STATE READY-TO-EMBALM LAWS AND THE MODERN FUNERAL MARKET: THE NEED FOR CHANGE AND SUGGESTED ALTERNATIVES

David Foos

2012 Mich. St. L. Rev. 1375

TABLE OF CONTENTS

INTRODUCTION ................................................................. 1376
I. EARLY CRITICISMS AND ATTEMPTS AT REFORM ....................... 1377
   A. The Buildup to Reform .................................................... 1377
      1. Federal Trade Commission Intervention .......................... 1379
      a. Price Competition ...................................................... 1379
      b. Misrepresentations and Demand Inducement .................... 1380
      2. Modern Market Failure ................................................ 1383
   B. Overview of the Funeral Industry .......................................... 1384
      1. The "Traditional" Funeral Market ...................................... 1384
      a. The Emergence of Ready-to-Embalm Laws ....................... 1385
      b. Survey of the States: Common Approaches and Modern Turmoil ...................................................... 1388
      2. The Modern Culture Shift ............................................. 1393
      a. The Rise in Cremations .............................................. 1394
      b. Ethnic and Non-traditional Funerals ............................. 1395
      c. Consolidation of the Industry ..................................... 1397
      d. The Funeral Rule—Revisited ....................................... 1398
II. READY-TO-EMBALM LAWS IN THE MODERN MARKET ................... 1400
   A. Preserving the Status Quo .............................................. 1400
   B. Demand Inducement ..................................................... 1404
   C. Restricting Cultural and Religious Access to the Industry ....... 1407
   D. The Public Health Myth: Deconstructing the Justification for Regulation .......................................................... 1408
III. BRINGING LIFE BACK INTO THE INDUSTRY .............................. 1411
   A. Dual Licensing ............................................................ 1412
   B. Hybrid Embalming Room Proposal ..................................... 1414
CONCLUSION ........................................................................... 1418
INTRODUCTION

Emerging out of the Civil War, the American funeral model has traditionally revolved around small, full-service funeral homes.\(^1\) Fundamental to this model was the traditional burial, which was centered upon the display of an embalmed body.\(^2\) As a staple of the American funeral industry, by the middle of the twentieth century the traditional burial had become a ubiquitous part of American funeral custom.\(^3\) However, by 1960, a strong social dialogue had also developed condemning the industry for exorbitant funeral prices and exploitation of grieving consumers.\(^4\) The Federal Trade Commission (FTC) promulgated The Funeral Rule (the Rule) in 1982\(^5\) with the hopes of alleviating these concerns, primarily by encouraging competition and empowering consumers with greater information.\(^6\) The Rule’s impact has been limited, however, due to constant friction with state regulations mandating that all funeral homes and funeral directors be prepared to embalm.\(^7\) Principally enacted in the early half of the twentieth century, these “Ready-to-Embalm” laws are in force in a majority of states today.\(^8\)

Yet, the modern funeral landscape is vastly different from the era in which these regulations were enacted. American funeral custom is in the midst of a fundamental value shift that is challenging the traditional funeral model—consumers are spending less, embalming demand is decreasing, and the industry is shifting away from small, individually-owned funeral homes.\(^9\) The blanket mandates imposed by Ready-to-Embalm laws have proven to be inflexible and irresponsible to the needs of funeral directors seeking to adapt and survive in this market. Ultimately, these regulations inhibit the growth of cheaper alternatives to the traditional burial, increase the direct cost of funeral services, and result in the annual expenditure of hundreds of millions of dollars by funeral consumers.\(^10\)

In sum, the tension created as Ready-to-Embalm laws interact with the changing modern market has not only frustrated the purpose of the Rule, but has also reinvigorated many of the concerns the Rule was designed to pre-

\(^{1}\) See infra Subsection I.B.1.a.
\(^{2}\) See infra Section I.B.
\(^{3}\) See infra Subsection I.B.1.a.
\(^{4}\) See infra Section I.A.
\(^{6}\) See infra Subsection I.A.1.a.
\(^{8}\) See infra Subsections I.B.1.a-b.
\(^{9}\) See infra Subsection I.B.2.
\(^{10}\) See infra Section II.A-B.
vent. By repealing the blanket embalming mandate and, instead, adopting an approach that gives businesses and individuals the freedom to decide whether or not they will be ready to embalm, the industry will be better able to meet the demands of the modern market. Part I discusses the historical concerns of the industry and efforts to curtail funeral price increases. Part I also discusses the history of embalming as part of a traditional burial service and the modern shift away from that traditional service. Part II examines the empirical evidence that exhibits the antiquity of Ready-to-Embalm laws in light of the Rule’s goal of promoting competition and in the context of the evolving funeral market. Part III explores alternatives to a Ready-to­Embalm scheme and, using a combination of existing approaches, presents a practical solution for states.

I. EARLY CRITICISMS AND ATTEMPTS AT REFORM

It is impossible to fully understand the tension between the Rule and state regulations without first examining the policy and historical development behind their existence. The problems sought to be remedied by The Funeral Rule are rooted in a historical social commentary that criticizes the industry for unscrupulous business practices and exorbitant funeral prices.11

A. The Buildup to Reform

Social critiques and criticism of the industry have been common throughout the twentieth century. As early as 1905, social workers complained that funeral directors were deliberately pricing funeral services so as to absorb as much of the deceased’s insurance policy as possible.12 In 1921, Quincy Lamartine Dowd questioned the exploitative operating practices of many funeral directors and argued against the extravagant cost of funerals.13 Similarly, in 1928, John Gebhart examined the funeral industry’s sales tactics and pricing methods to conclude that “[o]nce the undertaker secures possession of the body, he can usually charge all that the traffic will bear.”14 The principal reforms proposed by Gebhart included better education for the

11. See, e.g., JESSICA MITFORD, THE AMERICAN WAY OF DEATH (1963); see also Harrington, Markets, supra note 7, at 202-03.
13. Id. at 1-2.
14. JOHN C. GEBHART, FUNERAL COSTS: WHAT THEY AVERAGE: ARE THEY TOO HIGH? CAN THEY BE REDUCED? 221 (1928). “[A]s long as the public is ignorant of what funeral service and merchandise should cost and as long as . . . [it is] possible for inefficient and superfluous [funeral homes] to continue, there is little hope of lowering funeral prices to the public or correcting the flagrant abuses . . . .” Id. at 239.
public about the costs and methods of disposing of the dead.15 While these materials did not receive widespread public attention, they proved to be the primary source material for inflammatory magazine and newspaper articles that helped keep the national conscious aware of the funeral industry.16

By the late 1940s, public awareness of funeral prices began to emerge at nearly all levels of American culture. Testifying before a congressional committee in 1947, the famous undertaker W.W. Chambers characterized the industry as “‘the most highly specialized racket in the world.’”17 Chambers testified that funeral homes refused to produce itemized bills because there were “no standard prices; whatever can be charged and gotten away with is the guiding rule.”18 This testimony received considerable national attention as newspaper headlines framed Chambers’s off-color quips to generate reader interest.19 In 1948, the funeral industry served as the setting in the satirical comedy The Loved One: An Anglo-American Tragedy.20 This book was so well-received by both critics and audiences that in 1965 it was adapted into a film.21 In 1961, after writing an article condemning funeral industry practices, political activist Jessica Mitford appeared on a local San Francisco television show to debate two funeral directors.22 Her electric appearance caught the attention of the national magazine Saturday Evening Post.23 Mitford was subsequently featured in an article entitled, Can You Afford to Die?, which drew more reader response than had ever been received by any other single article published in the Saturday Evening Post.24

Social awareness of funeral industry practices peaked in 1963, as Mitford once again targeted the funeral industry in her seminal critique entitled, The American Way of Death.25 The book, which spent several weeks atop the New York Times Bestseller List and remained a constant on the list for a year,26 lamented the over-commercialization of funerals and advocated for

16. Id. at 32.
18. Id.
19. JOHN H. LIENHARD, INVENTING MODERN: GROWING UP WITH X-RAYS, SKYSCRAPERS, AND TAILFINS 59 (2003). For example, in the March 8, 1945 edition of The Washington Post, the lead-in to the story about Chambers’s testimony was “To Embalm Elephant Would Cost $1.50.” Id.
21. THE LOVED ONE (Filmyways Pictures 1965).
23. Id.
24. Id.
25. See generally MITFORD, supra note 11.
simpler, cheaper services.\textsuperscript{27} According to Mitford, funerals were a “huge, macabre and expensive practical joke on the American public.”\textsuperscript{28} Moreover, the funeral transaction was structured as an elaborate trap for unwary and easily deceived funeral consumers, who were regularly exploited for pecuniary gain.\textsuperscript{29}

1. Federal Trade Commission Intervention

Heavily influenced by Mitford’s critique and spurred on by the developing social commentary, in 1973 the Federal Trade Commission (FTC) embarked upon a decade-long study of the funeral industry.\textsuperscript{30} The FTC sought to remedy the two primary criticisms that had emerged from the social dialogue: the continuously rising price of a funeral and the ability of unethical funeral directors to induce bereaved consumers into making more expensive purchases.\textsuperscript{31}

a. Price Competition

Price relief was necessary because the growth of funeral prices meant “the purchase of a funeral [was] the third largest single expenditure many consumers [would] ever have to make, after a home and a car.”\textsuperscript{32} The FTC documented “‘a striking absence of price competition in the funeral industry,’”\textsuperscript{33} which allowed “‘the overall level of prices in the funeral industry [to be] higher than they otherwise would be in a properly functioning competitive market.’”\textsuperscript{34} The lack of meaningful price competition inhibited potential market entrants from challenging established funeral homes, insulating the market from competition, and allowing for higher prices.\textsuperscript{35} Thus, the FTC

\textsuperscript{27} MITFORD, supra note 11.
\textsuperscript{28} Id. at 15-16.
\textsuperscript{30} Harrington, Markets, supra note 7, at 202-03.
\textsuperscript{32} Id. at 42,260.
\textsuperscript{33} Id. at 42,270 (quoting Roger D. Blackwell, Price Levels in the Funeral Industry, 7 Q. REV. ECON. & BUS. 74, 75-76 (1976)).
\textsuperscript{34} Id. at 42,292.
\textsuperscript{35} See id. at 42,293.
sought to provide price relief primarily by promoting competition within the industry.\(^{36}\) By increasing the transparency of price information, consumers could comparison shop amongst funeral homes in search of better prices.\(^{37}\) Not only would this provide short-term economic benefits to consumers, but in the long term it would encourage entry into the market by competitors who hoped to compete on the basis of price.\(^{38}\) Thus, the competitive aims of The Funeral Rule were twofold: create incentives for the industry to reduce funeral prices while simultaneously opening the market to greater competition.\(^{39}\)

As a result of these findings, the Rule mandates that a funeral provider make available “accurate price information disclosing the cost to the purchaser for each of the specific funeral goods and funeral services used.”\(^{40}\) A General Price List (GPL), which provides an itemized detail of all funeral goods offered, must be made available at the beginning of any discussion with a consumer regarding the price, type, or offerings of the funeral provider.\(^{41}\) Furthermore, consumers who arrange for the purchase of any funeral service must be given an “itemized written statement” containing the cost of each component of the service selected, any cash advance items, and the total cost of all goods and services selected.\(^{42}\)

b. Misrepresentations and Demand Inducement

The FTC also noted that the unique interplay of economic, religious, and social considerations underlying a funeral transaction exacerbated the need for measures that reduced the pressure a funeral director could exert upon consumers.\(^{43}\) The FTC reviewed considerable testimony from psychologists and industry representatives who asserted that “[t]he [bereaved]
individual’s susceptibility to influence and suggestion makes him vulnerable to exploitation by funeral industry personnel." As a result of this suggestibility, consumers may “select” a funeral by acquiescing to the suggestions and decisions made by the funeral director. The FTC found the extensive testimony to be credible and concluded that substantial economic injury resulted from easily persuaded consumers purchasing funeral goods they would not otherwise have purchased. Thus, the FTC found it necessary to enact provisions that attempted to limit the influence a funeral director might have.

