

REGULATED TO DEATH: OCCUPATIONAL LICENSING AND THE DEMISE OF THE U.S. FUNERAL SERVICES INDUSTRY

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For the first two centuries of European settlement in North America, the preparation of human remains for final disposition was an activity that centered on the family and the religious community.¹ Until the end of the 19th century, the disposition of human remains in the United States was largely a non-commercial activity.² Undertakers were sometimes employed, more commonly in the cities, to build the casket and transport human remains from the home to the cemetery, but their role was limited.³ That began to change as embalming became a more popular option, again, mostly in cities, in the decades following the Civil War.⁴ In the last decades of the 19th century, men who were trained in embalming sought to establish a new profession in the United States, one dedicated to the disinfection of human

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1. See, e.g., JAMES J. FARRELL, *INVENTING THE AMERICAN WAY OF DEATH, 1830–1920*, at 147 (1980).

2. TANYA D. MARSH & DANIEL GIBSON, *CEMETERY LAW: THE COMMON LAW OF BURYING GROUNDS IN THE UNITED STATES* 3 (2015); Brian Walsh, *How Lincoln's Embrace of Embalming Birthed the American Funeral Industry*, CHI. TRIB. (Oct. 31, 2017), <http://www.chicagotribune.com/sns-how-lincolns-embrace-of-embalming-birthed-the-american-funeral-industry-86196-20171031-story.html>.

3. GARY LADERMAN, *REST IN PEACE: A CULTURAL HISTORY OF DEATH AND THE FUNERAL HOME IN TWENTIETH-CENTURY AMERICA* 5 (2003).

4. *Id.*

remains and the facilitation of grief.⁵ These men called themselves “funeral directors.”⁶

The funeral services industry was invented at the same time the modern medical and legal professions were born.⁷ Concerns about quackery and malpractice led members of those professions to establish self-governing organizations⁸ and encouraged state legislatures to enact laws requiring minimum standards of education and training.⁹ The traditional path to these professions—apprenticeship—was replaced by occupational licensing regimes established by state law.¹⁰ Occupational licensing regimes work by defining a scope of activity, limiting the performance of that activity to licensed people, and then establishing minimum standards as a condition of licensure.¹¹ Following the imposition of the occupational licensing regimes, for example, one could not simply declare himself to be a physician. Only licensed doctors could practice medicine; only licensed attorneys could practice law.¹²

Funeral directors saw themselves as professionals and wanted to be treated the same way.¹³ They therefore successfully

5. *Id.*

6. FARRELL, *supra* note 1, at 155–56; ROBERT W. HABENSTEIN & WILLIAM M. LAMERS, *THE HISTORY OF AMERICAN FUNERAL DIRECTING* 155 (7th ed. 2010) (“The burial of the dead as a distinct and separate business is of comparatively recent origin or necessity. Many of you can remember when a ready-made coffin was an unheard of thing As the country became more thickly settled the cabinet makers began to make coffins ‘to order’ and take charge of funerals, and step by step they advanced until they became known as ‘undertakers’ as well as furniture dealers. In the cities these men gradually limited their business to undertaking.” (quoting E.L. Devore, Remarks at a Meeting of the National Funeral Directors Association (date unknown))); *see, e.g.*, LADERMAN, *supra* note 3, at xxiii.

7. FARRELL, *supra* note 1, at 46 (noting the National Funeral Directors Association was founded in 1882). *See generally* *AMA History*, AMA, <https://www.ama-assn.org/ama-history> (last visited Sept. 23, 2017) (established in 1847); *History of the American Bar Association*, A.B.A., https://www.americanbar.org/about_the_aba/history.html (last visited Sept. 23, 2017) (established in 1878).

8. FARRELL, *supra* note 1, at 150–51.

9. *Id.* at 152–53.

10. DEP’T OF TREASURY OFFICE OF ECON. POLICY, COUNCIL OF ECON. ADVISERS, & DEP’T OF LABOR, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 17–18 (July 2015) https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.

11. *See id.* at 6–7.

12. *Id.*

13. *Id.* at 22 (“Following in the footsteps of more established professions such as physicians and lawyers, practitioners in newer areas may view professionalization as both

lobbied state legislatures to define the “practice of funeral service” as a set of activities centered around the preparation of human remains for final disposition and to establish educational and training standards centered around the new technology of embalming.¹⁴

By enacting these occupational licensing regimes, the state legislatures created the modern funeral services market in the United States to the near complete exclusion of the traditional guardians of the dead. Even in states that expressly allowed non-licensed family members to care for their own dead,¹⁵ bureaucratic requirements including death certificates and burial transit permits either required a funeral director’s signature or made it difficult for families to avoid engaging a funeral director.¹⁶ Shielded from competition, the funeral services industry flourished for many years.¹⁷

A century later, that government-created market is broken.¹⁸ Consumers perceive that they are paying too much for too few choices. Traditional mom-and-pop funeral homes are

beneficial for the profession—in helping to achieve greater legitimacy, cultural authority and income—as well as serving wider social interests, through improving quality and public safety.”); HABENSTEIN & LAMERS, *supra* note 6, at 348–49.

14. See Dick M. Carpenter II, *Bottlenecks: The Origins of Occupational Licensing and What Can Be Done About Its Excesses*, 18 FEDERALIST SOC’Y REV. 14, 15 (2017).

15. See, e.g. 26 VT. STAT. ANN. § 1211(b) (2012)(“Nothing in this section shall prohibit . . . (3) immediate family members of the deceased from providing for the care, preparation or disposition of dead human bodies.”).

16. See CTRS. FOR DISEASE CONTROL & PREVENTION, DEP’T OF HEALTH & HUMAN SERVS., FUNERAL DIRECTORS’ HANDBOOK ON DEATH REGISTRATION AND FETAL DEATH REPORTING 1 (2003), https://www.cdc.gov/nchs/data/misc/hb_fun.pdf (“The funeral director is responsible for filing an accurate and complete death certificate with the proper registration official, although State laws vary in specific requirements.”).

17. See Carpenter, *supra* note 14, at 15.

18. Bob Pierce, *What Do Changing Funeral Customs Really Mean to the Independent Funeral Home?*, PIERCE CFO, http://www.piercecfo.com/resources/changing_Funeral_Customs.pdf (last visited Sept. 30, 2017).

“Funeral customs are changing. Family expectations are changing and the industry isn’t keeping up with the changes. And, we are only seeing the tip of the iceberg. The changes to come will be greater than the changes we have seen. The industry is already clinging to the last vestiges of the traditional funeral in many markets. Many of us still depend heavily on these higher revenue services to remain viable and profitable. If the revenue from the traditional funeral were gone tomorrow, many of our colleagues would also be gone.”

