JESSICA MITFORD WAS WRONG

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I appreciate that this is a provocative title, especially for those familiar with Jessica Mitford and her critique of the American funeral services industry. Jessica Mitford was the author of a book published in 1963 entitled The American Way of Death.1 In her book, Mitford described the “traditional” American funeral, which she argued was not traditional at all, as an embalmed body, an open casket viewing, and ground burial of the casketed remains in a single grave for perpetuity.2 English by birth, Mitford was bewildered by the elaborate and expensive funeral customs she encountered in America.

Foreigners are astonished to learn that almost all Americans are embalmed and publicly displayed after death. The practice is unheard of outside the United States and Canada . . . . I asked a London undertaker if he had ever conducted an open-casket funeral, in which the mourners file by to look at the embalmed corpse. He answered that such a thing would be considered so absolutely weird, so contrary to good taste and proper behavior, so shocking to the sensibilities of all concerned that he thinks it could never become a practice in England. The overwhelming majority of English of all classes, he said, settle for a simple wooden coffin and a small gathering

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2. See id. at 17.
(six or seven is average) of the immediate family at the funeral service.\textsuperscript{3}

Mitford’s essential premise was that this “absolutely weird” set of practices was invented by the American funeral services industry—that “funeral directors are putting something over on the American people, something that people did not ask for and did not want, and something that the funeral directors find extremely profitable.”\textsuperscript{4}

When most people read The American Way of Death for the first time—when I first read The American Way of Death—I was struck by Jessica Mitford’s cutting turn of phrase and her absolutely unapologetic takedown of the American funeral services industry. Anyone who writes with such passion and conviction, I thought, must be right. Well, the title of this article is a little misleading. I think that Jessica Mitford was right about some things. But the more I’ve learned about the funeral services industry, the more complicated the story has become and the more I’ve realized that on a couple of key points, Jessica Mitford was wrong.

Let’s take a minute to talk about who Jessica Mitford was. She was English and she was, as she was often accused to be by the American funeral industry, a communist.\textsuperscript{5} She was a complicated and fascinating person. Jessica Mitford was born in 1917 in a manor house at the edge of the Cotswolds.\textsuperscript{6} She one of the six infamous Mitford sisters.\textsuperscript{7} Her friend, the equally infamous Christopher Hitchens, described Jessica’s family:

Jessica Mitford was one of a clutch of children born to the uncontrollably eccentric Lord and Lady Redesdale and raised in an isolated mansion where neither formal education nor contact with outsiders was


\textsuperscript{7} Id.
permitted. Only one of the sisters, Deborah, fulfilled parental expectation by marrying a duke. Of the remainder, Unity and Diana betrayed their country, if not their class, by falling in love with Adolf Hitler in the first instance and Sir Oswald Mosley—founder of the British Blackshirt movement—in the second. Another sister, Nancy, became a celebrated novelist and brittle social observer.\(^8\)

The Mitford sisters were all extreme in their own ways. Legend has it that Unity and Jessica shared a bedroom in their teens—Unity decorated her side of the room with swastikas and pictures of Hitler; Jessica carved hammers and sickles in the wood on her side of the room.\(^9\) You cannot make this stuff up. In 1937, Jessica eloped with Esmond Romilly, a nephew of Winston Churchill.\(^10\) They joined the International Brigade to fight against fascism in Spain.\(^11\) They soon returned to England and then early in 1939 emigrated to America.\(^12\) Esmond joined the Canadian Air Force at the outbreak of World War II and was killed in action in November 1941.\(^13\)

After Esmond’s death, Jessica moved to Washington and met her second husband, a Harvard-educated civil rights lawyer.\(^14\) After the war, they settled in the Bay Area where she spent the remainder of her life.\(^15\) Jessica Mitford wrote a number of books,\(^16\) all characterized by the sharp intelligence of all the Mitford sisters. Her most famous book, by far, was *The American Way of Death*.\(^17\)

*The American Way of Death* was a bestseller and its scathing critique of the American funeral industry dominated the public

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12. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
imagination. Mitford believed that Americans spent too much money on funerals and, moreover, that we did so because the American funeral industry tricked and cajoled us into it. The “traditional” American funeral—the American way of death—was not traditional, she argued, and was in fact the creation of the funeral industry. Mitford wrote:

Although people die everywhere in the world, only in the United States has death been successfully merchandised. Gone is the simple funeral of our forebears, with services held in a small church, attended by only family and close friends who later followed the coffin to the cemetery on the hill. This simplicity is now a thing of the past. In the attempt to establish that they are part of tradition and culture, cemeteries and mortuaries, the two main branches of the burial business, have raised the funeral to a level unequaled anywhere in the world.