The need for consumer protection measures was further compounded because the average consumer had very little interaction with the funeral industry and was often highly ignorant of the funeral planning process. Industry studies indicated that the average funeral consumer was ill-informed as to the average price of a funeral, the available alternatives, and the legal requirements of embalming. Thus, aside from providing price relief, another fundamental tenant of the Rule was to provide sweeping consumer protection measures against deceptive and overbearing sales tactics employed by funeral directors.

To protect consumers, the Rule forbids misrepresentations in six broad categories: embalming, use of caskets for cremation, use of outer burial...
containers, legal and cemetery requirements, claims on the preservative and protective value of any funeral good, and any cash advance items. Because consumers exhibited poor awareness of the legal requirements, a funeral provider is prohibited from misrepresenting any of the legal obligations surrounding a funeral. In fact, as a prophylactic measure, an affirmative duty is placed upon funeral providers to disclose to consumers which funeral goods are not required by state and local law. Any disclosure to consumers about the legality or necessity of any funeral goods purchased must be conveyed "in a clear and conspicuous manner.

The FTC also included provisions designed to guarantee notice to consumers of their right to seek clarification from funeral directors for any assertions made during the funeral arrangement process. The GPL must contain the following language: "You may choose only the items you desire. If legal or other requirements mean you must buy any items you did not specifically ask for, we will explain the reason in writing on the statement we provide describing the funeral goods and services you selected." Thus, not only did the Rule seek to shake up a stagnant funeral market, it also included a comprehensive consumer protection scheme.

54. Id. § 453.3(a) (forbidding representations that embalming is required by state or local law). This section was necessary to prevent unwary consumers from being deceived into purchasing embalming services when they would otherwise not have. Funeral Industry Practices, 47 Fed. Reg. 42,260, 42,276 n.162 (Sept. 24, 1982) (codified at 16 C.F.R. pt. 453) (citing a survey that found that when consumers were unaware that embalming was not legally required, embalming took place 88.1% of all cases but, when consumers were aware that it was not required, embalming only took place 58.5% of the time).

55. 16 C.F.R. § 453.3(b) (forbidding representations that caskets are required for cremations).

56. Id. § 453.3(c) (forbidding representations that outer burial containers are necessary).

57. Id. § 453.3(d) (forbidding statements that federal, state, or local law requires the purchase of a good when such is not the case).

58. Id. § 453.3(e) (forbidding representations that a funeral good will delay the natural decomposition of a human body indefinitely or protect the body from gravesite substances).

59. Id. § 453.3(f) (forbidding representations "that the price charged for a cash advance item is the same as the cost to the funeral provider... when such is not the case").

60. See id. § 453.3(a)(1), (b)(1)(i), (c)(1)(i), (d)(1).

61. See id. § 453.3(a)(2)(ii), (b)(2), (c)(2), (d)(2), (f)(2).

62. Id. § 453.7.

63. Id. § 453.4(b)(2)(i).

64. Id. § 453.4(b)(2)(i)(A). Similarly, the statement of funeral goods or services purchased must state: "If we are required by law or by a cemetery or crematory to use any items, we will explain the reasons in writing below." Id. § 453.4(b)(2)(i)(B).
2. Modern Market Failure

Despite the Rule’s promulgation in 1982, the cost of a funeral has continued to experience unfettered growth. According to data from the National Funeral Directors Association (“NFDA”), in 2009 the average price of a traditional burial service was $7,755.\(^{65}\) While this alone represents a 329% price increase since 1980,\(^{66}\) the real cost of a funeral is significantly higher because the NFDA calculation fails to account for incidental expenses like the purchase of a gravestone or cemetery plot.\(^{67}\)

Thus, even in the modern industry, funeral prices remain a significant burden. This burden, exacerbated by the challenging modern economic climate, has spread to nearly all participants within the funeral market. As seen by the sharp rise in unclaimed bodies throughout the country, indigent families are making the economic choice of leaving bodies in city morgues rather than be saddled with funeral costs they cannot afford.\(^{68}\) The meager assistance that was provided to help indigent families and funeral homes has begun to disappear as budget-constrained state and local governments simply cannot afford to extend appropriations that help subsidize the cost of funerals.\(^{69}\) This has merely shifted the economic burden onto funeral homes, as many are forced to perform these basic services without any prospect of payment.\(^{70}\)


\(^{66}\) Id. The average cost of a funeral in 1980 was $1,809. Id. The percentage increase is unadjusted for inflation.

\(^{67}\) Harrington, Markets, supra note 7, at 202. Notably, the NFDA’s average does not account for expenses such as headstones, cemetery plots, burial vaults, graveside costs, and supplemental services such as memorial cards, obituaries, or flowers. See id. These services often add thousands of dollars to the bottom line and, as a result, many funerals will run over $10,000. Funerals: A Consumer Guide, FED. TRADE COMM’N (June 2000), http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro19.shtm.

\(^{68}\) Ignazio Messina, As Its Cemeteries Fill, Toledo Wants to Cremate the Indigent, COLUMBUS DISPATCH (Jan. 4, 2011), http://www.dispatch.com/content/stories/local/2011/01/04/toledo-cremate-poor.html. The largest increase of unclaimed bodies was seen in Oregon, where a 50% year over year increase in the number of unclaimed bodies was reported in 2009. Id. Florida reported a 25% increase, while Wisconsin reported a 15% increase. Id.


B. Overview of the Funeral Industry

Historically, the funeral market has centered around two primary means of handling the deceased: the "traditional burial" and "cremation." The traditional burial is a memorial service centered on the public display of an embalmed body at the funeral home. Cremation is defined as "a heating process which incinerates human remains," after which the remains are usually stored in an urn for the family. These products are intertwined not only with the history of American funeral custom, but also with the development and modernization of the funeral market itself. Thus, to understand the context of state and federal regulation of the funeral industry, it is necessary to examine the history of these product offerings.

1. The "Traditional" Funeral Market

The emergence of embalming in American funeral custom is rooted in the Civil War. While some families traveled to battlefields to reclaim the bodies of their loved ones, grieving families often requested that a fallen soldier's body be transported back home for a proper burial. Transportation of the bodies, however, proved to be troublesome as early methods of preservation were reliant upon ice and were only effective for a short period of time. To rectify this problem, President Lincoln approved the use of embalming on Union soldiers and established a team of "embalmer-surgeons" from the Army Medical Corps to perform embalming services on the battlefield. In total, it is estimated that 40,000 soldiers were embalmed during the conflict.

Social acceptance of the public display of an embalmed body as part of the grieving process was largely driven by the funerals of military offic-

72. 16 C.F.R. § 453.1(e) (2012).
73. See Cremation FAQ, NAT'L FUNERAL DIRS. ASS'N, http://www nfda.org/planning-a-funeral/cremation/160.html (last visited Jan. 12, 2013). Prior to cremation, there is typically a waiting period of at least 24-48 hours after the time of death to allow for identification, authorization, and preparation of the body. Id.
74. Pascale Trompette & Mélanie Lemonnier, Funeral Embalming: The Transformation of a Medical Innovation, 22 SCI. STUD. 9, 15 (2009) (noting "the American Civil War marked a turning point in 'The American Way of Death,' notably in terms of the legitimization and democratization of embalming for body display").
77. Cooney, supra note 75.
78. Id.
ers in the era. On May 24, 1861, Colonel Elmer Ellsworth was the first prominent military officer to be killed in the war. His body was embalmed and public funeral services were conducted at the White House, in New York City, and in Albany. His funeral service received favorable attention in the press and proved to be important not only in familiarizing the public with the concept of embalming but also establishing a pattern for future burials of prominent figures.

The assassination and subsequent burial of President Abraham Lincoln in 1865 provided much of the American public with its first exposure to an embalmed body. Considered "the greatest funeral in the history of the United States," President Lincoln's embalmed body was displayed and transported along a 1,654 mile route between Washington D.C. and his hometown in Springfield, Illinois. Beginning April 21, 1865, Lincoln's funeral caravan passed through nine states, 440 communities, and was a part of twelve major funeral services during the 20-day journey. An estimated 1.3 million people viewed the open casket along its journey, and over 12 million witnessed the caravan en route to Springfield. Lincoln's funeral thus served as the preeminent display of embalming and exposed a large segment of the general public to the aesthetic benefits of embalming.

a. The Emergence of Ready-to-Embalm Laws

However, despite its growing prominence in America, post-Civil War embalming was entirely divorced from the funeral industry and relegated to the few medical professionals who actively practiced during the war.

79. See, e.g., Mayer, supra note 76, at 477. Embalming was not practical in every circumstance, however, and the practices of handling the dead in these circumstances lead to the establishment of the National Cemetery System. Id. Commanding generals were ordered to move the remains of those killed in battle to graves bearing their names and numbers on headstones. Id.
80. Id.
81. Id.
82. Id.
83. Id. at 482.
86. Id.; Fagant, supra note 84, at 115.
87. Ron Coddington, Abraham Lincoln's Final Journey Home, USA TODAY (Apr. 17, 2010), http://www.usatoday.com/news/nation/lincoln-funeral-train.htm. The website also contains an interactive map detailing the various stops in the route to Springfield, with the number of visitors at each stop. Id.
88. See Mayer, supra note 76, at 482.
89. See id.
Complicating any potential integration of embalming with the funeral industry, the funeral profession lacked the instruction and professional organization necessary to incorporate any sweeping changes to the industry. In the absence of any formal mortuary educational opportunities, the earliest forms of embalming training were done primarily through apprenticeships, traveling lecturers, journals, and trial and error.

This began to change in the 1880s, as the funeral industry began earnestly moving towards the integration of embalming into the profession. In 1882, the NFDA was founded to provide large scale organization and guidance to funeral directors. That same year, the first formal educational institution opened—the Cincinnati College of Mortuary Science. Recognizing the growing market for embalming-based products, commercial companies began heavily investing in researching and developing new products and techniques, resulting in a large body of knowledge termed mortuary science.

However, while the funeral home emerged as the primary location for memorial services after the Civil War, the difficulty in providing for the expedient transportation of bodies meant embalming still occurred within the home of the deceased. The crude techniques used during this period by inexperienced funeral directors, combined with the heavy reliance on arsenic as the primary embalming chemical, created public health concerns that became a focus of state legislatures. Complementing these concerns, a

90. Id. 91. Id. at 490. 92. See CLIFTON D. BRYANT & DENNIS L. PECK, ENCYCLOPEDIA OF DEATH AND THE HUMAN EXPERIENCE 405 (2009). 93. NFDA Background, NAT’L FUNERAL DIRS. ASS’N, http://www.nfda.org/media-center/nfda-background.html (last visited Jan. 12, 2013). The first state association of funeral directors occurred in Michigan in 1880, which was called the Funeral Directors Association. MAYER, supra note 76, at 484. 94. About Us, CINCINNATI C. OF MORTUARY SCI., http://www.ccms.edu/view/home/about-us.aspx (last visited Jan. 12, 2013). 95. MAYER, supra note 76, at 490; Trompette & Lemonnier, supra note 74, at 15-16. 96. See MAYER, supra note 76, at 476. 97. Id. at 490. Chemicals for embalming during the Civil War were generally self-manufactured by the embalmer. Id. at 476. Techniques at this time ranged from the more sophisticated arterial embalming—where an artery was raised and injected with prepared chemicals—to a more primitive cavity treatment—the trunk of the body was eviscerated and then filled with sawdust, powdered charcoal, or lime. Id. at 476. During the 1880s, the treatment for cavities improved greatly with the invention of the trocar, a tool that was thrust through a single point in the navel to distribute a preservative fluid simultaneously throughout the trunk of the deceased. Id. at 492. Embalmers soon became divided between these two methods of preservation, leading to debates amongst “belly punchers” (advocates of cavity treatment) and “throat cutters” (arterial embalmers). Id. Though no superior process emerged, embalmers also experimented with variations of these processes during this period. Id. One such example is the “eye process” where the trocar was inserted in the medial corner.
separate public health movement also emerged from the widespread belief that graveyards created health risks to nearby communities. Embalming was viewed as a measure to reduce that risk, and trade organizations like the NFDA lobbied for greater use of embalming on that basis.

Thus, the historical justification for the licensure of funeral directors was the product of two convergent movements—one which focused on the health of inexperienced, poorly-trained embalmers working in the home of the deceased and one which focused on protecting the general public from pestilent graveyards. As a result, states began adopting licensing requirements for embalming practitioners, the earliest of which was Virginia in 1894. By the turn of the century, twenty-four states had enacted embalming legislation to regulate the growing number of funeral directors engaged in the practice.