Id.

struggling to remain profitable.¹⁹ Entrepreneurs seeking to offer consumers new methods of disposition and memorialization are frustrated.²⁰ In 2013, funeral director F. Todd Winninger described the problem in an industry blog:

[T]here's still been no significant change in funeral service in the last 150 years [T]he Baby Boomers are here, and they don't want embalming, caskets, your chapel or even you The industry wants to sell buggy whips—it likes buggy whips, is good at them and they've been profitable. But the market wants cars²¹

The buggy whip in Winninger's analogy is the “full service funeral,” characterized by an open casket service at the funeral home followed by a ground burial.²² The centerpiece of the full service funeral is the embalmed corpse. The central assumption of the modern funeral services industry and the occupational licensing regimes that govern it is that Americans want a full service funeral. That was largely true, particularly in urban areas,

19. David Nixon, *Listening to Cremation: Part XXI*, in FUNERAL DIRECTOR'S GUIDE TO STATISTICS 103, 103 (Thomas A. Parmalee & Patti Martin Bartsche eds., 2015) (“For a profession and industry designed to sell caskets and embalming, the loss of those two major revenue producers in a cremation-based economy can spell financial hardships as the comfort of steady and higher-priced burial offerings slowly disappear.”); Nat'l Funeral Dir. Ass'n, *NFDA Releases 2017 Cremation and Burial Report*, 8 MEMORIAL BUS. J., no. 27, 2017, at 2 (“As cremation numbers increase, the forecast for funeral home revenue gains is stagnant since cremation services in general produce lower revenue. . . . Based on analysis of the key external influences on the funeral service industry, business conditions are projected to stagnate for the industry over the five-year period 2016-21, with revenue anticipated to expand at an average annual rate of less than 0.1% for funeral homes.”). Service Corporation International projects very different annual growth in adjusted earnings per share at 8-12%. Press Release, Raymond James 38th Annual Institutional Investors Conference, Serv. Corp. Int'l, Delivering Total Shareholder Return 8 (Mar. 7, 2017).

20. David E. Harrington, *Breathing Life into the Funeral Market*, 26 REGULATION, no. 1, 2003, at 14 (“[S]tate funeral regulations impede the entry of new firms—especially those specializing in low-cost alternatives to the funerals sold by conventional funeral homes—by raising the cost of entry via facility requirements, training requirements, and prohibitions against anyone other than funeral directors licensed in the state from selling funeral goods and services. In short, they increase the market power of existing funeral homes by excluding rivals.”).

21. F. Todd Winninger, *Why Funeral Service Isn't Ready to Embrace the Future*, FUNERALONE BLOG (June 5, 2013), <http://blog.funeralone.com/grow-your-business/funeral-service-future>.

22. *Types of Funerals*, FED. TRADE COMM'N, <https://www.consumer.ftc.gov/articles/0302-types-funerals> (last visited Sept. 30, 2017).

at the beginning of the 20th century.²³ The problem is that consumer preferences have radically changed in the past century.²⁴ Today, industry surveys indicate that fewer than one-third of consumers prefer a full service funeral.²⁵ As a result, there is a fundamental conflict between what the modern funeral consumer wants and what the modern funeral services industry is prepared to and economically able to provide.²⁶

Although there are innovative exceptions, in general, existing funeral services providers are not adequately meeting changing consumer demand.²⁷ The industry's failure to adapt is understandable. If you inherited the family buggy whip company, went to school to make buggy whips, invested in a physical plant and equipment to make buggy whips,²⁸ and defined your

23. Tanya D. Marsh, *Life After Death: Americans Are Embracing New Ways to Leave Their Remains*, CONVERSATION (Oct. 27, 2017), <https://theconversation.com/life-after-death-americans-are-embracing-new-ways-to-leave-their-remains-85657>.

24. Jacob Terranova, *Why Do Funeral Homes Close?*, FRAZER CONSULTANTS (Sept. 15, 2016), <http://www.frazerconsultants.com/2016/09/why-do-funeral-homes-close> (“It’s clear that families want new experiences. Funeral traditions are changing fast. The past 15 years of funeral service alone have seen more change than the past 50 years. Cremation is hotter than ever, and it now beats traditional burials. And it seems each day there’s an alternative to the traditional funeral popping up.”).

25. Deana Gillespie & Edward J. Defort, *Inside the Numbers, Part 2: A Closer Look at the Findings of the 2017 NFDA Consumer Awareness and Preferences Survey*, 8 MEMORIAL BUS. J., no. 30, 2017, at 5.

26. See Robert L. Pierce, *A Profitable Funeral Home*, AM. FUNERAL DIRECTOR, Oct. 2007, at 54, 54, http://www.piercecfo.com/resources/profitable_Funeral_Home.pdf (“Higher profit burials are being replaced by lesser profit cremations and direct disposers are taking a part of the low-end cremation calls. This is reality. According to Federated Funeral Directors of America, 2006 funeral profits were 5.63 percent of sales, down from 12.91 percent in 1982. . . . Make no mistake about it. . . . [t]here is a very real downward pressure on funeral home profits.”).

27. Rebecca Mead, *Our Bodies, Ourselves: A Funeral Director Wants to Bring Death Back Home*, NEW YORKER (Nov. 30, 2015), <https://www.newyorker.com/magazine/2015/11/30/our-bodies-ourselves>.

28. Funeral directors and funeral homes have significant sunk costs related directly to embalming. See, e.g., Duncan Stuart Todd, *The Worth of the Prep Room: Could It Be \$50,000-\$100,000 Annually?*, FUNERAL BUS. ADVISOR MAG. (Jan. 26, 2016), <https://funeralbusinessadvisor.com/the-worth-of-the-prep-room-could-it-be-50000-100000-annually/funeral-business-advisor> (noting that, in most states, funeral homes must meet minimum requirements for licensure, including a minimum square footage and the construction of a “preparation room,” outfitted with the equipment needed to perform embalmings). In order to provide funeral services, typically broadly defined as the preparation and disposition of human remains, individuals must be licensed by the state. *Careers in Funeral Service*, NAT’L FUNERAL DIRECTORS ASS’N, <http://www.nfda.org/careers/overview> (last visited Sept. 30, 2017). Licensure requires a degree from a mortuary college, where more than half of the curriculum focuses on embalming and restoration. *Id.* Prospective licensees must serve twelve to eighteen month apprenticeships. *Id.* Funeral services must

professional identity by your ability to make buggy whips, it would not be easy to switch to making cars, no matter what the market wants. The rigidity of the occupational licensing regimes creates several interrelated problems for the industry and consumers.

I. THE AMERICAN FUNERAL SERVICES INDUSTRY

There are approximately 2.5 million human deaths in the United States each year.²⁹ The vast majority of these deaths are “handled” by the funeral services industry.³⁰ That industry is a remarkably insular world. Fewer than 40,000 licensed funeral directors and embalmers³¹ work in approximately 19,500-24,000 funeral homes, unevenly distributed throughout the United States.³² The prevailing economic model is a family-owned funeral home passed on from father to son for the past three to four generations.³³ Funeral directors and embalmers honestly believe that the goods and services that they sell are necessary for

be provided in a licensed structure—typically referred to as a “funeral home.” Giselle Diamond, *Requirements to Open a Funeral Home*, SAPLING (Apr. 1, 2010), <https://www.sapling.com/6186773/requirements-open-funeral-home>.

29. *Deaths and Mortality*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/nchs/fastats/deaths.htm> (last visited Sept. 30, 2017).

30. *Statistics*, NAT’L FUNERAL DIRECTORS ASS’N, <http://www.nfda.org/news/statistics> (last visited Nov. 7, 2017). The NFDA estimates that there are 19,322 funeral homes in the United States with an average caseload of 113 deaths per funeral home per year, resulting in a total of approximately 2.2 million deaths per year handled by American funeral homes.

