Part 1
Bodies, Business, and Traditions for Saying Goodbye

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1 Circling the Hearses

Three-year-old Lorenzo Farmer's tiny body lay locked up in a Salt Lake City hospital morgue for days in 2006. It wasn't that he had no family; his grief-stricken parents had been by his side. It wasn't that the family didn't know what to do for his funeral; they were unusually clear-minded and resolute. Lorenzo was going back to the Fort Hall Indian Reservation in Idaho for a traditional Native American funeral. But the hospital wouldn't release Lorenzo to his own mother and father thanks to a new state law that made the dead in Utah hostages of the funeral industry.

"It was like a wall. Everybody was telling us 'No, no, no. We can't release the body to a family member. A funeral home has to be involved,'" Lorenzo's grandmother, Wendy Rodriguez, told the *Herald Extra*.

Until 2006, Utah law followed those of most other states; if no funeral director was involved, the family member *acting as the funeral director* could sign the spot on the death certificate describing the final disposition of the body. After May 1 of that year, however, only a funeral director could. Lorenzo finally made it back to his parents' arms, but not until Fort Hall consumer advocates David Robles and Marcia Racehorse-Robles found a sympathetic funeral director—as shocked at this law as we were—who signed the certificate and refused to take a fee. And not before Lorenzo's parents, Adrian and Crystal, had to endure the outrage of being denied the custody of their own son and the prospect that a mortuary might forcibly embalm his tiny body.

"You just go with whatever they tell you to," said Rodriguez. "We were just going to have to do it because we thought that was the only way we were going to get him back home."

The Utah Funeral Director's Association (UFDA) and the legislators who danced to their tune were responsible for this family's misery. In a brazen act of self-dealing, the UFDA told state lawmakers the slight change in wording in the death certificate law was part of a housekeeping bill to clean up technicalities. The bill slipped onto the "consent calendar," where non-controversial acts get a rubber stamp.

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"The primary goal was to protect the consumer more than anything," UFDA President Tod Bonzo told the *Herald Extra* when the story broke. "It is a protection for human health . . . ."

It defies believability that UFDA was trying to protect the public by requiring that every citizen pay for the services of their dues-paying funeral homes. Utah was the latest to join the few other states with laws that restrict or prohibit full family control over their funeral rituals.

Fortunately, consumer activists stepped up. Joyce Mitchell, President of FCA of Utah, gathered families, consumer advocates, and Native American tribal representatives to testify against the restrictive law. Dave Robles and his wife, Marcia Racehorse-Robles, drove from Idaho and stalked the halls of the Utah legislature with Mitchell, pushing hard to restore this important family right. Their collective efforts sparked newspaper coverage and support from influential talk-radio hosts. Thanks to Mitchell's Representative, Brad Daw (R-Orem), HB 265 passed the House overwhelmingly, and Senator Luz Robles (D–Salt Lake, no relation to Dave Robles) became an enthusiastic Senate sponsor. The governor signed the corrective bill into law in 2009.

State Laws Denying Rights of Grieving Families

Eight other states continue to restrict families' rights to funeral privacy. Every one of these nonsensical prohibitions offends fairness and decency and reeks of an industry meddling to prevent consumer choice and protect its members' income:

- Connecticut requires a funeral director's signature on the death certificate and bars anyone but a funeral director or embalmer from removing a body or transporting it.

- The Illinois administrative code (which appears to have been changed after the publication of Carlson's 1998 book) defines "funeral director or person acting as such" to include only funeral directors or their employees or "associates." This means a mother couldn't obtain a disposition permit for her own deceased child, but any anonymous "associate" of a licensed funeral director could.

- Indiana law says burial permits can be given only to funeral directors, even though other statutes clearly refer broadly to the "person in charge" of the disposition, the next-of-kin.

- Louisiana law mandates funeral-director involvement in obtaining all necessary permits and funeral director presence at the final disposition of the body. Who knows what nefarious activities families

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and preachers might get up to if left alone at the grave with a casket! New York has similar requirements.

- Michigan health department officials have always been uncooperative with home-funeral families, and statutory changes in 2003 and 2006 now give them a legal excuse for their resistance. All death certificates must now be "certified" by a funeral director—though the statute doesn't even define what that means. Even more strangely, the wills and probate section of the law requires all body dispositions to be conducted by a licensed funeral director.

- Nebraska law requires a funeral director to supervise all dispositions and gives funeral directors the right and authority to issue "transit permits" to move the body out of state.

