral Assistance*, FED. EMERGENCY MGMT. ADMIN., <https://www.fema.gov/disaster/coronavirus/economic/funeral-assistance> (Aug. 10, 2022) (“FEMA may provide COVID-19 Funeral Assistance to you if: you are a U.S. citizen, non-citizen national, or qualified non-citizen, the death occurred in the United States, including U.S. territories and the District of Columbia; the death was attributed to COVID-19; and you are responsible for the eligible funeral expenses incurred on or after January 20, 2020.”).

371. Aiken, *supra* note 420 at S55.

372. WORLD HEALTH ORGANIZATION, *SCORE FOR HEALTH DATA TECHNICAL PACKAGE: GLOBAL REPORT ON HEALTH DATA SYSTEMS AND CAPACITY 2020*, 29 (Feb. 1, 2021) (“There is often a lack of recognition that a death certification is an important document for the family of a deceased person, in particular for children (who may be able to benefit from services for orphans) and for widows(ers) who need the death certificate in order to claim spousal pensions and benefits, as well as the right to marry in settings where monogamy is the law. In addition, a death certificate is required for surviving family members to claim inheritance or access to resources and property of the decedent.”).

373. HEALTH PROT. SURVEILLANCE CTR., *GUIDELINES FOR THE MANAGEMENT OF DECEASED INDIVIDUALS HARBOURING INFECTIOUS DISEASE 5* (2013).

374. Susan Salter Davidson & William H. Benjamin, *Risk of Infection and Tracking of Work-Related Infectious Diseases in the Funeral Industry*, 34 *AM. J. INFECTION CONTROL* 655, 568 (2006).

375. *Id.*

376. *Id.*

377. Aurora B Lee et al., *A Gap Analysis of the United States Death Care Sector to Determine Training and Education Needs Pertaining to Highly Infectious Disease Mitigation and Management*, 14 *J. OCCUPATIONAL ENVTL. HYGIENE* 674 (2017).

378. HEALTH PROT. SURVEILLANCE CTR., *supra* note 427 at 4.

funeral homes analogous to those found in most health care facilities.<sup>379</sup> To be fair, dead bodies in general do not pose a significant infectious risk.<sup>380</sup> Infections are spread from person-to-person through coughing, sneezing, contaminated hands, intimate contact, or contact with contaminated drainage, blood or body fluids.<sup>381</sup> Thus, many infections are not likely to be transmitted after death unless body fluids containing the infectious agent come in contact with living persons in a way that allows the infections to be passed.<sup>382</sup> Nevertheless, prevention is worthwhile, especially in light of COVID-19.

The third policy implication is the need to improve the quality of mortality data and routine surveillance.<sup>383</sup> According to WHO, “only 10% of deaths in the African region are registered while in the European and Americas regions, over 90% of deaths are registered.”<sup>384</sup> However, the “Covid-19 pandemic unmasked smoldering concerns about the patchwork of mortality tracking in the United States and elsewhere.”<sup>385</sup> For example, “official Covid-19 death counts have underestimated the mortality impact of the Covid-19 pandemic in the United States.”<sup>386</sup> This is particularly salient among those who die alone.<sup>387</sup> Additionally, in many rural areas, coroners identify the deceased, determine the cause of death, and issue death certificates.<sup>388</sup> However, these coroners are often “laypeople who typically lack professional training in medical certification . . . and often serve dual roles such as a sheriff–coroner.”<sup>389</sup>

Moving forward, public health professionals should consider those who die in isolation, as well as the needs, training, and qualification of those who handle the dead. Both are essential components of a robust death investigation and reporting system. The focus on those who handle the dead, i.e., last responders, is one of the suggested approaches below.<sup>390</sup>

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379. Davidson & Benjamin, *supra* note at 657.

380. See letter from Dr. Michael T. Osterholm, Director, Center for Infectious Disease Research and Policy, Univ. of Minnesota, to The Honorable Representative Carolyn Laine, Minnesota House of Representatives and Senate Hearings on H.F. 31511 S.F. 2903 (March 2010) <https://funerals.org/wp-content/uploads/2020/05/Dr.-Osterholm-Letter-Embalming-Minnesota-2010.pdf> (noting that “Once a human dies, infectious agents that would be of any concern, including those on the individual’s skin or internal organs is greatly diminished.”)

381. HEALTH PROT. SURVEILLANCE CTR., *supra* note 427 at 5.

382. *Issues to Consider in Preparing for Disposition of Decedents*, *supra* note 281.