As the traditional burial became a ubiquitous element of American funeral custom in the early twentieth century, states began adopting additional regulations to ensure the availability of adequate embalming facilities. States mandated that all operating funeral homes be equipped with capable embalming rooms. Combined with the licensing regulations that

---

98. Harrington, Markets, supra note 7, at 201. In 1843, Sir Edwin Chadwick presented to English Parliament “the first comprehensive study of the funeral-burial industry” in which he concluded “the health of whole towns was severely threatened by urban grave sites.” Robert B. Ekelund, Jr. & George S. Ford, Nineteenth Century Urban Market Failure?: Chadwick on Funeral Industry Regulation, 12 J. REG. ECON. 27, 28, 30 (1997). In modern times, however, this has been proven to be false. See, e.g., Oliver Morgan, Infectious Disease Risks from Dead Bodies Following Natural Disasters, 15 PAN AM. J. PUB. HEALTH 307, 310 (2004) (“Although there is some evidence of microbiological contamination in the immediate vicinity of cemeteries, the rapid attenuation of these microorganisms suggests that they pose little risk to the public.”).

99. 1978 FINAL STAFF REPORT, supra note 44, at 102 n.4 (“In a period when sanitary reform and the general social movement embracing public health had gained widespread attention, . . . many funeral directors found it natural to associate their functions with those of the sanitarian.”) (citation omitted). Some believe the NFDA’s spearhead of the push towards licensing was done only to secure professional status for the industry and “to underscore their claim to practitioners in . . . a profession rendering necessary important, personal services legitimated by the community.” Id. at 40 (citation omitted).

100. Id. at 102; Mayer, supra note 76, at 493.

101. 1978 FINAL STAFF REPORT, supra note 44, at 40.

102. Id.

103. Statistics, supra note 65.

104. Harrington, Markets, supra note 7, at 201.

105. Id. For example, in Wyoming, a funeral establishment is defined as: [A] place of business . . . consisting of a preparation room equipped with a sanitary floor, necessary drainage and ventilation, and containing necessary instruments and supplies for the preparation and embalming of human dead bodies for burial or
required embalming training, these regulations have been termed “Ready-to-Embalm” laws because of the primary purpose that all funeral directors be prepared and trained to embalm.106

b. Survey of the States: Common Approaches and Modern Turmoil

At present, thirty-nine states have some variation of a Ready-to-Embalm scheme in force.107 Twenty-three states have retained pure Ready-to-Embalm schemes, which require that all funeral homes have licensed embalming facilities and that all funeral directors be licensed embalmers.108 The remaining states have a mixed approach, either requiring that the funeral home have embalming facilities or that all funeral directors be prepared to embalm.109 Eight states impose only the requirement that funeral homes be equipped with embalming rooms,110 while four states maintain only the requirement that funeral directors be trained to embalm.111 The remaining fifteen states do not have Ready-to-Embalm schemes.112

While individual licensing standards vary from state to state,113 two primary means of licensing funeral practitioners have emerged.114 The first approach is a dual licensing structure which separates an embalmer’s li-

transportation, and a display room containing a stock of funeral caskets and shipping cases.

WYO. STAT. ANN. § 33-16-301(b) (2012).

106. See Harrington, Markets, supra note 7, at 201-02.

107. Id. at 202. After the publication of Harrington’s study, one state, Maryland, has amended its Ready-to-Embalm scheme. See infra text accompanying notes 126-32. Harrington’s state survey has been adjusted accordingly.


109. See id.

110. Id. These states include: Alabama, Kansas, Louisiana, Mississippi, North Carolina, South Carolina, Vermont, and Wyoming. Id.

111. Id. These states include: Iowa, Nebraska, Oklahoma, and Utah. Id.

112. Id. These states include: Alaska, Arkansas, California, Colorado, Florida, Hawaii, Kentucky, Missouri, Nevada, New Mexico, Ohio, Oregon, Tennessee, and Washington. Id.

113. For a comprehensive breakdown of licensing requirements for each individual state, including the requirements for continuing education, expiration of licensure, apprentice program requirements, and test scores, see generally Licensing Requirements for Funeral Home Directors, 0020 REGSURVEYS 5 (2012) (Westlaw).

114. William G. Whittaker, Cong. Research Serv., RL 30697, Funeral Services: The Industry, Its Workforce, and Labor Standards 31-37 tbl.3 (2005). Forty-nine states have adopted licensing requirements for participants within the industry. Id. Colorado, which does not license funeral directors or embalmers, is the lone exception. Id.
cense from a funeral director’s license.\textsuperscript{115} This approach results in a heightened education requirement for the embalmer’s license, which takes an average of 1.3 years of additional education to attain.\textsuperscript{116} The second approach to licensing involves a merger of the funeral director’s license and embalmer’s license into a single license, thereby requiring that all funeral directors be trained to embalm.\textsuperscript{117} Generally the merged license approach falls within the ambit of a Ready-to-Embalm scheme,\textsuperscript{118} though it is possible to structure a dual licensing system in this way as well.\textsuperscript{119}

The propriety of a single operating license was the subject of litigation in many states that enacted these laws in the early 1900s.\textsuperscript{120} The Wisconsin Supreme Court addressed the issue of “whether the business of an undertaker is . . . identical with that of an embalmer as to permit of them being put under one classification, so that one cannot be an undertaker without also being an embalmer.”\textsuperscript{121} In its analysis, the court pondered “since embalming is not compulsory, since it is not universally practiced, why require every undertaker to have an embalmer’s license before he can bury the dead?”\textsuperscript{122} Thus, because the qualifications for obtaining an embalmers license would add nothing to “public health, safety, convenience, comfort or morals,” its enactment was invalid.\textsuperscript{123} Addressing a similar issue, the Supreme Judicial Court of Massachusetts stated, “We know of nothing connected with the duties of an undertaker that calls for the work of a licensed embalmer . . . [because embalming] is not an essential part of the duties of

\textsuperscript{115} As of 2005, seventeen states maintain separate licenses for embalming and funeral directing: Alaska, Arizona, Arkansas, California, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Vermont, Washington, and Wyoming. \textit{id.}

\textsuperscript{116} Harrington, \textit{Markets, supra} note 7, at 208; see \textit{Whittaker, supra} note 114, at 31-37 tbl.3.

\textsuperscript{117} \textit{Whittaker, supra} note 114, at 31-37 tbl.3. For example, in Michigan, prospective funeral directors must obtain a mortuary science license that requires the applicant to complete embalming training at a mortuary college. \textit{Mich. Comp. Laws} § 339.1806(1) (West, Westlaw through 2012 Sess.).

\textsuperscript{118} See, e.g., \textit{Neb. Rev. Stat.} § 38-1414(1) (2012) (“The department shall issue a single license to practice funeral directing and embalming to applicants who meet the requirements of this section.”).

\textsuperscript{119} While dual licenses for an embalmer and funeral director are recognized in Arizona, a precondition of licensure as a funeral director is that the applicant held a “license as an embalmer for at least one year” and directed at least twenty-five funerals. \textit{Ariz. Rev. Stat. Ann.} § 32-1322(C)(4) (2007).

\textsuperscript{120} These states are Wisconsin, New York, and Massachusetts. Subsequent statutory amendments have resulted in a licensing structure inconsistent with the following opinions; however, they are instructive in addressing the propriety of a single licensing scheme.

\textsuperscript{121} \textit{State ex rel. Kempling v. Whyte}, 188 N.W. 607, 609 (Wis. 1922).

\textsuperscript{122} \textit{Id.}

\textsuperscript{123} \textit{Id.}
an undertaker, and it has no relation to the public health." The Court of Appeals of New York also addressed this issue and concluded that "[t]he work of an embalmer and that of an undertaker can . . . be done by the same person, but the public health does not require that an embalmer be an undertaker, or that an undertaker be an embalmer." More recently, in 2007, Maryland addressed the problems created by its single operating license. A strong Ready-to-Embalm scheme existed in Maryland, with licensure as a funeral director and ownership of a funeral home predicated upon completion of a mortuary science program that included the embalming of at least twenty bodies. However, after the election of the first Muslim in the Maryland House of Delegates, attention was drawn to the inequity this created on religions that did not permit embalming. To rectify this problem, Maryland created a funeral director's license that allowed for an individual to obtain licensure to practice all aspects of funeral direction except for embalming. In this way, Maryland did not have to sacrifice the licensing requirements in its existing mortician's license, yet it simultaneously afforded individuals the opportunity to "practice in a way that is most fitting to their culture or religious belief." The funeral establishment license was similarly amended to allow for holders of the funeral director's license to own funeral homes. At present, thirty-one states require that funeral homes be equipped with specialized embalming rooms. These statutes require a funeral establishment to maintain a separate room for the preparation and embalming of

127. Id.
128. Id.
129. MD. CODE ANN., HEALTH OCC. § 7-101(j) (LexisNexis 2012). A “[f]uneral director” under Maryland law is defined as “an individual . . . licensed . . . to practice all aspects of mortuary science except for embalming.” Id.
130. Muslim Funeral Rites, supra note 126; see MD. CODE ANN., HEALTH OCC. § 7-101(q). A “[m]ortician” is defined as “an individual who practices mortuary science.” Id. § 7-101(s).
131. Muslim Funeral Rites, supra note 126 (“If anybody who is in the funeral service industry doesn’t want to embalm, they will be able to practice in a way that is most fitting to their culture or religious belief.”).
132. Id.; MD. CODE ANN., HEALTH OCC. § 7-310(c).
bodies containing specialized flooring, drainage, and ventilation, along with the necessary supplies and instruments. 134 The strictest version of this type of statute requires that every single funeral establishment maintain an embalming room, regardless of whether or not embalming will be performed at that location. 135 However, a more flexible approach also exists, such as that in Indiana, which exempts funeral homes from the embalming room requirement if it can demonstrate access to off-site embalming facilities. 136

The embalming room requirement was subject to extensive review in Arizona in 2003. 137 The Arizona Auditor General reviewed Arizona’s licensing requirements and concluded that “[t]he requirement for a new establishment to contain a preparation room creates a barrier [to competition] and unnecessarily creates increased costs to the consumer.” 138 The Auditor General proposed an amendment that required any establishment offering embalming to either have an in-house embalming room or, as an alternative, demonstrate access to an off-site embalming room. 139 “Establishments that [did] not offer embalming would not be subject to [any] requirement [for embalming facilities].” 140 In support of this recommendation, the Auditor

---

134. The Bureau of Consumer Protection found that these statutes are often “remarkably specific” in proscribing the minimum facility requirements. 1978 FINAL STAFF REPORT, supra note 44, at 113-14. For example, the Minnesota funeral establishment statute contains five separate subdivisions describing categorized minimum requirements including lighting and ventilation; plumbing connections; floors, walls, ceilings, doors and windows; and equipment and supplies. Id. at 114; MINN. STAT. ANN. § 149A.92(2)-(6) (West, Westlaw through 2012, Sess.).


136. 832 I N D. ADMIN. CODE 5-1-4(b) (West, Westlaw through 2012 Sess.). Indiana generally requires all funeral homes to:

[B]e equipped with a fully functional embalming room . . . . However, persons who own and operate more than one (1) funeral home in a county or adjoining counties may designate one (1) embalming room in one (1) of those funeral homes as the sole embalming room for all of its funeral homes in that county or those adjoining counties.

Id.


