

FOREWORD

THE DEATH CARE REVOLUTION

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We are in the midst of a death care revolution, and most people don't even know it. American cultural practices surrounding the memorialization and disposition of our dead are changing at an astonishing rate. As a result, the funeral services industry and the system of laws that govern it are being challenged. I often describe our changing consumer preferences as an irresistible force headed towards an inevitable confrontation with an immovable object, an entrenched industry created by a rigid occupational licensing regime.

The Disrupting the Death Care Paradigm Symposium sponsored by the *Wake Forest Journal of Law & Policy* took place at the Wake Forest University School of Law on February 24, 2017. It was an unprecedented gathering focused on the very active legal, political and grassroots challenges to the dominant paradigm of death care in this country. There are two main fronts of challenge to the existing paradigm: first, from those primarily concerned with the market-disruptive power of the occupational licensing regime that shapes the funeral industry, and second, from those primarily concerned with promoting new methods of memorialization and disposition.

The morning session of the Symposium addressed the first front, the challenges to the regulation of the funeral industry. Each of the morning's speakers contributed an article to this volume.

In my article entitled *Regulated to Death*, I set the stage for the discussion by arguing that the economic model of the funeral industry is unsustainable, ironically because of the restraints imposed by the protectionist occupational licensing regime that created it. Expensive barriers to entry are predicated on the assumption that all human remains will be embalmed. That is

increasingly untrue, undermining the rationale of the occupational licensing regime.

David E. Harrington, who holds the Himmelright Professorship in Economics at Kenyon College and has extensively studied the economics of the American funeral industry, together with his co-author Jaret Treber, Associate Professor at Kenyon College, have contributed an article entitled *Numbers Matter: Estimating the Cost of State Funeral Regulations*. Harrington and Treber make a significant contribution to legal scholarship and public policy with this article, presenting new data and methodically demonstrating the financial cost of particular aspects of the occupational licensing regime.

One of the consumers of Harrington's previous economic analyses of the funeral industry is Jeff Rows, a senior attorney with the Institute for Justice. Rows contributed an article entitled *Caskets and the Constitution: How a Simple Box Has Advanced Economic Liberty*. Rows explains that efforts to challenge the funeral industry's occupational licensing regime in court have resulted in a circuit split on a fundamental question of constitutional law: "may the government enact a law for the sole purpose of advancing private financial interests?" This is a question of increasing concern as occupational licensing regimes of all kinds proliferate and challengers attempt to fight back through the courts after receiving no relief from state legislatures, captured by the industries that they seek to regulate.

Switching focus from the state occupational licensing regimes to the federal government, Josh Slocum, the Executive Director of the Funeral Consumers Alliance addressed the Federal Trade Commission's regulation of the funeral industry in his article *The Funeral Rule: Where It Came From, Why It Matters, and How to Bring It to the 21st Century*. Harrington, Rows and I argue that state regulation of the funeral industry limits choice and increases costs for consumers; Slocum makes the case that the FTC Funeral Rule is a powerful tool for consumers and should be modernized to become more effective.

The afternoon session examined the grassroots challenges to the dominant paradigm of death care in the United States. That dominant paradigm was described by Jessica Mitford in 1963 as *The American Way of Death*. In *Jessica Mitford Was Wrong*, I argue that the central failures in Mitford's historically significant critique of the funeral industry were that she demonized the industry and

discounted the fact that many consumers wanted that model of death care. It was not, as she alleges, hoisted upon them by a predatory industry. In other words, I argue that Americans need to take responsibility for the system that has developed. If we want to change that system, we need to similarly take responsibility.

Lee Webster, the former President of the National Home Funeral Alliance and the Director of New Hampshire Funeral Resources, Education & Advocacy is one of the leading voices in the American funeral reform movement. In her article *Why Caring for Our Own Dead Is an Act of Social Justice*, Webster argues that “systems that have been in effect for a century are no longer working, requiring an overhaul that puts people at its core, people of all races, ethnicities, cultural mores and customs, and all economic means and spiritual convictions.” “This will take time and skill,” she cautions, “based on an open exchange of ideas that begins with a sense of fairness and equality.” Webster’s argument is powerful and a humanizing spin on the largely economic critiques presented in the morning session.

The final article contributed by a speaker from the afternoon session was written by Philip R. Olson, an Assistant Professor at the Department of Science and Technology in Society at Virginia Tech. In *Basic Cremation*, Olson describes “funerary alkaline hydrolysis” and the current private and public debates surrounding its legalization and implementation. The challenges are economic and rhetorical, but more deeply, Olson notes that the struggle is over our collective understanding of the “right” way to treat human remains and the roles that the law and the funeral industry should play in making essentially moral choices.

The Disrupting the Death Care Paradigm covered significant ground and generated important food for thought. I am grateful to the speakers who participated in the symposium and contributed articles to this volume. I am also grateful to Amy Cunningham of Fitting Tribute Funeral Services for speaking about her experience as a funeral entrepreneur in Brooklyn, and to Caitlin Doughty, funeral director at Undertaking LA, founder of The Order of the Good Death, and best-selling author, for kicking off the symposium with a provocative and inspiring presentation “I’m OK. Death’s OK.”

I am enormously grateful to Crissy Dixon, the former Editor in Chief of the *Journal*, for proposing this symposium; to Erica Oates, the Symposium Editor who organized the event; to

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the staff at Wake Forest University School of Law who implemented it; and to all of the leadership and staff of the *Journal* who worked so hard to make this event and this volume a reality.