31. *May 2013 National Occupational Employment and Wage Estimates*, U.S. BUREAU LAB. STAT., https://www.bls.gov/oes/2013/may/oes_nat.htm (last visited Sept. 30, 2017). The Department of Labor’s Bureau of Labor Statistics divides funeral directors and embalmers into three categories: 39-4011 Embalmers (4390 employed in May 2013, annual mean wage \$42,750), 11-9061 Funeral Service Managers (8810 employed in May 2013, annual mean wage \$80,250), and 39-4031 Morticians, Undertakers & Funeral Directors (24,280 employed in May 2013, annual mean wage \$51,720). All three categories describe licensed funeral directors and embalmers, although in some states funeral service managers may be unlicensed. *Id.*

32. According to the National Funeral Directors Association, there are 19,322 funeral homes in the United States. *Statistics, supra* note 30. According to IBISWorld, there are approximately 24,000. DEVIN MCGINLEY, IBISWORLD INDUSTRY REPORT 81221: FUNERAL HOMES IN THE US 23 (2017).

33. See Alison Cathles et al., *The Gender Gap in Funeral Directors: Burying Women with Ready-to-Embalm Laws?*, 48 BRITISH J. INDUS. REL., no. 4, 2010, at 688, 690 (“A few decades ago, funeral directors in the United States were almost always male For nearly a century, women played only a minor role in the funeral industry.”).

Americans to process their grief.³⁴ It is not surprising then that the industry typically reacts defensively to criticism;³⁵ as a result, it tends to limit access to information about the industry.³⁶

The typical funeral home is a small business.³⁷ Some enterprises own multiple funeral homes, typically in the same metropolitan area or cluster of counties, and there are a handful of national businesses.³⁸ The vast majority of funeral homes are mom-and-pop operations owned by the funeral director.³⁹ Industry analysts estimate that the funeral services industry is currently generating profit margins of approximately 9.8%,⁴⁰ down from 10.7% in 2012.⁴¹

But these numbers paint an inaccurately rosy view of the funeral services industry because they do not account for the distortion generated by the most significant operator—Service Corporation International (“SCI”)—on the overall description of the industry’s economic health. Founded in 1962 and traded on the New York Stock Exchange, SCI describes itself as “North America’s largest provider of deathcare products and services, with

34. See, e.g., THOMAS LYNCH, *THE UNDERTAKING: LIFE STUDIES FROM THE DISMAL TRADE*, at xv (1997) (“I had come to know that the undertaking that my father did had less to do with what was done to the dead and more to do with what the living did about the fact of life that people died.”); Blake E. Ashforth & Glen E. Kriener, “*How Can You Do It?: Dirty Work and the Challenge of Constructing a Positive Identity*,” 24 *ACAD. OF MGMT. REV.*, no. 3, 1999, at 413, 420 (“A funeral director states: ‘A lot of people ask us how we can stand to be in this business. . . . They act like we must be strange or something. When we go to the conventions and meet with all of the other people there who are just like us . . . I feel *normal* again.’”).

35. According to Ashforth and Kriener, this is a typical response for those engaged in work like the funeral industry. In order to “reconcile outsiders’ derogatory perceptions with their own desire for self-esteem . . . [workers] impugn the motives, character, knowledge or authority—in short, the *legitimacy*—of critical outsiders as moral arbiters.” Ashforth & Kriener, *supra* note 34, at 424.

36. KATE SWEENEY, *AMERICAN AFTERLIFE: ENCOUNTERS IN THE CUSTOMS OF MOURNING* 166 (2014) (“Ninety percent of funeral homes across the country are still family-run independents, passed from father to son and daughter, and largely, the dismal trade is still a conservative one, based more on tradition, trust, and insularity than on openness, supply and demand, and innovation.”).

37. MCGINLEY, *supra* note 32, at 23.

38. *Statistics*, *supra* note 30 (“Approximately 86 percent of funeral homes in the United States are privately owned by families or individuals. The remaining 14 percent are owned by publicly-traded corporations.”).

39. MCGINLEY, *supra* note 32, at 4.

40. *Id.* at 19. “IBISWorld uses earnings before interest and tax (“EBIT”) as an indicator of a company’s profitability. It is calculated as revenue minus expenses, excluding interest and tax.” *Id.* at 31.

41. *Id.* at 19.

a network of funeral service locations and cemeteries unequaled in geographic scale and reach.⁴² And that is not hyperbole.⁴³

As *Table 1* below illustrates, SCI owns only 5.6 percent of the funeral homes in the United States, but it earns nearly eleven percent of the revenue and 22.4 percent of the profit generated by those funeral homes. In other words, it is not useful to base an assessment of the health of the funeral services industry without adjusting for the distortive effect of SCI.⁴⁴

Table 1: Comparison of SCI and Non-SCI Funeral Homes

	Total	Non-SCI	SCI ⁴⁵
Number of Funeral Homes	28,243 ⁴⁶	26,741 ⁴⁷	1502
Annual Revenue	\$16.1 billion ⁴⁸	\$14.3 billion ⁴⁹	\$1.75 billion ⁵⁰
Annual Revenue per funeral home	\$568,061	\$534,467	\$1.17 million

42. SERV. CORP. INT'L, QUARTERLY REPORT (FORM 10-Q) 24 (July 27, 2017) ("We are North America's largest provider of deathcare products and services, with a network of funeral service locations and cemeteries unequaled in geographic scale and reach Our financial position is enhanced by our approximately \$10.3 billion backlog of future revenue from both trust and insurance-funded sales at June 30, 2017, which is the result of preneed sales. Preneed selling provides us with a current opportunity to lock-in future market share while deterring the customer from going to a competitor in the future.").

43. SCI holds approximately a sixteen percent market share in the funeral and cemetery industry based on total industry revenue. SERV. CORP. INT'L, PROXY STATEMENT AND 2017 ANNUAL MEETING NOTICE 3 (2017); MCGINLEY, *supra* note 32, at 23 ("In an industry that is highly fragmented, where the majority of establishments are locally owned, independent operations, SCI stands out as one of the few national players.").

44. The second and third largest funeral home operators in the United States are Carriage Services, Inc. with approximately a one percent market share, and StoneMor Partners, LP with less than one percent market share. MCGINLEY, *supra* note 32, at 23–24.

45. SERV. CORP. INT'L, *supra* note 42, at 24 ("At [sic] June 30, 2017, we operated 1,502 funeral service locations and 475 cemeteries (including 286 funeral service/cemetery combination locations), which are geographically diversified across 45 states, eight Canadian provinces, the District of Columbia, and Puerto Rico.").

46. MCGINLEY, *supra* note 32, at 8.

47. Calculated by subtracting the number of SCI funeral homes from the total number. MCGINLEY, *supra* note 32, at 4; SERV. CORP. INT'L, *supra* note 42, at 24.

48. MCGINLEY, *supra* note 32, at 4.

49. This figure was calculated by subtracting the annual revenue of SCI from the total annual revenue of the funeral industry. *See id.*; SERV. CORP. INT'L, ANNUAL REPORT (FORM 10-K) 87 (Feb. 15, 2017).