139. See FUNERAL DIRECTORS AND EMBALMERS, supra note 137.

140. Id. These recommendations were also part of the Auditor General’s recommendations in its 1983 performance audit. Id.
General cited the potential cost of these rooms, which varied from $10,000 to $35,000, and noted the embalming room requirement was "outdated" for modern practices.\textsuperscript{141}

The Arizona State Board of Funeral Directors and Embalmers rejected the Auditor General's recommendations.\textsuperscript{142} In so doing, the Board noted that "[i]t would not be in public health interests" to allow a funeral establishment to exist without an embalming room.\textsuperscript{143} Further, because the statute did not require the embalming facilities to actually be used, there was no barrier to centralizing embalming operations.\textsuperscript{144} Finally, embalming facilities were necessary to provide consumers with a choice of care,\textsuperscript{145} and because, if "a problem occurs with the body, it is reasonable to expect that a consumer could have that problem resolved in a timely manner."\textsuperscript{146} Consequently, the Arizona law was left unchanged, and the state currently maintains its strict Ready-to-Embalm scheme.\textsuperscript{147} While Arizona's analysis is instructive, it was not the first state to address this issue. The Texas Attorney General also stated that an exception from its embalming room requirement was not al-

\begin{footnotesize}
\begin{enumerate}
\item Id. at iii, 27. The Auditor General cited a Phoenix corporation that owned twenty-four establishments, of which only five were used to embalm. Id. at 27. Each establishment was required to have and maintain specialized embalming facilities. Id.
\item Letter from Rodolfo R. Thomas to Debra K. Davenport, supra note 138, at 5.
\item Id. at 6.
\item Id.
\item Id. at 5-6 ("The analogy may be used that when a consumer enters a restaurant for service he assumes that the licensed restaurant has a kitchen and that the kitchen is inspected and functional. He may order only a salad and not anything from the grill or oven[,] yet it is reasonable to expect that those services are available if desired.").
\item Id. at 6.
\item The licensing requirements in Arizona also qualify as Ready-to-Embalm laws. See Ariz. Rev. Stat. Ann. § 32-1322(C)(4) (2007). A recent Pennsylvania district court ruling offers a contrary perspective. See Heffner v. Murphy, 866 F. Supp. 2d 358, 429 (M.D. Pa. 2012). The Pennsylvania district court granted summary judgment holding the Pennsylvania embalming room requirement to be unconstitutional. Id. The court held the regulation lacked a sufficient public interest to outweigh the burden it placed on out-of-state competitors. Id. at 401. The Pennsylvania Funeral Directors Association argued that the embalming room requirement was necessary because funeral directors must take precautions to protect themselves from diseases and because hazardous chemicals are used to prepare the dead. Id.
\end{enumerate}
\end{footnotesize}
lowable and that a funeral home could not circumvent the statute by designating an off-site embalming facility as its primary location.

A small number of states appear to have found an alternative middle ground. For example, in Ohio, in lieu of a specialized embalming room, a non-embalming funeral home may opt to maintain a "holding room" for bodies. Thus, a specialized embalming room is only necessary when embalming will actually occur at that location. Similar provisions are also currently in force in Maryland and Oregon.

2. The Modern Culture Shift

The funeral market is in the midst of a culture shift that is changing the dynamics of American funeral custom. There is a concerted movement away from the formalism associated with a traditional burial and consumers are instead opting for smaller, more personalized services. The Bureau of Consumer Protection’s 1990 report to the FTC captured this trend, as it reported that consumers were purchasing less expensive items and fewer funeral products. A 2010 survey conducted of 1,643 respondents indicated that just 11% desired a traditional funeral. Funeral providers are cognizant of this cultural shift, as the increase in non-traditional funerals was voted the

---

148. Tex. Att’y Gen. Op. LO-98-014 (Feb. 23, 1998), available at https://www.oag.state.tx.us/opinions/opinions/48morales/lo/1998/pdf/lo1998014.pdf. The question presented was “[w]hether the Texas Funeral Service Commission may by rule exempt a funeral establishment from the requirement of having an embalming preparation room.” Id. The funeral establishments at issue did not offer embalming services, and merely engaged in general funeral directing and sale of funeral goods. Id. The Texas Attorney General did note that the embalming room requirement does create additional costs for the funeral establishment. Id.

149. Tex. Att’y Gen. Op. JC-0059 4-5 (June 2, 1999), available at https://www.oag.state.tx.us/opinions/opinions/49cornyn/op/1999/pdf/jc0059.pdf. The Attorney General concluded that all embalming rooms must be part of the fixed site of each funeral establishment, even if embalming services are not offered. Id. at 5. Similar to the Arizona Board’s rationale, the Attorney General noted that embalming was not required to actually occur on-site. Id.


151. § 4717.06(B)(2)(a).

152. MD. CODE REGS. 10.29.03.02 (2012).

153. OR. ADMIN. R. 830-030-0008(1)(b) (West, Westlaw through 2012 Sess.).


number one issue facing the profession in a 2011 survey.157 Similarly, the public’s changing attitudes of funeral customs was also rated the preeminent issue facing the profession in 2012.158

This movement is representative of a modern shift in values and attitudes that deviates from more traditional burial practices.159 Simply put, as the modern consumer makes value judgments as to the type of service desired, “they are making funeral choices based on values that are different than previous generations.”160 As part of this foundational shift in American funeral custom, pervasive trends within this developing market are challenging the basis of state regulation and how they operate within the modern market.161 The major trends within the industry include the rise in cremations, the growth of ethnic and “nontraditional” funeral services, and consolidation.162

a. The Rise in Cremations

Mitford’s critique of the funeral industry and emphasis on cheaper burial alternatives, such as cremation, resonated with the American public, as the total number of cremations has increased every single year since her book, The American Way of Death, was published in 1963.163 As a result, the overall cremation rate has grown from a meager 3.71% share of all dispositions in 1963164 to command a 38.15% share of all dispositions in 2009.165 In at least thirteen states cremation has surpassed the traditional burial as the primary means of disposition.166 Projections from the Cremation Association of North America (CANA) indicate that this trend will

157. Issues and Changes in the Industry, DIRECTOR, Jan. 2012, at 42, 43. The response marks the first time in twelve years that the number one issue facing the profession was not the trend toward cremation. Id.
158. Id. Respondents rated the issues “on a scale from 0 to 10,” where “10 mean[es] ‘extremely important.’” Id. The changing attitudes of funeral customs was rated 8.1 by respondents. Id.
159. See Statistics, supra note 65.
162. Id.
164. Id.
165. Statistics, supra note 65.
continue for the next several decades, as the cremation rate is expected to climb to 46.57% by 2015.167 In sum, "'[c]remation is gradually becoming the preferred American way of death."168

The shifting consumer preference towards cremation appears to be rooted in a combination of practical and economical considerations. Because of the relative inexpensiveness of cremation compared to a traditional burial,169 cremation is primarily appealing to consumers because of its low cost.170 However, funeral consumers have also cited personal preference, simplicity, environmental concerns, and the fact that the body is not buried as other reasons for choosing cremation.171 Consistent with the apparent value shift in the purchasing decisions of the modern consumer,172 CANA has cited the "[g]reater flexibility in memorialization services" and the weakening of traditional ties as fundamental factors driving this trend.173

b. Ethnic and Non-traditional Funerals

Immigrants from across the globe have influenced the death care industry and integrating their customs with local burial traditions.174 As a result, many funeral homes have resorted to creative solutions to meet the demands of the various traditions and cultures of mourners.175 Thus, in the modern market, greater awareness of the different ethnic and religious customs is crucial to success.176 This trend has created opportunities within the

168. WHITTAKER, supra note 114, at 12 (citation omitted).
170. Benefits of Cremation, supra note 169. These responses were the result of a 2005 industry survey of 371 people planning to be cremated. Id.
171. Id.
172. See supra text accompanying notes 159-60.
175. Id. (noting one funeral home would hold Buddhist services in the room furthest from the crematory so the mourners could finish chanting while processing to the cremation).
176. See NFDA Fact Sheets, NAT'L FUNERAL DIRS. ASS'N, http://www.nfda.org/media-center/7.html (last visited Jan. 13, 2013); Brulliard, supra note
industry, as funeral homes that exclusively serve specific religions or ethnicities have become more common.\textsuperscript{177} Consistent with this trend, the number of foreign-born funeral directors is also on the rise.\textsuperscript{178}

The apparent internationalization of funeral customs has a clear impact on embalming demand. This is so because the practice of incorporating an embalmed body in a funeral service is almost entirely unique to the North American continent.\textsuperscript{179} One commentator summarized the English attitude towards this custom and suggested it "would presumably be dealt with as a revolting spectacle and therefore a public nuisance."\textsuperscript{180} In Australia, cremation is the preferred means of disposition, with over 65\% of deaths resulting in cremation.\textsuperscript{181} In Japan, the practice of embalming is non-existent as 99.81\% of the population is cremated upon death.\textsuperscript{182} Likewise, among other Asiatic nations such as India and China, cremation is the preferred means of disposition.\textsuperscript{183}

The use of embalming as part of the grieving process is also shaped by prevailing religious beliefs. The strongest views against embalming are held by those of Islamic and Jewish faith, both of which view the procedure as tantamount to desecration of the body.\textsuperscript{184} Less extreme views exist in Buddhism and Hinduism, both of which strongly prefer cremation and view embalming as unnecessary.\textsuperscript{185} In contrast, Christian denominations are more accepting of the procedure and allow for the individual to decide whether the body is to be embalmed.\textsuperscript{186}

\textsuperscript{174} (noting the example of one Buddhist who, while planning a funeral in the 1990s, could not find any funeral home familiar with Buddhist services).
\textsuperscript{178} Harrington, Markets, supra note 7, at 213-14.
\textsuperscript{179} Mitford, The Undertaker’s Racket, supra note 17. For an extensive breakdown of international funeral customs, see generally KODO MATSUNAMI, INTERNATIONAL HANDBOOK OF FUNERAL CUSTOMS (1998).
\textsuperscript{180} Mitford, supra note 29, at 206 (quoting Alfred Fellows).
\textsuperscript{182} Id.
\textsuperscript{183} Id.
c. Consolidation of the Industry

Consolidation is a significant trend occurring both nationally and locally and is revolutionizing the traditional business model.\(^{187}\) Traditionally, funeral homes have been local, family-owned businesses exclusively serving the surrounding community.\(^{188}\) However, beginning in the 1990s “mega-corporations” began acquiring an extensive network of nationwide holdings, attempting to create regional clusters\(^{189}\) of funeral homes that shared resources, personnel, and management.\(^{190}\) To a lesser extent, this trend is also occurring on a local scale.\(^{191}\) Respondents to the annual Citrin Cooperman survey of the industry\(^{192}\) captured this trend, as 37% of all participants reported ownership of two or more funeral homes.\(^{193}\) In 2011, the mean number of funeral homes owned increased to 1.65 per owner, the highest in the history of the survey.\(^{194}\) Further, 27% of respondents are considering expanding existing facilities or acquiring new funeral homes, an increase from the 21% reported in the prior year.\(^{195}\) With a corresponding increase in the number of participants willing to sell in the immediate future, this trend is

---

\(^{187}\) WHITTAKER, supra note 114, at 6-9.

\(^{188}\) Id. at 6-10.

\(^{189}\) Id. at 6, 26. The “competitive concerns” that these clusters create in local, regional, and national markets has been significant enough to warrant FTC action. See Nation’s Largest Funeral Home/Cemetery Chains Agree to FTC Terms Before They May Merge, FED. TRADE COMM’N (NOV. 22, 2006), http://www.ftc.gov/opa/2006/11/scialderwoods.shtm. Despite the FTC’s monitoring, consumer groups still report that the price of funeral services charged by these corporations remains higher than average. See generally Taylor Dobbs, Consumer Group Says Corporation Charges 30 Percent More for Funeral Services, VTDIGGER.ORG (Jul. 13, 2011), http://vtdigger.org/2011/07/13/funeral; National Issues: The FTC Funeral Rule, FUNERAL CONSUMERS ALLIANCE (Aug. 25, 2008), http://www.funerals.org/newsandalerts/national-issues.

\(^{190}\) WHITTAKER, supra note 114, at 11, 26. Estimating the total market share controlled by these corporations is difficult, primarily in part because conglomerate-owned funeral homes are still held out as being individually owned. Id. at 6, 9, 26-27. One observer stated that the total market share is irrelevant because consolidators have effectively seized control of the industry. Id. at 6. (“While the independents still account for the majority of firms in number of operating units, . . . their power—always fragmented, always fractured by suspicion—is gone.” (quoting Tom Fisher, Columnist, Mortuary Magazine)).

\(^{191}\) See Funeral Home Owners Look to Stem the Tide of Eroding Profitability, DIRECTOR, Jan. 2012, at 38.

\(^{192}\) Id. at 38-40. Citrin Cooperman is a full-service accounting firm that has conducted an annual survey of the funeral industry for twelve consecutive years. Id. at 38. Their surveys are published as part of the NFDA’s State of the Profession. See id. For its 2011 data, the survey received responses from more than 370 funeral homes. Id. at 40.

