A LEGISLATIVE HANDBOOK IN SUPPORT OF THE FAMILY

FAVORING THE FAMILY

FAMILY AS THE FUNDAMENTAL UNIT IN PUBLIC POLICY
# Table of Contents

**Introduction** .............................................................. 1

**Family as the Fundamental Unit in Child Welfare** ............. 13
   - The Purpose of the Child Welfare System
   - Expanded Mission, Inherent Conflicts
   - Brief Historical Perspective
   - Sound Principles to Guide Child Welfare Policy
   - Important Policy Options
   - Policy Recommendation
   - Model Legislation

**Family as the Fundamental Unit in Education** ............... 27
   - Parental Rights and Responsibilities in an Educational Context
   - The Key to Understanding the Question of Educational Authority
   - A Right to Education? No.
   - Politics and Power: The Roots of Coercive Education
   - "Coercion Equals Freedom" and the "Public Good"
   - Policy Background
   - Policy Recommendation
   - Model Legislation

**Family as the Fundamental Unit in Policy Making** .......... 59
   - Family Impact Statements in the Law
   - Rationales for Family Impact Statements
   - A "Functional" Model of the Family
   - A Normative Model of the Family
   - Defining "Family"
   - Building an Effective Policy
   - Policy Recommendation
   - Model Legislation

**Family as the Fundamental Unit in Marriage & Divorce** ...... 77
   - The Rise of No-Fault Divorce
   - The Legacy of No-Fault
   - Covenant Marriage
   - Other Reforms
   - Policy Recommendation
   - Model Legislation
# TABLE OF CONTENTS

**FAMILY AS THE FUNDAMENTAL UNIT IN CARING FOR OUR AGED** 87
- The Great Depression Hits the Family
- Assumptions Take on Life
- The Contradictions of Elder Care
- Will Reform Work?
- Policy Recommendation
- Model Legislation

**FAMILY AS THE FUNDAMENTAL UNIT IN COMMUNITY STANDARDS** 101
- Prosecuting Obscenity
- The Threshold of Controversy: Unprotected Expressions
- Is the Supreme Court Right?
- Another Reasonable Objection
- A Long Term Solution
- Policy Recommendation
- Model Legislation

**FAMILY AS THE FUNDAMENTAL UNIT IN child-bEARING** 117
- Dimished Love and the Fruit of Abortion Culture
- The Development of the “Right to Privacy” and Abortion
- Legal Deceptions
- Can Anything Be Done to Defend the Family in Abortion Policy?
- Policy Recommendation
- Model Legislation
- State Chart & Legislation Summary

**STATE CHART & LEGISLATION SUMMARY** 137

**ENDNOTES** 153
ABOUT THE SUTHERLAND INSTITUTE

The Sutherland Institute is an independent, non-profit, non-partisan public policy group. Our mission is to influence public policy in Utah. We seek lasting solutions to community problems in concert with community, business, and government.

The research program of the Institute focuses on the institutions of civil society - families, communities, voluntary associations, churches and other religious organizations, business enterprises, private initiatives - that are solving problems more effectively than large, centralized, bureaucratic government.

The Sutherland Institute is funded by private donations. The Institute is a 501 (c)(3) charitable organization; all contributions are tax deductible. The Institute neither solicits nor accepts government funds.

BOARD OF TRUSTEES

Gaylord K. Swim
Robert A. Alsop
Timothy A. Bridgewater
Jaren L. Davis
Maury J. Giles
James W. Jenkins
Darren Mansell
Paul T. Mero
Maxwell A. Miller
Daniel E. Witte

BOARD OF SCHOLARS

Larry M. Arnoldsen
Jay M. Bagley
Joe G. Baker
Kathryn O. Balmforth
Arthur G. Christesen
Bryce J. Christensen
Christopher Fawson
Terrance D. Olson
Steven Russell

www.sutherlandinstitute.org
ABOUT THE AUTHORS

Kathryn Ogden Balmforth is a partner at the law firm of Wood Crapo, L.L.C. She participated in the 1991 defense of Utah’s abortion statute. Ms. Balmforth spent three years as Director of the World Family Policy Center at Brigham Young University, where she worked to counter attacks on the family in international organizations, such as the United Nations. Mrs. Balmforth and her husband, David, have six children and thirteen grandchildren.