50. This figure was calculated by multiplying 10.9% and the total annual revenue of the funeral industry. MCGINLEY, *supra* note 32, at 4.

2018] *REGULATED TO DEATH* 13

Gross Profit	\$1.60 billion ⁵¹	\$1.24 billion	\$0.36 billion ⁵²
Gross Profit Margin	10.0% ⁵³	8.7%	20.6%
Gross Profit per funeral home	\$56,651	\$46,370	\$239,680

SCI argues to investors that the funeral services industry represents an “inefficient industry model”⁵⁴ and claims that economies of scale permit SCI to vastly outperform the rest of the industry.⁵⁵ SCI’s business strategy focuses on highly concentrated “markets” in primarily urban and suburban areas. Over fifty percent of SCI’s United States funeral homes are located in just seven states.⁵⁶ Each SCI market is led by a manager and shares personnel, embalming services, and vehicles.⁵⁷ “Our scale,” SCI told investors in June 2016, “gives us tremendous competitive advantages.”⁵⁸

On average, an SCI funeral home generates gross annual profits more than five times greater than a non-SCI funeral home.⁵⁹ But of course profits are not distributed evenly—a funeral home in a small town does not have the same caseload as a funeral home in a large metropolitan area. For example, funeral homes in the State of Nebraska have an average caseload of fifty-nine cases per year,⁶⁰ significantly lower than the national average of 113

51. *Id.*

52. SERV. CORP. INT’L, *supra* note 49, at 30 (using the more conservative “comparable funeral gross profit” rather than the “consolidated funeral gross profit”).

53. *See supra* Table 1. Calculated by dividing annual revenue by gross profit.

54. Tom Ryan, President & CEO, Serv. Corp. Int’l, Presentation at SCI’s Investor Day on “Driving Long-Term Growth & Value” 9 (Feb. 17, 2015), <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NTY5NzI2fENoZWxkSUQ9MjcwNjYwfFR5cGU9MQ==&t=1>.

55. *See id.* at 16.

56. SERV. CORP. INT’L, *supra* note 49, at 6. Texas (167), California (163), Florida (130), New York (69), North Carolina (60), Illinois (44), Indiana (49) and Washington (44) total 726 funeral homes, forty-eight percent of the 1502 U.S. locations. *Id.* Eight U.S. states have four or fewer SCI funeral homes each. *Id.* District of Columbia (1), Hawaii (2), Iowa (4), Nebraska (4), New Mexico (1), Rhode Island (4), Utah (4), Vermont (3). *Id.* Six states, Delaware, Montana, North Dakota, South Dakota, Wisconsin, and Wyoming, have no SCI funeral homes. *Id.*

57. *Id.* at 6.

58. Ryan, *supra* note 54, at 13.

59. *See supra* Table 1.

60. Nebraska has a population of 1.9 million people in ninety-three counties, and 175 licensed funeral establishments and 111 licensed branch establishments, which

cases per year.⁶¹ The more densely populated counties in Nebraska have more funeral homes, but assuming for the sake of illustration that deaths in a county are handled by in-county funeral homes and the cases are evenly distributed between funeral homes in a particular county, there is a vast difference between the average funeral home in Cuming County (twenty-two calls per year) and the average funeral home in Sarpy County (179 calls per year).⁶² But the regulatory requirements for the small town funeral home and the big city funeral home are the same, even though we know that the caseload will not be.⁶³ This means that funeral homes in smaller communities must spread similar fixed costs across a smaller number of cases; as a result, many really struggle to break even, let alone profit.⁶⁴ SCI recognizes its ability to spread high fixed costs among many busy funeral homes is the key to its success,⁶⁵ but there is little recognition that at the

collectively employ 423 licensed funeral directors and embalmers. *See* Minutes of the Meeting of the Board of Funeral Directing and Embalming 2 (Oct. 14, 2015), <http://dhhs.ne.gov/publichealth/Licensure/Documents/101415fdeminutes.pdf>. Each licensed establishment in Nebraska therefore has an average of 1.48 licensed employees. The number of cases per establishment can be roughly reconstructed by calculating the number of deaths in each county and then dividing it by the number of funeral establishments in that county. In 2015, 16,731 people died in the State of Nebraska. NEB. DEP'T OF HEALTH & HUMAN SERVS., NEBRASKA 2015 VITAL STATISTICS REPORT 54 (2015), <http://dhhs.ne.gov/publichealth/Vital%20Statistics%20Reports/Vital%20Statistics%20Report%202015.pdf>. Divided by the state's 286 funeral establishments, that equals an average of fifty-nine calls per funeral home per year or approximately one per week.

61. *Statistics, supra* note 30.

62. *See American Factfinder*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF> (last visited Sept. 30, 2017) (showing eighty-two of Nebraska's ninety-three counties have populations of less than 30,000 and two-thirds have populations less than 10,000). Many Nebraska counties have a single funeral home or no funeral home at all. The number of cases handled by funeral homes in the largest counties is significantly higher than the state average—179 cases per year in Sarpy County (the home of Strategic Air Command), 162 cases per year in Douglas County (Omaha), and 143 cases per year in Lancaster County (Lincoln). (Data on file with author).

63. NEB. REV. STAT. §§ 38-1419 to -1420 (2017).

64. NAT'L FUNERAL DIRS. ASS'N, 2013 NFDA COMPENSATION STUDY: CALENDAR YEAR ENDING DECEMBER 31, 2012, at 32, 35–36 (2013).

65. SERV. CORP. INT'L, *supra* note 49, at 6, 9 ("In 2016, our operations in the United States and Canada were organized into 33 major markets, 35 metro markets, and 55 main street markets. Each market is led by a market manager or director with responsibility for funeral and/or cemetery operations and preneed sales. Within each market, the funeral service locations and cemeteries share common resources such as personnel, preparation services, and vehicles We continue to drive operating discipline and leverage our scale through standardizing processes and capitalizing on new technologies. We regularly examine our purchasing spend to look for opportunities to consolidate our supplier base,

other end of the spectrum this economic reality means that small funeral homes in less populated communities are in trouble.⁶⁶

Although the cost of the average funeral is high—the National Funeral Directors Association (“NFDA”) estimated that in 2014 the national median price of the adult casketed funeral with viewing was \$7180 (excluding the cost of the vault and the grave, along with opening and closing the grave)⁶⁷—funeral directors are not getting rich. Wages of licensed funeral directors and embalmers vary significantly depending upon the size of the funeral home and the location.⁶⁸ But again, according to the NFDA, median salaries range from \$40,000 to \$50,000.⁶⁹ These salaries are comparable to the mean annual salary for all United States industry sectors and slightly higher than the median annual

modify processes and policies for more efficient purchasing, and employ metrics to manage and improve supplier performance. Additionally, many of our accounting and administrative functions use third-party providers, who demonstrate scale and execution excellence, allowing for greater efficiency.”).

