

Caskets, Cartels, and Consumer Choice
Funeral Consumer Alliance Conference Address
by Institute for Justice Staff Attorney Valerie Bayham

I would like to start tonight by telling you a few stories about some of the people that the Institute for Justice has represented over the years.

Rev. Nathaniel Craigmiles

Rev. Craigmiles was the pastor of Marble Top Missionary Baptist Church in Chattanooga, Tennessee. After his mother passed away, he realized something that everyone here already knows: funerals are expensive. The cost of burying a loved one now averages over \$8,000. The casket is the most expensive part of a funeral, and funeral homes often mark up casket prices by 200%, 300%, or even as much as 600%.

Rev. Craigmiles realized that many of his parishioners simply could not afford a funeral that expensive, so he decided to do something about it. In the late 1990s, he found a business partner and opened a casket business, selling caskets directly to the public for just above the wholesale price.



Kim Powers

All the way across the country, Kim Powers was working for a large funeral company in Oklahoma when she realized that she wanted to do something a little more on her own. She came from a long line of businesswomen; entrepreneurship was in her blood. Kim also wanted to do something about the exorbitant price of funerals, so she co-founded Memorial Concepts Online, selling funeral merchandise directly to the public over the Internet.

The Power of Entrepreneurship

Small business entrepreneurs like Rev. Craigmiles and Kim Powers drive our national economy, creating 70% of new jobs and the largest chunk of the U.S. GDP. More importantly, small business ownership allows people to realize their dreams. They can support their families, work independently, and make their own way based on nothing but

their own talent and hard work. Quite simply, entrepreneurship is the American Dream. That's why the right to work in the occupation of one's choice is a fundamental constitutional right. The government should be doing everything it can to support small business owners like Rev. Craigmiles and Kim Powers.

Bureaucratic Red Tape

Instead, the government tried to shut both of these entrepreneurs down for having the gall to sell caskets at low prices.

A casket, when you think about it, is nothing more than a glorified box. Yet, the state of Oklahoma believes that before someone can sell that box, it is imperative that they know (1) how to reconstruct a face that has been damaged by trauma, (2) how atomic particles interact with each other, and (3) how a virus reproduces itself.

Those criteria may sound strange, but in the state of Oklahoma you have to be a licensed funeral director to sell a casket. Requirements for funeral directors can include up to two years of mortuary school and a one-year apprenticeship. You might also have to embalm 25 bodies. All this just to sell a box.

We took the states of Tennessee and Oklahoma to court to prove that America is still the land of opportunity, and that people should be able to buy their caskets at wholesale prices from big box stores, Rev. Craigmiles, or even over the Internet. We won our challenge on behalf of Rev. Craigmiles, and a few other states' laws have been removed by similar litigation. But we lost in Oklahoma, where, according to the Tenth U.S. Circuit Court of Appeals, "dishing out special economic benefits" is as American as apple pie and baseball. The list of states that actively enforce these restrictions has dropped to four (Oklahoma, Louisiana, Virginia, and South Carolina), but a few more still have language on the books and could always change their tune.



Larry Gegner

In fact, I had been at the Institute for Justice for a little over a year when I first got a call from Josh Slocum (Executive Director with the Funeral Consumers Alliance) about a situation in Missouri regarding Larry Gegner. Larry is a sweet retiree from rural Missouri where he and his wife Kay raise miniature ponies. He believes it is his Christian mission to educate people about how to have a meaningful, dignified, but affordable funeral. He's read Lisa Carlson's book on *Caring for the Dead*, and he's very knowledgeable at the Missouri statutes. You might say he is a regular FCA spokesperson.

Larry wanted to help educate people in his community, so he started having seminars at Elks Lodges and the local Catholic church. He had the audacity to tell people in Missouri that they didn't need to hire a funeral director—that it was perfectly acceptable to conduct a low-cost, private burial, and arrange the funeral arrangements themselves. Larry told them about price lists, about tricks that funeral directors use to sell more expensive caskets, and about the Funeral Rule. If they were interested, he would even sell them a low-cost casket out of his shed.

Several local funeral directors were none too pleased, to say the least. They filed a complaint with the Missouri funeral board, and the board decided to prosecute Larry. Although there was nothing in the statutes that said you couldn't sell caskets or that you were required to hire a funeral director, the Board had decided to pass their own regulations prohibiting such behavior. The Board thought that they could simply bully Larry into caving under the pressure.

What the Board hadn't counted on was that Larry would call the FCA who would call IJ. Nor did they predict that we would defend Larry and forward information about the case to the Federal Trade Commission. Before it was all over, the board had to back way down. Not only did they have to drop their casket restriction, but they also had to settle out with the FTC for passing anti-competitive regulations.

Charles Brown

Charles owns Rest Haven cemetery in Maryland, about two hours north of Washington, D.C. He decided to build a funeral home on his cemetery. But in Maryland, you have to be a licensed funeral director to own a funeral home. It's a little like saying the president of United Airlines has to be a pilot. But Charles obeyed Maryland's ridiculous law and leased the building to a funeral director.