383. Vickie M. Mays & Susan D. Cochran, *A Look at When Dying Really Counts: An AJPH Supplement on Mortality Data in Public Health*, 111 AM. J. PUB. HEALTH, Supp. 2 at S47 (2021).

385. Cochran & Mays, *supra* note 437.

386. Eugenio Paglino et al., *Excess All-Cause Mortality across Counties in the United States*, MAR. 2020-DEC. 2021, 1 MEDRXIV (2022).

387. Jillian Mckoy, *Uncovering Covid-19’s Hidden Deaths in the United States*, B.U.: THE BRINK (Jan. 2022), <https://www.bu.edu/articles/2022/underreporting-covid-19-deaths/>.

388. UNIV. OF N.M., OFF. OF THE MED. INVESTIGATOR, *What is a Coroner?*, <https://hsc.unm.edu/omi/about/faq/coroner.html> (last visited Aug. 10, 2022).

389. Stokes, et. al, *supra* note 315 at S53.

390. See *infra* p. 44.



## IV. SUGGESTED APPROACHES

While public health has traditionally focused on infection control among the living, scant attention is paid to handling of the deceased.<sup>391</sup> Although we cannot prevent a death that has already occurred, the pandemic behooves us to pay attention to what happens after death. Several public health agencies and organizations have started focusing on what happens after someone dies.<sup>392</sup> For example, both the WHO and CDC have issued model guidelines for the management of human remains during a pandemic.<sup>393</sup> In September 2020, the WHO published its interim guidance on infection prevention and control for the safe management of a dead body in the context of COVID-19.<sup>394</sup> It notes that people who have died from COVID-19 can be buried or cremated according to local standards and family preferences, and that national and local regulations may determine how the remains should be handled and disposed.<sup>395</sup> Similarly, CDC has provided recommendations for the collection and submission of postmortem specimens from deceased persons with a confirmed or suspected case of Covid-19.<sup>396</sup> The recommendations include biosafety and infection control practices as well as autopsy precautions and procedures.<sup>397</sup>

However, guidelines across the country are still inconsistent.<sup>398</sup> This article recommends that states update their laws on the transportation and burial of human remains because “many of the state-by-state regulations are outdated and completely unnecessary.”<sup>399</sup> As of the time of this writing, no state has changed or updated its laws regarding transportation and burial of human remains due to COVID-19.<sup>400</sup> Rather state departments of health have issued guidance

391. HEALTH PROT. SURVEILLANCE CTR., *supra* note 427 at 1.

392. *See, e.g.*, WORLD HEALTH ORGANIZATION, INFECTION PREVENTION AND CONTROL FOR THE SAFE MANAGEMENT OF A DEAD BODY IN THE CONTEXT OF COVID-19, INTERIM GUIDANCE, at 3 (2020) (explaining that the WHO has issued guidelines for managing human remains during the pandemic); *see also* CTRS. FOR DISEASE CONTROL AND PREVENTION, COLLECTION AND SUBMISSION OF POSTMORTEM SPECIMENS FROM DECEASED PERSONS WITH CONFIRMED OR SUSPECTED COVID-19 . POSTMORTEM GUIDANCE (2022) (The CDC has issued guidelines for collecting postmortem specimen from people confirmed to have had Covid-19).

393. *See* WORLD HEALTH ORGANIZATION & CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 448.

394. *See* WORLD HEALTH ORGANIZATION, *supra* note 448 at 1 (relaying that the WHO has released guidance on handling corpses infected with Covid-19).

395. WORLD HEALTH ORGANIZATION, *supra* note 448 at 3.

396. CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 448.

397. *Id.*

398. *See* Waters, *supra* note 16.

399. *See Id.* (citing Professor Victoria Haneman and noting that “many of the state-by-state regulations are outdated and completely unnecessary.”).