\(^{193}\) Id. at 38.

\(^{194}\) Id. at 39.

\(^{195}\) Id. at 38.
likely to continue. Both local and national consolidators have enormous potential to bring efficiency to a traditionally fragmented industry, as the opportunity to centralize facilities, share resources, and reduce labor costs has never been greater.197

d. The Funeral Rule—Revisited

In 1990, the FTC began the process of reviewing the Rule to decide whether it should be repealed or retained.198 In its 1990 report to the FTC, the Bureau of Consumer Protection found that the Rule’s price disclosure and itemization requirements were increasing consumer awareness and highlighting the price-sensitivity of consumer purchasing behavior.199 While the overall price impact was difficult to gauge because of the short amount of time that had passed since promulgation of the Rule, price competition was increasing.200 Further, the Bureau found that the affirmative disclosure requirements established by the Rule were directly reducing the amount of unneeded services purchased by consumers.201

The FTC’s reexamination allowed opponents of the Rule an opportunity to argue for its removal. The NFDA used this opportunity to assert that compliance with the Rule’s mandates imposed significant costs on the industry, and the Rule failed to provide any of the expected competitive benefits.202 However, finding the compliance costs to be minimal, the FTC concluded that the “pro-competitive and informational benefits attributable in part to the Rule appear to be manifesting in the market and are likely to increase over time.”203 Thus, despite the fundamental changes occurring within the funeral market, the FTC concluded the Rule was still neces-

---

196. Id. 7% of respondents indicated a willingness to sell, up from 5% in the prior year. Id. at 39.

197. WHITTAKER, supra note 114, at 10 (noting that consolidation has “revolutionized” the industry and “forced an unusually fragmented industry toward massive rationalization”).

198. 1990 Final Staff Report, supra note 43.


200. 1990 Final Staff Report, supra note 43, at 86.

201. Id. at 180. The empirical data indicated that consumers who had purchased unneeded embalming services decreased from 18% to 9% from 1981 to 1987. Id. Similarly, from 1981 to 1987 consumers who purchased an unneeded casket in a cremation service declined from 11% to 2%. Id.


203. Id. at 1,597.
sary. The 1984 version of the Rule survived with only "fine-tuning" amendments to the price disclosure and misrepresentation requirements.

Even though the Rule had originally called for state regulations to operate in conjunction with the Rule, the FTC heard testimony indicating that reform of state regulation was unlikely to occur because of the strong industry opposition to such measures. The Bureau of Consumer Protection indicated that state licensing boards were likely to promote trade association interests ahead of consumer interests. One state legislator reflected upon the strength of these trade associations in preventing regulatory changes by asserting that challenging these organizations "just isn't important enough for you to fall on your sword." States had not adopted any significant measures to complement the overall scope, purpose, and impact of the Rule. In fact, the Bureau of Consumer Protection hinted that the anticompetitive impact of state regulations may be enough to warrant future FTC attention, but that specific issue was beyond the scope of its review. Thus, the issue of state regulations evaded FTC review during this reexamination process.

Beginning in the early 1960s, the American funeral industry has seen a drastic paradigm shift away from the values that drove the traditional funeral market. Innovations in the business model, value shifts in consumer behavior, and alternative product offerings have resulted in a market that is fundamentally different from the market that existed in the first half of the twentieth century. The modern funeral industry has proven to be a dynamic industry that is changing nearly every aspect of the traditional business model. Yet, in spite of the sweeping changes occurring, one constant remains in this market—Ready-to-Embalm laws.

204. Id. at 1,600.
205. Id. The only "major" change related to disclosures was the deletion of the affirmative telephone disclosure requirement. Id.
206. 1978 FINAL STAFF REPORT, supra note 44, at 207 (imposing upon states "the task of correcting features of their regulations that impose unnecessary costs and restrict consumer choice").
208. 1978 FINAL STAFF REPORT, supra note 44, at 104 (noting that the licensing boards tend to operate as an arm of the associations because of the immense influence imposed on licensing boards).
212. See supra Subsection I.B.2.
213. See supra Subsection I.B.2.
II. READY-TO-EMBALM LAWS IN THE MODERN MARKET

The Rule has continued to provide modest benefits\textsuperscript{214} to consumers while imposing minimal compliance costs on funeral homes.\textsuperscript{215} Yet, since the FTC’s last formal review in 1990, it has become clear that the Rule has not had the foundational shift that the FTC originally envisioned.\textsuperscript{216} Some critics have asserted that the Rule’s failure is attributable to lax enforcement by the FTC,\textsuperscript{217} while others maintain that the FTC’s assumptions in promulgating the Rule were misguided.\textsuperscript{218} Despite these alternative explanations, the true value of the Rule is difficult to ascertain because of the presence of Ready-to-Embalm laws.\textsuperscript{219}

The Rule was designed to provide price relief by promoting competition while reducing the occurrences of funeral directors preying on grieving consumers.\textsuperscript{220} A series of studies conducted by economist David E. Harrington demonstrated that Ready-to-Embalm laws are having an anticompetitive impact and encouraging the behavior of unscrupulous funeral directors.\textsuperscript{221} In spite of this powerful evidence condemning their existence, Ready-to-Embalm laws are often justified by a basis that has long been dispelled—the public health interest.\textsuperscript{222}

A. Preserving the Status Quo

A survey of the overall prices between markets suggests that Ready-to-Embalm laws increase the market price of cremations and traditional burials.\textsuperscript{223} Harrington measured and compared the retail price and marginal cost\textsuperscript{224} charged by 407 funeral providers in regulated and unregulated


\textsuperscript{215}. See FTC Comment Request, 76 Fed. Reg. 76,297 (May 6, 2011).

\textsuperscript{216}. Harrington, Markets, supra note 7, at 203; see supra Subsection I.B.2.

\textsuperscript{217}. MITFORD, supra note 29, at 184.


\textsuperscript{219}. Harrington, Markets, supra note 7, at 203.

\textsuperscript{220}. See supra Subsection I.A.1.

\textsuperscript{221}. Harrington, Markets, supra note 7, at 201; Harrington & Krynski, supra note 108, at 199.

\textsuperscript{222}. FUNERAL DIRECTORS AND EMBALMERS, supra note 137, at 27.

\textsuperscript{223}. Harrington, Markets, supra note 7, at 201.

\textsuperscript{224}. Marginal cost is defined as the “additional cost incurred in producing one more unit of output.” BLACK’S LAW DICTIONARY 398 (9th ed. 2009).
While retail price significantly exceeded the marginal cost in both markets, the difference in states with Ready-to-Embalm laws was roughly double that experienced in markets without these regulations. The average retail price for a cremation in Ready-to-Embalm markets was $1,224 compared to just $911 in unregulated states. Harrington concluded that the $313 difference was the estimated price impact attributable to the presence of Ready-to-Embalm laws. Based upon the 450,398 cremations that occurred in states with Ready-to-Embalm laws in 2005, an excess $141 million was spent by funeral consumers in these markets. Because the data also suggests that Ready-to-Embalm laws increase the marginal cost of cremation, the presence of these regulations creates additional opportunity costs in the form of forgone consumer savings.

Harrington also estimated the price impact of Ready-to-Embalm laws on traditional funeral prices. This was done by estimating specific determinants that explain a funeral consumer’s expenditures on a traditional burial. From these determinants, the estimated price impact was measured by adding the price impact directly attributable to Ready-to-Embalm laws to the costs attributable to the increased educational requirements created by these regulations. With a $266.90 increase attributable to Ready-to-Embalm laws, and a $278.36 increase attributable to the increased education requirements, Harrington estimated that the total price impact on traditional funerals was $545 per burial. The resulting consumer injury is a

---

225. Harrington, Markets, supra note 7, at 206. Of the 407 funeral providers surveyed, 46 did not provide information, 258 provided both trade and retail figures, 96 gave only trade price, and 12 estimated only the retail price. Id.

226. See id. at 206 tbl.2. In states without Ready-to-Embalm laws, the difference between retail price and marginal costs was $328. Id. In states with Ready-to-Embalm Laws, the difference between retail price and trade price was $608. Id.

227. Id.

228. Id.

229. Id. at 207 fig.1.

230. Id. Harrington estimated this comparing the marginal costs in Ready-to-Embalm markets ($616.39) with the marginal costs in markets without Ready-to-Embalm laws ($582.78). Id. The difference, $33.61, represents the estimated increase in marginal cost per cremation attributable to Ready-to-Embalm laws. Id.

231. Id. at 208.

232. Id. at 205 tbl.1.

233. Id. The determinants included median household income, college degree, native, age, rural, religiosity, required training of funeral directors, and the presence of ready to embalm regulations. Id.

234. Id.

235. Id.

236. Ready-to-Embalm laws create, on average, an increase of 1.31 in years of education. Id. at 209 n.1. This was multiplied by the estimated price of education ($212.49) to arrive at the estimate for education in a Ready-to-Embalm market ($278.36). Id.

237. Id. at 209.
staggering $657 million of excess spent on traditional burials as a result of these regulations.\(^{238}\)

An analysis of this data reveals the two primary impacts of Ready-to-Embalm laws. First, the costs of operating in a Ready-to-Embalm market are higher than in other markets.\(^{239}\) This is reflected in the data in the form of higher marginal costs for traditional burials and cremations in these markets.\(^{240}\) The firms that are the most affected by these costs are firms that wish to operate outside of the traditional realm of a small, full-service funeral home.\(^{241}\) In this way, Ready-to-Embalm laws punish innovation and specialization within the industry while preserving the traditional business model.\(^{242}\) For example, a funeral home desiring to establish a central facility with satellite branches in neighboring markets is unable to realize substantial cost savings in a Ready-to-Embalm scheme.\(^{243}\) Not only does this hurt funeral homes attempting to appeal to a narrow market segment through low-cost operations,\(^{244}\) but, as evidenced by retail price levels, it hurts consumers in the form of higher prices.\(^{245}\)

Second, the massive fixed cost investment in embalming rooms creates a prohibitive barrier of entry that frustrates competition within markets.\(^{246}\) By increasing the initial investment required to compete in a market,

\(^{238}\) Id.
\(^{239}\) Id. at 201.
\(^{240}\) Id. at 206.
\(^{241}\) Id. at 201.
\(^{242}\) Id. Harrington also demonstrates this point by examining online casket and cremation sales numbers. Id. at 209-12. Online cremation and casket sales represent a small, but growing, market segment. Id. Harrington measured the growth of one successful online firm, Funeral Depot, to determine whether Ready-to-Embalm laws had an effect on market share. Id. at 211. There was a statistically significant impact between the presence of Ready-to-Embalm laws and Funeral Depot’s market share, as the market share for Funeral Depot was 50% less in markets with Ready-to-Embalm laws. Id. at 211.
\(^{243}\) See 1978 FINAL STAFF REPORT, supra note 44, at 115 n.42 (noting that embalming requirements on funeral homes “prevent legitimate firms from cutting overhead costs by sharing facilities or establishing branch outlets with centralized facilities or equipment”). In the modern market, “it may well be economically rational, efficient and publicly desirable for certain individuals to appeal to a narrow segment of the market with a low overhead, low-cost operation.” Id.
\(^{244}\) Id. The Bureau of Consumer Protection found that the arguments from funeral industry representatives displayed “questionable logic” in refuting this point. Id. at 115 n.43. For example, one representative asserted that funeral establishment regulations were necessary to prevent “a funeral director putting up several store front operations to restrain competition.” Id.
\(^{245}\) Harrington, Markets, supra note 7, at 206; Tex. Att’y Gen. Op. LO-98-014 (Feb. 23, 1998) (“Clearly, an establishment required to have facilities it does not use has therefore an added cost of doing business which it will likely pass along to the ultimate consumer, the purchaser of funeral services.”).
\(^{246}\) See supra text accompanying note 138 (discussing the findings of the Arizona Auditor General that embalming rooms ranged from $10,000 to $35,000); 1978 FINAL STAFF
Ready-to-Embalm laws insulate the existing funeral market from outside competitors.\(^{247}\) As a result, with inefficient markets devoid of any meaningful price competition, funeral providers can charge inflated market prices without the fear of losing business.\(^{248}\) Consistent with the FTC's own findings,\(^{249}\) this effect is seen in Harrington's data in the form of higher market prices in Ready-to-Embalm markets.\(^{250}\) As a result of these inflated prices, Harrington posits that inefficient funeral homes that would otherwise be forced to exit the industry are able to remain in business.\(^{251}\)

Harrington concludes these effects are not unintentional and that the ability to preserve the status quo is the redeeming feature that state licensing agencies find in retaining their Ready-to-Embalm schemes.\(^{252}\) The Bureau of Consumer Protection appears to support this theory, as it noted that "many restrictive state regulations operate not to provide badly-needed information or weed out the unqualified or unscrupulous, but to insulate licensed funeral directors from the pressures of competition."\(^{253}\) In fact, many of the state regulations have been drafted and sponsored by funeral director associations.\(^{254}\) Moreover, because of the infusion of trade associations with state licensing agencies, many state licensing agencies are subservient to the interests of the trade association.\(^{255}\) Thus, it should come as no surprise that

\(^{247}\) See supra text accompanying note 33; Heffner v. Murphy, 866 F. Supp. 2d 358, 400 (M.D. Pa. 2012) (noting the plaintiffs argument that the cost of constructing and equipping a preparation room, which could cost between $190,000 and $220,000, would place a significant burden on out-of-state interests).

