BURIED, CREMATED, DEFLESHED BY BUZZARDS? RELIGIOUSLY MOTIVATED EXCARNATORY FUNERAL PRACTICES ARE NOT ABUSE OF CORPSE

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I. INTRODUCTION

Great diversity in global funeral practices exists amongst the varied religions. Those practicing the Abrahamic religions of Christianity, Judaism, and Islam, bury their dead.[2] Hindus[3], Jains,[4] Sikhs,[5] and Buddhists[6] cremate and store or spread the ashes. Others engage in a variety of practices.[7] The thread linking

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[2] SAINT AMBROSE CATHOLIC CHURCH, FUNERAL PLANNING GUIDE 1 (2012); NORMAN L. GEISLER ET AL., FROM ASHES TO ASHES: IS BURIAL THE ONLY CHRISTIAN OPTION? 5-7 (Christian Research Institute 1998); MUHAMMADHUSEIN KERMALI, BURIAL RITUALS 9 (Ahlul Bayt Islamic Centre).

[3] Encyclopedia Britannica, *Anteyeshti Hindu Rite* (Mar. 16, 2011), https://www.britannica.com/topic/antyeshti.; BRIANNA PATEL, LAST RITUALS FOR THE INDIAN AMERICAN COMMUNITY: A RESOURCE GUIDE 8-9 (2008).

[4] *Id*. at 14.; DR. TANSUKJ J. SALGIA, JAIN FUNERALS, PRACTICES, AND OBSERVANCES: PRACTICAL GUIDELINES FOR THE COMMUNITY 15 (1st ed. 2004).

[5] UK SIKH HEALTHCARE CHAPLAINCY GROUP, GUIDANCE NOTE ON ISSUES SURROUNDING DEATH IN A SIKH FAMILY 2.; BRIANNA PATEL, LAST RITUALS FOR THE INDIAN AMERICAN COMMUNITY: A RESOURCE GUIDE 26 (2008).

[6] BUDDHA DHARMA EDUCATION ASSOCIATION INC., A GUIDE TO A PROPER BUDDHIST FUNERAL 22 (Malaysian Buddhist Co-operative Society Berhad).

[7] The Funeral Source, *Asian Funeral Traditions: Filipino Funeral Traditions* (2014), http://thefuneralsource.org/trad140208.html ("Bilaans wrap their dead inside tree bark [and] the body is then suspended from treetops…Ilongots [are] buried in a sitting position, and if a woman, has her hands tied to her feet to prevent her ghost from wandering… [The Benguet corpse is blindfolded and made to] sit on a chair that is placed next to the house's main entrance [for eight days]. The arms and legs are held in the sitting position by means of tying. A bangil rite is performed by the elders on the eve of the funeral, which is a chanted narration of the biography of the deceased. During interment, the departed is directed towards heaven by hitting bamboo sticks together. …The Itnegs of Abra bury their dead under their houses [and the Apayaos bury under the kitchen.]").; Jo Munnik and Katy Scott, *Famadihana: The Family Reunion Where the Dead get an Invite*, CNN (Oct. 18, 2016, 7:19AM), http://www.cnn.com/2016/10/18/travel/madagascar-turning-bones/.; Barry Bearak,

these practices is that, regardless of their mainstream acceptance, they are sacred to those who believe in them.

This Note argues for a Free Exercise exemption for religiously motivated excarnatory funeral practices currently banned in the United States under state Abuse of Corpse statutes. Part One of this note briefly examines what excarnatory funeral practices are, which religions practice it, and why excarnation is important to them. Part Two examines funeral law. Part Three discusses the Supreme Court's trend of minority religion inclusion through granting Free Exercise exemptions and discusses how the passage of the Federal Religious Freedom Restoration Act (RFRA) and its state counterparts shows strong and passionate support for the Free Exercise Clause and the Compelling Interest Test which only allows the government to restrict free exercise if it can give a compelling reason to do so. Part Four contends that any proffered compelling reason the government tries to make under the Supreme Court's Compelling Interest Test, Federal RFRA, or any state RFRA fails. This Note concludes that a Free Exercise exemption for religiously motivated excarnatory funeral practices should exist.

A. Excarnation Defined

Excarnation is the practice of stripping flesh from a corpse[8] which dates back to pre-historic times.[9] This practice is mandated

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Dead Join the Living in a Family Celebration, N.Y. Times (Sept. 5, 2010), http://www.nytimes.com/2010/09/06/world/africa/06madagascar.html?pagewanted=all&_r=0.; Hiroko Nakata, *Japan's Funerals Deep-Rooted Mix of Ritual and Form*, Japan Times (Jul. 28, 2009), http://www.japantimes.co.jp/news/2009/07/28/reference/japans-funerals-deep-rooted-mix-of-ritual-form/; Amanda Bennet, *When Death Doesn't Mean Goodbye*, National Geographic (Mar. 2016), http://www.nationalgeographic.com/magazine/2016/04/death-dying-grief-funeral-ceremony-corpse/.; National Geographic, *Here, Living With Dead Bodies for Weeks—Or Years—Is Tradition*, YouTube (Mar. 25, 2016), https://www.youtube.com/watch?v=hCKDsjLt_qU.

[8] Richard H. Underwood, *Notes from the Underground (Sometimes Aboveground, Too)*, 3 Savannah L. Rev. 161, 162 (2016) (citing Richard Broxton Onians, THE ORIGINS OF EUROPEAN THOUGHT: ABOUT THE BODY, THE MIND, THE SOUL, THE WORLD, TIME, AND FATE (1951)).; Paul HGM Dirks ET AL., *Geological and Taphonomic Context for the New Hominin Species Homo Naledi from the Dinaledi Chamber South Africa*, ELIFE, at 27 (Sept. 10, 2015), https://elifesciences.org/content/4/e09561.

[9] *Id.*; Chris Fowler, *Pattern and diversity in the Early Neolithic Mortuary Practices of Britain and Ireland: Contextualizing the Treatment of the Dead*, Documenta Praehistorica, 2010, at 7-10.

in the religion of Zoroastrianism, is a common practice in the Buddhist mountains of Tibet, and occurs in a variety of aboriginal and Native traditions.

B. Zoroastrianism and its Excarnatory Funeral Practices

1. Zoroastrian Funeral Beliefs

Zarathustra[10] (or Zoroaster, as he was known to the Greeks),[11] the prophet of the God Ahura Mazda,[12] started the religion of Zoroastrianism in 2 B.C.E.[13] or approximately 3,500 years ago.[14] The Zoroastrian holy book, The Avesta[15] contains the Vendidad (Laws or Regulations to Keep Demons Away)[16] which calls for disposing of the dead on high places so flesh-eating dogs or birds can consume them[17] because Nasush ("Nasu", the demon of pollution)[18] infects the dead immediately after death[19] and cannot be expelled until the flesh of the corpse is consumed.[20]

The Vendidad explains why other funeral methods are inappropriate and the consequences of inappropriate funerals. It states that corpses must be disposed of in an excarnatory manner because allowing them to touch the ground contaminates the ground for one year[21] and that burying contaminates the ground for fifty years,[22] details various methods people can use to purify water polluted with dead matter,[23] and explains the method Ahura Mazda himself uses to purify polluted water.[24] Furthermore, the Vendidad expressly states that there is no way to purify purposely polluted "Atar" (Fire) or water.[25] In short, Zoroastrianism strictly

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[10] PRODS OKSTOR SKJAERVO, INTRODUCTION TO ZOROASTRIANISM 1 (2005).
[11] *Id*. at 2.
[12] *Id*.
[13] *Id*. at 1.
[14] BBC, *Zoroastrianism at a Glance*, (Oct. 2, 2009), http://www.bbc.co.uk/religion/religions/zoroastrian/ataglance/glance.shtml.
[15] Skjaervo, *supra* 9, at 3.
[16] *Id*. at 5.
[17] VENDIDAD (VIDEVDAD) OR LAWS AGAINST DEMONS 52 (Joseph H. Peterson ed., James Darmesteter trans. 1898) (1995) [hereinafter Vendidad].
[18] MANECKJI NUSSERVANJI DHALLA, HISTORY OF ZOROASTRIANISM 313 (Joseph H. Peterson electronic ed., 2003) (1938).
[19] Vendidad at 55.
[20] *Id*.; Dhalla, *supra* 17, at 210.
[21] Vendidad at 48.
[22] *Id*. at 62.
[23] *Id*. at 50-52.
[24] *Id*. at 51-52.
[25] *Id*. at 70-71.

forbids the dead from being buried in the ground, cremated, or put to rest in the sea or in a river because the elements of Earth, Fire, and Water are sacred[26] and thus that the only acceptable funeral method is excarnation. Purity of body and therefore freedom from contamination via pollution is the most salient feature in the life of a Zoroastrian.[27]

2. General Overview of Zoroastrianism

The Avesta describes Ahura Mazda as the greatest God.[28] Zoroastrians believe that he is eternal light[29], the all-knowing ruler[30], and head of the agents of order.[31] Despite his status, Ahura Mazda must constantly vie for supremacy[32] against Lie ("Drug", "Druj", "Dragua", "The Cosmic Deception") and the other agents of chaos[33] including its primary agent, Angra Manyu ("The Evil Spirit").[34]

Zoroastrians believe that Ahura Mazda created the ordered universe.[35] Examples of the order Ahura Mazda creates include the rise of the sun and the onset of the summer season.[36] He does this by overcoming the agents of chaos who bring the night and the winter season.[37] The agents of order are the six life giving immortals and the great gods such as the sun god Mithra.[38] One of the six life giving immortals is Atar ("Fire").[39] Atar is also known

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[26] JIVANJI JAMSHEDJI MODI, THE RELIGIOUS CEREMONIES AND CUSTOMS OF PARSEES, 58 (2d ed. 1937).; BBC, *Zoroastrian Funerals* (Oct. 2, 2009), http://www.bbc.co.uk/religion/religions/zoroastrian/ritesrituals/funerals.shtml.; JIVANJI JAMSHEDJI MODI, THE FUNERAL CEREMONIES OF THE PARSEES 7 (4th ed. 1928).

[27] Dhalla, *supra* 17, at 134.; Skjaervo, *supra* 9, at 66. (explaining that pollution can also result from contact with "dead matter" including corpses and excretions from the body such as blood, hair, nails, spilled semen, urine, and feces because dead matter becomes infected by Nasush, a.k.a., "Nasu", "the demon of pollution" immediately after death).

[28] *Id*. at 15.

[29] Dhalla, *supra* 17, at 54.