- New Jersey statutes changed after the publication of Carlson's 1998 book, revising sections of law that had allowed families to care for their own dead before that. References to the "person acting as" her own funeral director disappeared from the law.

While family-directed funerals are still permissible in Minnesota, the state tightened the screws in 2007. The law change barred families from using pickup trucks for transporting their dead (a hearse would be just fine, though). When Carlson and Slocum complained about this in response to a press interview, David Benke, director of the Health Department's mortuary science section said, "If that's what you want, go to one of those countries where they have no rules or regulations. You can dig a hole and bury a body in your back yard." (Mr. Benke was apparently unaware that Minnesota law did allow for family cemeteries on private land.)

Also, the state decided to keep its one-of-a-kind law requiring embalming for public viewing—religious or personal objections be damned. Once again, consumer activists mobilized, and they found the sympathetic ear of Representative Carolyn Laine. Laine successfully shepherded a bill into law in 2010 that rolled back these nonsensical restrictions and finally ended Minnesota's dubious claim to fame as the only state that required embalming for public viewing.

Funeral Directors Write Their Own Laws

The great majority of laws covering funeral licensing and practice were historically instigated by the National Funeral Directors Association and its handmaidens at the state level. Nearly all funeral licensing boards in the various states are dominated by funeral directors. They routinely ignore legitimate consumer complaints and sweep abuses under the rug.

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Take Alabama as an example. The Alabama Examiner of Public Accounts (the state's inspector general) published a scathing audit of the Alabama Board of Funeral Service in 2007. Some of the findings showed that the board lacked transparency or even any kind of reasonable record keeping. The Examiner found the Board didn't have a website (it does now), Board members didn't respond to e-mails, the majority of office records were handwritten on paper (in 2006!), and the Board couldn't even provide a list of all licensed funeral homes in the state, as required by law. More worrisome, the report also indicates (though in careful language) that the Board falsified its own inspection records, claiming to have inspected far more funeral homes than any human could have in the time allotted. What's more, three funeral homes told the Examiner that the Board's associate executive secretary "requested money (other than normal fees) for board services."

Too often, state regulatory boards and the trade associations they align with lobby for laws that keep out competition—and write regulations to thwart entrepreneurs who want to lower funeral costs. As they see it, they're following a grand American tradition. As the 10th Circuit Court of Appeals put it in a bizarre decision upholding Oklahoma's right to outlaw direct-to-consumer casket sales, "Dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments."

Most people who have a bad experience with a commercial funeral home quickly learn the difference between consumer protection and *industry protectionism*. Missouri widow Marilyn Oehlschlaeger called Funeral Consumers Alliance in 2006 after her husband's funeral. She claimed the funeral home never gave her a price list, and when she got the bill (more than $9,000) there were hundreds of dollars in charges for items she never asked for and didn't want. Oehlschlaeger and her two daughters told Slocum they repeatedly asked the funeral director for specific services and told him to strike off the extras they didn't want. "He kept saying, 'But we have these packages now,'" Oehlschlaeger said. "I told him we didn't want a package."

Slocum wrote a detailed letter to the state funeral board and the Attorney General pointing out the funeral home's legal misdeeds under the Federal Trade Commission's Funeral Rule and state law. During the complaint process, funeral home employees harassed Oehlschlaeger continually, calling her at home and pressuring her to meet with them and resolve the issue (a favorite ploy of corporate mortuary chains to make sure their *pattern* of misbehavior goes undetected). Slocum advised her not to meet with them—especially without a lawyer—and to let the complaint process play out. In the end, all she got from the state board (five funeral directors and one public member) was a one-paragraph letter saying the board hadn't found any legal violations. No explanation was given for how the board failed to see the

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statutory violations Slocum pointed out. The Attorney General's office did no better, claiming it had no jurisdiction over the funeral board.

How We Got Here

> The legal profession have their associations for mutual improvement. So do clergymen, chemists, Boards of Health, civil and mining engineers, physicians and surveyors . . . . It is well known that we can never have an educated profession of funeral directors unless we compel it by legal enactments as a sanitary measure . . . . I would have a law regulating the care and burial of the dead the same as there is for medicine.
>
> *—Hudson Samson, President of the National Funeral Directors Association, addressing NFDA's fifth annual convention in 1886.*

President Samson would be pleased with the progress trade groups have made over the past 124 years. All 50 states today have laws controlling the business of undertaking (though Colorado and Hawaii have no specific regulatory body enforcing them). Some are so detailed they prescribe in feet the length of the room in which the dead are embalmed or bar the use of profanities or "unprofessional" language in the presence of the deceased. So far as we know, none of the dainty dead have complained.