400. *See, e.g.*, ARIZ. DEP’T OF HEALTH, *Arizona Covid-19 Response, What A funeral Home Personnel Should Know*, A.Z. FUNERAL DIRECTORS & EMBALMERS, [https://funeralboard.az.gov/sites/default/files/media/Funeral%20Home%20Fact%20Sheet\\_0.pdf](https://funeralboard.az.gov/sites/default/files/media/Funeral%20Home%20Fact%20Sheet_0.pdf) (last updated Jan. 22, 2021); IND. STATE DEP’T OF HEALTH, *Covid-19 Guidance for Funeral Homes and Directors*, IN.GOV (Nov. 16, 2020), [https://www.coronavirus.in.gov/files/IN\\_COVID-19-funeral-home-11.16.20.pdf](https://www.coronavirus.in.gov/files/IN_COVID-19-funeral-home-11.16.20.pdf); *COVID-19: Funerals and Handling of Bodies*, LA. DEP’T OF HEALTH (Apr. 1, 2020),

documents for funeral establishments.<sup>401</sup> But these guidance documents have a number of weaknesses. First, they are, as the name implies, just guidelines, not laws or regulations.<sup>402</sup> As such, funeral establishments have the liberty to decide whether to follow them or not.<sup>403</sup> Second, they are fleeting, some with fixed expiration dates.<sup>404</sup> Third, almost all of them were issued in 2020 at the height of the pandemic.<sup>405</sup> Most have not been updated or changed.<sup>406</sup> Finally, the focus of these guidelines seems to be on funeral establishment staff.<sup>407</sup> That said, little focus is placed on the bereaved families. Unlike guidance documents, comprehensive laws and regulations are durable and can apply to funeral establishment staff and families.<sup>408</sup>

This article also suggests selective or “reasonable” enforcement of death laws during times of disasters.<sup>409</sup> Selective enforcement occurs when facially neutral policies are not enforced fairly among different groups of people.<sup>410</sup> As

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[https://ldh.la.gov/assets/oph/Coronavirus/resources/COVID-19\\_FuneralGuidance.pdf](https://ldh.la.gov/assets/oph/Coronavirus/resources/COVID-19_FuneralGuidance.pdf); NEV. GOVERNOR’S OFFICE & NEV. DEP’T OF HEALTH & HUMAN SVCS., *Essential Status Clarification for Funeral Homes*, NEVADA HEALTH RESPONSE (Apr. 6, 2020), [https://gov.nv.gov/uploadedFiles/govnewnv.gov/Content/News/Emergency\\_Orders/2020\\_attachments/003-Funeral-Home-Guidance2020-04-06.pdf](https://gov.nv.gov/uploadedFiles/govnewnv.gov/Content/News/Emergency_Orders/2020_attachments/003-Funeral-Home-Guidance2020-04-06.pdf); N.J. CEMETERY & MORTUARY SCIENCE BDS., *Covid-19 Advisory for New Jersey Cemeteries and Mortuaries*, N.J. DIV. CONSUMER AFFS. (Oct. 30, 2020), <https://www.njconsumeraffairs.gov/COVID19/Documents/Covid-19-Advisory-for-New-Jersey-Cemeteries-and-Mortuaries.pdf>; *Interim Guidance On Postmortem Care Of A Decedent Whose Death Is Confirmed Or Suspected To Be Attributed To COVID-19*, PA. DEP’T HEALTH (Jan. 11, 2021), <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Guidance/Postmortem-Care.aspx>; R.I. DEP’T OF HEALTH, *Guidance for Funeral Homes and Funeral Directors, Phase III*, REOPENING RHODE ISLAND (June 29, 2020), <https://reopeningri.com/wp-content/uploads/2020/07/071320-Phase-III-Funeral-Guidance-Reopening-Template.pdf?189db0&189db0>; TENN. DEP’T OF COMMERCE & INS., CORONAVIRUS (COVID-19) MESSAGE TO FUNERAL AND CEMETERY PROFESSIONALS REGARDING EXECUTIVE ORDER No. 30 (Apr. 30, 2020), <https://www.tn.gov/commerce/news/2020/4/30/coronavirus--covid-19--message-to-funeral-and-cemetery-professionals-regarding-executive-order-no--30.html>; TEX. FUNERAL SERVICE COMM’N, *Texas Funeral Services Commission Recommendations for Funeral Practitioners during the COVID-19 Outbreak*, TEX. FUNERAL DIRS. ASS’N (Apr. 6, 2020), <https://www.tfd.com/assets/COVID19/TFSC%20COVID%2019%20Funeral%20Protocols%20Revision%2004062020.pdf>; and WASH. STATE, *Weddings, Funerals, and Events COVID-19 Requirements*, WASH. GOVERNOR, <https://www.governor.wa.gov/sites/default/files/COVID19%20Wedding%20Funeral%20and%20Events%20Guidance.pdf> (Archived document “no longer in force as of June 30, 2021 but may be used as guidance.”).

401. *Id.*

402. *Id.*

403. *Id.*

404. For example, CDC’s document specifically states “This document provides specific *interim* recommendations for the collection and submission of postmortem specimens from deceased persons with confirmed or suspected COVID-19.” See CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 448.