[30] Skjaervo, *supra* 9.

[31] *Id*.

[32] *Id*.

[33] *Id*. at 15.

[34] *Id*. at 18.

[35] *Id*. at 2.

[36] Skjaervo, *supra* 9, at 21.

[37] *Id*.

[38] *Id*. at 14.

[39] *Id*. at 16.

as the son of Ahura Mazda[40] because Ahura Mazda manifests in fire.[41] Zoroastrians believe that, Atar brings the sacrifices, prayers, and offerings of the worshippers to Ahura Mazda and Ahura Mazda's gifts to the worshippers.[42] The role of Atar is especially important because the role of the worshippers is to help Ahura Mazda in the battle against chaos by, "thinking good thoughts, speaking good speech, and doing good deeds."[43] This is such because the cosmic order, or balance, must regularly be supported and reestablished.[44]

Zoroastrianism was the religion of Iranian Kings until the Arab invasion of the 7th century C.E.[45], including Cyrus the Great and Darius the Great.[46] It then declined under Muslim rule because the Muslims treated Zoroastrians as Dhimmis or People of the Book who had to pay extra taxes if they wished to keep their religious practices.[47] In the 10th century C.E., many Zoroastrians left Iran to escape religious oppression and went to India[48] where their modern day descendants are called Parsis or Parsees.[49] Though the number of adherents of Zoroastrianism has declined, adherents exist in several countries, including at least 11,000 in the United States.[50]

3. The Zoroastrian Funeral Procedure

Zoroastrian funerals are called Geh Sarnu.[51] They involve first taking the corpse to a mortuary[52] and washing it with either the traditional Gomez ("Taro", White Bull's Urine) because it is an anti-bacterial disinfectant, or, if the body is being washed within the first six hours of death, with water because water can be

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[40] Vendidad at 72.

[41] Dhalla, *supra* 17, at 54.

[42] Skjaervo, supra 9, at 18.

[43] *Id*. at 2.

[44] *Id*. at 17.

[45] *Id*. at 3.

[46] BBC, *Zoroastrianism: Under Persian Rule*, (Oct. 2, 2009), http://www.bbc.co.uk/religion/religions/zoroastrian/history/persia_1.shtml.

[47] *Id*.

[48] Skjaervo, *supra* 9, at 3.

[49] *Id*.

[50] Laurie Goodstein, *Zoroastrians Keep the Faith and Keep Dwindling*, N.Y. TIMES, Sept. 6, 2006.

[51] K. E. Eduljee, *Zoroastrian Heritage: After Life and Funeral Customs – Body & Spirit. Traditional Ceremonies/Geh Sarnu*, https://heritageinstitute.com/zoroastrianism/death/page2.htm.

[52] *Id*.

sufficiently purified using modern sanitation techniques.[53] The corpse is then dressed in recently washed old white cotton clothes including a Kusti which is a traditional Zoroastrian girdle while Kusti Prayers are recited.[54] The Ashem Vohu and Yatha Ahu Variyo prayers are then whispered into the corpse's ears.[55] The mourners must be careful however, not to display excessive grief at their loss because it would hinder the deceased's soul in its journey out of the corpse.[56]

The corpse is then handed over to the Nasa-Salars ("Pall-Bearers") who have ritually bathed and donned a new set of clean white clothes, Dastana ("white gloves") and Padan ("veil-like covering of their faces").[57] The Nasa-Salars lift the corpse up and place it on a raised stone slab while wrapping the corpse in a shroud.[58] The Nasa-Salars then mark the borders of the Kash ("Kaska") protected space around the body which is three paces away from the corpse.[59] Zoroastrian Priests then recite the Yasna Ahunavaiti Gatha prayer.[60] Halfway through the prayer recital, the Sagdid ritual is then performed where a Chatur-Chasma ("four-eyed dog", or a dog with two eye-like spots above its eyes) confirms the body is dead by not looking at it or stares steadily at the body to demonstrate that it is still alive.[61] The Nasa-Salars then lift the corpse by the shroud, place it on a Gehan ("iron bier" or "stretcher"), and wrap a string around the corpse seven times while reciting the Yatha-Ahu-Variyo prayer to give the corpse continued spiritual protection against agents of chaos.[62]

Given the need to protect the earth from pollution, Zoroastrians need stone structures built on mountain tops called Dakhmas ("Towers of Silence") on which corpses can be placed and eaten by birds.[63] Dakhmas are squat circular walled stone structures[64] with a platform that is divided into three concentric circles representing good thoughts, words, and deeds. The Nasa-

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[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] Eduljee, *supra* 50.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] Vendidad at 48, 52.
[64] K. E. Eduljee, *Zoroastrian Heritage: After Life and Funeral Customs - Mortuary, Methods of Laying the Dead to Rest, and Memorial Prayers*, HERITAGE INSTITUTE, https://heritageinstitute.com/zoroastrianism/death/page3.htm.

Salaras then carry the corpse to the Dakhma and the mourners follow.[65] Next, the corpse is placed on a stone platform for the second and final Sagdid ritual.[66] Then, the Nasa-Salaras alone take the corpse to the Dakhma by climbing a set of stairs on the eastern wall of the tower and entering the tower through a solid iron door.[67] The corpses of children, women, and men are placed in the inner, middle, and outer concentric circles respectively[68] before sunset so that they can be bathed in sunlight for the Khursheed Nigerishn ("Beholding by the Sun ceremony").[69] All coverings are removed so the corpse is left naked and the coverings are disintegrated by lime or acid in a pit outside the Dakhma.[70] The corpse is tied down with iron bars, clay, or stones to prevent it from being carried off.[71] Assuming an adequate population of birds, the corpse will be stripped of its flesh within a couple of hours at most.[72]

The mourners say farewell prayers for the deceased for the next three days, until 3:30am on the fourth day[73] because, at that point, the deceased's soul meets the Angel, Mihr Dawar who, along with Rashnu, the Angel of Justice, and Ashtad, the Angel of Truth, judge whether the deceased's soul will go to Paradise, Hamistagan ("purgatory"), or Hell depending on if their good deeds outweigh, equal, or are less than their bad deeds respectively. The bones stay atop the Dakhma to bleach in the sun until they are moved to a central well where they reduce to powder over time but this process is sometimes sped up with the addition of lime.[74]

4. Those with Similar Excarnatory Funeral Practices

Tibetan Buddhists have a similar traditional excarnatory funeral practice where corpses are chopped up and placed on mountain tops for vultures to feed on.[75] This practice stems from

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[65] *Id.*; Eduljee, *supra* 50.
[66] *Id.*
[67] *Id.*
[68] Eduljee, *supra* 63.
[69] Eduljee, *supra* 50.
[70] *Id.*
[71] Vendidad at 53.
[72] Eduljee, *supra* 50.
[73] *Id.*
[74] JIVANJI JAMSHEDI MODI, RELIGIOUS CEREMONIES AND CUSTOMS OF PARSEES, 58, 67 (2d ed. 1937).; Eduljee, *supra* 63.
[75] *The Tibetan 'sky burials' where bodies are chopped up and left to be picked clean by vultures 'who take the dead to Heaven'*, DAILY MAIL (Nov. 3, 2015, 6:20AM), http://www.dailymail.co.uk/news/article-3301536/The-Tibetan-sky-

both practical and religious motivations.[76] Practically speaking, Tibet's mountainous, rocky terrain and scarce trees makes burial or cremation wasteful and unduly difficult.[77] Religiously speaking, Tibetans are Buddhists who believe that their bodies are mere shells that maintain no connection to the soul after death, so the body being useful after death is desirable.[78] Furthermore, Tibetans believe that the vultures are angels that carry the deceased's souls to heaven where the soul will be reincarnated.[79] Although their reasoning differs from that of the Zoroastrians, the excarnatory nature of the funeral is similar.

Other examples of sky funerals or excarnation include the funeral practices of Aboriginal tribes in Australia and various Native American tribes in North America. Aboriginal tribes in northern Australia placed corpses on raised platforms covered with foliage to decompose after which the bones were painted red and carried around or stored.[80] The Sioux and Lakota tribes of North America historically buried their dead but sometimes placed corpses on wood scaffolds or tree limbs as offerings to the sky, to encourage the deceased's spirit to depart into the sky, and to minimize contact with the corpse to prevent the spread of disease.[81] Some tribes in the Sac and Fox Nation of the United States placed corpses in trees or left fallen warriors at the site of the battle that killed them so that they could decompose naturally. These practices are similar to Zoroastrian funerals in that many require a raised structure like the Zoroastrian Dakhma and, at least in the Sioux and Lakota tribes, the desire to prevent the spread of disease is similar as well.[82]

5. Legality of Excarnatory Funeral Practices in the United States

Whether the excarnatory funeral practices are Zoroastrian, Tibetan, or otherwise, they are classified as criminal Abuse of

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burials-bodies-chopped-left-picked-clean-vultures-dead-Heaven.html.; Marco Mandonnet, *Traditional Tibetan Sky Burial **Graphic*** (Nov. 1, 2014), http://www.liveleak.com/view?i=666_1414847845.

[76] Meg Van Huygen, *Give my Body to the Birds: The Practice of Sky Burial* (Mar. 11, 2014), http://www.atlasobscura.com/articles/sky-burial.

[77] *Id.*

[78] *Id.*

[79] See *supra* 74.

[80] Huygen, *supra* 75.

[81] *Id.*

[82] *Id.*

Corpse by many state statutes and constitute a misdemeanor to felony offense. This forces those with these beliefs to either ship their bodies overseas, which can be prohibitively expensive, or to engage in a funeral practices contrary to their religious mandate.[83] Due to the expense of travel, many Zoroastrians in the United States are forced to get cremated instead thus polluting the holy Atar and desecrating their way of communicating with Ahura Mazda.[84]

Although there are only a very small number of people who wish to have religiously motivated excarnatory funerals in the United States, the Supreme Court of Georgia has already addressed the issue of excarnatory funerals in *Serpentfoot v. Newy*, where it found excarnation a "morally and legally reprehensible" violation of Georgia's criminal Abuse of Corpse statute,[85] denied a WWII veteran's wife possession of her husband's corpse[86] because she informed the hospital about the excarnatory Tibetan Sky Funeral she intended to give him based on his wishes,[87] and had him buried instead.[88]

II. FUNERAL LAW

A. The Interests of the Living

"Courts have recognized that there is a right to a decent burial, corresponding to the common-law right to bury one's dead

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[83] Everplans, *How to Transport a Body via Airplane*, https://www.everplans.com/articles/how-to-transport-a-body-via-airplane. (noting that the "cost of shipping body [via airplane] is based on the weight of the shipment and the distance from the place of origin to the destination...[Additional costs include] the cost of the shipping container as well as any fees to the funeral home").