Today 48 states and the District of Columbia require some level of education, usually two years of college, before a person can get a funeral director's license. The majority require funeral businesses to have on-site embalming rooms. Many require funeral homes to have casket showrooms and chapels with minimum seating capacities. Massachusetts requires funeral homes to haul bodies in a vehicle used exclusively for transporting corpses—it's illegal to take the van out to McDonalds on one's lunch hour.

There is, of course, much justification for government regulation of the funeral industry. Very few people buy more than one or two funerals during their lifetime, and, when they do, it's almost always at a time of grief and vulnerability. The problem is that instead of protecting the public from deceptive sales practices and fraud, the laws and regulations too often protect the dismal traders from public accountability.

The funeral business is so effectively insulated from free-market competition that many families can't even imagine a funeral home free of faux-Victorian sitting rooms and a fleet of Cadillacs. Rules and regulations that make it hard for simple-burial businesses to thrive force consumers to pay for the upkeep and taxes that go along with a fancy facility.

Real consumer-protection laws are rare. It is no accident that the deck is stacked in favor of undertakers and their pocketbooks. When the National

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Funeral Directors Association first organized, the motivation to establish an "educated profession" wasn't learning for learning's sake. The founding funeral directors knew that if they could convince lawmakers to require elaborate facilities and special schooling and certification, the burgeoning trade could keep out competition while raising prices to an "appropriately" high level.

NFDA's longtime apologist-in-chief, William Lamers, compiled 100 years of "The Words And Deeds of Funeral Service Practitioners" into *A Centurama of Conventions*. This thin 1981 paperback mixes gravitas and fawning. (One half expects to find "I ♥ my undertaker!" scribbled in the margins.) Sympathetic though he is to the undertakers' plight, Lamers states their aims more candidly than they do:

> One of these [concerns] was securing passage of laws setting high standards of training and education for admission to funeral service. Such laws would make certain that only qualified persons would be licensed by public authority.

The idea of undertakers as a Capital P Profession wasn't easy to put over. Before the last quarter of the 19th century, most Americans called on their undertaker (often a local cabinetmaker) to supply a coffin, bring chairs to the home, and to lend a general helping hand to the family members as they buried their dead. It would have seemed absurd that such prosaic work needed the eagle eye of a state bureaucracy to enforce complicated educational and legal requirements. Surely undertakers did not need the level of training required of doctors, lawyers, and other highly paid professionals.

Indeed, 19th-century undertakers complained bitterly about the difficulty of convincing the public and politicians to clear all obstacles on their road to Professionalism:

> The greatest assistance we want, and in my humble opinion the strongest protection we stand in need of, is the recognition before the law we justly deserve, and that the law shall require at our hands that degree of proficiency our calling is capable of, and that mead of protection we are competent to give and the public stand in need of and should demand . . . . Although in every state where we tried, our bill has fallen and failed of passage . . . ."
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> — NFDA President Robert Bringhurst, 1890

If only President Bringhurst were around today; the campaign to lock up the funeral market has been a stunning success. While some states (California, Texas and Florida, for example) allow stripped-down, simple funeral businesses to exist in the form of "direct disposition" establishments, many others prevent innovation with arbitrary and picayune requirements. And

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while most states require funeral homes to have an embalming room, they don't require them to have their own refrigerator to serve those who object to embalming on personal or religious grounds.

Enforcing Petty Rules While Ignoring Consumer Protection

Massachusetts is typical. Funeral directors have long complained that instead of rooting out crooks, employees of the Board of Registration of Funeral Directors and Embalmers slap businesses with fines for all sorts of minor infractions that have nothing to do with consumer protection.

A 2006 press release from the Board brags that inspectors collected $2,200 in fines after finding "code violations" in the embalming rooms at six funeral homes. Small wonder, as state regulations give the overzealous inspector (tax collector) a smorgasbord of opportunities. Massachusetts funeral homes must:

- have a "chapel sufficiently large and sufficiently equipped for the conduct of an average funeral service" with a minimum of 300 square feet;
- not have any living space on the same floor as the funeral business unless the owner promises not to offer customers food or drinks;
- be physically connected, if the business consists of multiple buildings; and
- have an embalming room at least 12' by 14' with a tile or cement floor; any rubber mats used have to be at least 3/16" thick, and the room must have "one standard-type sanitary operating table; one flush-rim sink, one floor drain. . . one sanitary waste receptacle which is opened by a foot pedal; and a standard-type instrument sterilizer."