\(^{248}\) See Harrington, Markets, supra note 7, at 209; see supra text accompanying notes 33-34.

\(^{249}\) See supra text accompanying notes 33-34.

\(^{250}\) Harrington, Markets, supra note 7, at 206.

\(^{251}\) Id. at 209.

\(^{252}\) See Harrington, Breathing Life, supra note 7, at 14.

\(^{253}\) 1978 FINAL STAFF REPORT, supra note 44, at 103. The Bureau noted that funeral establishment regulations appear to be aimed at curbstones—those who rent small-scale facilities for the highly specialized services they offer. Id. at 113-14. The judge in Heffner, characterized the actions of the state board as "constitut[ing] nothing more than thinly-veiled attempts to maintain the status quo for established funeral directors and their families." Heffner v. Murphy, 866 F. Supp. 2d 358, 429 (M.D. Pa. 2012).

\(^{254}\) 1978 FINAL STAFF REPORT, supra note 44, at 102.

\(^{255}\) Id. at 104.
industry interests are sometimes placed ahead of consumer interests, especially when the underlying goal is to stifle competition.

B. Demand Inducement

In a practical sense, demand inducement captures the manipulation and exploitation of consumers warned of by Mitford and the FTC. Harrington attempted to quantify this behavior by defining demand inducement as the selling of more funeral goods and services than necessary, the extra cost of which is not justified by the marginal benefits provided to the consumer. By examining the correlation between Ready-to-Embalm laws and cremation rates, Harrington concluded that demand inducement can be observed in the states. Harrington divided states according to the presence or absence of Ready-to-Embalm regulations. By isolating factors such as income, national origin, age, educational level, religion, and race, potentially distorting socio-economic variables were eliminated so that the pure impact of state regulations on cremation data could be measured.

The results of the study indicate that state regulation of embalming has a statistically significant impact upon the consumer choice between cremation.
In 1990, the cremation rate was 16% less in Ready-to-Embalm markets, as the measured cremation rate was 12.1% in Ready-to-Embalm markets compared to 27.2% in other markets. Holding the socio-economic variables constant, this resulted in a 3.9% difference in the cremation rate attributable to the operation of Ready-to-Embalm laws. Further replications of this study using 2000 and 2005 industry data reveal that the distorting effect of state embalming regulations on the cremation rate appears to be increasing. The gap between regulated and unregulated states had grown to 16.24% in 2000 and increased to 17.1% in 2005. Holding the socio-economic factors constant, in 2005 an 8.5% reduction in the cremation rate is attributable to Ready-to-Embalm regulations. In sum, Ready-to-Embalm laws create an inefficient funeral market that results in far less cremations than would otherwise be observed.

The data is supported by the findings of the Bureau of Consumer Protection and the FTC. While the FTC was unable to estimate the extent of aggregate consumer injury that occurred due to demand inducement, it did note that the injury was likely to be "significant." Harrington, using 1990 industry data, estimated that the aggregate consumer injury was roughly $250 million. Replicating this calculation with 2005 industry data, the consumer injury had grown to a staggering $657 million. Simply put, the data indicates "state funeral regulations play a pivotal role in determining the amount of demand inducement."

---

264. Id. at 222.
265. Id. at 215.
266. Id.
267. See Harrington, Breathing Life, supra note 7, at 17; Harrington, Markets, supra note 7, at 201.
268. Harrington, Breathing Life, supra note 7, at 17.
269. Harrington, Markets, supra note 7, at 201. The measured rate of cremation was 26.7% in Ready-to-Embalm markets, compared to 43.8% in other markets. Id.
270. Id. at 204.
271. Id. at 208. Operating efficiently, the estimated amount of cremations that would have been observed was 539,396. Id. The amount of cremations actually observed was 450,398. Id. at 207. The difference is the inefficiency attributable to Ready-to-Embalm laws. Id. at 208.
272. See supra text accompanying note 49.
273. See supra text accompanying notes 43-47.
274. See supra text accompanying note 46.
275. See Harrington & Krynski, supra note 108, at 217. This was computed by multiplying the sum of the products of the estimated embalming coefficients and the number of deaths in states with the corresponding regulations by the difference in the average funeral expenditures on burials and cremations. Id at 217 n.59.
277. Harrington & Krynski, supra note 7, at 223; see Harrington, Breathing Life, supra note 7, at 17.
Evidence of the type of the unscrupulous behavior that the FTC sought to avoid and critics such as Mitford attempted to expose, the data indicates that funeral providers will protect the bottom line by persuading consumers to choose more lucrative services. In regulated states a 1% growth of the market resulted in a .4% increase in the overall cremation rate, whereas a 1% contraction of the market created a 1.1% decrease in the cremation rate. The sharper effect on the cremation rate in a contracting market suggests that funeral providers are more aggressively inducing consumers towards more lucrative product offerings when profitability is threatened.

The apparent correlation between industry profitability and demand inducement is alarming given the challenges faced by funeral homes in a cremation-dominated market. Cremations are a much weaker revenue source compared to traditional burials. As a result, the cremation trend creates a massive profit challenge for an industry that operates with large fixed expenses. The challenges presented by the increase in cremation have impacted industry balance sheets in recent decades, as overall industry profit margins have shrunk. In fact, this represents the top concern amongst practitioners, who rated the increase in cremations and decrease in traditional burials as the two most negative changes affecting the industry. Embracing the cremation trend is critical to the long term survival of each

278. See supra text accompanying notes 43-47
279. See supra text accompanying note 29.
281. Id. In contrast, in markets without Ready-to-Embalm laws the change in size of the funeral market had no significant impact on the cremation rate. Id.
282. Id.
283. WHITTAKER, supra note 114, at 12.
284. See SERV. CORP. INT’L, ANNUAL REPORT 12 (2010) (“The continuing upward trend in the number of cremations performed in North America could result in lower revenues and gross profit.”); CARRIAGE SERVS., INC., QUARTERLY REPORT 21 (2010) (“The average revenue per contract is influenced by the mix of traditional burial and cremation services because our average cremation service revenue is approximately one-third of the average revenue earned from a traditional burial service.”).
285. See, e.g., SERV. CORP. INT’L, supra note 284, at 12 (“[T]he funeral home and cemetery businesses are high fixed-cost businesses.”); CARRIAGE SERVS., INC., supra note 284, at 21 (“Funeral homes have a relatively fixed cost structure. Thus, small changes in revenues, up or down, normally cause significant changes to our profitability.”).
286. Daniel M. Isard, The Need for Consensus, DIRECTOR, Jan. 2012, at 32 (finding average profit profits have shrunk from 15% in 1984 to about 6% in 2011). Profit is decreasing because “providing for a cremation consumer bears as much overhead as providing for a burial consumer. Id.
287. Issues and Changes in the Industry, supra note 157, at 42. The leading two responses represented 52% of all responses, with cremations reported by 27% of respondents, and the decrease in full services reported by 32% of respondents. Id. Proving the importance of these issues, the third most common response, unfair competition, was reported by only 9% of respondents. Id.
funeral home in this evolving industry, as "'[c]remation-seeking families . . . constitute a market force'" that must be dealt with profitably.\textsuperscript{288} However, in the short term, firms must find ways to reduce overhead, including labor and facility costs.\textsuperscript{289} In an industry where the popularity of a less lucrative product offering is squeezing profit margins, the economic incentive for funeral directors to aggressively influence consumers towards traditional burials cannot be ignored.\textsuperscript{290}

C. Restricting Cultural and Religious Access to the Industry

Commensurate with the greater incorporation of international burial customs in the American funeral service,\textsuperscript{291} the number of foreign-born funeral directors is rising.\textsuperscript{292} However, Ready-to-Embalm laws have stunted the growth of foreign-born funeral directors.\textsuperscript{293} Using Census data from 1990 and 2000, Harrington observed that the percentage of funeral directors that were foreign-born had stagnated in states with Ready-to-Embalm laws.\textsuperscript{294} Meanwhile, in states without Ready-to-Embalm schemes, the percentage of foreign-born funeral directors nearly doubled during the ten-year period.\textsuperscript{295} Harrington concluded the difference is not attributable to a greater increase in the foreign-born share of the population in states without Ready-to-Embalm laws because the difference in total population share was only one-third the size of the difference in the growth of foreign-born funeral directors between markets.\textsuperscript{296}

The constraints that these laws have on religious customs can be seen particularly with respect to members of the Jewish and Islamic faith, both of which forbid the use of embalming services.\textsuperscript{297} Members of these religions are effectively barred from obtaining licensure as a funeral director under a Ready-to-Embalm scheme.\textsuperscript{298} Thus, despite varying religious and interna-

\textsuperscript{288.} WHITAKER, supra note 114, at 12 (quoting Cremation Could Cost $27 Billion in Casket Sales: Suppliers to Offer More Cremation Products and Programs, AM. FUNERAL DIRECTOR, Nov. 1994, at 22).
\textsuperscript{289.} Id. at 11.
\textsuperscript{290.} Harrington & Krynski, supra note 108, at 222; see supra Subsection 1.B.2.a.
\textsuperscript{291.} See supra text accompanying notes 174-77.
\textsuperscript{292.} Harrington, Markets, supra note 7, at 213; see supra text accompanying note 178.
\textsuperscript{293.} Harrington, Markets, supra note 7, at 213.
\textsuperscript{294.} Id. The percentage of foreign-born funeral directors rose from 1.24% to 1.40% over the ten year period. Id.
\textsuperscript{295.} Id. The percentage of foreign-born funeral directors increased from 2.29% to 4.58%. Id.
\textsuperscript{296.} Id. at 213-14.
\textsuperscript{297.} See supra text accompanying note 184.
\textsuperscript{298.} See Harrington, Markets, supra note 7, at 214; see supra text accompanying note 128.
tional attitudes regarding embalming, Ready-to-Embalm laws allow for little flexibility for the increasing amount of funeral homes seeking to exclusively serve particular ethnic and religious communities. The inherent restriction that a Ready-to-Embalm scheme creates on religious access to the industry was enough for Maryland to abandon its Ready-to-Embalm scheme in 2007.

D. The Public Health Myth: Deconstructing the Justification for Regulation

Ready-to-Embalm laws are rooted in an era when traditional burials were the dominant market offering. The foundation for licensing funeral homes and funeral directors was born out of the reality of the industry as it existed during that time. Technological limitations, the lack of formal training and direction of the funeral industry, and the use of dangerous chemicals inside the deceased's home spurred the need for states to begin considering licensure of embalmers. Combined with the general sanitary reform and the myth of lethal graveyards, industry trade associations seeking professional status were able to characterize embalming as necessary to preserve the public health. Proponents of Ready-to-Embalm laws continue to call upon these historical justifications by asserting that it would not be in the interests of the public health in having funeral homes incapable of embalming.