One day, the family showed up for a funeral and the funeral director was nowhere to be found. He had simply left in the middle of the night. Charles didn't know what to do. Charles called the board and asked whether he could arrange with another funeral director to come out and finish the arrangements. The board refused. Instead, the poor widow had to traipse out to another funeral home in town to make other arrangements.



The situation was an absolute disaster, and Charles was beside himself, vowing that day that something that awful would never happen again. He went down to the capitol and talked to the legislators about getting the law fixed so that he could own the funeral home and hire a director to work for him. Charles got a supporting letter from the Maryland Department of Health and even the FTC; everyone seemed to be on his side.

But the bill never made it out of committee. Turns out the committee chairperson was good friends with the state's funeral directors association. They didn't want the law to change—after all, it increased their profits. According to an economist we hired, the restriction allows Maryland funeral directors to charge a premium of about \$800 per funeral by artificially keeping the number of directors down. Charles wore out his shoes walking the halls of the capitol building until he got a sympathetic news reporter to write an article that drew our attention.

The Cartel Tale

What all of our clients' stories have in common is that they all deal with government bureaucrats protecting their power. Far too often, government agencies act to protect their turf—instead of in the best interests of the public.

Most funeral boards are made up of funeral directors. Far too few boards have private citizens who act as advocates to keep the board in check. Even when they do, the public members are usually people with political connections, not consumer advocates. This is true across the board for countless other occupations. In fact, you might be surprised at what is considered a licensed profession today.

From Florists to Floaters

Louisiana Florists: Shamille Peters worked at Albertson's grocery store as a cashier. When she transferred to the floral department, she discovered she had a natural eye for arranging flowers. After her friends and family kept asking her to design arrangements for special events, Shamille wanted to try to support herself by arranging flowers for banquets and other events in New Orleans.

Unfortunately for Shamille, Louisiana is the only state in the country where you have to have a license to design floral arrangements. If you want to do something as simple as putting baby's breath between roses, you need a license. Florist licenses require a practical exam that is graded by licensed florists—in other words, an applicant's future competition. The other florists have a vested interest in flunking as many people as possible. In fact, the pass rate when we launched our case was less than 50%. So, some might say that it is easier to pass the bar exam than to become a licensed Louisiana florist. Shamille took two classes in flower arranging, but failed the florist exam five times. Despite having customers who wanted to hire her, Shamille had to pursue another occupation.



Hairbraiding: My first case at IJ was representing several African-style hair braiders in Tupelo, Mississippi. Most states require hair braiders to obtain a license in cosmetology, requiring thousands of dollars and 1500+ hours of training. Compare that number to the 400 hours of training for police officers in Mississippi. So, according to the government, it is nearly four times more dangerous to braid hair than to carry a loaded weapon into dangerous situations. [The following photograph is of braiders from Minnesota, with IJ client Lillian Anderson seated.]



Taxi Driving: Luis Paucar, a legal immigrant from Ecuador, made his money in the grocery business. Dissatisfied with the available taxi industry in Minneapolis, he wanted to open a bilingual taxi service to serve the growing Hispanic population. But Minneapolis, like most cities, had a cap on the number of taxi licenses. New competition, no matter its quality, was not wanted.



Horse Teeth Floating: Horses' teeth continue to grow throughout their lives, so they need to be filed down every once in awhile just like horses' hooves. Veterinary associations in Minnesota and Texas have tried to restrict this practice to vets—despite the fact that veterinary schools do not require you to take a class where you would actually learn how to do this.



Consequences

The examples that I mentioned here are just the tip of the iceberg. The rate of new professional licensing requirements is skyrocketing. Today it is more than 20% of the workforce, up from 4.5% in the 1950s. A recent Forbes magazine article called

professional licensing “the new guild system.” Just as in the Middle Ages, the goal of a guild is to restrict entrance to the profession in order to benefit the guild’s members.

Morris Kleiner, an economist at the University of Minnesota, has spent his professional life researching occupational licensing. Based on his and others’ research, however, the benefits of licensing are difficult to find. Kleiner examined studies from 1978 to 2005 for occupations for which one would expect regulations: dentists, contractors, electricians, plumbers, teachers, real estate agents, optometrists, and vets. He also looked at insurance premiums for occupational therapists, nurses, and psychologists.

Kleiner’s results were very interesting. Professional licensing drives up wages but it also decreases employment. Importantly, however, there is no measurable impact on overall quality. In short, consumers pay more with no corresponding benefit to them; money is simply redistributed. If this is true for occupations that people routinely expect to require a license, it just makes the ridiculous restrictions on casket retailing and florists even worse.

How It Works

The interior design industry provides a current example of licensing politics in action. The American Society of Interior Designers has undertaken a national campaign pushing for licensing restrictions. The group claims that it wants to increase the stature of the industry.