66. Meghan E. Irons, *Nantucket Scrambles as Funeral Home Closes*, BOS. GLOBE (Dec. 1, 2013), <https://www.bostonglobe.com/metro/2013/12/01/nantucket-scrambles-after-new-s-that-lewis-funeral-home-closing/tkmDdRsUtBEV3uC6ej4FtO/story.html> (“Lewis Funeral Home, the only such business on Nantucket, decided to close The funeral home has been a fixture on Nantucket since 1878, when Simeon Lewis was sexton of the Cemeteries of Nantucket. The Lewis family continued the business for five generations, when Richard ‘Ricky’ Lewis, out of Holy Cross College and the Marines, began working with his father and grandfather as a fellow funeral director in 1965 But over time, as the cemeteries became their own entities, and as more people opted for cremation, Lewis was barely making it. Lewis . . . had hoped to turn over the business to his granddaughter, but she did not complete her training as a funeral director”). Even communities with greater population density have seen mom-and-pop funeral homes close: New York City, for example, has gone from 841 funeral homes in 1990 to 475 in 2015. Hillary Potkewitz, *Grave Situation for City’s Funeral Homes as Death Rate Drops and Customs Change*, CRAIN’S N.Y. BUS. (July 24, 2016), <http://www.craigslist.com/article/20160724/SMALLBIZ/160729946/once-seen-as-recession-proof-the-funeral-industry-is-in-a-death-spiral-some-owners-are-staving-off-the-end-by-catering-to-a-new-generations-burial-tastes> (“Over two decades, hundreds of funeral homes have shuttered, many of them multi-generation family businesses—neighborhood mainstays who could be counted on to remember old-timers’ nicknames or provide a steady presence to the grieving.”).

67. Nat’l Funeral Dirs. Ass’n, *NFPA Releases Results of 2015 Member General Price List Study*, 6 MEMORIAL BUS. J., no. 41, 2015, at 1.

68. NAT’L FUNERAL DIRS. ASS’N, *supra* note 64, at 19–20, 35, 39.

69. *Id.* at 17 (stating that the median salary in states that grant a single license to funeral directors and embalmers is \$49,549, compared to \$41,414 for funeral directors and \$40,000 for embalmers in dual license states). The median salary for single license funeral directors and embalmers in funeral homes with zero to seventy-five cases per year is \$40,800 compared to \$58,000 in funeral homes with more than 500 cases per year. *Id.* at 35, 39. Salaries grow slowly—single license funeral directors and embalmers with five or fewer years of experience earn a median salary of \$45,000 compared to \$52,500 for those with 20 or more years of experience. *Id.* at 41.

earnings for full-time wage and salary workers with the equivalent educational attainment required of funeral directors and embalmers.⁷⁰

II. THE OCCUPATIONAL LICENSING REGIME

In 1886, Hudson Samson, then president of the NFDA, at the first organizational meeting of that group, laid a blueprint for the adoption of occupational licensing by the states.⁷¹ He said:

I would advise (funeral directors) . . . to convince our state Board of Health of the necessity of having a law passed that will compel all who have not been a certain number of years serving as Funeral Directors to pass an examination, and to serve a given time as an apprentice. I would have a Board of Examination appointed by the Governor whose duty it shall be to determine the fitness of applicants for license to serve as Funeral Director

I would have a law regulating the care and burial of the dead the same as there is for the practice of medicine I would advise an active step be taken in some States to have an act passed regulating the burial of the dead and we, as a National Association, to help, aid, and assist in bringing about such legislation.⁷²

The NFDA drafted a model legislative act that served as the basis for many of the early occupational licensing statutes.⁷³ Modern regulation of the funeral industry essentially follows the same template.⁷⁴ State boards are established by statute and given

70. See *May 2013 National Occupational Employment and Wages Estimates*, *supra* note 31 (stating that the mean annual wage in May 2013 was \$46,400, which permits an apples to apples comparison with the 2013 NFDA Compensation Study).

71. HABENSTEIN & LAMERS, *supra* note 6, at 306–07.

72. *Id.* at 307.

73. *Id.* at 322 (noting Samson drafted a model legislative act entitled “An Act Pertaining to the Care, Preparation and Disposition of the Dead, and to Insure the Better Education of the Funeral Directors”).

74. Virginia became the first state to license embalmers in 1894. *Id.* at 338. The remaining states passed statutes requiring the licensing of embalmers over the next several decades. *Id.* Pennsylvania became the first state to license funeral directors in

the authority and obligation to regulate the “practice of funeral directing.”⁷⁵ The first obvious step in doing so is defining what activities are included in that practice. There is no uniform definition of “funeral directing” in the state codes.⁷⁶ The key activities reflected in state law are: (1) preparing human remains for burial or other disposition (other than by embalming, which is defined separately); (2) managing a funeral home or mortuary; (3) making funeral arrangements; and (4) holding oneself out to be in the business of a funeral director or undertaker.⁷⁷

After states define funeral directing, they typically include a statute that forbids its practice without a license.⁷⁸ Nearly every

1895, joined by Virginia in 1897 and New York in 1898. *Id.* By 1910, twelve states licensed funeral directors, and by 1930, nineteen states licensed funeral directors. *Id.*

75. *See, e.g.*, N.H. REV. STAT. ANN. § 325:2.I (LexisNexis 2017) (“There shall a board of registration of funeral directors and embalmers consisting of 5 members, including 4 funeral directors or embalmers and one public member, appointed by the governor, with the approval of the council, to serve terms of 5 years. No member of the board shall be appointed to more than 2 consecutive terms. The commissioner of the department of health and human services, or his designee, shall serve as a non-voting secretary of the board.”).

76. *Compare* N.C. GEN. STAT. ANN. § 90-210.20.f (West 2008) (defining “funeral directing” as “engaging in the practice of funeral service except embalming”), *with* N.H. REV. STAT. ANN. § 325:1.VII (LexisNexis 2017) (defining “funeral directing” as “the business, practice, or profession of: (a) Directing or supervising funerals; (b) The preparation or disposal of dead human bodies; (c) Conducting or maintaining a preparation room or establishment equipped with necessary drainage and ventilation, which contains the necessary instruments and supplies for the preparation and embalming of dead bodies for burial, cremation, or transportation; or (d) Conducting or maintaining a funeral home or parlor, mortuary or funeral chapel from which funerals may be held and in which services may be conducted”).

77. *See, e.g.*, MO. ANN. STAT. § 333.011.1(8) (West 2016) (defining “funeral directing” as “engaging by an individual in the business of preparing, otherwise than by embalming, for the burial, disposal or transportation out of this state of, and the directing and supervising of the burial or disposal of, dead human bodies or engaging in the general control, supervision or management of the operations of a funeral establishment”); N.J. STAT. ANN. § 45:7-34(c) (West 2004) (“‘Funeral directing’ means (1) the engaging in or conducting or holding one’s self out as being engaged in or conducting the preparation (other than embalming) for burial or disposal and the direction or supervision of burial or disposal of dead human bodies; or (2) maintaining, using or operating a mortuary; or (3) in connection with one’s name or mortuary using the words ‘mortician’ or ‘funeral director’ or ‘undertaker’ or any other words or title of like import or signification.”). *See generally* TANYA MARSH, *THE LAW OF HUMAN REMAINS* (2015).