However, as the potential health risk of un-embalmed bodies has been understood, it has become clear that there is no public health interest served by embalming. It is widely accepted by medical professionals that an un-

299. See supra text accompanying note 177.
300. See supra text accompanying note 96-99.
301. FUNERAL DIRECTORS AND EMBALMERS, supra note 137, at 27. For example, Arizona's funeral establishment statute was enacted in 1945, during which time cremation only accounted for 3.72% of dispositions. CREMATION ASS'N OF N. AM., supra note 163.
302. See supra text accompanying note 100.
303. See supra text accompanying notes 89-99.
304. See supra text accompanying notes 98-99.
305. See supra text accompanying note 99.
306. See supra text accompanying note 143. Trade associations such as the NFDA regularly perpetuate this myth, as exemplified in its Consumer Education Series Brochure where it asserted the "foremost reason for embalming is the protection of public health." JOSHUA SLOCUM & LISA CARLSON, FINAL RIGHTS: RECLAIMING THE AMERICAN WAY OF DEATH 63 (2011). The Minnesota Funeral Directors Association (MFDA), in opposition to a 2010 legislative change, relied on a public health interest argument. Id. at 62. The Director of the Center for Infectious Disease Research and Policy at the University of Minnesota concluded that the MFDA's argument was merely "scare tactics" that was "simply without scientific merit." Id. at 62-63.
307. SLOCUM & CARLSON, supra note 306, at 63 ("[T]here is no genuine controversy—it's a scientific fact that dead bodies do not pose a health to anyone except in very rare cases."); 1978 FINAL STAFF REPORT, supra note 44, at 111 ("It appears that the necessity and
embalmed body does not pose a general health risk to the public. In fact, no state requires embalming for public viewing and, except in certain limited circumstances, embalming is done almost entirely for aesthetic reasons. Even the United States Centers for Disease Control notes that "[w]e have not at any point prescribed embalming as a method of protecting public health." The lack of any public health interest served in licensure was the basis of some early court decisions striking down Ready-to-Embalm schemes and, more recently, it served as the basis for the complete deregulation of the Colorado funeral industry. Thus, though a valid regulatory interest exists in ensuring the health of those actually embalming, there are no public health consequences at stake to justify the sweepiness of embalming as a sanitary and public health measure have been considerably exaggerated.").

308. Dead Bodies and Disease: The "Danger" That Doesn't Exist, FUNERAL CONSUMERS ALLIANCE (Jan. 29, 2008), http://www.funerals.org/frequently-asked-questions/environment/142-embalming-myths-facts (quoting Dr. Lakshmanan Sathyavagiswaran, Chief Medical Examiner of Los Angeles, as saying: "To refuse to present a body unembalmed because of public health risk is unfounded").

309. Minnesota was the last state to require that embalming occur on bodies subject to public viewing. This requirement was eliminated in 2010. 2010 H.F. 3151, 86th Leg., Reg. Sess. (Minn. 2010).

310. Funeral Regulations in North America, ISLAMIC SOC'Y OF N. AM., http://www.isna.net/Services/pages/Funeral-Regulations-in-North-America.aspx (last visited Jan. 20, 2013). These circumstances are generally when the body is subject to interstate transit, to prevent the spread of highly communicable diseases, or when there is a long delay between death and the final disposition of the body. Id.

311. See id.


313. See supra text accompanying notes 120-25.

314. 1978 FINAL STAFF REPORT, supra note 44, at 110. In 1982, the Colorado Department of Regulatory Agencies concluded that "there is no actual health threat associated with the disposition of dead human bodies." Id. Lobbying efforts from a state industry association has resulted in some interim legislative changes, such as a 2009 change that required funeral homes to be registered with the state. U.S. GOV'T ACCOUNTABILITY OFFICE, GA0-12-65, DEATH SERVICES: STATE REGULATION OF THE DEATH CARE INDUSTRY VARIES AND OFFICIALS HAVE MIXED VIEWS ON NEED FOR FURTHER FEDERAL INVOLVEMENT 34 (2011).

315. For example, the modern embalming process subjects the embalmer to possible health risks from inhalation and direct contact with hazardous chemicals such as formaldehyde, phenol, and ammonia. See generally MAYER, supra note 76, at 42, 60-65. These risks can be minimized with proper ventilation, temperature controls, and training. Id. at 42-43. On this basis, the licensing of embalming is proper to protect the health of the embalmer operating under such hazards. Id. To put it simply, there is a valid interest in licensing individuals actually conducting embalming activities, but that interest does not extend to those who will not embalm.
ing mandate that all funeral homes and funeral directors be licensed to embalm. 316

Unwilling to address the fact that embalming is used extremely rarely as a means of protecting the public, Ready-to-Embalm proponents have merely broadened their conception of the public health interest. 317 One state licensing agency has suggested that the public health interest includes the consumer’s fundamental choice of care. 318 Consumers expect embalming to be available at every funeral home and requiring facilities and funeral directors to be ready to embalm is necessary to protect that interest. 319

The dynamics of the modern funeral industry exposes this paternalistic position. 320 The typical funeral consumer is intimately familiar with the funeral home and its services prior to making any at-need purchase. 321 Highlighting this familiarity, consumer surveys indicate that the two leading reasons for selecting funeral homes are knowledge of the funeral director and previous experiences with the funeral home. 322 A separate study also confirms that consumers pay close attention to the overall facilities of the funeral home prior to any arrangements. 323 Even those unfamiliar with the particular funeral home are likely to be well informed of the services and facilities offered by the funeral home prior to any arrangements. 324 Moreover, with pre-need planning increasing in popularity, 325 many consumers are

316.  See, e.g., Morgan, supra note 98, at 310; Heffner v. Murphy, 866 F. Supp. 2d 358, 401 n.23 (M.D. Pa. 2012) (discussing the presumption that a statutory scheme that refuses to allow for centralized facilities ignores “the realities of business, commerce, and modern transportation modalities . . . [and] presume[s] the handling of dead bodies in a manner more consistent with the practices of the nineteenth century than those of the twenty-first century”).

317.  See supra text accompanying note 145.

318.  See supra text accompanying note 144.

319.  See supra text accompanying note 144.

320.  See McChesney, supra note 218, at 27-29 tbl.3A.

321.  See id.

322.  Id. at 27. Consumers were surveyed regarding the “single most important reason” for selecting the funeral home. Id. Personal knowledge of the funeral director was the most important factor in 38% of responses, while prior experience with the firm was the most important reason in 30% of responses. Id. A separate study performed by Northwestern University produced similar results, as the most important factor in selecting a funeral home was the prior experience with the funeral home. Id. at 29 tbl.3C.

323.  Id. at 43 tbl.10A. Consumers were asked to measure the importance of various factors on a scale of 1 to 10, with 10 being the most important. Id. The rating for “Facilities” was rated at 8.44. Id.

324.  Id. at 32 tbl.4B. Consumers were asked: “Prior to your discussing the details of the funeral you arranged, did the funeral director explain to you the choices of services, facilities and merchandise available?” Ninety percent of consumers responded with “yes.” Id. Of the affirmative responses, 99% felt the explanation was satisfactory. Id.

making arrangements with funeral homes in advance of their own death.326 Thus, even if consumer knowledge of the legal technicalities of the Rule remains low,327 consumers are likely well aware of the services offered by the funeral home.328

As evidenced by Harrington's studies, Ready-to-Embalm laws are having an anticompetitive impact while simultaneously frustrating the trends occurring within in the modern funeral market.329 With the massive consumer injuries created by these regulations,330 retention of a Ready-to-Embalm scheme makes little sense, especially considering the modern scientific knowledge regarding the necessity of embalming.331 Thus, funeral providers and their consumers will benefit greatly from some long overdue changes in Ready-to-Embalm markets.

III. BRINGING LIFE BACK INTO THE INDUSTRY

With the inadequacy of Ready-to-Embalm laws in the modern market fully explored, it is necessary to discuss the alternatives and examine why they are superior in the modern funeral climate. Conceptually, instead of requiring adherence to a strict regulatory scheme, the premise of the alternatives proposed here is to allow funeral homes to make rational profit decisions within the demands of the evolving modern market. This flexibility, however, must be counterbalanced alongside the state's own legitimate regulatory interest in ensuring the health of those actually performing embalming.332 Balancing these competing interests, the functional impact of the alternatives is that state regulation is proper when embalming will actually be performed; deciding on offering embalming services, however, is a business decision that should be left to the funeral home or funeral director. Consequently, states should repeal their Ready-to-Embalm laws and create dual licenses for funeral directors and morticians and amend their embalming room requirement to allow for exemptions when on-site embalming will not be performed.

326. AARP, FUNERAL AND BURIAL PLANNERS SURVEY (Nov. 2007), available at http://assets.aarp.org/rgcenter/consume/funeral_survey.pdf. Responding to an American Association of Retired Persons (AARP) survey, 34% of respondents reporting having pre-planned a funeral. Id. It is estimated that 29.5 million people aged fifty and older have pre-planned their funeral. Id. at 1.
328. See McChesney, supra note 218, at 27 tbl.3A.
329. See supra Sections II.A-C.
330. See supra text accompanying notes 274-77.
331. See supra Section II.D.
332. See supra note 315 and accompanying text.
A. Dual Licensing

A dual licensing structure in the funeral industry refers to the separation of licenses between funeral directors and morticians. With respect to the scope of the duties granted under each license, the licenses should be functionally equivalent except for the authority to perform embalming. While the qualifications for obtaining the licenses are a matter for each state to decide, a state may not disguise a Ready-to-Embalm scheme by conditioning the funeral director’s license on having previously held the morti-

333. The following presents a basic skeleton of the following proposal:

(1) Only individuals possessing a mortician’s license or funeral director’s license may lawfully engage in the practice of mortuary science or funeral direction within this state: (a) A mortician’s license issued by the board authorizes the licensee to practice mortuary science while the license is effective; (b) A funeral director’s license issued by the Board authorizes the licensee to practice funeral direction while the license is effective.

(2) Definitions: (a) Practice of Funeral Direction. (i) The practice of funeral direction means: (A) To own and operate a funeral establishment; (B) For compensation, to prepare a dead human body for disposition; or (C) For compensation, to arrange for or make final disposition of a dead human body; (ii) The practice of funeral direction does not include: (A) The practice of embalming a dead human body; (b) Practice of Mortuary Science. (i) The practice of mortuary science means: (A) The practice of funeral direction; and (B) Practice of Mortuary Science.

334. See supra text accompanying note 114-15. There is varying terminology amongst the states in referring to these licenses. As used in this discussion, a funeral director’s license refers to a license that does not allow the licensee to practice embalming, while a mortician’s license allows the licensee to perform embalming.

335. In Maryland, both licenses are authorized to engage in the “practice of funeral direction” which includes the operation of the funeral home, the preparation of a dead human body for disposition, or to arrange for the final disposition of the body. § 7-101(t)(1). Funeral direction does not include embalming; consequently, the only difference between the licenses is the ability to embalm. Id. § 7-101(0)(2).

336. For an example of the extremes that exist in educational requirements between a funeral director’s license and mortician’s license, consider the approaches of Kansas and Wyoming. Kansas requires as a prerequisite for an embalming license that the licensee obtain an associate degree in mortuary science from a community college, college or university with a degree program approved by the board. KAN. STAT. ANN. § 65-1701a(a) (2011). To obtain a funeral director’s license the individual must have completed sixty credit hours from any accredited community college or university, with twenty credit hours earned in subjects designated by the state board, along with having one year of working full-time under a Kansas licensed funeral director. Id. § 65-1714(b). In Wyoming, an applicant for an embalming license must complete one year of college, have one year of training under a licensed embalmer, complete a twelve month course at a college of embalming, and have embalmed twenty-five bodies. WYO. STAT. ANN. § 33-16-101(d) (2011). However, the funeral director’s license has no educational requirement and, instead, only requires the applicant to be “an adult and of good character.” Id. § 33-16-303(a).
cian's license. To put it simply, an individual licensed to practice mortuary science may perform embalming while an individual licensed to practice funeral direction may not.

The benefits of a dual licensing structure will be manifested amongst the current trends in the market. Primarily, this approach is responsive to the increasing popularity of cremations because it allows for funeral directors to specialize in serving this growing market segment. Moreover, as cremations continue to challenge funeral home balance sheets, it provides an opportunity for a reduction in overhead in the form of reduced labor costs. With the median salary of a mortician being $8,800 greater than the median salary of a funeral director, a dual licensing structure allows funeral homes to manage staff more efficiently. A dual licensing structure also removes the inherent barriers to religious and cultural access that are present in a Ready-to-Embalm scheme, thereby allowing for greater access to the industry for non-traditional practitioners.