That was a compelling claim in 1963 and it attracted much attention. Funerals were expensive and cost approximately ten percent of the median family’s annual income. Mitford learned as much as she could about the funeral industry, and then, boy, she let them have it. Mitford wrote:

There is a myth that the American public is only being given what it wants—an opportunity to keep up with the Joneses to the end. “In keeping with our high standard of living, there should be an equally high standard of dying,” says an industry leader.

18. Id.
19. MITFORD, supra note 1, at 15.
20. Id. at 15–16.
21. CBS Reports: The Great American Funeral, supra note 4. See generally MITFORD, supra note 1, at 17 (“Simplicity to the point of starkness, the plain pine box, the laying out of the dead by friends and family who also bore the coffin to the grave—all these were the hallmarks of the traditional funeral until the end of the nineteenth century.”).
24. MITFORD, supra note 1, at 17–18.
She continues: “Gradually, almost imperceptibly, over the years the funeral men have constructed their grotesque cloud-cuckoo-land where the trappings of Gracious Living are transformed, as in a nightmare, into the trappings of Gracious Dying.” Mitford also emphasized that funeral transactions are hopelessly onesided.

One of the practical difficulties . . . is that contracts for funerals are ordinarily made by persons differently situated. On the one side is generally a person greatly agitated or overwhelmed by vain regrets or deep sorrow, and on the other side persons whose business it is to minister to the dead for profit. One side is, therefore, often unbusiness-like, vague and forgetful, while the other is ordinarily alert, knowing and careful.

The picture that Mitford paints of the American way of death is one in which the hapless consumer has been tricked into purchasing a funeral way beyond his or her means by the funeral director motivated only by the search for profit. It is a tidy story. It is also, I believe, not entirely correct.

Mitford is correct that the American funeral services industry wrote the state occupational licensing regimes that govern it—they transparently sought and obtained protectionist laws that gave them a monopoly over funeral services in the United States. She is also correct that the American funeral services industry invented the American way of death—people were unlikely to invent embalming on their own. But she is not correct that this was a set of goods and services hoisted on unsuspecting, innocent American consumers who longed for a simple pine box carried to the cemetery on the hill.

The cost of funerals has been an issue in England since the sixteenth century and the United States since the seventeenth

25. Id. at 16.
26. Id. at 34.
27. See generally id. at 100–02.
century.\textsuperscript{28} It became fashionable for families to give mourners feasts following the funeral—this expanded to ritual gifts of mourning rings, gloves, and scarves.\textsuperscript{29} Things got so out of control in Boston in the 1760s that a sumptuary law was passed to limit the number of funeral gifts that could be given.\textsuperscript{30} By the mid-nineteenth century, before the Civil War, the cities on the east coast had many funeral professionals although they did not offer the range of services that they do today.\textsuperscript{31} In 1856, \textit{The New York Times} wrote an opinion piece on the cost of funerals in the city:

\begin{quote}
It is difficult, under present high prices, to live in health, it is comparative ruin to be sick, and to pass into the hands of the undertaker is positive bankruptcy. There is no family in the great cities, we imagine, at whose doors the grim monster has recently knocked, but has been startled in the amount of the items for the very most economical of funeral ceremonies . . . . In such a state of things, nobody that is not comfortably off in this world’s goods can afford to die. It is a luxury too costly for common people. Suicide is absolute extravagance.\textsuperscript{32}
\end{quote}

Although it is certainly true that many American funerals in the nineteenth century were simple affairs, especially in smaller towns and rural areas, it is also clearly true that in the cities there were people engaged in the funeral profession from the very beginning. Funerals were successfully merchandized in both America and England (and indeed, throughout Europe) since at least the sixteenth century.\textsuperscript{33} Expensive funerals are not a twentieth century American invention.