78. *See, e.g.*, MO. ANN. STAT. § 333.021.2 (West 2016) (“No person shall engage in the practice of funeral directing unless he has a license issued under this chapter nor shall any person use in connection with his name or business any of the words ‘undertaker’, ‘mortician’, ‘funeral home’, ‘funeral parlor’, ‘funeral chapel’, ‘funeral consultant’, ‘funeral director’, or other title implying that he is in the business defined as funeral

state licenses an occupation known as “funeral director.”⁷⁹ States approach the scope of this license in three different ways: (1) separately licensing funeral directors and embalmers (so-called “dual license” states); (2) issuing a single license that includes both sets of activities (“single license” states); and (3) licensing only embalmers.⁸⁰

Licensure requirements vary from state to state but all states require funeral director applicants to have obtained a minimum level of education.⁸¹ The majority of states require funeral director applicants to have graduated from a mortuary science or funeral service school accredited by the American Board of Funeral Services Education (“ABFSE”).⁸² The ABFSE has established certain minimum requirements for an accredited Funeral Service Education degree program that emphasizes

directing herein, unless he or the individual having control, supervision or management of his business is duly licensed to practice funeral directing in this state.”).

79. Colorado does not license individual funeral directors, but a law that went into effect on January 1, 2010 requires the licensure of funeral establishments and prohibits people from offering funeral goods or services to the public unless they work for a licensed funeral establishment. *See* COLO. REV. STAT. § 12-54-110(1) (2016). *See generally* HAW. REV. STAT. § 469-2 (2013) (authorizing the Department of Health to establish rules for the “business of an undertaker” and to require the registration of those engaged in that business, but not authorizing the establishment of any licensing regime for funeral directors or undertakers).

80. *See, e.g.*, WASH. REV. CODE ANN. § 18.39.035 (West 2017) (mandating separate requirements for obtaining a funeral director license and an embalming license); N.J. STAT. ANN. § 45:7-48 (West 2004) (“The board shall grant only a single license as a practitioner of mortuary science to any applicant, and any person shall hold a license as a practitioner of mortuary science issued under the provisions of this act before being permitted to practice mortuary science or embalming or funeral directing . . .”); HAW. REV. STAT. § 469-1 (2013) (listing only requirements to obtain a license for embalming).

81. New Jersey requires every person entering the field of mortuary science (which encompasses embalming and funeral directing), to pass appropriate examinations, which include “anatomy; physiology; pathology; chemistry; disinfection; hygiene; sanitary science; bacteriology; dissection; the care, preservation, embalming, transportation, burial or disposal of dead human bodies, including those dead as a result of contagious and infectious diseases; the signs of death and the manner in which death may be determined; laws and rules governing vital statistics and the preparation and transportation for burial of dead human bodies; the provisions of this act and of the rules and regulations adopted by the board; professional ethics; mortuary accounting; and such other subjects as the board may determine, by rule or regulation, to be necessary, proper or reasonably calculated to establish the qualifications and fitness of the applicant.” *See, e.g.*, N.J. STAT. ANN. § 45:7-49 (West 2004).

82. *Frequently Asked Questions*, AM. BOARD FUNERAL SERV. EDUC., <http://www.abfse.org/html/faq.html> (last visited Sept. 30, 2017).

embalming and the restorative arts, including a required clinical embalming component.⁸³

Every state except California and Wyoming requires funeral director applicants to complete an apprenticeship or internship with a licensed funeral director.⁸⁴ Many states separately license these trainees.⁸⁵ The length of these required apprenticeships range from twelve to thirty-six months.⁸⁶ They are a significant barrier to entry because applicants are required to secure an apprenticeship on their own, and existing funeral directors are under no obligation to hire apprentices.⁸⁷

In addition to the apprenticeship requirement, many states require that applicants demonstrate that they have performed a minimum number of embalmings (typically fifty), assisted in making a minimum number of funeral arrangements, and/or conducted a minimum number of funerals.⁸⁸ These additional requirements mean that apprenticeships must include meaningful on-the-job training.⁸⁹

The educational requirements have broadly proven to be a barrier to entry. The graduation rate at mortuary colleges is currently fifty-five percent, down from seventy-five percent in 1975.⁹⁰ In addition, half of all mortuary college graduates are

83. COMM. ON ACCREDITATION, AM. BD. OF FUNERAL SERV. EDUC., ACCREDITATION AND POLICY MANUAL 9-6 (2016), <http://www.abfse.org/docs/manual-accreditation.pdf>.

84. See WYO. STAT. ANN. § 33-16-517 (2017); *Professional Requirements and Career Outlook*, FUNERAL SERV. FOUND., <http://www.funeralservicefoundation.org/your-gift-at-work/funeral-service-more-than-a-job/professional-requirements-and-career-outlook> (last visited Sept. 30, 2017); *Funeral Director Information and Checklist*, CEMETERY & FUNERAL BUREAU, <http://www.cfb.ca.gov/licensee/fundir.shtml> (last visited Sept. 30, 2017).

85. *Information About the Funeral Profession*, AM. BOARD FUNERAL SERV. EDUC., <http://www.abfse.org/html/profession.html> (last visited Sept. 30, 2017).

86. *How to Become a Funeral Service Worker*, U.S. BUREAU LAB. STAT. (Dec. 17, 2015), <https://www.bls.gov/ooh/personal-care-and-service/funeral-service-occupations.htm#tab-4>.

87. Thomas A. Parmalee, *Citrim Cooperman Reports Survey Results*, in FUNERAL DIRECTOR'S GUIDE TO STATISTICS 43, 48 (Patti Martin Bartsche ed., 2013) (“[A]pprentices depend upon being employed in such a position in order to fulfill their licensing requirements; therefore, they are likely to be willing to work for less salary in an economy in which funeral home owners are trying to control or decrease their costs and expenses, including those related to payroll.”).

88. See, e.g., *South Carolina Board of Funeral Service: Frequently Asked Questions*, S.C. DEP'T LAB., LICENSING, & REG., <http://www.lfr.state.sc.us/POL/Funeral/index.asp?file=faq.htm> (last visited Sept. 30, 2017).

89. *How to Become a Funeral Service Worker*, *supra* note 86.

90. Letter from Blair Nelsen, Dir., E. Region Governmental Affairs, Serv. Corp. Int'l Mgmt., to Elizabeth A. Carter, Ph.D., Exec. Dir. of Va. Bd. of Health Professions (May 28, 2015), <http://www.dhp.virginia.gov/Bhp/studies/FuneralServiceProvider.pdf>.

expected to leave funeral service within five years of graduation.⁹¹ As a result of these trends, many in the funeral services industry are concerned that licensed funeral directors and embalmers are not being replaced to keep up with demand.⁹² There is evidence that the chief problem is the widespread requirement that funeral directors be trained as embalmers.

The Funeral Service Foundation, a nonprofit organization dedicated to furthering the interests of the industry, conducted a study several years ago in which [it] found that sixty-seven percent of men and sixty percent of women aged eighteen to twenty-nine would consider a course in funeral service or a profession in funeral service if they did not have to embalm.⁹³ The embalming requirement discourages many from pursuing a career in funeral service.⁹⁴ States that require funeral directors to be embalmers have seventeen percent fewer funeral directors per capita than states which provide for dual licenses.⁹⁵

The impact on women is even more dramatic. In the past century, funeral homes have largely been passed on from father to son, and women rarely became licensed funeral directors.⁹⁶ The ratio of women in funeral service education programs increased dramatically from 1995 to 2008 (thirty-five percent to sixty percent), however, in 2006, only 18.1% of funeral directors were women.⁹⁷ In states where funeral directors are required to be trained as embalmers, women comprised 15.6% of the funeral directors in 2006.⁹⁸ In states without that requirement, women comprised 21.8% of funeral directors, resulting in a gender gap of 6.2%.⁹⁹

A young entrepreneur who overcomes the barriers to entry posed by the education and apprenticeship requirements finds that it will be quite expensive to set up shop. Funeral homes are heavily regulated by the states and are therefore expensive. Many states require a minimum square footage, or require a fully

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *See* Cathles et al., *supra* note 33, at 688.