Arthur G. Christeian is a senior judge for the state of Utah. His prior positions include serving as a judge for the Third District Juvenile Court and the Third Circuit Court, Deputy State Court Administrator, Deputy Clerk of the United States Supreme Court and a Captain in the United States Air Force, JADG Department. Judge Christeian has taught advance courses for the National Judicial College, University of Utah, Graduate School of Social Work, and Brigham Young University. He has also served as President of the Utah Association of Circuit Court Judges, Chairman of the Board of Juvenile Court Judges, and Presiding Judge of the Third District Juvenile Court. Judge Christeian is married to Nelda Bohon Christeian. They have four children.

William C. Duncan is the executive director of the Marriage and Family Law Grant at the J. Reuben Clark Law School, Brigham Young University. He is also a consultant to the Marriage Law Project at the Columbus School of Law, The Catholic University of America. Mr. Duncan previously served as the acting director of the Marriage Law Project. He graduated from J. Reuben Clark Law School in 1998. He has also served as counsel to the Secretary of Education’s Commission on Opportunity in Athletics. Mr. Duncan has published numerous articles in legal journals and other publications on issues related to family law and policy and the constitution.

John L. Harmer is the president and CEO of Kanglaite-USA, a pharmaceutical company. He received his law degree from George Washington University and was later admitted to the bar of the United States Supreme Court. In 1966, he was elected to the California State Senate where he served until he was appointed as Lieutenant Governor of California by Governor Ronald Reagan. Following his public service in California, he represented clients in both domestic and foreign matters, negotiating contracts and agreements with government agencies in the United States, Europe, Asia, and India. Mr. Harmer is the author of five published works, which include Reagan: Man of Principle (2002) and A War We Must Win (1998). He is married to Carolyn Jonas. They are the parents of ten children.

Paul T. Mero currently serves as president of the Sutherland Institute. Before joining the Institute, Mr. Mero served as executive vice president of the Howard Center for Family, Religion, and Society in Rockford, Illinois. Mr. Mero spent over a decade working in Congress and on Capitol Hill. He began his public policy career as press secretary and legislative assistant to Congressman William E. Dannemeyer (R-CA). When Congressman Dannemeyer retired, Mr. Mero was asked to serve as the Legislative Director for an advocacy group called the Christian Action Network (CAN). He later joined Congressman Robert K. Dornan’s (R-CA) staff, first as a counselor and then becoming his Chief of Staff. In 1999, Mr. Mero served as the administrator and chief of staff for the second World Congress of Families meeting in Geneva, Switzerland. Mr. Mero received his B.A. in Public Policy from Brigham Young University. He and his wife, Sally, have six children.
Every public policy has a center point, or core, toward which a policy’s application is directed by certain underlying assumptions. Historically, competition for this center or core has been among five institutions: the individual, the family, the corporation, the church, and the state. In recent times a new contender, though not typically counted an institution, might be added: the environment. These six center points are at the heart of all public policies.

This rule is without exception: within every public policy is a center-point and behind every center point lay certain assumptions.

These collective assumptions represent specific mindsets, or ways of thinking about life. The state, with its coercive nature and legalistic structure, represents ordered man. The corporation represents economic man, while the church serves spiritual man. The environment does not represent man at all, only his surrounding and supporting world. The individual represents atomistic man. And the family, with its inherent familial duties and obligations, represents social man.

Only one of them, however, is a “fundamental” building block of society upon which all of these other institutions rest. That one center point is the family.

The family is prior to all other institutions and embodies the complete array of their services and collective purpose. Former Utah Supreme Court Justice Dallin H. Oaks once opined,

The rights inherent in family relationships – husband-wife, parent-child, and sibling – are the most obvious examples of rights retained by the people. They are “natural,” “intrinsic,” or “prior” in the sense that our Constitutions presuppose them, as
they presuppose the right to own and dispose of property.…

The integrity of the family and the parents’ inherent right and authority to rear their own children have been recognized as fundamental axioms of Anglo-American culture, presupposed by all our social, political, and legal institutions. “To protect the [individual] in his constitutionally guaranteed right to form and preserve the family is one of the basic principles for which organized government is established....” “The family is the basis of our society....” “The family entity is the core element upon which modern civilization is founded....”