As rational actors, politicians weigh the support of those who back a policy versus those who are against the policy. Interest groups—like the group of interior designers—hope to earn higher wages by restricting entrance to their profession. They tend to vocally support a licensing scheme. Consumers suffer higher costs, but those costs are dispersed: a few dollars here, a few dollars there. Consumers are also generally not organized, and, most of the time, they don’t even know about the proposed legislation; so there is little opposition. This is especially true in rare or episodic purchases like caskets. When the legislature weighs the matter, the interest group appears to have more vocal support. So the law gets passed.

The licensing process often starts with something called “title laws.” Funeral directors, for example, used to be called undertakers. Title laws don’t restrict the practice of a profession, only what the entrepreneur can call himself. So, under title laws, anyone can *practice* interior design but only someone with specified training can *call* himself an interior designer.

IJ is in the midst of challenging titling laws for interior designers right now. We recently helped Sherry Fazoy in New Mexico. Sherry was suddenly thrust into the position of supporting herself after her divorce. She learned of a franchising opportunity with a group called Decorating Dens in the field of interior design. It was not particularly easy to open her franchise; in fact, the company actually required her to take five tests. But New Mexico requires that anyone who wants to call themselves an interior designer must

go to school to be trained in the field. Without the resources to attend more schooling, Sherry must advertise in the Yellow Pages without calling herself an interior designer, which makes it difficult for customers to find her. [We won the case on when the State admitted that the law unconstitutionally restricted Sherry’s free speech rights and changed the law.]



Once everyone gets used to only referring to an interior designer as someone who receives six years of training, the American Society of Interior Designers goes back and asks the legislature to make the training mandatory. For example, interior designers helped pass a law in Alabama making it illegal to tell someone that they think green pillows would look better on their couch than purple ones, or that perhaps some new drapes are in order. The new law immediately put thousands of successful entrepreneurs out of business. Thankfully, the Alabama Supreme Court struck it down last year.

The harsh truth is that every state legislature that has actually looked at the “health and safety” arguments for interior design licensing has found no cause for concern. Now that IJ has been getting some publicity on the subject, unlicensed designers—those without the educational credentials—are starting to fight back and stop these new licensing laws in their tracks. The ability of small groups to raise awareness and get the word out about the cartelization of industries is very important. Watchdog organizations like the FCA have the power to stop bad legislation in its tracks.

IJ’s Role and the Legal Frontier

Meanwhile, when bad occupational licensing laws get passed, that’s where we come in. The courts have long recognized the right to earn an honest living as a fundamental right, but there is a big discrepancy in how the courts treat fundamental rights. Some, like free speech and religious freedom, get strict scrutiny—the highest standard of review. Other rights, like economic liberty, are subjected only to rational basis review, meaning that the restriction need only be rationally related to a legitimate government interest, such as public health and safety.

But the rational basis test is not really a test at all. In the name of judicial deference, the Supreme Court has rubber-stamped every economic regulation that has come before it for the past 70 years. In short, the courts have stopped playing their role as the check on government power gone amuck.

IJ is trying to get the courts to take these rights seriously again. We occasionally win at the margins: we've won a hairbraiding case, a shoeshine case, and an interior design case. Reverend Craigmiles' case is the first appellate court decision striking down an economic regulation since the New Deal. Unfortunately, the legal wins are few and far between. More often, the state will change the new law in response to the negative publicity they receive from our lawsuit.

We will continue to tilt at windmills, and we'll continue to have some successes. But the law is so bad that we cannot do it alone. We need your help. The list of obnoxious occupational licensing laws keeps growing; it is slowly killing our economy and pushing the American Dream out of reach for far too many Americans. Too many people are unable to take a year or two off from work to earn a license.

What You Can Do

I want to close tonight by giving each of you a call to action. There are five points that I want you to take home with you—five things that you can do to advance economic liberty in your own state:

1. **Contact your legislators and tell them what you think.** Don't let your legislature pass protectionist laws without opposition. Always remember that you are the representatives of consumers. You are organized and your voice is strong. *Just like the unlicensed interior designers who have banded together to fight the American Society of Interior Designers, you can stop the growth of protectionist legislation in your state.*
2. **If you live in a state that has casket restrictions on the books, make an effort to get them repealed.** You never know whether you can unless you try. *Three hairbraiders in Mississippi—making telephone calls, sending letters, and making a few trips to the capitol—were able to change the law.*
3. **Ask the governor to put a local FCA member—or two—on the Board.** Then watch the board like hawks. If your state does not have a public member, demand that one be created.
4. U.S. Supreme Court Justice Louis Brandeis once said, “**Sunlight is the best disinfectant.**” Often, just throwing light on the outrageous actions of the boards is enough to stop them. Write a letter to the editor. Call the newspaper and ask them to investigate. Show up at the board meetings. Ask questions. *Sparked by a single op-ed on the cartelization of the interior design industry, the*

governor of Indiana vetoed a measure that would have licensed interior designers in his state.

5. **Report abuses in the funeral industry to the FCA as soon as possible.** If you see something else regarding occupational licensing, feel free to give IJ a call.

Thank you for your attention tonight. But most of all, thank you for everything that you already do to fight back protectionism in the funeral industry. You are doing a great job; keep up the good work!