[84] Goldstein, *supra* 49.; Skjaervo, *supra* 9, at 18.

[85] Brief of Appellant at 22, Serpentfoot v. Newy, 2013 GA S. Ct. Briefs LEXIS 450 (2013).; Response in Opposition to Petitioner Serpentfoot's Petition for a Writ of Cert., Serpentfoot v. Newby, 2013 GA S. Ct. Briefs LEXIS 563 (2013).; Newby v. Serpentfoot, Ga. Floyd County Sup. Ct., Civil Action#: 13-CV-01200-JFL002 (2013).

[86] See *supra* 84.

[87] Petition to Determine the Right of Disposition of the Body of a Deceased Person at 3-4, In Re: Leevenous J. Dempsey and Newby v. Serpentfoot, (2013).

[88] Interment.net, *Georgia National Cemetery, Canton, Cherokee County, Georgia, Surnames D-E*, http://www.interment.net/data/us/ga/cherokee/georgia-national-cemetery-records-d-e.htm.

to maintain public health and human decency."[89] Therefore, the public at large and individuals have an interest in the right to a decent burial.[90] Given that "decency" is a moral and subjective analysis, the Supreme Court's recognition of the government's interest in regulating morality in non-free speech contexts comes into play.[91]

In the first half of the nineteenth century, a decent burial was defined as either being buried or entombed.[92] This narrow definition later broadened to include cremation[93] thus re-characterizing the public's interest in decent *burials* as the public's interest in decent *funerals*. This change in the law reflected the changing needs of a diverse community and thus supported the advocates of Legal Positivism rather than those of Legal Moralism. Lord Devlin, a leading advocate of Legal Moralism, contended that a shared moral code was necessary to every community's existence, that moral changes threatened society, and that legislation against immorality was a necessary part of the social contract.[94] Meanwhile, Legal Positivists like H.L.A. Hart argued that although societies need moral standards, those standards need not remain static and unresponsive to changes in the community.[95] Hart's argument was based on the notion of two types of laws: primary laws barring or allowing actions and secondary laws modifying the primary ones such that actions are

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[89] Mark E. Wojcik, *Discrimination After Death*, 53 Okla. L. Rev. 389, 394 n.32 (2000).

[90] *Id*. at 394.

[91] Andrew L. Reisman, *Speak of the Devil: First Amendment Protection of Immoral Conduct*, 1992 U. Ill. L. Rev. 879, 888 (1992).

[92] Ann M. Murphy, *Please Don't Bury Me in That Cold Cold Ground: The Need for Uniform Laws on the Disposition of Human Remains*, 15 Elder L.J. 381, 386 (2007) (citing GARY LADERMAN, THE SCARED REMAINS, AMERICAN ATTITUDES TOWARD DEATH, 1799-1883, at 36 (1996)).

[93] Cremation Association of North America, *History of Cremation*, http://www.cremationassociation.org/page/HistoryOfCremation ("In North America, although there had been two recorded instances of cremation before 1800, the real start began in 1876 when Dr. Julius LeMoyne built the first crematory in Washington, Pennsylvania…By 1900, there were already 20 crematories in operation, and by the time that Dr. Hugo Erichsen founded the Cremation Association of America in 1913, there were 52 crematories…By 2009, there were over 2,100 crematories and over 900,000 cremations...and 36.84% of deaths in the United States were handled through cremation, a percentage that is expected to grow to over half of deaths by 2018").

[94] Reisman, *supra* 90, n.94 (citing LORD PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 1, 13-14, 24-25 (1965)).

[95] *Id*. (citing H.L.A. HART, LAW, LIBERTY, AND MORALITY 7 (1963) (citing Jones v. Randall, 98 Eng. Rep. 954, 18-19 (1774))).

barred or allowed in various contexts.[96] For example, the Constitution first established the simple, permissive primary law of the First Amendment's grant of freedom of speech, which Congress later modified and contextualized barring hate speech.[97]

In regards to minority groups, the competing views of Lord Devlin and Hart are often referred to as the broader debate between assimilation and multiculturalism. Scholars like Parekh echo Hart in stating that the assimilation view is correct because "society cannot be held together unless its members share certain basic beliefs and values."[98] However, Parekh cautions that the idea of assimilation "bears no relation to contemporary reality and remains trapped in a dangerously naive nostalgia."[99] He states that this is because there is "no cultural and moral consensus" because people view morality in, "vastly different ways."[100] As such, scholars like Tully and Warwick argue that the world must embrace multiculturalism to prevent conflict.[101]

To do this, Warwick advises law-makers to diminish their "orthodox legal concern of the codification of normality (through the construction of norms)"[102] and to instead embrace a "willingness to recognize the other."[103] Miller advocates "increasing individual and political liberties so that citizens can build communities with shared values."[104] Taylor seconds this in stating that "only an individually based and rights oriented liberalism can provide a political framework within which collectivist communities are free to evolve according to the interests and needs of their members [while protecting] against cultural homeostasis."[105]

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[96] William C. Starr, *Law and Morality in H.L.A. Hart's Legal Philosophy*, 67 Marq. L. Rev. 673, 676 (1984).

[97] *Id*. at 677-78.

[98] Bhikhu Parekh, *Unity and Diversity in Multicultural Societies*, Int'l Inst. for Labour Studies, Mar. 2005, at 5.

[99] *Id*.

[100] *Id*.

[101] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge University Press, 1995, at 211.

[102] John Warwick, *Legal Pluralism: Toward a Multicultural Conception of Law*, 1997, at 236.

[103] *Id*. at 231 (citing Charles Taylor, *'Charles Taylor replies' in Philosophy in an Age of Pluralism: The Philosophy of Charles Taylor in Question*, Cambridge University Press, 1994, at 247.

[104] William Miller, *Conservatism and the Devlin-Hart Debate*, Int'l. Journal of Politics and Good Governance, 2010, at 13-15.

[105] Warwick, *supra* 101 at 192 (citing CHARLES TAYLOR, THE POLITICS OF RECOGNITION IN MULTICULTURALISM AND THE POLITICS OF RECOGNITION (Princeton University Press), 72 (1992)).

In this vein, Rodríguez-García encourages law-makers to formulate management models that reconcile cultural diversity with social, economic, and political cohesion in a Civic Multicultural Approach.[106] This approach calls for creating secondary laws that accommodate diverse moral attitudes as Hart advocated while keeping the spirit of the primary laws as Lord Devlin advocated. Therefore, the law can and should incorporate diverse moral visions.[107]

Additionally, the public's interest in the right to a decent funeral must be respected because the dying and the dead are among the weakest and most vulnerable members of society, and societies should be judged by how they treat their weakest and most vulnerable members.[108] Further, individuals have an interest in seeing the right to a decent funeral respected because it is part of our collective self-expression of values, of feelings, of affection, of individual dignity, and of human worth.[109]

B. Duty of the Living to the Dead

Attendant to the right to a decent funeral is a duty upon the living to see that the dead are properly buried, cremated, or otherwise taken care of.[110] The right to proper funeral rites is universally recognized, not only in law, but also in religious traditions.[111] This duty has a long history in the United States. Former Associate Justice of the Supreme Court, Joseph Story, stated in his address at the Mount Auburn Cemetery dedication in 1831 that "it is the duty of the living…to provide for the dead."[112] Justice Story supported this position in *Beatty v. Kurtz* by citing

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[106] Dan Rodríguez-García, *Beyond Assimilation and Multiculturalism: A Critical Review of the Debate on Managing Diversity*, 2010, at 258.

[107] Reisman, *supra* 90, at n.73 (citing H.L.A. HART, LAW, LIBERTY, AND MORALITY 7 (1963) (citing Jones v. Randall, 98 Eng. Rep. 954, 18-19 (1774))).

[108] Wojcik, *supra* 88, at n.33. (citing D. GARETH JONES, SPEAKING FOR THE DEAD: CADAVERS IN BIOLOGY IN MEDICINE 42 (2000)).; 123 Cong. Rec. 37286-38288 (Dedication of Hubert H. Humphrey HEW Building).

[109] Wojcik, *supra* 88, at 33. (citing D. GARETH JONES, SPEAKING FOR THE DEAD: CADAVERS IN BIOLOGY IN MEDICINE 42 (2000) (arguing that the distinctive features present during life which are not immediately extinguished at death, the memories of the deceased's personality, and the grief of the living make it difficult to distinguish between the living and dead states and lead to emotional distress if the corpse is not handled respectfully).

[110] *Id*. at 394.

[111] *Id*. at 394 n.27.

[112] TANYA MARSH, THE LAW OF HUMAN REMAINS 4 (2015).

the Old Testament.[113] The Romans and Greeks, who believed that proper funeral rites were necessary to guarantee a pleasant afterlife, have been cited to further support the universality of the duty of the living to provide for the dead.[114]

Support for a duty to the dead was later echoed in 1923 in *Lay v. Lay* which stated that "it has always been recognized as one of the first duties of the living to see that the dead are properly interred."[115] A belief in a duty to the dead often stemmed from the Christian belief that the dead would literally be resurrected thus disfavoring cremation, dissection, and the mutilation of remains.[116] Although most modern Catholics and Protestants have relaxed their literal understanding of this doctrine, the lingering effects can be felt in modern common and statutory law.[117]

C. The Interests of the Dead

The dead have an interest in the right to a decent funeral, and also in the living's duty to the dead, because it furthers the dead's interest of completing their final wishes. The law allows the dead to communicate their interests through advanced directives, medical powers of attorney, living wills, and last wills and testaments.[118] Last wills and testaments often include standard instructions about organ donation, handled instructions about embalming, and final disposition and funeral plans.[119] Final disposition and funeral plans consist of not only where viewings and funerals should be held, but also the specifications regarding the type of casket or urn to be used, which clergy or non-clergy member should conduct the funeral, what type of car should

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[113] *Id.*

[114] *Id.*

[115] Wojcik, *supra* 88, at n.30 (citing Lay v. Lay, 255 S.W. 1054, 1055 (Ky. 1923)).