Anyone who wants to open a funeral home offering customers low-cost, no frills-burials can forget it. They'll have to sink money into a for-profit chapel even if the religious service is at a church, or even if there is no service. They will pay for an elaborate embalming room, with nice thick mats, even if, like an increasing number of Americans, their customers reject embalming. Consumers pay for this frippery through higher prices, even if they choose a simple burial or cremation—all those sunk costs have to be paid for somehow.

Not only that, but the Massachusetts board has been operating in secrecy, going into illegal executive (closed) sessions, according to a longtime volunteer for the Funeral Consumers Alliance of Eastern Massachusetts. Byron Blanchard says the board refused to e-mail him copies of the minutes of its

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public meetings in 2006 and now refuses to even give him a paper copy. See the Massachusetts chapter for more of the state's secretive, anti-consumer behavior.

(In fairness, we should add that Massachusetts has taken some pro-consumer actions. Regulators announced in 2009 they'd inspect 175 funeral homes and found 25 percent were violating the FTC Funeral Rule, with offenses such as failing to give price lists to undercover shoppers. In addition, the Division of Professional Licensure named the scofflaws—something the FTC refuses to do—and filed legal action against 46 businesses.)

Georgia has been going on prep-room raids, too. The state board (six undertakers, one consumer member) congratulated itself in a 2008 press release for catching red-handed two funeral homes for "failure to maintain in inventory the required 24 bottles of arterial fluid and 24 bottles of cavity fluid in the embalming room." The inspectors must have been too busy counting bottles of Firmatone and Cavity King (yes, they really are called that) to notice that the Federal Trade Commission found 13 of 15 Georgia funeral homes inspected in 2007 had Funeral Rule violations. Perhaps the vapors from all that formalin can also explain why the Board has ignored a complaint from an elderly man who claims a funeral home substituted a much cheaper casket for his wife's funeral than the one he paid for. Or, maybe it's because the funeral director cited in the complaint was a member of the state board.

The Wisconsin Funeral Directors' Examining Board suspended Cassandra Clarson's business license for a year after ruling she "aided and abetted unlicensed practice" by letting her partner, Roger Henke, "make funeral arrangements without a license." Henke's crimes? "Obtaining obituary information and preparing obituaries; meeting with families to discuss type of funeral services; contacting clergy to set the times and locations for funerals; discussing the costs of funeral services and the monies to be advanced."

The *Janesville Gazette* editorialized on August 23, 2007:

> The rules appear to protect business interests and hinder competition that would benefit consumers . . . . Why can't a business manager handle such duties? Are we to assume that spouses of licensed funeral directors don't engage in such "unauthorized activity" in small funeral homes around Wisconsin? . . . If funeral homes must be licensed so they don't take advantage of grieving loved ones, shouldn't companies selling headstones or burial vaults be licensed?

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Consumers Fight Back

All this hearse-circling has some state boards so dizzy they've forgotten they're not a sovereign power. In 2005, the Missouri State Board of Embalmers and Funeral Directors went after Larry Gegner, an elderly man who sold caskets on the weekend at a flea market, when they found out he was telling people they had the right to bypass funeral homes and bury their own dead. The five morticians and one public member of the Board took Gegner to court on a laundry list of charges. These included "unlicensed activities" such as selling caskets to the public—*but state law specifically permits citizens to sell caskets to the public without a license.* The Board also charged Gegner with vague violations such as "arranging" funerals without a license.

Funeral Consumers Alliance and a nonprofit law firm, the Institute for Justice, pushed back. FCA sent several letters to the Board pointing out their legal errors, and IJ lawyer Valerie Bayham appeared at hearings to defend Gegner. Eventually Gegner and the Board reached a court settlement in which he promised not to engage in "funeral directing" (although he never had done so), and the Board acknowledged his right to sell caskets as well as his free-speech right to give advice on family-directed funerals. Before the settlement, the Board made a final attempt to dictate the behavior of private citizens by inserting into the funeral directing regulations, "Whether a fee is charged shall not be dispositive in determining whether one is engaged in the practice of funeral directing." Translation from Lawyerese to English: "We have the right to control anything anyone in Missouri does with a dead body, even private families or religious groups, whether or not money changes hands."