405. See *supra* note 456.

406. *Id.*

407. *Id.*

408. *Id.*

409. See *infra* notes 466-468.

410. CHANGELAB SOL., *EQUITABLE ENFORCEMENT TO ACHIEVE HEALTH EQUITY* 25 (2020), [https://www.changelabsolutions.org/sites/default/files/2020-06/Equitable\\_Enforcement\\_to\\_Achieve\\_Health\\_Equity-GUIDE-ACCESSIBLE\\_FINAL\\_20200610.pdf](https://www.changelabsolutions.org/sites/default/files/2020-06/Equitable_Enforcement_to_Achieve_Health_Equity-GUIDE-ACCESSIBLE_FINAL_20200610.pdf).

a threshold matter, the selective enforcement of laws generally has a harmful effect on public health.<sup>411</sup> However, in times of an emergency, use of discretion may be warranted.<sup>412</sup> For example, some states require that a burial permit be obtained within three to five business days after death,<sup>413</sup> that a body must be embalmed or refrigerated if human remains either cannot reach the intended destination, or the body is not buried or disposed of within twenty-four hours after the death.<sup>414</sup> Where this is not possible, like during a pandemic, selective or reasonable enforcement of the laws may be necessary.

Additionally, funeral workers should be designated as essential.<sup>415</sup> Generally, funeral workers are often treated as last responders.<sup>416</sup> As a result, they are left out of the essential workers category and often forgotten as healthcare workers.<sup>417</sup> Just like healthcare workers who tend to the living, funeral workers faced overwhelming challenges as the pandemic death toll mounted, from exploding caseloads and shortages of personal protective equipment, to mental health concerns.<sup>418</sup> In recognition of their important role, the Cybersecurity and Infrastructure Security Agency of the Department of Homeland Security listed “workers performing mortuary funeral, cremation, burial, cemetery, and related services” as part of the essential critical infrastructure workforce.<sup>419</sup> Recognizing end of care workers as essential will

411. See Maya Hazarika Watts et al., *Equitable Enforcement of Pandemic-Related Public Health Laws: Strategies for Achieving Racial and Health Justice*, 111 AM. J. PUB. HEALTH 395 (2021) (describing persistent systemic failures in public health enforcement that have deleterious health impacts including chronic failure to enforce health and safety regulations, such as housing safety codes, and selective enforcement of certain public health laws, such as antismoking ordinances, that target and displace unhoused individuals); Kelly K. Dineen & Elizabeth Pendo, *Ending The War on People With Substance Use Disorders in Healthcare*, 21 AM. J. BIOETHICS 20 (2021) (describing structural forces that lead institutions and individuals in law and medicine to selectively enforce laws to protect and treat people with substance use disorders.).

412. See Hamann Kristine & Bismuth Charlotte, *Seeking Justice and Solutions in the Opioid Epidemic-The Prosecutor's Role*, 36 CRIM. JUST. CHI. 8,17 (2021) (explaining how with the opioid epidemic, some District Attorneys have taken a prevention approach involving community service and selective, carefully investigated prosecutions to stem the deaths).

413. See, e.g., ALASKA. ADMIN. CODE tit. 7, § 05.460(a) (2022) (“A dead body. . .may not be finally disposed of, or removed from the state, until a burial-transit permit has been issued...within seventy-two hours after death.”); see also HAW. REV. STAT. §338-9 (2022) (requiring a certificate of death within three days after occurrence).

414. See *supra* Section III.B.

415. Essential workers are those who conduct a range of operations and services that are typically essential to continue critical infrastructure operations. See Nat’l Conf. of State Legs., *Covid-19: Essential Workers in the States*, NCSL.ORG (Jan. 11, 2021), <https://www.ncsl.org/research/labor-and-employment/covid-19-essential-workers-in-the-states.aspx#:~:text=Workers%20in%20the%20following%20settings,supply%20stores%20and%20liquor%20stores.>

416. Sherry V. Bensimon, *Seeing Death Up Close: Funeral Directors as Forgotten First Responders in the COVID-19 Pandemic*, 111 AM. J. PUB. HEALTH S57 (2021).