[116] Marsh, *supra* 111.; CBS News, *Vatican issues new guidelines for cremation ashes* (Oct. 25, 2016, 11:08 AM), http://www.msn.com/en-us/news/world/vatican-issues-new-guidelines-for-cremation-ashes/ar-AAjnInj?OCID=ansmsnnews11.; Dorothy Nelkin ET AL., , *Do The Dead Have Interests? Policy Issues For Research After Life*, 24 Am. J.L. & Med. 261, 262 (1998) (citing CAROLINE WALKER BYNUM, THE RESURRECTION OF THE BODY 114 (1995)).

[117] Marsh, *supra* 111.; CBS News, Vatican issues new guidelines for cremation ashes (Oct. 25, 2016, 11:08 AM), http://www.msn.com/en-us/news/world/vatican-issues-new-guidelines-for-cremation-ashes/ar-AAjnInj?OCID=ansmsnnews11.

[118] Andrew Trew, *Regulating Life and Death in the Modification and Commodification of Nature*, 29. U. Tol. L. Rev. 271, 286 n.227.

[119] U.S. Legal Wills, *MyFuneral-Sample Document*, (Jan. 27, 2017, 3:36 PM), https://www.uslegalwills.com/myfuneral_sample.

transport the body from the funeral home to the cemetery or crematorium, what music should be played, who should carry the casket, and so forth.[120] The law, therefore, grants the dead a limited posthumous right to liberty for their funerals and final dispositions mirroring the inalienable right of liberty they enjoyed while alive.

The law also strives to honor the decedent's wishes and to protect his interests because society has chosen, within limits, to adhere to the principle of autonomy. This is why courts often consider a decedent's wishes when determining the disposition of his corpse or property.[121] While posthumous rights can be explained simply as a way to control the behaviors of the living, this theory ignores the innate human desire to treat the wishes of once-living persons with respect.[122] The role of dignity and autonomy can be seen in the consistent use of rights language throughout the law, and these principles have played an important part in the development of posthumous rights.[123]

D. Corpses as Property

1. Under English Common Law

The Bible's effect on common law can be seen in English Common Law in that the heirs of the decedent had the right to protect the monuments, tombstones, and burial shrouds of the decedent but the Church took possession of the body after it was buried in the church grounds.[124] This was such because the church owned the church grounds in fee simple and because the church had a strong interest in protecting the buried from anything that would harm their ability to be resurrected.[125] Although the Church had no property interest in the bodies buried in their cemeteries, ecclesiastical courts provided a remedy against disturbers of the dead.[126]

2. Under American Common Law

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[120] *Id*.

[121] Kirsten Rabe Smolensky, *Rights of the Dead*, 37 Hofstra L. Rev. 763, 764-65 n.3 (2009).

[122] *Id*. at 764.

[123] *Id*. at 803.

[124] Marsh, *supra* 111, at 5.

[125] *Id*.

[126] Steve Russell, *Sacred Ground: Unmarked Graves Protection in Texas Law*, 4 TEX. F. ON C.L. & C.R. 3, 7-8 (1998).

American common law follows English common law in recognizing no property interest in a corpse, but courts in the United States have used tort law rather than property law to award damages.[127] However, interest in a corpse, came to be accepted as a bundle of legal rights inhering in the next of kin or other person charged with the duty and right of burial and preservation of the remains.[128] The quasi-property bundle of rights includes that of holding and protecting the body until it is processed for burial, cremation, or other lawful disposition; selecting the place and manner of disposition; carrying out the burial or other last rites; and the right to the undisturbed repose of the remains in grave, crypt, niche, urn, or elsewhere sanctioned by law but not in the monetary value of the corpse.[129]

However, this quasi-property right can be violated when the interests of the living outweigh the interests of the dead.[130] For example, the government can disturb the dead through an exercise of the power of eminent domain or by the necessity to exhume a corpse to determine facts that affect the rights of the living.[131]

E. State Abuse of Corpse Statutes

The Model Penal Code states that unless authorized by law, "a person who treats a corpse in a way that he knows would outrage ordinary family sensibilities commits a misdemeanor."[132] Prohibiting conduct that would "outrage ordinary family sensibilities" is broad enough to preclude gaps in coverage and yet precise enough in its statement of the ultimate question to give a meaningful standard of decision. Any possible problems of indeterminacy and lack of notice to the actor are resolved by the requirement of knowledge with respect to the outrageous character of his conduct. Thus, the person who is not aware that his acts would offend family sensibilities does not commit an offense under this section, even though precisely that reaction obtains.[133]

Abuse of Corpse is a misdemeanor under the Model Penal Code because, as stated in *Kohn v. United States*, the "physical

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[127] *Id*.
[128] *Id*. at 8.
[129] *Id*.
[130] *Id*.
[131] *Id*.
[132] Model Penal Code § 250.10 (1962).
[133] Wojcik, *supra* 88, at 426.

mutilation of remains may be expected to distress the next of kin…[b]ut where they believe that the treatment will affect the afterlife of the deceased, the impact inevitably is greater."[134] Thus, the Eastern District of New York held that the parents of a serviceman killed by another serviceman were entitled to damages because the government's handling of the corpse violated the parent's Jewish religious beliefs because certain parts of the body were removed to be kept indefinitely while other parts were cremated.[135]

There are seven states whose Abuse of Corpse statutes are similar to the MPC.[136] There are seven states that have Abuse of Corpse statutes closely modeled after the MPC.[137] There are six states that prohibit "mutilation" of corpses in their Abuse of Corpse statutes.[138]

III: SUPREME COURT TREND OF MINORITY RELIGION INCLUSION

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[134] Kohn v. United States, 591 F. Supp. 568, 573 (E.D.N.Y. 1984).

[135] *Id*.

[136] See Ark. Code Ann. § 5-60-101 (Michie 1987) ("Physically mistreats a corpse in a manner offensive to a person of reasonable sensibilities"); Mont. Code Ann. § 44-3-404 (1995) ("purposely touches, removes, or disturbs a corpse"); Or. Rev. Stat. § 166.085 (1995) ("'abuse of corpse' includes treatment of a corpse by any person in any manner not recognized by generally accepted standards of the community"); S.C. Code Ann. § 16-17-600 (Law Co-op. 1995) ("desecrate human remains"); Tenn. Code Ann. § 39-17-312 (1996) ("Physically mistreats a corpse in a manner offensive to the sensibilities of an ordinary person."); Tex. Pen. Code Ann. § 42.08 (West 1997) ("treats in a seriously offensive manner a human corpse."); Va. Code Ann. § 18.2-126 (Michie 1996) ("willfully and intentionally physically defiles a dead human body").

[137] See Ala. Code § 13A-11-13 (1996) ("knowingly treats a human corpse in a way that would outrage ordinary family sensibilities"); Colo. Rev. Stat. Ann. § 18-13-101 (West 1997) ("Treats the body or remains of any person in a way that would outrage normal family sensibilities."); Del. Code Ann. tit. 11, § 1332 (1996) ("treats a corpse in a way that a reasonable person knows would outrage ordinary family sensibilities."); Haw. Rev. Stat. Ann. § 711-1108 (Michie 1988) ("treats a human corpse in a way that the person knows would outrage ordinary family sensibilities."); Ky. Rev. Stat. Ann. § 525.120 (Banks-Baldwin 1995) ("intentionally treats a corpse in a way that would outrage ordinary family sensibilities."); Ohio Rev. Code Ann. § 2927.01 (Banks-Baldwin 1995) ("treat a human corpse in a way that the person knows would outrage reasonable family sensibilities . . . (or) reasonable community sensibilities."); 18 Pa. Cons. Stat. Ann. § 5510 (West 1997) ("treats a corpse in a way that he knows would outrage ordinary family sensibilities.").

[138] See Ariz. Rev. Stat. Ann. § 36-861 (West 1996); Cal. Health & Safety Code § 7052 (West Supp. 1997); La. Rev. Stat. Ann. § 654 (West 1996); Me. Rev. Stat. Ann. tit. 17-A, § 508 (West 1996); Mich. Comp. Laws Ann. § 750.160 (West 1996); Wyo. Stat. Ann. § 6-4-502 (Michie 1996). See also 9 Guam Code Ann. § 61.50 (1995); 33 L.P.R.A. § 4768 (2011); 14 V.I.C. § 2021 (2017).

Laws can be intentionally neutral, non-neutral, generally applicable, or targeted. Neutral laws do not intentionally inflict disabilities on the basis of religion because they do not exclude members of a certain sect from public benefits.[139] For example, a law requiring individuals to get a permit before conducting any large-scale event in a public park is a general law that does not target speech, whereas a law only requiring individuals to get a permit before conducting a religious ceremony in a public park specifically targets religion.[140] Generally applicable laws are facially neutral and do not intentionally target the practices of a particular religion for discriminatory treatment through their design, construction, or enforcement.[141] A law prohibiting animal cruelty is a general law that is not aimed at a religious practice, whereas a law prohibiting ritual animal sacrifice is specifically aimed at a religious practice.[142]

Therefore, Abuse of Corpse statutes are neutral because they do not intentionally exclude any sects and are generally applicable because they do not intentionally target the practices of any particular religion. Although the Supreme Court has not addressed whether a Free Exercise Clause based exemption exists for these particular statutes, the Court has addressed other neutral laws of general applicability.

A. History of Free Exercise Jurisprudence

1. Early Free Exercise Jurisprudence

Early Free Exercise jurisprudence denied Free Exercise challenges to generally applicable, neutral laws that burdened religious conduct because the Free Exercise clause prohibited regulating and discriminating against religious beliefs but not religious practices.[143] This was established in *Reynolds v. United*

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[139] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 557 (1993) (citing McDaniel v. Paty, 435 U.S. 618 (1978)), Bowen v. Roy, 476 U.S. 693, 703-04 (1986) (opinion of Burger, C.J.)).

[140] Jeffery M. Shaman, *Rules of General Applicability*, 10 First Amend. L. Rev. 419 (2012).

[141] *Hialeah*, 508 U.S. at 557 (1993) (citing Fowler v. Rhode Island, 345 U.S. 67 (1953)).

[142] Shaman, *supra* 139.

[143] Reynolds v. United States, 98 U.S. 145, 166 (1879).