After pressure from FCA, they backed off this position and, at the time of this writing have drafted new regulations making it clear families have the right to conduct their own funerals. The Federal Trade Commission also sued the Board, resulting in a consent agreement barring the Board from enacting further regulations that restricted casket and vault sales.

An Irrational Basis

Why do so many cockeyed laws stay on the books? Few consumers or advocacy groups realize there's a problem in the first place. The rat's maze of industry regulation is designed to stymie people with bureaucratic bafflegab. Even fewer organizations know how to effectively challenge these laws, and those who do spend a lot of time pushing rocks up hills.

"There is a presumption that any law the government passes is a valid law, and that the burden is on the citizen to overcome this," according to Clark Neily, a lawyer for the Institute for Justice.

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IJ does battle with the regulatory gatekeepers that keep small entrepreneurs out of fields from flower arranging to bug spraying. At any given time, IJ is apt to be fighting the Arizona Structural Pest Control Commission for bullying a teenager who made pocket money rat-proofing his neighbors' roofs without a license, or the Louisiana Horticultural Commission, which stands between helpless consumers and rogue florists who haven't passed a state test proving they know how to stuff daisies in a pitcher "so that the whole composition will be of good design."

The industry's arbitrary restrictions on who can sell what kind of boxes has given IJ plenty of grist for its mill. When Tennessee threatened the Reverend Nathaniel Craigmiles with criminal prosecution for selling coffins directly to the public, IJ sued the state in federal court and won. The 6th Circuit US Court of Appeals unanimously struck down the state's ban on retail casket sales as unconstitutional under the 14th Amendment.

Tennessee scraped the bottom of the vault to justify the ban; casket retailers don't have the necessary "psychological training" and retail caskets don't "protect the public health" the way mortuary caskets do. The Court didn't buy it:

> *. . .survivors must deal with a panoply of vendors in order to make funeral arrangements, from churches to food vendors for a wake, none of whom is required to have this psychological training. This justification is very weak indeed.*
>
> *Indeed, the only difference between the caskets is that those sold by licensed funeral directors are systematically more expensive.*
>
> *— Craigmiles et al v. Giles et al, 2002*

IJ tried to rack up another victory against those Jessica Mitford called the "bier barons" with a similar suit against Oklahoma. Kim Powers and Dennis Bridges started an on-line casket business, only to be smacked down by the State Board of Embalmers and Funeral Directors. The Board thought the best use of taxpayer dollars was to fight for the right to require casket sellers to become full-fledged morticians with two years of college, a year of apprenticeship, and 25 properly preserved Loved Ones under their belts. The district court ruling described the uses to which undertakers put this specialized training:

> *Oklahoma funeral homes have attempted to increase the amount of money a consumer spends on a casket by showing higher-priced caskets more favorably in a showroom by strategic use of lighting, by placement of high-end caskets on rugs or beside sentimental sculpture, and by displaying less expensive caskets in unattractive colors alongside expensive caskets displayed in attractive colors. In at*

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least one case, an Oklahoma funeral home priced a low-end casket at $695, which had a probable wholesale cost of between $150 and $120.

Yet the court *ruled for the state*. So did the 10th Circuit Court of Appeals, even though the court acknowledged that "Consumer interests appear to be harmed rather than protected by the limitation of choice and price encouraged by the licensing restrictions on intrastate casket sales." Even worse, the court ruled against free trade, even while acknowledging that "dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments." IJ appealed to the Supreme Court in 2005 but the Supremes declined to hear the case.

How can judges support such bald-faced nonsense? Through the richly-named "rational basis" test. Ever since a precedent-setting 1877 Supreme Court case, US courts have bent over backwards to show deference to the supposed wisdom of state legislatures when they enact laws, no matter how transparently unfair. IJ's Clark Neily explains:

The original legal definition of insanity is the inability to tell right from wrong. So it is the first irony of the "rational" basis test that it is, according to that definition, insane . . . the rational basis test is nothing more than a Magic Eight Ball that randomly generates different answers to key constitutional questions depending on who happens to be shaking it and with what level of vigor. . . .

[The rational basis test leads to] judges simultaneously recognizing and refusing to protect fundamental constitutional rights; permitting government lawyers and witnesses to misrepresent—or at least disregard—material facts; preferring conjecture over evidence; saddling plaintiffs with a burden of proof that is technically impossible to discharge.