In Britain by the middle of the nineteenth century, the overriding worry in the minds of the bereaved . . . was

\begin{footnotesize}
\textsuperscript{28} See generally LOU TAYLOR, MOURNING DRESS: A COSTUME AND SOCIAL HISTORY (1983).
\textsuperscript{29} Id. at 34.
\textsuperscript{30} See, e.g., id. at 35.
\textsuperscript{31} See, e.g., id. at 36.
\textsuperscript{32} \textit{Funeral Rites and Wrongs}, N.Y. DAILY TIMES, Dec. 1, 1856, at 4.
\textsuperscript{33} See generally TAYLOR, supra note 28 (surveying the history of funeral rituals in Europe and America).
\end{footnotesize}
the terror of being publicly shamed by their failure to carry through the etiquette of death correctly. The worries were exactly the same for the poor as for the rich. The country and urban working classes struggled to provide their own dead with funerals as near to those of the rich as they could afford . . . the value attached to a ‘respectable’ burial was deep rooted and care was taken to ensure that adequate money was available to pay for the necessities.34

The game changer for the funeral industry, which Mitford correctly notes, was the invention of embalming and the popularization of it after the Civil War.35 Mitford wrote:

Embalmimg is indeed a most extraordinary procedure, and one must wonder at the docility of Americans who each year pay hundreds of millions of dollars for its perpetuation, blissfully ignorant of what it is all about, what is done, and how it is done . . . Whether or not the undertakers themselves actually believe that embalming fulfills an important health function (and there is evidence that most of them really do believe it), they have been extraordinarily successful in convincing the public that it does.36

Mitford suggests that people do not want embalming, that it is a grotesque technology foisted upon us by the funeral industry. I do not want embalming. I think it is pretty grotesque, but overall I think that her critique is historically inaccurate. Certainly, many people believed the whole “miasma makes you sick” line, and that embalming was necessary to protect the public health.37 But at least in the beginning, the chief advocates for requiring embalming under certain circumstances were the baggage handlers on trains—charged with transporting casketed

34. *Id.* at 36–37.
35. *See Mitford,* supra *note* 1, at 196.
36. *Id.* at 68, 82.
37. *Id.* at 82.
remains across the country in un-air-conditioned trains. And I cannot really say that I blame them.

Embalmimg began in the United States during the Civil War, when northern families of means who were eager to have their fallen husbands and sons returned home for burial could hire “surgeons” to embalm the remains so that they could be transported. Dr. Thomas Holmes, the “father of modern embalming,” was engaged by the Union Army to establish battlefield embalming stations. These early embalmers utilized embalming fluids based on arsenic or zinc chloride. Following the Civil War, newly trained embalmers refined their skills and products and worked to create new markets at home.

President Abraham Lincoln was embalmed with zinc chloride and publicly displayed in Washington, D.C., Philadelphia, New York City, and Chicago before being laid to rest in Springfield, Illinois. The positive reviews of his appearance

38. See Drew Gilpin Faust, This Republic of Suffering: Death and the American Civil War 91–92 (2008); Charles M. Ranger, A.B., The Practice of Artorial Embalming in Public Health, in [Aug. 1913] 1 Public Health 10, 11 (R.L. Dixon, ed., Mich. St. Bd. of Health 1913) (“The general baggage agents took an active interest [in the subject of embalming] and were ready to make use of any betterment in the preparation of dead bodies for shipment. They were especially interested in protecting the health of their train baggage men who necessarily had to be in closed baggage cars while the dead bodies were in transit.”).

39. Faust, supra note 38, at 94; Jack McLaughlin, Gettysburg: The Long Encampment 183 (1965) (“A whole skw of them had descended on Gettysburg in the high spirit of profit. Setting up their places of business within a macabre distance of the field hospitals, they did not wait long for a flourishing trade…. [T]he embalmers pumped the bereaved for all the cash they could get and then pumped in their preservative.”).


42. Habenstein & Lamers, supra note 40, at 328–29 (noting between 1860 and 1869, ten patents were granted for embalming materials and processes).

43. Thomas J. Craughwell, Stealing Lincoln’s Body 8 (2007) (“[The embalmer Henry P.] Cattell made an incision in Lincoln’s upper right thigh and pumped in the zinc chloride. As was customary at the time, he did not drain the body of blood. Once again, the embalming formula worked its miracle, and the dead president took on the appearance of a marble statue.”).