417. *Id.*

418. *Id.*

419. CYBER SEC. & INFRASTRUCTURE AGENCY, DEP’T OF HOMELAND SEC., GUIDANCE ON THE ESSENTIAL CRITICAL INFRASTRUCTURE WORKFORCE: ENSURING COMMUNITY AND NATIONAL RESILIENCE IN COVID-19 RESPONSE (2020).

allow them to be prioritized for health services, like vaccines and personal protective equipment.<sup>420</sup>

Finally, it goes without saying that preparedness is essential in managing and handling the number of corpses caused by a pandemic.<sup>421</sup> For example, in 2020, Hart Island in New York city became a mass burial ground for those killed by COVID-19.<sup>422</sup> Over 2,300 corpses were buried on the island that year.<sup>423</sup> What is more galling is that many of these corpses were unidentified and unclaimed.<sup>424</sup> This is no way to treat the dead or bereaved families.<sup>425</sup> However, when faced with unprecedented numbers of deaths from a pandemic, identification of each corpse is impractical, and hospital morgues, mortuaries, and funeral homes are bound to run out of storage space, making mass grave sites inevitable. Nevertheless, disaster preparedness requires that municipalities, cities, and counties make a good faith attempt to locate family members before burying corpses in mass graves.<sup>426</sup> Disaster preparedness requires having adequate resources, such as personal protective equipment and refrigeration capacities, to mitigate the impact of future pandemics.<sup>427</sup> Since some of the unclaimed bodies that necessitated mass burials were probably the result of families' inability to afford private funerals,<sup>428</sup> funeral assistance programs like the one offered by FEMA, should be available.<sup>429</sup>

## V. CONCLUSION

Public health has traditionally focused on keeping the living healthy, scant attention is paid to handling of the deceased. Additionally, people who work with the dead are not often discussed, or even considered first responders.<sup>430</sup> The COVID-19 pandemic has changed this quite dramatically. The pandemic has

420. See Bensimon, *supra* note 483 ("Other funeral directors from around the country were given temporary legal authority in New York and New Jersey to assist us.").

421. See *infra* notes 479-482.

422. Colum. J-School Stabile Ctr., *One in 10 Local COVID Victims Destined for Hart Island, NYC's Potter's Field*, THE CITY (Mar. 24, 2021 9:29 PM EDT), <https://www.thecity.nyc/missing-them/2021/3/24/22349311/nyc-covid-victims-destined-for-hart-island-potters-field>.

423. *Id.*

424. W.J. Hennigan, *Lost in the Pandemic: Inside New York City's Mass Graveyard on Hart Island*, TIME (Nov. 18, 2020), <https://time.com/5913151/hart-island-covid/> ("City workers put unidentified or unclaimed corpses in simple wooden coffins, load them onto a ferry and entomb them in trenches across the island.").

425. Jeff Clyde G. Corpuz, *A Dignified Death: Management of Dead Bodies During COVID-19*, 44 J. PUB. HEALTH 1 (2021).

426. Hennigan, *supra* note 481 ("At points, the city was so overwhelmed that bodies were sent to the island before authorities had a chance to determine their cause of death or track down next of kin.").

427. Hennigan, *supra* note 481 (discussing how the remains of many who died of Covid-19 were held in makeshift storage units and trucks).

428. *Id.* ("Some families chose to have their loved ones buried here. Some families had no other option. And some families weren't aware their relative had died in the first place.").

429. FED. EMERGENCY MGMT. ADMIN., *supra* note 316.

430. Bensimon, *supra* note

resulted in millions of morbidity and mortality cases.<sup>431</sup> Moreover, many people died alone, whether through quarantine and isolation, or lack of social contacts precipitated by the pandemic.<sup>432</sup> This article has addressed deaths caused by isolation on the one hand, and on the other, what to do with human bodies after death, with specific emphasis on transportation and burial of the dead. It avers that the burdens on family members when someone dies are enormous. These burdens were further complicated by the pandemic. Therefore, it is critical for public health practitioners to focus on the role of social isolation as a contributing factor to mortality during a pandemic and to understand the laws and public health implications of transportation and burial of human remains in the fifty states.

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431 Erin K. Stokes et. al., *Coronavirus Disease 2019 Case Surveillance – United States, January 22–May 30, 2020*, 69 MORBIDITY AND MORTALITY WKLY. REP. 759 (2020).

432 See e.g., Alejandra Victoria Capozzo, *Dying Alone Due to Covid-19: Do the Needs of the Many Outweigh the Rights of the Few-or the One?*, FRONTIERS PUB. HEALTH 1 (2020) (pointing out that due to Covid-19, “many have died in isolation”); Ken Budd, *On the Obligation to Prevent People from Dying Alone*, WASH. POST MAG. (Dec. 8, 2021).