—No Such Thing: Litigating Under the Rational Basis Test, NY Journal of Law and Liberty, v. 1, no. 2

Courts that adhere strictly to this test (like the 10th Circuit in the Powers casket case) abandon facts and fairness. As long as the government can offer *any justification whatsoever* for the law, no matter how far-fetched or plainly dishonest, the Court will uphold it. Said a Second Circuit Court decision:

. . .the Government is under no obligation to produce evidence or empirical data to sustain the rationality of a statutory classification and can base its statutes on rational speculation.

Pretend an auto dealer's association gets sore over dealerships losing business to low-priced outfits like Jiffy Lube. So they send their lobbyist to get a

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law passed outlawing grease-and-lube drive-ups and requiring all oil changes to be performed by a licensed dealership. Say a would-be Jiffy Lube owner takes the state to court, and shows the law was concocted to funnel business into full-service dealerships. But no, the state says, we created the law to protect consumers from fly-by-night grease jockeys who might wreck their engines. Under the rational basis test, the court would rule for the state, because the state *could have* meant to protect consumers, "rationally" speaking, even though everyone knows the truth.

That's exactly what the 10th Circuit Court did in the Oklahoma casket case. The ruling is pure through-the-looking-glass reasoning:

> *The licensing scheme at issue here leaves much to be desired. The record makes it clear that limitations on the free market of casket sales have outlived whatever usefulness they may have had. Consumer interests appear to be harmed rather than protected by the limitation of choice and price encouraged by the licensing restrictions on intrastate casket sales. Oklahoma's general consumer protection laws appear to be a more than adequate vehicle to allow consumer redress of abusive marketing practices. . . . But the majority is surely right that the battle over this issue must be fought in the Oklahoma legislature, the ultimate arbiter of state regulatory policy. I therefore conclude that the legislative scheme here meets the rational basis test and join in the judgment of the majority.*

"Consumer Protection" in Regulating Crematories

Many states have fallen for plainly dishonest "consumer protection" arguments when they finally got around to regulating crematories. Seven states require crematories to be owned by, run, or affiliated with full-service funeral homes. Twelve states bar crematories from selling to the public directly; crematories in these states are relegated to working as wholesale trade jobbers for full-service funeral homes that purport to be selling cremation to their clients, but who do nothing but haul the body and file the death certificate. Most consumers would be shocked to find out the average cost of the actual cremation at the crematory is just a few hundred dollars. You're unlikely to pay the undertaker less than a thousand.

Arizona funeral homes have just such a sweet deal. Now, you don't have to be a funeral director to own or operate a crematory. You just have to have an incorporated business, pass a criminal and professional background check, and "be of good moral character." But the law says you can't sell a cremation that isn't "arranged by a funeral establishment" unless "otherwise permitted by law." We'd argue that since families clearly have the right to care for their own dead in Arizona, that selling a cremation to a family that brings

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the body and the legal paperwork is permitted. Not so, claims the state. And what justification is there for forcing crematories to serve as second-class businesses at the beck and call of full-service mortuaries? We have to be able to regulate cremation, says the state. Then why not just regulate crematories *themselves*?

Such nonsense is par for the course when you start digging into the rationale for protectionist schemes. In 2002, Georgia regulators discovered 334 rotting bodies lying un-cremated on the back lawn and in broken-down hearses at the now infamous Tri-State crematory in Noble. Smelling an opportunity, the state's undertakers got behind a new law that they claimed closed a loophole that had allowed the Tri-State crematory to operate without regulation.

Under the old law, in effect at that time, a crematory that dealt directly with the public needed to be operated by a licensed funeral director. A crematory that dealt *only* with funeral directors was not regulated. The assumption, presumably, was that the funeral directors dealing with the crematory would check to be sure that the services they contracted for were being provided.

Because Tri-State dealt only with funeral directors, not with the general public, it did not need to be licensed or inspected. Think about this scenario: All the duly-licensed undertakers that sent bodies to Tri-State clearly didn't bother to do the most cursory checking; 334 corpses scattered about the property are hard to miss. In most instances, the funeral directors marked up the crematory charges by at least 100 percent, and usually more, when they passed them along to the consumer. Just *what* were all those undertakers doing to justify those prices?

The new law required all crematories to be inspected. That is obviously justifiable, given the horrible scene discovered at Tri-State. But none of the proponents of the new law could explain why requiring funeral director supervision of crematories was necessary to protect the public. Despite the evidence to the contrary, (especially in this specific case) we are supposed to believe funeral directors are inherently more ethical and conscientious than grubby old crematory operators.