44. The Funeral Cortege: From Philadelphia to New York N.Y. Times Apr. 25, 1865, at 1 (“Philadelphia, Monday, April 24. The body of President Lincoln remained in state till 1 o’clock this morning, when the entrances were closed, all the throng having had an opportunity of viewing the remains. Dr. Brown, the embalmer, removed the dust that had settled on the face, and preparations were made for the departure of the body.”); The
were vital to public acceptance of embalming. In 1865, *The New York Times* reported:

The corpse of the late President has been laid out in the room known as the ‘guests’ room,’ northwest wing of the White House. It is dressed in the suit of black clothes worn by him at his late Inauguration. A placid smile rests upon his features, and the deceased seems to be in a calm sleep. White flowers have been placed upon the pillow and over the breast. The corpse of the President will be laid out in state in the east room on Tuesday, in order to give the public an opportunity to see once more the features of him they loved so well.

Embalmimg certainly did not become a widespread practice overnight, but the most significant shift in American funerary customs began after the Civil War. By World War II, embalming was a strongly established social norm in the United States. Was embalming invented by the funeral industry? Yes. Does that mean that people did not independently demand it once they learned about it? No.

The third claim that Mitford makes is that the funeral consumer is a victim of the funeral industry. I do not assert that

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*President’s Obsequies, From Chicago to Mr. Lincoln’s Home*, N.Y. Times, May 3, 1865, at 5. (Today long lines of people have been moving toward the Courthouse, entering at the door bearing the inscription ‘Illinois claps to her bosom her slain but glorified son,’ and retiring by the one on the other side surmounted by the word, ‘The beauty of Israel is slain upon the high places...’ The light from a chandelier was cast upon the face of the lamented dead, and revealed the deep surrounding drapery and the coffin, with its splendid and magnificent floral adornments.

45. HANDBOOK OF DEATH AND DYING 164 (Clifton D. Bryant ed. 2003) (“President Lincoln’s funeral process, which travelled from Washington, D.C. to Springfield, Illinois, was a public event that increased awareness of the new practice of embalming... [A]s Lincoln’s funeral procession progressed through many portions of the Northeast and Midwest, people along its path became aware that it was possible to keep and view the dead for long periods of time. Although buried in 1865, Lincoln’s body was so well embalmed that when it was later viewed after exhumation in 1899, it was proclaimed to be in a perfect state of preservation. For such reasons, embalming became an increasingly important aspect of the American way of death.”); see, e.g., *Our Great Loss: The Assassination of President Lincoln*, N.Y. Times, Apr. 17, 1865, at 1.

46. *Our Great Loss: The Assassination of President Lincoln*, supra note 45.


48. *Id.*

49. MITFORD, supra note 1, at 28.
she was wrong *per se*, but I think her view is too forgiving of the consumer. Jessica Mitford contrasted the funeral consumer with other consumers:

Because of the nature of funerals, the buyer is in a quite different position from the one who is, for example, in the market for a car. Visualize the approach. The man of prudence and common sense who is about to buy a car consults a Consumers’ Research bulletin or seeks the advice of friends; he knows in advance the dangers of rushing into a deal blindly. In a funeral home, the man of prudence is completely at sea, without a recognizable landmark or bearing to guide him. It would be an unusual person who would examine the various offerings and then inquire around about the relative advantages of the Keystone casket by York and the Valley Forge by Batesville. In the matter of cost, a like difference is manifest. The funeral buyer is generally not in the mood to compare prices here, examine and appraise quality there. He is anxious to get the whole thing over with—not only is he anxious for this, but the exigencies of the situation demand it.\(^50\)

How can we test Mitford’s view of the funeral consumer? Industry professionals tend to describe some funeral consumers as well-informed and others in desperate need of the steadying hand and trusted counsel of a funeral director. The 2016 NFDA Consumer Preferences Survey, however, suggests that Mitford’s description of the funeral consumer is incomplete:

- Most strikingly—“81.2% of respondents called only one funeral home before making their choice.”\(^51\)
- Of those respondents who reported calling two or more funeral homes, only 51.4% reported that they did so “to compare prices.” Approximately 31%  