States, where the Supreme Court held that the First Amendment protected religious belief, but that it did not protect religious practices that were judged to be criminal such as bigamy.[144] The Court determined that to permit religious practice to overrule the law "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself… thus [making] the Government… only in name."[145] *Davis v. Beason* reinforced this holding because the Court rejected that polygamy was a meaningful tenet of religion, and thus rejected the plaintiff's claim to Free Exercise Clause protections.[146] The Court reasoned that the Free Exercise Clause referred primarily to "one's views of his relations to his Creator" and "modes of worship" but was never intended to be "invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society."[147]

These holdings reflect the Court's concern about an overreaching Free Exercise Clause overtaking the government's authority to set and enforce law and a desire for bright line rules clearly delineating the arenas of church and state. Additionally, these holdings reflect a desire to maintain the perceived moral or social order of the time which was majority Judeo-Christian.[148] In *Reynolds*, Justice Waite espouses the sentiments of racial superiority pervasive at the time by ignoring well documented cases of ancient Abrahamic polygamy[149] in stating that polygamy "has always been odious among the northern and western nations of Europe" and instead that it was "almost exclusively a feature of the life of Asiatic and African people."[150]

2. Free Exercise Jurisprudence moving towards the Compelling Interest Test

Beginning with *Cantwell v. Connecticut*, the Supreme Court began to protect Free Exercise in the form of solicitation. In *Cantwell*, the Court found that while general solicitation regulations such as time and place regulations were legitimate,

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[144] *Id*.

[145] *Reynolds*, 98 U.S. at 167-78 (1879).

[146] Davis v. Beason, 133 U.S. 333, 341-42 (1890).

[147] *Id*. at 342.

[148] Department of Commerce, Historical Statistics of the United States: Colonial Times to 1970, Bicentennial Edition Part 2, Washington, D.C., 1975.

[149] PETER CHARLES HOFFER, WILLIAMJAMES HULL HOFFER, AND N.E.H. HULL, THE SUPREME COURT: AN ESSENTIAL HISTORY 155 (2007).

[150] *Reynolds,* 98 U.S. at 164 (1879).

restrictions based on religious grounds were not because the restricting statute allowed local officials to determine which causes were religious and which ones were not thus violating the First and Fourteenth Amendments.[151] The Court further reasoned that maintenance of public order was a valid state interest but that it could not be used to justify the suppression of "free communication of views" so solicitation without any threat of bodily harm was protected religious speech even if offensive.[152] The Court went on to espouse the view that the Free Exercise Clause serves as a shield allowing "many types of life, character, opinion[,] and belief [to] develop unmolested and unobstructed [and that n]owhere is this shield more necessary than in [the United States because it's people are] composed of many races and of many creeds."[153]

The Court followed up with *Jones v. City of Opelika*, holding that states could not prohibit the distribution of religious handbills where the handbills sought to raise funds in a lawful fashion and religious groups used traditional means of distribution.[154] *Follett v. McCormick*, continued the trend in that the Court held that people who earn their living by selling or distributing religious materials could not be required to pay the same licensing fees and taxes as those who sell or distribute non-religious materials.[155]

However, the Court did not grant every Free Exercise exemption put before it. In *McGowan v. Maryland*, the Court found that laws which only allow certain items, such as drugs, tobacco, newspapers and some foodstuffs, to be sold on Sundays did not violate the Free Exercise Clause because the plaintiff employees only alleged economic injury and not infringement on their religious beliefs.[156] Further in *Braunfeld v. Brown*, the Court held that the freedom to hold religious beliefs and opinions was absolute but that the freedom to act (even under religious convictions) was not totally free from government restrictions so laws of a secular nature not directed against any particular religion were without fault.[157] That said, the Court still recognized that a state that makes an individual's religiously motivated conduct criminal burdens that individual's free exercise of religion

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[151] Cantwell v. Connecticut, 310 U.S. 296, 306-07 (1940).
[152] *Id*. at 308-10.
[153] *Id*. at 310.
[154] Jones v. City of Opelika, 316 U.S. 584, 614 (1942).
[155] Follett v. McCormick, 321 U.S. 573, 577-78 (1944).
[156] McGowan v Maryland, 366 U.S. 420, 429-30 (1961).
[157] Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

in the severest manner possible for it "results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution".[158]

3. Compelling Interest Test for Free Exercise Clause

The Court's willingness to allow certain Free Exercise exemptions, especially if the ordinance was directed against a particular group, while still not granting all exemptions set the stage for *Sherbert v. Verner*.[159] In *Sherbert*, the Court established a compelling interest test for the Free Exercise Clause.[160] Under the Compelling Interest Test, plaintiffs seeking exemptions must first show that the law or government practice burdened their sincerely held religious beliefs.[161] Then, the burden shifted to the state and the state prevailed only if it showed that it had a compelling interest in the law or practice and that the state was using the least burdensome method to satisfy its interest.[162] This test showed the Court's desire for more individualized treatment of Free Exercise cases and a desire to protect religious minorities from the tyranny of the majority which led to a great deal more minority religion inclusion.[163] It also recognized that Free Exercise cases should not be "resolvable…in terms of what an individual can demand of government…but [rather] solely in terms of what government may not do to an individual in violation of his religious scruples."[164]

The Compelling Interest Test was applied in many cases until the 1980s and in certain scenarios, exemptions were granted. For example, in *Sherbert*, the Court held that the state's eligibility restrictions for unemployment compensation imposed a significant burden on Sherbert's ability to freely exercise her faith and thus the state's given reason was not compelling.[165] Similarly, in *Wis. v. Yoder*, the Court held that an Amish individual's interests in the free exercise of religion under the First Amendment outweighed the State's interests in compelling school attendance beyond the eighth grade because an additional one or two years of high school would not produce the benefits of public education the state of

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[158] *Id*. at 605.
[159] Sherbert v. Verner, 374 U.S. 398 (1963).
[160] *Id*. at 403.
[161] *Id*.
[162] *Id*.
[163] *Id*. at 412.
[164] *Id*.
[165] *Sherbert*, 374 U.S. at 410. (1863).

Wisconsin cited to justify the law.[166] In *Yoder*, the Court stated that although "religiously grounded conduct must often be subject to the broad police power of the State,"[167] there are "areas of conduct protected by the Free Exercise Clause of the First Amendment [that are] thus beyond the power of the State to control."[168] The Court stated that this included regulations of general applicability because "a regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion."[169]

However, in many cases, the state's interest was compelling enough and thus exemptions were not granted. For example, in *United States v. Lee*, the Court held that the social security tax was not unconstitutional as applied, so by becoming an employer, the defendant entered into commercial activity and accepted certain limits on the exercise of his beliefs.[170] Similarly, in *Goldman v. Weinberger*, the Court held that a Jewish Air Force officer should be denied the right to wear a yarmulke when in uniform on the grounds that the Free Exercise Clause applied less strictly to the military than to ordinary citizens.[171] Further, in *Bowen v. Roy*, the Court found that the social security requirement did not violate the First Amendment because it was entirely neutral in religious terms and was a reasonable means of preventing welfare fraud.[172] That said, in Justice O'Connor's *Bowen* concurrence, she stated that a neutral criminal law prohibiting conduct that a state may legitimately regulate is more burdensome than a neutral civil statute placing legitimate conditions on the award of a state benefit.[173] Finally, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, the Court found that construction of the proposed road did not violate the First Amendment regardless of its effect on the religious practices of the respondents because it compels no behavior contrary to their belief.[174]

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[166] Wis. v. Yoder, 406 U.S. 205, 234-36 (1972).
[167] *Id*. at 220.
[168] *Id*.
[169] *Id*. at 220.
[170] United States v. Lee, 455 U.S. 252, 261 (1982).
[171] Goldman v. Weinberger, 475 U.S. 503, 509-10 (1986).
[172] Bowen v. Roy, 476 U.S. 693, 698 (1986).
[173] *Id*. at 731-32.
[174] Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 467 (1988).

4. Smith and Beyond

Employment Div. v. Smith greatly restricted the Compelling Interest Test because the majority opinion reasoned that the text of the First Amendment did not mandate a ruling in favor of a Free Exercise exemption because although the Free Exercise Clause forbids government prohibition of the free exercise of religion, it only prevented the government from intentionally punishing or compelling religious beliefs or practices.[175] The majority therefore adopted a categorical rule and held that neutral, generally applicable laws could incidentally burden religious interests.[176] They found that the state could, but did not need to, deny unemployment benefits to an individual fired for violating a state prohibition on the use of peyote even though the use of the drug was part of a religious ritual.[177]

The majority acknowledged the Compelling Interest Test of *Sherbert* and stated that it "that lent itself to individualized governmental assessment"[178] but also stated that the heavy burden on the state allowed individuals to become the law onto themselves because it created "a private right to ignore generally applicable laws"[179] and thus that "any society adopting such a [test] would be courting anarchy."[180] Further, the majority reasoned that the Compelling Interest Test could not be used if the issue at hand was central to the Free Exercise claim because judges should not be in the position of determining the degree of centrality of belief.[181] In making its decision, the majority acknowledged the religious diversity of the country in the late 1980s but nevertheless denied religious minorities the greater protection of the Compelling Interest Test out of a fear of overwhelming the courts.[182]

Justice O'Connor's *Smith* concurrence however, reiterated her position in *Bowen v. Roy* where she stated that "a neutral criminal law prohibiting conduct that a State may legitimately regulate is more burdensome than a neutral civil statute placing legitimate conditions on the award of a state benefit"[183] and that

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[175] Employment Div. v. Smith, 494 U.S. 872, 888-90 (1990).
[176] *Id*. at 878.
[177] *Id.* at 878-79.
[178] *Id*. at 884.
[179] *Id* at 886.
[180] *Id*. at 888.
[181] *Smith*, 494 U.S. at 887 (1990).
[182] *Id*. *at* 888-89.
[183] *Id.* at 898-99.