Mortuary Schools Gloss Over Cremation Basics

The idea that crematory operators need the "special" training mortuary school provides falls apart when you look at what the 50-odd schools actually teach. There's little to nothing in many curricula on cremation, and the national board exam study guide for aspiring funeral directors—published by the International Conference of Funeral Service Examining Boards (ICFSEB)—glosses right over it. Carlson's Spring, 2005 *Newsletter for the Funeral Ethics Organization* found:

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Only two questions out of 150 deal with cremation in the Funeral Arts section of ICFSEB's National Board Study Guide. The purpose of the exam, it states, is to determine "the MINIMUM QUALIFICATIONS to function as an entry level funeral director"—

2. Cremation first gained widespread acceptance and practice in:

A. ancient Rome
B. Hebrew lands
C. ancient Greece
D. Scandinavian countries

12. The proper terminology for the placing of cremated remains into a final container is

A. interment
B. inurnment
C. entombment
D. cremains interment

Cremation isn't rocket science, but requires basic skills such as retort operation, maintaining a documented chain of custody for the body, and understanding the various state laws on who can legally authorize a cremation. These things aren't taught in many embalming schools. States would do far better for the public's protection and pocketbook to get rid of the funeral director monopoly and set up reasonable training and inspection requirements for crematories that serve the public. In fact, prospective crematory owners get more relevant training from the short courses offered by the Cremation Association of North America than they would from two years at America's mortuary colleges.

Where We're Going

There's cause for hope—and for worry. Most state boards are still dominated by the industry members they purport to regulate, and the consequences to consumers are dire. In 2006, the Kentucky legislature caved to industry fat-cat demands by outlawing lower-cost funeral homes from opening. Not outright, of course, but by requiring every funeral home to meet the most elaborate standards—an embalming room, visitation and ceremonial space, etc. They even tried to do away with citizens' rights to conduct private funerals until FCA stepped in. The new law, backed by the state board of four funeral directors and one "public member" (whose wife worked at a funeral home) was aimed at an upstart undertaker who wanted to offer low-cost direct burials and cremations from a storefront office.

A lawmaker in Wisconsin tried similar shenanigans, and only a good old-fashioned public humiliation in the media—courtesy FCA—persuaded

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Phil Montgomery to amend his 2005 bill that would have outlawed "strip mall" funeral homes. In truth, the bill was written *by* the Wisconsin Funeral Directors Association. Montgomery justified his bill to a TV station thus: "The fact that when you squeeze one in between a Dunkin' Donuts, you know, and a Hooters, I don't believe it serves the industry, or the consumers well." We must conclude it didn't occur to Mr. Montgomery that those who objected to the staff attire at beach-themed restaurants need only stay next door and keep their eyes at casket level. Or that nobody would be required to go to a low-cost establishment if they preferred one in a tonier neighborhood.

The worst abuse of power we've seen so far came in 2007, when the North Carolina Board of Funeral Service accused the volunteer President of the Funeral Consumers Alliance of the Central Carolinas of practicing funeral service without a license and threatened her with criminal prosecution. The charges? Publishing an obituary that would lead the public to think this consumer group sold funerals. The only problem—President Mary Brack didn't publish any obituaries. An FCA member family merely thanked the group for its help in one line in the obituary, "The Funeral Consumers Alliance of the Central Carolinas assisted the family." Of course, we are to believe this had nothing to do with the fact that the nine-member board has seven funeral directors, six of them picked by the state's two largest undertaker trade groups, *a right guaranteed to these lobbying groups by state law.*

Fortunately, at least a few lawmakers in a few states are wising up to rent-seeking rackets. Marilyn Oehlschlaeger—the Missouri widow whose case was discussed earlier in this chapter—became so disgusted with the regulators she went to state Representative Brian Baker's office for help. Baker promptly filed House Bill 1588 in 2007. The bill would have put five new consumer advocates on the board to break the undertakers' monopoly voting bloc. Sadly, it didn't pass.

In Maryland, Representative Joanne Benson became fed up with the eight-undertaker majority on the state board thwarting her efforts to break the monopolistic licensing system in Maryland. She solicited testimony from FCA and its state chapter about the need to reform the board. Benson's crusade successfully remade the board. Before 2008, the 12-member board consisted of eight funeral directors and four consumer members. The new board has 11 members; six are funeral directors, and five are consumer members. While the undertakers still have a majority, it's a big step in the right direction.