\(^50\) Id. at 28-29.  
called “to check available service options,” and 22.5% called “to check availability.”\textsuperscript{52} 
• “Admittedly,” an industry publication concluded, “these figures seem to downplay the notion of price shoppers.”\textsuperscript{53} 
• Instead of price, the survey found that funeral consumers generally choose a funeral home based on previous experience (30.4%) and location (29.0%).\textsuperscript{54}

We have known for centuries that funerals are expensive and that funeral consumers are at a disadvantage if they make decisions at the time they need funeral goods and services. Jessica Mitford believed that the funeral industry was completely at fault for the excessive cost and the lack of education of the funeral consumer. I believe that the American consumer bears some responsibility for educating himself or herself about their options ahead of time, but that requires us all to think about death with a clear eye and to discuss it with our family members and friends.

But where I think Jessica Mitford was really wrong is that her narrative, in which she ascribed all blame to the funeral industry and none to the American consumer, was hapless and blameless, and ignored the role of the law. It is true that the funeral services industry wrote much of the state occupational licensing regimes.\textsuperscript{55} But, they were not the only authors of and inspiration for the American law of the dead. The other source of law is English ecclesiastical law.

In the seventeenth and eighteenth centuries, the formative years of the American common law, the Church of England and families organized and controlled the funeral and burial processes in England.\textsuperscript{56} At that time, the English law of the dead was ecclesiastical law, rooted in Anglican church doctrine.\textsuperscript{57} Relevant Anglican doctrine was, in turn, essentially Catholic doctrine with

\textsuperscript{52} Id. at 2.  
\textsuperscript{53} Id. at 1.  
\textsuperscript{54} Id. at 2.  
\textsuperscript{55} MITFORD, supra note 1, at 236.  
\textsuperscript{56} MARSH, supra note 47, at 5.  
minor modifications. Although ecclesiastical law was not expressly adopted into American common law, courts informally incorporated ecclesiastical principles into American common law. Therefore, the American law of the dead is strongly informed by English ecclesiastical law and, in turn, by seventeenth and eighteenth century Anglican doctrine.

American common law regarding the dead, and many statutes, are clear expressions of Protestant Christian principles and values. This may have represented the moral majority at the time of the Revolution, but I think we can and should question whether or not it is appropriate for a pluralistic society to remain trapped by seventeenth century Protestant ideas about the “appropriate” way to dispose of human remains.

I think that Jessica Mitford also believed that the best funeral was a cheap funeral. I believe as a normative matter, she is wrong. The best funeral is the funeral that is meaningful to you, your family, your friends, and your community. Nobody, not an English author, not a funeral director, not a state legislature, and not me, can decide what is the best funeral for you.

And yet, American law creates roadblocks that limit our available choices. Many states make it difficult to have a home funeral. In most states, alkaline hydrolysis is not permitted by law. Indeed, in most states the only legally permissible methods
of disposition are burial and cremation.\textsuperscript{63} In many states, burial means a single body in a single grave in perpetuity.\textsuperscript{64} No grave recyling with a communal ossuary, which was common in the colonial American cities and remains the norm in Europe today.\textsuperscript{65} Why can we not do that? While many state statutes regulating death were written by the funeral industry to limit competition, I do not think that there is historical evidence that the laws limiting the legal methods of disposition were. Unless it is pushed, the law evolves slowly and in many ways it is still stuck in the eighteenth and nineteenth centuries, when nearly everyone was buried in a churchyard or family cemetery. Laws designed to give great latitude to religious organizations and nonprofit corporations to make rules governing their cemeteries cannot confront the new challenges posed by Service Corporation International.

Jessica Mitford did not provide many solutions in \textit{The American Way of Death}. She identified a number of problems. She wrote an entertaining and thought-provoking book. But ultimately, by letting the American consumer and the American legal system off the hook, she was wrong. Democracy, as we are especially learning these days, is hard. It requires much of us. But it also gives us freedom to shape the rules to match what we want. So, as a society, let’s figure out what that is. Let’s talk about death, let’s get better informed about our options, let’s talk about what we want from death care, and then, if necessary, let’s take our passion and conviction to the state legislatures to get real change in the law.


\textsuperscript{64} Marsh, supra note 57, at 1336.