"even if, as an empirical matter, a government's criminal laws might usually serve a compelling interest in health, safety, or public order, the First Amendment at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim."[184] Further, she argued that the courts had shown their capacity to evaluate Free Exercise cases on a case by case basis and thus that a categorical rule was not needed.[185] Finally, Justice O'Connor argued that the majority opinion ran contrary to the purpose of the Free Exercise Clause in that it was "enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility,"[186] that the majority opinion failed to "withdraw [the Free Exercise Clause] from the vicissitudes of political controversy" as Justice Jackson had advocated in *West Virginia State Bd. Of Ed. v. Barnette,*[187] and that the Compelling Interest Test best reflected "the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society."[188] Justice O'Connor then analyzed the *Smith* case under the Compelling Interest Test and found that the state's compelling interest in preventing the harmful and dangerous health risks associated with drug use and drug trafficking mitigated the severe burden placed on free exercise.[189]

Justice Blackmun's dissent in the *Smith* case stemmed from his belief that the Compelling Interest Test should have been applied and from a disagreement on the outcome of the case if the test was applied. He argued that Justice O'Connor's Compelling Interest Test analysis failed to "reduce the competing interests [of free exercise and criminal law enforcement] to the same plane of generality [thus] distort[ing] the weighing process in the State's favor."[190] Quoting Pound's "A Survey of Social Interests" and Clark's "Guidelines for the Free Exercise Clause" respectively, Justice Blackmun stated that "when it comes to weighing or valuing claims or demands with respect to other claims or demands, [courts] must be careful to compare them on the same plane . . . [or else they] may decide the question in advance in our

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[184] *Id*. at 899.
[185] *Id*. at 902.
[186] *Id*.
[187] *Smith*, 494 U.S. at 902-03 (citing West Virginia State Bd. of Ed. v. Barnette 319 U.S. 624, 638 (1943)).
[188] *Id.* at 903.
[189] *Id*. at 903-06.
[190] *Id*. at 910.

very way of putting it."[191] This is such because "the purpose of almost any law can be traced back to one or another of the fundamental concerns of government: public health and safety, public peace and order, defense, revenue [so measuring an individual's interest] directly against one of these rarified values inevitably makes the individual interest appear the less significant."[192]

Therefore, Justice Blackmun found the state's speculative concerns about drug use and drug proliferation merely symbolic because the state had failed to enforce its drug laws against other peyote users.[193] Citing several cases, Justice Blackmun determined that a symbolic government interest was not enough to abrogate the constitutional rights of individuals[194] because there was not enough evidence in the record.[195] He also determined that the values and interests of those seeking the religious exemption were congruent to the interests of the state thus weakening the state's argument.[196] This congruency arose because the Church's doctrine limited peyote use to specific ceremonial contexts meaning that the drug addiction and drug proliferation concerns of the state were unfounded.[197] Finally, Justice Blackmun pointed out that that Supreme Court had repeatedly rejected the argument that granting an exemption would open the floodgates to other free exercise exemptions and hinder law enforcement.[198]

Disregarding protests of Justices O'Connor and Blackmun, the Court applied the incidental versus purposeful reasoning of *Smith* when deciding *Church of Lukumi Babalu Aye v. City of Hialeah*, holding that although the ordinances banning animal sacrifice were justified by a compelling governmental interest and although they were narrowly tailored to that interest, they were not legal because the ordinances were specifically directed against

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[191] *Id*. (quoting Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 2 (1943)).

[192] *Smith*, 494 U.S. at 910 (1990) (quoting J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 Harv. L. Rev. 327, 330-1 (1969)).

[193] *Id.* at 911-12.

[194] *Id*. at 910-11 (citing Treasury Employees v. Von Raab, 489 U.S. 656, 687 (1989)).

[195] *Id.* (citing Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 719 (1981); Wis. v. Yoder, 406 U.S. 205, 224-229 (1972); Sherbert v. Verner, 374 U.S. 398, 407 (1963)).

[196] *Id.* at 914.

[197] *Id*. at 914-17.

[198] *Id*. at 917 (citing Frazee v. Illinois Dept. of Employment Security, 489 U.S. 829, 835 (1989); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 719 (1981); Sherbert v. Verner, 374 U.S. 398, 407 (1963)).

a particular religious group.[199] In their concurrence, Justices O'Connor and Blackmun agreed with the majority's conclusion but reiterated that the pre-*Smith* Compelling Interest Test "came closer to fulfilling the language of the Free Exercise Clause than the rule *Smith* announced because the Free Exercise Clause…gives special protection to the exercise of religion."[200] This is because the Free Exercise Clause draws no distinction between laws whose object it is to prohibit religious exercise and laws with that effect.[201]

B. Passage of the federal Religious Freedom Restoration Act (RFRA) and its state counterparts

The desire for an alternative to *Smith* was evident in the House's unanimous passage and the Senate's overwhelming passage of the Religious Freedom Restoration Act (RFRA) in a 93 to 7 vote.[202] The bill's express purpose was to ensure that interests in religious freedom were protected in light of the *Smith* case.[203]

However, four years later, in the *City of Boerne v. Flores* case, the Supreme Court ruled that RFRA was not a proper exercise of Congress' enforcement power as applied to the states although it could be applied to the federal government.[204] In her *Flores* dissent, Justice O'Connor gave evidence of the desire to protect Free Exercise pre-dating the formation of the Articles of Confederation and the Constitution thus reiterating and strengthening her *Smith* concurrence.[205] She did this by citing the language in several colonial constitutions including Madison's purposeful shift from Mason's language of "toleration in the exercise of religion" to the language of a right of free exercise of religion in the Virginia Colony constitution.[206]

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[199] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546 (1993).
[200] *Id*. at 574.
[201] *Id*.
[202] Eugene Volokh, *What is the Religious Freedom Restoration Act?*, VOLOKH CONSPIRACY, (Dec. 2, 2013, 7:43 AM), http://volokh.com/2013/12/02/1a-religious-freedom-restoration-act/.
[203] 42 U.S.C.S. § 2000bb(b)(1)-(2) (1993).
[204] City of Boerne v. Flores, 521 U.S. 507, 536 (1997).
[205] *Id*. at 554-55.
[206] *Id*. at 555.

As a result of the Flores ruling, twenty-one states passed state RFRA laws.[207] Overall, the reaction to the *Smith* and *Flores* cases shows strong and passionate support for the Free Exercise Clause, the Compelling Interest Test, minority religion inclusion, and an individualized and fact intensive test in the judiciary rather than a bright line rule.

C. Analysis of Free Exercise Jurisprudence

Free Exercise case law reflects a legal system struggling to determine how to uphold its stated ideals when those ideals are subjective and highly individualized. Early Free Exercise case law is representative of a relatively monolithic country with very little religious diversity, relative intolerance to others, and the belief that Christianity was and should be supreme. This mindset naturally led to a near bright line rule preventing exemptions.

The solicitation cases however, showed the advent of a more open and inclusive society which *Sherbert* and its Compelling Interest Test fully embraced. This test forced the state to give a compelling reason for its policies thus providing more protection to minority religious groups. It also moved away from bright line rules and towards individualized, subjective evaluation.

However, the Court expressed a desire to return to bright line rules with *Smith*. While the *Smith* test is easier to apply than the Compelling Interest Test of *Sherbert*, and protects minority religions from purposeful discrimination, it fails to satisfy the purpose of the Free Exercise Clause, and sorely lacks the flexibility needed to address the incidental discrimination courts

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[207] ALA. CONST. Art. I, Sec. 3; S.B. 975, 90-th Gen. Assemb., Reg.Sess. (2015); ARIZ. REV. STAT. § 41-1493 (2017); CONN. GEN. STAT. ANN. § 52-571b (2017); FLA. STAT. ANN. §§ 761.01-761.05 (2014); IDAHO CODE ANN. §§ 73-401 to 73-404 (2014); 775 ILL. COMP. STAT. ANN. 35 (1998); SB 101, 119th Gen. Assemb., Reg. Sess. (Ind. 2015); KAN. STAT. ANN §§ 60-5301 - 60-5305 (2016); KY. REV. STAT. ANN. § 446.350 (2016); LA. REV. STAT. ANN§ 13:5231 (2010); MISS. CODE. ANN. § 11-61-1 (2014); MO. REV. STAT. § 1.302 (2017); N.M. STAT. ANN. §§ 28-22-1 to 28-22-5 (2017); OKLA. STAT. tit. 51, §§ 251-258 (2016); 71 PA. STAT. § 2403 (2017); R.I. GEN. LAWS ANN. §§ 42-80.1-1 - 42-80.1-4 (2017); S.C. CODE ANN. §§ 1-32-10 to 1-32-60 (2016); TENN. CODE ANN. § 4-1-407 (2016); TEX. CIV. PRAC. & REMEDIES CODE §§ 110.001-110.012 (2015); VA. CODE ANN. §§ 57-1 to 57-2.1 (2016).; Juliet Eilperin, 31 States Have Heightened Religious Freedom Protections, WASH. POST (Mar. 1, 2014), http://www.washingtonpost.com/blogs/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/.; 2015 State Religious Freedom Restoration Legislation, NATL. CONFERENCE OF STATE LEGISLATURES (Apr. 16, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx.

are more likely to encounter in the multicultural, diverse society of America today.[208] Therefore, the *Smith* test represents an unfortunate dereliction of the Court's duty to provide case-by-case evaluations in favor of judicial expediency.

As early as 1940, in *Cantwell*, the Court recognized the unique importance of the Free Exercise Clause in the United States given that it is "composed of many races and of many creeds."[209] This, combined with the Court's recognition in *Braunfeld* that making an individual's religiously motivated conduct criminal burdens that individual's free exercise of religion in the severest manner possible,[210] indicates a basic recognition of the differing challenges faced by those in majority religions and those in minority religions.

Sherbert's recognition that the nature of religion puts the state in the best position to resolve an individual's free exercise concerns[211] also shows the Court's willingness to consider the greater difficultly those in a minority religion are likely to have in acquiescing to the state's demands than the state would have in acquiescing to theirs. Then, the Court went even further in *Yoder* in stating that neutral regulations of general applicability can be beyond the broad police powers of the state[212] if they unduly burden the free exercise of religion[213] because they are "areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control."[214] The language in *Yoder* shows that Free Exercise protections were

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[208] Manfred Zuleeg, *What Holds a Nation Together? Cohesion and Democracy in the United States of America and the European Union*, 45 AM. J. COMP. L. 505, 515-16 (1997) (describing US immigration policies from 1870 on).; Anthony Daniel Perez and Charles Hirschman, *The Changing Racial and Ethnic Composition of the US Population: Emerging American Identities*, National Institutes of Health, 12, 25-28 (2009).; D'Vera Cohn and Andrea Caumont, *10 Demographic trends that are shaping the U.S. and the world*, (March 31, 2016)., http://www.pewresearch.org/fact-tank/2016/03/31/10-demographic-trends-that-are-shaping-the-u-s-and-the-world/; Laura B. Shrestha and Elayne J. Heisler, *The Changing Demographic Profile of the United States*, Congressional Research Service, 31 (2011).; Department of Commerce, *supra* 147, at 389-92.; Pew Research Center, *America's Changing Religious Landscape: Christians Decline Sharply as Share of Population; Unaffiliated and Other Faiths Continue to Grow* (2015), http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.

[209] Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

[210] Braunfeld v. Brown, 366 U.S. 599, 605 (1961).

[211] Sherbert v. Verner, 374 U.S. 398, 412 (1963).

[212] Wis. v. Yoder, 406 U.S. 205, 219 (1972).

[213] *Id*. at 220.