The Lynch Lawsuit

Lawmakers in Michigan have told us they're willing to work to restore families' rights to perform their own funerals, but it will be an uphill battle against well-heeled lobbyists who swarm out of the woodwork like drown-

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ing termites whenever such bills are filed. Advocates will likely have to contend with the silver-tongued Thomas Lynch, too. Lynch, an award-winning poet and author as well as the owner of several Michigan funeral homes, very much dislikes being questioned, and he appears to believe that dislike overrides the First Amendment rights of his critics.

In 2008 Lynch sued the Funeral Ethics Organization, Lisa Carlson personally, Funeral Consumers Alliance, and the Funeral Consumers Alliance of Idaho for libel in federal court. On what grounds? Carlson wrote an article in the FEO newsletter in which she noted that members of the Lynch family have publicly opposed families' rights to care for their own dead without using a funeral director (which they have). In a posting to an e-mail discussion list, Carlson also noted (correctly) that, in the PBS Frontline documentary *The Undertaking,* which profiled the Lynch funeral homes, funeral home staff were not shown giving consumers General Price Lists as required by the FTC. The tiny, volunteer-run, low-budget FCA of Idaho got dragged into the suit for reprinting this comment in their newsletter. And FCA's sin? A PowerPoint presentation titled "Deconstructing Thomas Lynch" that suggested profit was probably Lynch's motivation for writing a particular article praising lavish funerals. (The article is posted at <www.funerals.org>).

The court threw out the suit, of course, correctly observing that none of these statements was false or malicious. While it is tempting to comment further on Mr. Lynch's shenanigans, we don't think he deserves a stage for any more theatrics. For anyone interested, however, the lawsuit and various commentaries are on the FEO website: <www.funeralethics.org/newsletter>. The Funeral Consumers Alliance's website, <www.funerals.org>, also contains a number of articles on *l'affaire Lynch*.

Recommendations

It's time to bury the status quo in an unmarked grave. Industry-dominated regulation has done a whole lot to prop up outrageous funeral prices but almost nothing to stop consumer abuses. The near-universal requirement to go through two years of mortuary school before opening a funeral home only ensures the next generation of funeral directors will be indoctrinated by an outdated curriculum that's still harping on the "value of viewing and embalming" while teaching students little about cremation, green burial, alternative funeral options, religious diversity in funerals, or even how to set up a business website.

Sensible, fair, and effective regulation would:

- Restore families' constitutional rights to care for their own dead in the states where restrictions exist.

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- Eliminate the need for expertise in embalming as a requirement to run a funeral home. Embalmers who serve the public should be required to have this training, of course, but there's no reason a simple disposition business owner should have to take classes in flooding the abdomen with formaldehyde.

- Eliminate requirements for funeral homes to have embalming rooms, "chapels," and other vestiges of old-school funeral parlors. Let the market decide what services are on offer. After all, no law requires McDonald's to sell poached salmon in dill sauce.

- Develop a test for prospective licensees that focuses on what's important for consumer protection. Test them on the FTC Funeral Rule, knowledge of state laws on funeral directing, prepaid funeral accounting requirements, and who has the legal right to make funeral decisions on behalf of a decedent.

- Require prospective licensees to do an apprenticeship of a reasonable length with a funeral business to gain practical experience. Vermont used to require that embalmers serve a one-year apprenticeship and funeral directors to assist with at least 30 funerals before becoming licensed. This worked perfectly well from time immemorial, but predictably, the Vermont Funeral Director's Association convinced lawmakers to require mortuary school attendance for licensure starting in 2009.

- Reform state licensing boards so industry does not have a majority voting bloc. A properly constituted board would ensure a spot for representatives of all trades regulated by the board—crematories, cemeteries, etc.—not just full-service funeral directors. Licensing boards should include as many or more disinterested consumer members as industry representatives.

- Consider abolishing the licensing boards altogether and place responsibility for licensing and oversight with a dedicated civil service staff, perhaps with an advisory board of funeral directors and public members to consult.

- Establish a clear, efficient complaint process for consumers with a grievance. Employ adequate staff sufficiently trained in funeral laws and regulations to fairly resolve complaints. Make complaints and resolutions public documents.

Are all of these reforms likely to take place in the foreseeable future? Of course not. Back in the 1980s, passage of the FTC Funeral Rule seemed to

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many to spell final victory for funeral consumers, and some predicted that CAFMS (the former name of FCA) would be out of business, with its goals accomplished. What a pleasant—but naïve—thought that was. But it is well worth the effort to work for reform and to help consumers to learn how the system works so they can protect themselves, especially when the regulators won't.

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