This parental right transcends all property and economic rights. It is rooted not in state or federal statutory or constitutional law, to which it is logically and chronologically prior, but in nature and human instinct. (Re J.P., 648 P2d 1364 (Utah 1982)).

On this point we agree – family is a prior institution to all others and, as such, is the fundamental unit of society.

This same conclusion is drawn from our second point: the family institution embodies all of the positive qualities, characteristics, and services of the other five institutions. In fact, it can be said reasonably that the other institutions were created, in their purity, to support the family and now exist increasingly, in their excesses, in competition with the family.

Let’s briefly examine these relationships one by one.

**The Individual.** Families are comprised of individuals. Families give birth to individuals. It is not the other way around. In this case, the chicken precedes the egg. Families are autonomous and diverse
because individuals are. The strength of the family exists in its individual parts tied by familial bonds.

On the other hand, the atomistic individual is destructive to the family. The part cannot long survive without the whole. At the very least, the quality of life for the part without the whole is significantly diminished. The atomistic individual is driven by selfishness and will ultimately self-destruct. Duty and obligation guide the familial individual, ever tying familial bonds on which it can always rely for sustenance.

To promote the individual as the fundamental unit of society is to promote chaos and ultimately the authoritarian hand of state. The autonomy and diversity of the family buffers the individual from the state. Weaken the family and society’s natural order by promoting atomistic individualism and we invite the state to impose an unnatural order.

Furthermore, from a public policy view, the interests of the atomistic individual are not usually the interests of the family, especially regarding an array of social issues such as abortion, pornography, and gambling.

**The Corporation.** Families also gave birth to economic man. For millennia, the home economy was the only economy. But whether at home or later at the factory or now at the office, the economic building blocks of progress remain in the family. Broken homes, not broken jobs, are the number one cause of poverty in America.

The corporation, in representing economic man, has benefited families in several ways. Higher wages, job stability, and innovative products that make our lives more convenient are a few examples. Even so, the corporation challenges the family on several alternative fronts and has displaced many traditional functions of the home. Even obvious functions of the home, such as meals and childcare, are being supplied in plenty by corporations.
Promoting the corporation as the fundamental unit of society would reduce all human action to utility, and the value of human life would be greatly debased. The corporation does not recognize non-utilitarian value in human life or human activity. Whereas the family, while producing economic man, also protects, cherishes, and comforts non-economic man (i.e., the handicapped, the aged, the disabled, or the less fortunate among us) without any sense of reciprocal economic gain or utility.

**The Church.** The church continues to be the most faithful friend of the family. It, among all other institutions, was created with families in mind. Its mission is to lead people to God and it knows that the institution most able to create godly people is the family, hardly a mystery given that, as we appreciate the Genesis model, the family institution gave birth to the church and its mission.

But placing the church as the fundamental unit of society can have many detrimental effects. In the case of families, it puts the cart before the horse. In the case of society, it would steal moral agency required to be a godly people. In other words, by perverting the relationship, families would exist to serve the church and its mission to promote godly people thereby diminishing the moral agency of man. Family autonomy and diversity, the only true bulwark of freedom, would disappear with the essential freedom to choose to be a godly people. A mission to lead people to God could easily be transformed into a mission to drag people to God.

As a lone moral authority, the church also would immerse itself in the most detailed minutia of public policy were we to crown it the fundamental unit of society. Few states are more servile than theocracies such as rule in the Middle East and elsewhere.

**The Environment.** A great debate of the modern era is whether or not man is prior to nature. The human voice of nature, environmentalism, offers a resounding no to this question. This voice might respond that even the Genesis plan had environmental concerns preceding those of humans — a reasonable point.
However, another point not recognized by environmental ethicists, is that the intrinsic value of nature only derives that same value from man. Absent of man, nature lacks all value. In arguing for intrinsic value, some environmentalists act as self-appointed ambassadors for a constituency – whales, birds, trees, etc. – that no conceivable democracy could even enfranchise. Because democracy only enfranchises humans, environmentalism of this sort almost invariably ignores or distorts democracy.