[214] *Id*. at 219.

never intended merely for purposeful discrimination as the *Smith* test espouses but rather that Free Exercise protections extend to incidental discrimination resulting from neutral laws of general applicability as well. Evaluations of neutral laws of general applicability however, necessitate the case-by-case evaluation Justice O'Connor called for in her *Smith* concurrence[215] and necessitates the Court to determine the proper plane of generality such that the weighing process is not skewed to the state as Justice Blackmun called for in his *Smith* dissent.[216]

At the end of his *Hialeah* concurrence, Justice Souter echoed these concerns when he briefly mused about a scenario where the Court would have to determine whether to grant a free exercise exemption from a neutral, generally applicable law or ordinance.[217] While he declined to speculate on the matter, he stated that the result of *Hialeah* and the Court's use of the *Smith* Test rather than the Compelling Interest Test did not necessarily show that the Court thought that the state had strong enough compelling reason for its ordinances.[218] This, and the rest of Justice Souter's concurrence, in which he espouses a preference for the Compelling Interest Test rather than the test in *Smith*, shows that the test in *Smith* is by no means settled law, and that the result of a case where individuals ask for a free exercise exemption from a neutral law of general applicability is not settled either.

D. Where Religiously Motivated Excarnatory Funeral Practices Fit into Free Exercise Jurisprudence

The religious basis for the excarnatory funeral practices of Zoroastrians is strikingly similar to the religious basis for animal sacrifice in *Church of Lukumi Babalu Aye v. City of Hialeah*. In *Hialeah*, the Santeria religion believed that their deities' survival depended on animal sacrifices being performed at births, marriages, death rites, times of sickness, initiations of new members and priests, and during annual celebrations.[219] Similarly, despite Zoroastrians believing that their corpses are infested with Nasush ("Nasu", demon of pollution)[220] and thus cannot be buried,

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[215] Employment Div. v. Smith, 494 U.S. 872, 899 (1990).
[216] *Id*. at 910.
[217] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 580 (1993).
[218] *Id*.
[219] *Id*. at 525.
[220] Dhalla, *supra* 17.

cremated, or submerged in a body of water,[221] they also believe they must do their part to aid their god in his survival.[222] They do this by having their corpses consumed by birds atop Dakhmas—Towers of Silence,[223] because they believe their corpses are their final sacrifices to the Earth and to their god.[224] The difference between the two scenarios however, is that in *Hialeah*, the city purposely discriminated against the Santeria religion by passing an ordinance directly against it, whereas, the legislative history of the Abuse of Corpse laws impinging on the free exercise of Zoroastrians does not show purposeful discrimination but rather incidental discrimination.[225]

In *Hialeah*, the lower court agreed with the city's four compelling interests.[226] First, the lower court found that animal sacrifices presented a substantial health risk, both to participants of animal sacrifices and to the general public because the animals were often kept in unsanitary conditions and were uninspected and animal remains were found in public places.[227] Second, the lower court found the city's interest in preventing emotional injury to children who witnessed the sacrifice of animals compelling.[228] Third, the lower court found compelling the city's interest in protecting animals from cruel and unnecessary killing.[229] Fourth, the lower court found the city's interest in restricting the slaughter or sacrifice of animals to areas zoned for slaughterhouse use compelling.[230]

Here, the state is likely to argue that it has a compelling interest in protecting public health, safety, and welfare; that the state has a compelling interest in preventing the emotional injury to both adults and children that is likely to result from witnessing a religiously motivated excarnatory funeral; that the state has a compelling interest is protecting the dead from desecration; and that, at the very least, the state has a compelling interest in restrictive zoning.

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[221] JIVANJI JAMSHEDJI MODI, RELIGIOUS CEREMONIES AND CUSTOMS OF PARSEES, 58, 129 (2d ed. 1937).

[222] Skjaervo, *supra* 9, at 2.

[223] Vendidad at 48, 52.

[224] *Id*.

[225] *Hialeah*, 508 U.S. at 542 (1993).

[226] *Id*. at 529.

[227] *Id*.

[228] *Id*.

[229] *Id* at 529-30.

[230] *Id* at 530.

IV. ANY PROFFERED REASON THE GOVERNMENT TRIES TO ARGUE UNDER THE SUPREME COURT'S COMPELLING INTEREST TEST, FEDERAL RFRA, OR ANY STATE RFRA FAILS

A. State's Interest in Protecting Participants and the General Public from the Presumed Substantial Health Risks posed by Human Corpses

In *Hialeah*, the city's proffered interest was in public health, safety, and welfare.[231] States, and therefore cities, have an interest in public health, safety, and welfare.[232] This interest stems from the Tenth Amendment.[233] States maintain control over those matters which are reasonably related to the promotion and maintenance of the health, safety, morals, and general welfare of the public, through what are traditionally known as "police powers."[234] Police powers are the broadest, "least limitable" American governmental powers[235] and exercises pursuant to police power extend to all public needs.[236] In the field of public health law, state police powers constitute the original source of governmental authority to act for the benefit of the public.[237] The Supreme Court espoused this view in *Sporhase v. Nebraska*, by stating that "a State's power to regulate... for the purposes of protecting the health of its citizens... is at the core of its police power."[238]

However, public health powers are constitutionally permissible only if exercised in conformity with four standards: public health necessity, reasonable means, proportionality, and harm avoidance.[239] Justice Harlan, in *Jacobson v. Massachusetts*, insisted that police powers must be based on the "necessity of the case" and could not be exercised in "an arbitrary, unreasonable manner" or go "beyond what was reasonably required for the

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[231] *Hialeah*, 508 U.S. at 529-30 (1993).

[232] *Id.* at 530.

[233] James G. Hodge Jr., *The Role of New Federalism and Public Health Law*, 12 J.L. & Health 309, 318 (1997-1998).

[234] *Id.* at 319.

[235] *Id.* at 322.

[236] *Id.*

[237] *Id.* at 323.

[238] Hodge, *supra* 232, at n.75 (citing Sporhase v. Nebraska, 458 U.S. 941 (1982)).

[239] Lawrence O. Gostin, *Public Health Theory and Practice in the Constitutional Design*, 11 Health Matrix 265, 297 (2001).

safety of the public."[240] Reasonable means require that even though the goal of the legislature may be valid and beneficent, the methods adopted must have a "real or substantial relation" to protect public health, and cannot be "a plain, palpable invasion of rights.'"[241] Further, in his *Smith* dissent, Justice Blackmun advocated carefully comparing the interests of the state and the interests of the individual on the same plane of generality to prevent the individual's interests from being unjustly dwarfed by the state's interest.

In *Hialeah*, one of the city's proffered reasons for passing an ordinance preventing the Santeria religion from performing animal sacrifices was an interest in protecting participants and the general public from the presumed substantial health risks of the improper disposal of dead animals.[242] The Supreme Court however, found that the state's regulation overreached because the regulation targeted the act of sacrificing animals rather the method of disposing of the sacrificed animals.[243] Given that the city's proffered public health interest stemmed from its police power which it derived from the state, the city's interest should have been evaluated on the same plane of generality as those of the individuals seeking a Free Exercise exemption and the Court should have granted the Free Exercise exemption to the Santeria religion if the city's proffered interest was arbitrary or went beyond what was necessary.

Here, the state's interest in protecting public health, safety, and welfare should be similarly evaluated and therefore also found to be equally overreaching. The state's interest must first be placed on the same plane of generality as the Free Exercise exemption claim. In doing so, the state's interest in protecting public health, safety, and welfare becomes its interest in protecting participants and the general public from the presumed substantial health risks posed by human corpses. As such, only the degree of danger posed by human corpses is at issue when determining if the state's regulation is arbitrary or beyond what is necessary.

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[240] *Id*. quoting Jacobson v. Massachusetts, 197 U.S. 11, 28 (1905).
[241] Gostin, supra 238, at 298.
[242] *Hialeah*, 508 U.S. at 529 (1993).
[243] *Id*. at 535-37.

The state is likely to think that human corpses pose a public health risk because they spread disease.[244] However, despite the hysteria surrounding the supposed danger human corpses pose to the public, the World Health Organization and the American Journal of Disaster Medicine both state that dead bodies pose no risk of epidemics even in natural disaster or war conditions.[245] Instead, both simply recommend the use of universal precautions consisting of gloves and splash guards when handling corpses.[246] Therefore, the degree of danger posed by a human corpse is negligible.

Despite this, the state is likely to counter with concerns about the carrion birds used in excarnatory funerals carrying corpses off the Dakhma and thus negatively impacting public health. However, the Vendidad explicitly mitigates this concern by requiring that corpses be tied down to the top of the Dakhma to prevent them from being carried off.[247] Therefore, public health is not at risk and although the state may wish to regulate where these religiously motivated excarnatory funerals take place, the state's public health, safety, and welfare interest is not compelling enough to ban them outright.

The fact that "Body Farms" already exist in several states further supports this.[248] Body Farms are research centers where forensic scientists study human decomposition.[249] Human bodies are exposed to the elements, chopped up, scavenged by animals, buried in shallow graves, left in dumpsters, etc... so that scientists can learn how bodies decompose under different conditions and help law enforcement agencies to evaluate human remains at

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[244] Peter M. Sandman and Jody Lanard, *Talking about Dead Bodies: Risk Communication after a Catastrophe*, (Feb. 8, 2005), http://www.psandman.com/col/tsunami2.htm.

[245] Oliver Morgan, *Infectious disease risks from dead bodies following natural disasters*, Rev Panam Salud Publica, 307, 310 (2004).; Thomas A. Gionis, *Dead bodies, disasters, and the myths about them: Is public health law misinformed?*, AM. J. OF DISASTER MED., Jul.-Aug. 2007, at 185-86.; Pan American Health Organization, *Management of Dead Bodies in Disaster Situations*, 73 (2004), http://www.who.int/hac/techguidance/management_of_dead_bodies.pdf.

[246] *Id* at 52-53.; Morgan, *supra* 244, at 310.

[247] Vendidad, at 53.

[248] Kristina Killgrove, *Forensic 'Body Farm' Opens in Florida – Becomes Seventh in US*, (Feb. 28, 2017, 7:45 AM), https://www.forbes.com/sites/kristinakillgrove/2017/02/28/new-body-farm-opens-in-florida-becomes-7th-in-u-s/#2c0248022864.