The attractiveness of this type of licensing structure is magnified by the ease with which it can be implemented. Any argument that implementation would be unmanageable or would place a prohibitive administrative burden on existing state licensing agencies is unsupported by the records of states that have already addressed this issue. In Maryland, the existing

337. See ARIZ. REV. STAT. ANN. § 32-1322(C)(4) (2007). Arizona’s dual licensing system is an example of a cloaked Ready-to-Embalm scheme because one qualification for licensure as a funeral director is having obtained an embalmer’s license. Id. Maryland expressly forbids such a qualification by noting in its license qualifications statute that “[f]or an individual applying for a license to practice funeral direction, the practical examination qualification . . . may not include demonstrating competency in embalming.” § 7-303(c).


339. See supra Subsection 1.B.2.a

340. See supra text accompanying note 288; WHITTAKER, supra note 114, at 11 (noting that, because conglomerates can use their purchasing power to command large discounts from suppliers and pool resources amongst firm clusters, small firms “could be placed under even greater pressure to economize in other areas such as[s] labor costs”).

341. NFDA Releases Results of 2010 Member Compensation Survey, NAT’L FUNERAL DIRS. ASS’N (Dec. 28, 2010), http://www.nfda.org/news-a-events/all-press-releases/2289-nfda-releases-results-of-2010-member-compensation-survey.html. The mean salary for a funeral director not trained to embalm is $38,000, while the mean salary for a mortician is $46,800. Id.

342. This can be illustrated by the following conceptual example: Assume the embalming, cremation, and general demand for funeral services dictates that the funeral home needs a staff of six to operate efficiently. In a Ready-to-Embalm scheme, all six employees will be trained to embalm and will command a higher salary. However, if the actual demand for embalming could be met with just one of those employees being licensed to embalm, the labor costs of the funeral home are inefficient and the funeral home could have reduced labor costs by employing more funeral directors.

343. See supra text accompanying notes 178-85.

344. See supra text accompanying note 128.

345. See supra text accompanying notes 126-31.
state licensing board simply absorbed the administration of the newly created funeral director’s license.\textsuperscript{346} In fact, while noting the “[p]otential[ly] meaningful” impact on small business, the Maryland legislature concluded that the additional costs for administration would be minimal.\textsuperscript{347} Most importantly, the implementation of a dual licensing structure does not compromise existing regulations because a funeral director’s license can be created in such a way so as to require no modification to a pre-existing embalming license.\textsuperscript{348} Thus, a dual licensing structure provides flexibility to funeral practitioners operating in an evolving market, can be easily implemented and administered, and better approximates the current consumer culture.

B. Hybrid Embalming Room Proposal

As demonstrated by the approaches of Ohio\textsuperscript{349} and Indiana,\textsuperscript{350} alternatives to the strict embalming room requirement already exist. However, in states such as Arizona, where consumer protectionism appears to be valued over market efficiency, changes to a Ready-to-Embalm scheme are likely to be met with great reluctance.\textsuperscript{351} Nevertheless, it is possible to use existing approaches to craft a comprehensive plan that is responsive to the prevailing trends within the industry while simultaneously recognizing the state’s regulatory interest. Specifically, the proposal outlined here utilizes elements of the Arizona Auditor General’s recommendation,\textsuperscript{352} Indiana’s access exemption,\textsuperscript{353} and Ohio’s holding room requirement.\textsuperscript{354}


\textsuperscript{347} Id. at 1.

\textsuperscript{348} See supra text accompanying note 130.

\textsuperscript{349} OHIO REV. CODE ANN. § 4717.06(B)(2)(b) (LexisNexis 2011).

\textsuperscript{350} 832 IND. ADMIN. CODE 5-1-4(b) (2012).

\textsuperscript{351} See Letter from Rodolfo R. Thomas to Debra K. Davenport, supra note 142, at 2-6.

\textsuperscript{352} The Auditor General’s proposal was outlined as follows: The Legislature should consider modifying [the embalming room requirement] by requiring that any establishment that offers embalming must have a preparation room or access to one. Having access to a preparation room could mean access to another establishment under the same ownership or a contractual agreement with another funeral establishment. Establishments that do not offer embalming would not be subject to this requirement.

\textsuperscript{353} The relevant portion of the Indiana rule provides: (a) The issuance of a funeral home license and the continued use thereof shall depend among other things on compliance with this section, section 3 of this rule [832 IAC 5-1-3], and the Indiana Plumbing Code, 675 IAC 16.
Under this plan, for funeral establishments that offer embalming services to consumers, either an on-site embalming room must be present or

(b) All funeral homes must be equipped with a fully functional embalming room on the premises of the funeral home. However, persons who own and operate more than one (1) funeral home in a county or adjoining counties may designate one (1) embalming room in one (1) of those funeral homes as the sole embalming room for all of its funeral homes in that county or those adjoining counties. Any funeral home which does not have an embalming room under the provisions of this subsection must notify the board in writing, as to the location of its embalming room, prior to operating a funeral home without an embalming room. In no case may the embalming room for the funeral home be located anywhere other than in the county where the funeral home is located or in an adjoining county.

Ohio REV. CODE ANN. § 4717.06(B).

The model statutory construction of this plan is as follows:

(1) A funeral home shall have, either on its business premises or by demonstrating access to, the following: (a) For funeral homes that offers embalming services, an "adequate embalming room." (b) For funeral homes that do not offer embalming services, an "adequate holding room."

(2) A funeral home can demonstrate access to an embalming room or holding room by submitting a written application to the board disclosing the location of the embalming room or holding room and complying with either of the following: (a) Demonstrating control or ownership of one funeral home in a county or adjoining counties and designating one embalming room or holding room in one of those funeral homes as the sole embalming room or holding room for all of its funeral homes in that county or those adjoining counties; or (b) Demonstrating a written contract exists for the use of the embalming room or holding room with another off-site funeral home licensed by the board, provided the off-site funeral home is located within the same county or within an adjoining county.

(3) Definitions: (a) An adequate embalming room is a room that is kept in a clean and sanitary condition and used only for the embalming, preparation, or holding of dead human bodies. An embalming room shall contain only the articles, facilities, and instruments necessary for these purposes. (b) An adequate holding room is a room that is kept in a clean and sanitary condition and used only for the preparation, other than embalming, and holding of dead human bodies. The holding room shall contain only the articles and facilities necessary for these purposes.
the funeral home must demonstrate access to an embalming room. If a funeral home does not offer embalming services to consumers, then the funeral home is not subject to the requirement for an embalming room. Instead, the funeral home must either have an on-site holding room or demonstrate access to a holding room. Funeral homes can demonstrate access to an embalming room or holding room by contracting with other funeral homes for the use of the facilities when needed, or a funeral home might demonstrate common ownership between multiple locations. Practical geographical limitations could be set to limit the distance between a funeral home and its off-site embalming or holding room.

The principal feature of this proposal is the elimination of the mandatory embalming room for firms not offering embalming services to consumers. The holding room requirement allows funeral homes to rid themselves of underutilized embalming facilities as they transition into a predominantly cremation-based market. The alternative for a holding room is not only a practical solution, given the trend of cremation, but also necessary because many states require a certain period of time to elapse between death and the subsequent cremation of the body. Moreover, a holding room alternative is more receptive to the internationalization of funeral customs and the prospect of ethnic and religious-specific funeral homes.

By allowing funeral homes to satisfy the embalming and holding room requirement through off-site facilities, this proposal encourages centralization of facilities while alleviating the barrier to competition inherent in a

See 832 IND. ADMIN. CODE 5-1-4; FUNERAL DIRECTORS AND EMBALMERS, supra note 137, at 27; see also § 4717.06.

356. See 832 IND. ADMIN. CODE 5-1-4(b).
357. See FUNERAL DIRECTORS AND EMBALMERS, supra note 137, at 27.
358. See § 4717.06(B)(2)(b).
359. See FUNERAL DIRECTORS AND EMBALMERS, supra note 137, at 27.
360. See id.
361. See 832 IND. ADMIN. CODE 5-1-4(b).
362. See FUNERAL DIRECTORS AND EMBALMERS, supra note 137, at 27.
363. See supra Subsection I.B.2.a.
364. See supra Subsection I.B.2.a.
365. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 49.25 (West 2011) (requiring forty-eight hours to elapse between the death and cremation of the decedent, unless the death was caused by "the pestilential diseases of Asiatic cholera, bubonic plague, typhus fever, or small pox," or unless otherwise approved in writing by the medical examiner); FLA. STAT. ANN. § 872.03 (2012) (making it a misdemeanor of the second degree to cremate a dead human body prior to the expiration of forty-eight hours after the death of the body).
366. See supra Subsection I.B.2.b.
367. For example, Jewish and Muslim funeral homes would not be required to maintain an expensive embalming room that would almost never be used. Instead, the funeral home would only be required to maintain access to a holding room where the body would undergo its pre-burial preparations.
368. See 832 IND. ADMIN. CODE 5-1-4(b) (2011).
pure Ready-to-Embalm scheme. This promotes greater cost efficiency in the market and allows corporate chains to share resources and facilities amongst firm clusters and local funeral home owners to centralize facilities in local markets. Because experience dictates that funeral consumers are price-sensitive, the greater cost efficiency will encourage funeral homes to create market advantages on the basis of price. Thus, by lessening the initial fixed cost investment for market entry, this proposal alleviates the "striking absence" of price competition observed in some markets. The infusion of competition should provide modest benefits to consumers as market prices trend towards price levels observed in unregulated markets. Some critics have suggested that this type of exemption creates a risk that problems on an embalmed body cannot be expeditiously solved after it is transferred to a funeral home that lacks embalming facilities. However, the geographical limitation built into this proposal ameliorates this concern by ensuring that facilities will not be so remotely located as to create this issue.

An overwhelming amount of evidence indicates that the national attitude towards funeral custom is shifting radically. Looking beyond the arguments offered by self-interested licensing agencies, continued retention of a Ready-to-Embalm scheme is puzzling. The dual licensing proposal and hybrid embalming room proposal better approximate the needs of consumers and practitioners in the current market without compromising established licensing goals of ensuring the health and preparedness of embalmers.

369. See Funeral Directors and Embalmers, supra note 137, at 47 ("[The] embalming preparation room requirement is costly and acts as a barrier to new competition.").
370. See supra text accompanying notes 189-90.
371. See supra text accompanying notes 198-99.
372. See supra text accompanying note 199.
373. See Harrington, Markets, supra note 7, at 204.
375. See supra text accompanying notes 232-44.
376. See Funeral Directors and Embalmers, supra note 137, at 47.
377. See 832 Ind. Admin. Code 5-1-4(b) (2011) (using adjacent county lines to limit scope of off-site funeral homes). A similar limitation can be seen in Oregon, which requires that a funeral establishment have access to a mortuary or hospital refrigeration unit that is no more than 45 minutes away from the licensed facility. OR. ADMIN. R. 830-040-0020(6) (2011).
378. See supra Subsection I.B.2.
379. See supra text accompanying notes 252-64.
CONCLUSION

The policies underlying the formation of Ready-to-Embalm laws were representative of the needs of the early-twentieth century funeral industry. 380 Intervening value shifts in funeral consumer behavior 381 and a better understanding of the health consequences of an un-embalmed body 382 have eroded the continued justification for these regulations. The inadequacy of the rigid mandates imposed by Ready-to-Embalm laws can be seen in nearly every major trend in the modern market—they inhibit the growth of cremation, 383 discourage centralization, 384 and create barriers for religious access to the industry. 385 Worse yet, these laws encourage the same unscrupulous practices that The Funeral Rule was designed to prevent 386 and create massive consumer injuries. 387 Thus, just as American funeral culture has evolved, so too must these archaic state regulations.

380. See supra Subsection I.B.1.a.  
381. See supra Subsection I.B.2.  
382. See supra Section II.D.  
383. See supra Section II.B.  
384. See supra text accompanying notes 244-51.  
385. See supra Subsection I.B.2.b.  
386. See supra Section II.B.  
387. See supra text accompanying notes 234-38.