VI. APPENDIX: FIFTY STATE LAWS AND REGULATIONS ON  
TRANSPORTATION AND BURIAL OF HUMAN REMAINS

State	Burial/transit permit required?	Embalming required?	Communicable disease procedures specified?
Alabama	Yes.	No.	Yes.
Alaska	Yes.	No.	Yes.
Arizona	Yes.	Yes, after 24 hours of death.	Yes.
Arkansas	Yes.	Yes, after 24 hours of death.	No.
California	Yes.	Yes, after 24 hours of death.	Yes.
Colorado	Yes.	Yes, after 24 hours of death.	Yes.
Connecticut	Yes.	No.	Yes.
Delaware	Yes.	Yes, if kept longer than 24 hours.	Yes.
Florida	Yes.	Yes, embalmed or chilled under 40 degrees Fahrenheit if in transit or a single location over 24 hours.	No.
Georgia	No.	No.	Yes.
Hawaii	Yes.	Yes, within 30 hours after death.	Yes.
Idaho	No.	Yes, 24 hours after death.	No, however, bars embalming if a person dies of a communicable disease.
Illinois	Yes.	No.	Yes.
Indiana	Yes.	No.	No.
Iowa	Yes.	No.	Yes.
Kansas	No.	Yes, after 24 hours.	Yes.

Kentucky	Yes, state of death perm.it accepted as well.	No.	Yes.
Louisiana	Yes.	Yes, after 30 hours.	No.
Maine	Yes, disposition permit from state of death accepted as well.	Yes, if transporting by common carrier .  No, if private vehicles, but must be concealed from public view.	Yes.
Maryland	Yes, disposition permit from state of death accepted as well.	No.	No.
Massachusetts	Yes, disposition permit from state of death accepted as well.	No.	Yes.
Michigan	Yes.	Yes – but only if body infected with certain diseases, and if the body will be transported and not reach its destination within 48 hours after death.	Yes.
Minnesota	Yes.	Yes, 72 hours after death.	No.
Mississippi	Yes.	Yes, if the body will not be buried within 24 hours of death.	No.
Missouri	No.	Yes, if not buried within 24 hours.	Yes.

Montana	No.	Yes, 48 hours after death with private company transport; 36 hours after death if transported by common carrier.	No.
Nebraska	Yes.	Yes, 24 hours after death.	Yes.
Nevada	Yes.	Yes, before it is transported and if death was by communicable disease.	Yes.
New Hampshire	Yes, permit from local registrar is required.	Yes, if the body will be exposed to the public after 24 hours of death.	Yes.
New Jersey	No, however, required if out of state transportation.	Yes, but only if body is shipped by common carrier and will not reach its destination within 24 hours.	Yes.
New Mexico	No.	Yes, 24 hours after death.	Yes.
New York	Yes, disposition permit from state of death accepted as well.	No, but the body must be encased in a casket and covered from view of the public.	Yes.
North Carolina	Yes, disposition permit from state of death accepted as well.	No.	Yes.
North Dakota	Yes.	Yes, if body cannot reach its destination within 48 hours	Yes.



		and if the death was due to a communicable disease.	
Ohio	Yes.	No.	Yes.
Oklahoma	No, unless moving body out of state.	Yes, 24 hours after death.	Yes.
Oregon	No.	Yes, 24 hours after death.	Yes.
Pennsylvania	Yes, disposition permit from state of death accepted as well.	Yes, if body is shipped by common carrier and will not reach its destination within 24 hours or the body can be sealed in a metal or metal-lined, hermetically sealed container.	No.
Rhode Island	Yes.	Yes, within 48 hours after death.	Yes.
South Carolina	Yes, disposition permit from state of death accepted as well.	No.	Yes.
South Dakota	Yes.	Yes, 24 hours after death.	No.
Tennessee	No, but other certification maybe required.	No.	No.
Texas	No.	Yes, 24 hours after death and if no relative or other legally approved person takes responsibility for	Yes.

		the body within 24 hours.	
Utah	No.	Yes, 24 hours after death or if shipped by common carrier.	No.
Vermont	Yes.	No.	Yes.
Virginia	No.	Yes, if the body will remain unburied for longer than 48 hours.	No
Washington	Yes.	Yes, when the body is received – authorization by person in control of body must be given.	No.
West Virginia	Yes.	No.	No.
Wisconsin	Yes.	No.	No.
Wyoming	Yes.	Yes, within 36 hours after death.	Yes.