96. *Id.* at 690.

97. *Id.* at 693.

98. *Id.*

99. *Id.*

outfitted embalming room, or a chapel, or a casket display room, or all of the above.¹⁰⁰ In 2015, SCI described for its investors the “average characteristics of a new build funeral home.”¹⁰¹ One and a half to two acres were required to build a 6000 to 9000 square foot structure at an average cost of \$2 to \$4 million.¹⁰² SCI estimates that it recoups its investment in a funeral home in seven to ten years.¹⁰³ Given that the average SCI-owned funeral home generates approximately five times as much profit as the average non-SCI funeral home, it is reasonable to assume that a non-SCI funeral home would take significantly longer to recover the investment in a new building. Funeral homes are not readily adaptable to other uses, reducing their resale value and attractiveness to mortgage lenders.¹⁰⁴

So, to recap, a young entrepreneur who wants to open a funeral home would have to invest two years in a mortuary college degree, spend another year or more as an apprentice, invest \$2 million to \$4 million in a new funeral home (or buy one from someone else), and could then look forward to a salary of \$45,000 and annual gross profit margins of \$46,000. This is not a sustainable economic model.

III. CHANGING PERSPECTIVES

The economic model of the modern funeral services industry would be bad enough if nothing were changing in American society, influencing consumer demand. But we are in the midst of a death care revolution. The most obvious change is

100. David E. Harrington, *Markets: Preserving Funeral Markets with Ready-to-Embalm Laws*, 21 J. ECON. PERSP., no. 4, 2007, at 202.

101. Jay Waring, Senior Vice President, Serv. Corp. Int'l, Presentation at SCI's Investor Day on “Driving Long-Term Growth & Value” 53 (Feb. 17, 2015), <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NTY5NzI2fENoaWxkSUQ9MjcwNjYwFR5cGU9MQ==&t=1>.

102. *Id.*

103. *Id.*

104. See Tim Grant, *Funeral Homes Vulnerable to Population Changes*, PITT. POST-GAZETTE (May 30, 2016, 12:00 AM), <http://www.post-gazette.com/business/pittsburgh-company-news/2016/05/30/Funeral-homes-vulnerable-to-population-changes/stories/201605150016> (“[Funeral homes] are often difficult to convert to other uses. They may include a chapel, a series of small visitation rooms, wide 15-foot hallways, a display room for caskets, an embalming room and a business office. . . . ‘Vacant funeral homes are a tough sell because they don’t make good ice cream parlors,’ Mr. Pierce [a funeral business consultant] said.”).

cremation.¹⁰⁵ In 1980, the cremation rate was in the single digits.¹⁰⁶ In 2017, more Americans will be cremated than buried.¹⁰⁷ We are not at European levels of seventy percent cremation yet, but we are headed there, and headed there fast.¹⁰⁸

Americans have embraced cremation for a number of reasons—cost, environmental concerns, and a relaxation of traditional anti-cremation views by major religious groups.¹⁰⁹ But the state occupational licensing regimes have not really adapted and, as a result, the economic model of the funeral services industry has not really adapted. According to the NFDA, the median price of a direct cremation in 2014 was \$2300, compared to \$5500 for a casketed funeral followed by cremation and \$7180 for a casketed funeral followed by burial.¹¹⁰ Anecdotal evidence suggests that the differential between the price of a direct cremation and a casketed funeral followed by burial may actually be much higher. For example, one Atlanta funeral director reported that “low-cost, direct cremation services (under \$800) make up [fifty-seven percent]” of the Atlanta market.¹¹¹ Perhaps ominously for the funeral services industry, he reported that many people in his market still choose to have memorial services in connection with cremation, but “they just don’t have them with us.”¹¹²

105. Both the National Funeral Directors Association and the Cremation Association of North America track and project cremation rates. According to NFDA, “[t]he national cremation rate exceeded the burial rate for the first time in 2015, and in 2016, preliminary numbers put the rate at over 50 percent for the first time.” Nat’l Funeral Dirs. Ass’n, *supra* note 19, at 1.

106. The cremation rate in 1980 in the United States was 9.72%. CREMATION ASS’N OF N. AM., ANNUAL CANA STATISTICS REPORT: FEATURING FINAL 2014 DATA, NEWLY RELEASED 2015 DATA, AND PROJECTIONS TO 2020, at 13 (2016). It rose to 17.13% in 1990, 26.19% in 2000, and 40.59% in 2010. *Id.*

107. *Industry Statistical Information*, CREMATION ASS’N N. AM., <http://www.cremationassociation.org/page/IndustryStatistics> (last visited Sept. 30, 2017) (stating the cremation rate in 2015 was 48.6%, and in 2020 it is projected to rise to 54.3%).

108. The NFDA projects that the cremation rate in the United States will rise to 78.8% in 2035. Nat’l Funeral Dirs. Ass’n, *supra* note 19, at 1. At the same time, the NFDA projects that the number of burials will fall to 541,200 in 2035, despite an increasing death rate. *Id.* In 2010, there were 1.3 million burials in the United States. *Id.*

109. *Id.*

110. Nat’l Funeral Dirs. Ass’n, *supra* note 67, at 1.

111. Nat’l Funeral Dirs. Ass’n, *Competing with Low-Cost Providers and Cremation Societies*, 8 MEMORIAL BUS. J., no. 24, 2017, at 2.

112. *Id.*

SCI told investors in 2015 that for every one percent shift in the cremation rate, it would lose \$10 million in annual revenue, but it could “tactically manage” these “shifts in the cremation mix at the location level to limit the impact on margins by” reducing some fixed costs and labor at the cluster level.¹¹³ In other words, SCI’s ability to spread fixed costs over multiple locations in a geographic cluster allowed it to minimize the lost revenue due to increased cremation. Of course, mom-and-pop funeral homes do not have that ability. They just lose revenue.¹¹⁴

Since 2012, the NFDA has conducted an annual survey of funeral consumers.¹¹⁵ “The main objective of this study,” according to an industry publication, is “to measure consumer awareness and perceptions of funerals and funeral services to help funeral directors improve the quality of service they provide to families.”¹¹⁶ According to the NFDA, the results from the five surveys conducted thus far “are fairly consistent,” and “[t]his consistency reflects a statistical significance and a high level of reliability.”¹¹⁷

The 2017 NFDA survey found the following about consumer preferences regarding memorialization and disposition options for their own funerals:¹¹⁸

113. Waring, *supra* note 101, at 55–56.

114. Nat’l Funeral Dirs. Ass’n, *supra* note 111, at 5–6. Atlanta area funeral director Mark Musgrove has purchased seven funeral homes and three cemeteries, and closed another four locations to consolidate them into his other operations. “Going forward,” Musgrove said, “I think the family funeral home that has multiple locations [will survive]. When you do 60, 70, or 80% cremation, it will be hard to survive when you are serving 100 families, especially if a low-cost provider moves into town and you have to deal with that.” *Id.* But see Potkewitz, *supra* note 66 (“‘There is a bright future for businesses who can adapt to a 21st-century way of doing business,’ said Dan Isard, president of funeral industry consultancy the Foresight Companies. ‘We may be able to cure cancer, but we can’t cure death.’”).