[249] Kelly Tatera, *Take a Video Tour of the World's Largest Dead Body Farm* (Dec. 9, 2015), http://thescienceexplorer.com/brain-and-body/take-video-tour-world-s-largest-dead-body-farm.

crimes scenes.[250] In the states that have Body Farms,[251] differential treatment of Body Farms and religiously motivated excarnatory funerals would weaken the state's public health concerns because of the similarities between what occurs on Body Farms and what occurs in the funerals given that both may involve exposure of the corpse to the elements and scavenging of the corpse by animals.

B. State's Interest in Preventing the Presumed Emotional Injury Resulting from Witnessing a Religiously Motivated Excarnatory Funeral

In *Hialeah*, the city argued that children would suffer emotional injury from witnessing the animal sacrifices.[252] The district court agreed with the city but the Supreme Court did not address this argument.[253] However, the mourners of deceased Zoroastrians will not suffer emotional injury because they do not enter the Dakhma[254] and the excarnation does not occur within view of anyone given that it occurs on the top of the Dakhma.[255] The height and traditionally remote locations of Dakhmas[256] also make it highly unlikely that anyone will witness the actual excarnation and thus make it even less likely that anyone will be emotionally injured from it.

Furthermore, given the religiously mandated nature of the excarnatory funerals and its cultural acceptance within the Zoroastrian community, it is unlikely that children or adults within the community will suffer emotional injury.[257] The studies Justice Blackmun cited in his *Smith* dissent that found that smoking peyote was a positive rather than a negative experience

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[250] Alex Mar, *Sky Burial*, Oxford American (Sept. 7, 2014), http://www.oxfordamerican.org/magazine/item/367-sky-burial-excarnation-in-texas.

[251] Google, *US Body Farms*, https://www.google.com/maps/d/u/0/viewer?mid=16v7MYHzqgtseLHoJbGUWACYQ3hw&hl=en_US&ll=32.8065388411147%2C-86.72506530664066&z=4.; Monica Raymunt, *Down on the Body Farm: Inside the Dirty Word of Forensic Science*, (Dec. 2, 2010), https://www.theatlantic.com/technology/archive/2010/12/down-on-the-body-farm-inside-the-dirty-world-of-forensic-science/67241/.

[252] *Hialeah*, 508 U.S. at 529 (1993).

[253] *Id.* at 530.

[254] Eduljee, *supra* 50.

[255] Eduljee, *supra* 63.

[256] *Id*. Eduljee, *supra* 63.

[257] Modi, *supra* 220.

for individuals in the church support this.[258] Given how positive following their religious beliefs was for the individuals in *Smith* and given how smoking peyote with their community and social group further amplified the positive effect following their religious beliefs had, there is likely to be a similar result here.[259] Following their religious mandate regarding excarnatory funerals will likely produce positive emotions in each individual which will be amplified by participating with the community or social group. Therefore, the psychological and emotional harm that arises from being barred from carrying out one's religious mandate is likely greater than any emotional harm that arises from following one's religious mandate.

C. State's Interest in Protecting the Dead from Desecration

In *Hialeah*, the city justified its ordinance banning animal sacrifices on an interest in preventing animal cruelty.[260] However, the Supreme Court found that the city's ordinance overreached[261] because the ordinance targeted the act of sacrificing animals when the same effect could have been reached through regulation of the animal's living conditions and their treatment.[262] Furthermore, the Court found the Santeria sacrifice method to be analogous to that of Kosher meat preparation and thus not cruel.[263]

Here, the Court could either stop its analysis at this point if it chooses to simply reiterate the point about how similar the practices on Body Farms are to those in excarnatory funerals and thus find that the state's proffered reason is not compelling just as it did in *Hialeah* because of the similarities between the Santeria animal sacrifices and Kosher meat preparation. However, it is more likely that the Court will find this situation more complex given that the state's interest arises from a desire to protect the dead bodies of humans from being desecrated rather than a desire to protect animals from cruelty.

This raises the issues of free will, consent, and the rights of the dead. While animals may have free will, they have no ability to consent to be sacrificed. However, the law allows the dead to communicate their interests via Last Wills and Testaments

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[258] *Smith*, 494 U.S. at 915. (1990).
[259] *Id*.
[260] Hialeah, 508 U.S. at 529-30 (1993).
[261] *Id*. at 537-38.
[262] *Id*. 538-39.
[263] *Id*. at 539.

meaning that a Zoroastrian could consent to a religiously motivated excarnatory funeral in their Last Will and Testament. Further, the law grants the dead a limited posthumous right of liberty for their funerals and final dispositions. Given that people can choose when and where a funeral takes place, which religious or non-religious figure conducts it, and even the type of music to be played at it, the dead have the liberty to choose to have a religiously motivated excarnatory funeral.

The free will of the dead, their ability to consent, and their limited posthumous right of liberty for their funerals and final dispositions supports the notion of the universal duty the living have to the dead in terms of carrying out the wishes of the dead. Furthermore, doing this serves the interest individuals have in seeing the right to a decent funeral respected because it supports humanity's collective self-expression of values, of feelings, of affection, of individual dignity, and of human worth.

This also furthers the public's interest in decent funerals because decency is a moral and subjective standard that should be analyzed under the current trend of the Civic Multicultural Approach. The Civic Multicultural Approach has had the support of the Supreme Court since *Cantwell v. Connecticut* where the Court stated that the Free Exercise Clause acts as a shield that allows "many types of life, character, opinion[,] and belief [to] develop unmolested and unobstructed [and that n]owhere is this shield more necessary than in [the United States because it's people were] composed of many races and of many creeds."[264] The Approach continued to enjoy that support in Justice O'Connor's *Smith* dissent in that she stated that the Clause was "enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility,"[265] that the majority opinion failed to "withdraw [free exercise] from the vicissitudes of political controversy" as Justice Jackson had advocated in *West Virginia State Bd. Of Ed. v. Barnette,*[266]and that the Compelling Interest Test best reflected "the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society."[267] As such, a management model reconciling the moral attitudes of the

[264] Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

[265] Employment Div. v. Smith, 494 U.S. 872, 902 (1990).

[266] *Id*. at 902-3 (1990) (citing West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943)).

[267] *Id*. at 903.

Zoroastrian community with the interests of social, economic, and political cohesion can be created.

D. State's Interest in Restrictive Zoning

In *Hialeah*, the city justified its ban on animal sacrifice with a professed interest in restricting the slaughter or sacrifice of animals to areas zoned for slaughterhouse use.[268] The Court found that the ordinance singled out the Santeria religion.[269] This was such because the ordinance was under-inclusive in that it only implicated larger scale slaughterhouses like those of the Santeria religion but not smaller operations that only slaughtered a few animals.[270] The Court did not find the city's interest compelling because the Court found that the ordinance classifying the Santeria sacrifices as slaughter unduly subjected it to regulation that other similarly situated killings were not subjected to.[271]

Here, no Dakhmas—Towers of Silence, exist in the United States[272] but, if constructed, the state's interest extends only to the point of on par regulation with similarly situated enterprises. Therefore, in states with Body Farms, it is likely that courts will determine that Dakhmas and Body Farms are similarly situated and thus should be similarly regulated under *Hialeah*.

Given the need for carrion birds to consume the corpse,[273] the need to sun-bleach the bones after excarnation has occurred,[274] and the state's likely desire to zone Dahkmas far away from residential and commercial areas, a promising state to build a Dakhma in is Texas. This is such because the Forensic Anthropology Center or Body Farm at Texas State University is well established and the local vulture population has already been used to study the effects of vulture scavenging on human decomposition.[275]

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[268] *Hialeah*, 508 U.S. at 530 (1993).

[269] *Id*. at 545.

[270] *Id*.

[271] *Id*.

[272] Mar, *supra* 249.; Beliefnet, *Buried in the Sky: Some Parsi Zoroastrians are having a hard time accepting changes to traditional death rituals*, http://www.beliefnet.com/faiths/zoroastrianism/buried-in-the-sky.aspx.

[273] Vendidad, *supra* 16.

[274] Eduljee, *supra* 63.

[275] M. Katherine Spradley, Michelle D. Hamilton, and Alberto Giordano, *Spatial patterning of vulture scavenged human remains*, Forensic Sci. Int'l. , 2011, at 59.

V. CONCLUSION

Although those with traditionally excarnatory funeral practices represent a very small part of the US population, the *Serpentfoot v. Newy* case shows that courts have already needed to address the issue.[276] Further, these issues are more and more likely to arise given the increased need for dispositions created as baby-boomers[277] reach the end of their lives and express their desire for wide ranging and diverse funeral options.[278] Most importantly, the religious rights of Zoroastrian Americans must be upheld because although their funeral practices are strange to most Americans, they are sacred to the Zoroastrians. Therefore, given the burden placed on those whose religions call for excarnatory funerals, the limited posthumous right to liberty granted the dead in modern funeral law, the widespread support for the Compelling Interest Test of *Sherbert* rather than the test in *Smith* for the Free Exercise Clause, and that the state's interest is not compelling outside a degree of zoning, there should be a Free Exercise exemption for religiously motivated excarnatory funeral practices.

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[276] Serpentfoot v. Newy, 2013 GA S. Ct. Briefs LEXIS 450, *19 (2013).

[277] Ann M. Murphy, *Please Don't Bury Me in That Cold Cold Ground: The Need for Uniform Laws on the Disposition of Human Remains*, 15 Elder L.J. 381, 411-12 (2007) (citing Frank Hobbs and Nicole Stoops, U.S. Census Bureau, Demographic Trends in the 20th Century: Census 2000 Special Reports 208 (2002), available at *http://www.census.gov/prod/2002pubs/censr-4.pdf*. (defining baby-boomers as those born between 1946 to 1964)).

[278] Murphy, at 384 (citing John Leland, *It's My Funeral and I'll Serve Ice Cream If I Want To*, N.Y. TIMES, July 20, 2006, at G2; Barbara Basler, *Green Graveyards - A Natural Way to Go: Back-to-Nature Burials in Biodegradable Caskets Conserve Land*, AARP Bull. (Am. Ass'n Retired Pers., Washington, D.C.), July-Aug. 2004, available at http://www.aarp.org/bulletin/yourlife/a2004-06-30-green graveyards.html; Cryonics: Alcor Life Extension Foundation, http://www.alcor.org/; Eternal Reefs, A Cremation Memorial Option, http://www.eternalreefs.com/ (last visited Oct. 26, 2007); LifeGem, Created Diamonds, http://www.lifegem.com (last visited Oct. 26, 2007); Lori Valigra, *"Green" Burials Offer Unique, Less Costly Goodbyes*, Nat'l Geographic News, Sept. 9, 2005, http://news.nationalgeographic.com/news/2005/09/.).