115. See, e.g., Deana Gillespie & Edward J. Defort, *Inside the Numbers: Taking a Closer Look at the Findings of the 2016 NFDA Consumer Awareness and Preferences Survey*, 7 MEMORIAL BUS. J., no. 31, 2016, at 1.

116. Deana Gillespie & Edward J. Defort, *Survey Says: NFDA Consumer Awareness and Preferences Study Helps Funeral Directors Give People What They Want*, 5 MEMORIAL BUS. J., no. 28, 2014, at 1.

117. Deana Gillespie & Edward J. Defort, *Inside the Numbers, Part 2: Taking a Closer Look at the Findings of the 2016 NFDA Consumer Awareness and Preferences Survey*, 7 MEMORIAL BUS. J., no. 32, 2016, at 1.

118. Gillespie & Defort, *supra* note 25, at 1.

- Approximately forty percent of respondents said they would prefer cremation without a viewing or visitation.¹¹⁹
- 14.1% of respondents said they would prefer cremation with “a complete funeral service with a viewing and visitation prior to cremation.”¹²⁰
- 20.9% of respondents said they would prefer burial. The survey did not inquire whether they would prefer a viewing and visitation prior to burial.¹²¹
- 18.1% of respondents indicated that they were “not sure” and 7.4% answered “other.”¹²²
- Assuming for the sake of argument that all of those who prefer burial would also choose to have a full-service funeral with viewing and visitation, that means that less than one-third of respondents would choose to have a full-service funeral.

Memorial Business Journal, an industry publication, noted in response to the 2017 NFDA Survey that “[o]ther trends are bubbling under the surface in funeral service that funeral directors should be aware of, including do-it-yourself funerals.”¹²³ The article further noted that almost half of respondents attended a funeral in a non-traditional location, including a “cemetery/gravesite, an outdoor setting such as a park or beach, a home and/or a public venue such as a banquet hall, country club, or hotel.”¹²⁴

Consumers have also expressed rising interest in “green” funeral options. The 2017 NFDA Study found that 53.8% of respondents would be interested in exploring green funeral options.¹²⁵ 36.4% of respondents said that they were interested in

119. This figure was calculated by taking the percentage of respondents who said that they prefer cremation (53.6%) and subtracting the percentage of respondents who said that they would prefer cremation with a complete funeral service with a viewing and visitation). *Id.* at 4–5.

120. *Id.* at 5.

121. *Id.* at 4–5.

122. *Id.* at 5.

123. Deana Gillespie & Edward J. Defort, *Inside the Numbers, Part 3: A Closer Look at the 2017 NFDA Consumer Awareness and Preferences Survey*, 8 MEMORIAL BUS. J., no. 31, 2017, at 1, 3.

124. *Id.* at 3.

125. *Id.* at 4.

2018]

REGULATED TO DEATH

25

green options because of potential environmental benefits, and 12.4% said that they were interested because of potential cost savings.¹²⁶ Twenty percent of respondents had no interest in green funeral options, and twenty-five percent were unsure or had no opinion.¹²⁷

There is also evidence that a meaningful number of funeral consumers want to avoid the funeral services industry entirely. A study commissioned by Batesville Casket Company in February 2008 found that sixty-two percent of consumers agreed with the statement that “[m]aking arrangements does not require the help of a funeral director.”¹²⁸ This percentage is up significantly from forty-seven percent in 2000, an increase that a Batesville representative described as “ominous.”¹²⁹ Perhaps more ominously for the industry, a 2007 American Association of Retired Persons (“AARP”) survey found that seventy-seven percent of respondents had considered not using a funeral home at all.¹³⁰

IV. CONCLUSIONS

So what should we make of all this? I propose three takeaways as I think about the future of the funeral services industry.

First, single-location funeral firms, particularly in less populated areas, are at a severe disadvantage to regional and national firms for several reasons. All funeral firms, responding to requirements imposed by the occupational licensing regimes, are deeply invested in embalming education and equipment. Larger firms are able to minimize the impact of these sunk costs by spreading resources like embalming facilities and embalmers across multiple locations. Compounding the problem for single-location funeral firms is the fact that the national and regional firms tend to acquire and open funeral homes in urban and suburban markets, both because they are chasing income and growth and because these markets allow them to cluster

126. *Id.*

127. *Id.* at 4–5.

128. KATES BOYLSTON PUBL'NS, *Understanding Consumer Attitudes About Cremation*, in THE FUNERAL DIRECTOR'S ECONOMIC SURVIVAL GUIDE 53, 53 (2009).

129. *Id.*

130. LONA CHOI-ALLUM, AARP, FUNERAL AND BURIAL PLANNERS SURVEY 14 (2007), https://www.assets.aarp.org/rgcenter/consume/funeral_survey.pdf.

operations and more readily capitalize on economies of scale. Rural areas tend to be served by single-location funeral firms and are more likely to struggle with depopulation and the lingering effects of the last recession. As a result of these factors, regional and national funeral firms can compensate for reduced revenue as consumers turn away from the full service funeral. Single-location funeral homes serving rural populations are in a more economically precarious position. I am deeply concerned about the future of the rural funeral home, and about what people will do if those businesses close when the current owners retire and no one re-opens them.

Second, the occupational licensing regimes severely limit competition and innovation through expensive barriers to entry that emphasize embalming education and equipment. Consumer demand for embalming is at an all-time low since the practice became widely available at the end of the 19th century, and demand for alternatives is growing. By requiring entrepreneurs who want to meet that demand to first invest in embalming education and equipment, the occupational licensing regimes artificially support an industry designed to sell a product that most Americans no longer want. This is particularly problematic because the rituals and choices surrounding the disposition of human remains are deeply personal and, for many Americans, profoundly religious. As a policy matter, in a conflict between protectionist occupational licensing regimes benefitting 40,000 licensed funeral directors and embalmers and our fundamental First Amendment freedoms, I think most Americans would choose the latter.

Third, the occupational licensing regimes undermine normal market incentives for existing participants to innovate by limiting the ability of consumers to avoid the funeral services market. In most states, the occupational licensing regimes make it very difficult, or even impossible, to dispose of the dead without the involvement of a licensed funeral director. Although the number of Americans who wish to dispose of their own dead is small, it is increasing.

It is well-documented that the American funeral services market is not natural—it was created by the occupational licensing regime authored by early industry leaders. I think it is also clear that many of the market's failures were created by the protectionist occupational licensing regimes that created it. The

2018]

REGULATED TO DEATH

27

death care reform movement is doing good and important work. But part of my message is that if even if we do nothing, the modern American funeral services industry is unsustainable. It is running out of time. It has been regulated to death.

The real questions therefore are—what comes next and what role will we have to play in creating the legal regime that will allow the new funeral services market to evolve?