There is no question that the family benefits from a robust and pure physical environment. But it is equally without question that quality of life is defined by much more than physical environment. Most importantly: quality of life is a distinctly human judgment and to look to our physical environment alone for that measure of quality is shortsighted and ultimately destructive to the many higher qualities of life we all seek.

To place the environment as the fundamental unit of society is to ignore the real purposes of life – purposes only defined by mankind. It seems odd to include the environment as one of the six “institutions” claiming the crown of fundamental unit. After all, its claims are independent of man. Only a universally politicized world could give such a claim any standing. We are so politicized today that even inanimate and non-human objects have rights. And here we see the evidences of how democracy becomes distorted within this thinking.

The State. Families living in community created the state. Social order and physical protection are necessary any time more than one family living in close proximity to another exists. In its purest form, the state is simply the institution created to protect people and deliberate and set the rules of community. It is a necessary function, not a necessary “evil,” and in its proper role is a sign of communal health and well being. Again, in its purest form, we implicitly recognize its family-derived authority.

But contrived outside of its proper role and functions, driven from purity to excess, the state can be an enemy to the family. And, in
fact, it has become that in many subtle ways. Even with good intentions (e.g., in the name of providing a “safety net” for society), the state has assumed more and more of the traditional functions of the family. The entire welfare system is exhibit A: feeding, clothing, caring, healing, counseling, housing, and providing are all family functions now assumed by the state in growing fashion. But the problem is more than this. The state now also assumes the role of educating children, arbitrating domestic disputes, rescuing children from unfit parents, regulating neighborhood standards, and providing cultural assets.

Moreover, of these six institutions, only one - the state - is empowered with coercive abilities. In this regard, an expanding state influence can not only become an enemy to the family but also can become an enemy to each of the other institutions.

To place the State as the fundamental unit of society, with its coercive abilities, is to potentially (perhaps inevitably) destroy every other institution of society. This idea was not lost on diabolical people such as Adolph Hitler and Josef Stalin.

The Family as the Fundamental Unit of Society

In 1953, conservative scholar Robert Nisbet published a seminal work, *The Quest for Community*. Written less than a decade after Hitler’s defeat in World War II, and amidst the seemingly interminable worldwide struggles of Stalin’s Cold War, Nisbet offered an explanation for the atrocities of their empires rooted in the displacement of family authority by state authority. If atomistic man, in his innate quest to belong to anything, is separated from his natural associations (e.g., family), he will search endlessly for unnatural associations (e.g., the state). Nisbet argued that both Hitler and Stalin, and all totalitarians of note in history, knew of this basic human urge to belong. They knew, he argues, that the state – the national community – could fill this yearning only if its competitors were first weakened or destroyed.
Individual *versus* State is as false an antithesis today as it ever was. The State grows on what it gives to the individual as it does on what it takes from competing social relationships – family, labor union, profession, local community, and church....

In these associations, lying intermediate to man and the State, to the worker and market society, lay the promise of both security and freedom – security within the solidarity of associations founded in response to genuine needs; freedom arising from the very diversity of association and from the relative autonomy these associations had with respect to central systems of law and administration.

These were the associations that Tocqueville saw, during his visit to the United States, as the real protections of personal liberty, the actual supports of parliamentary or representative government, and the major barriers to the peculiar and oppressive despotism he found latent in the democratic State (228, 236-37).

_Quest_ is perhaps the best scholarly treatment of the inevitable societal outcome when the state displaces the family as the fundamental unit of society. Simply put, with the state as our center point, freedom is lost and tyranny rules.

The primary lesson of _Quest_, within our current context, is that freedom requires and depends upon family as the fundamental unit of society.

Only through its intermediate relationships and authorities has any State ever achieved the balance between organization and personal freedom that is the condition of a creative and enduring culture. These relationships begin with the family.... They are the real sources of liberal democracy (238).
As A Practical Matter

The family is the lifeblood of society. If evidence of this point is needed, it abounds. Due to space considerations present in this handbook, we direct you to the amazing and abundant social science New Research collection of The Howard Center for Family, Religion, and Society in Rockford, Illinois (www.profam.org) as well as the D.C.-based Heritage Foundation’s Family and Society Database (www.heritage.org), expanding on The Howard Center’s groundbreaking archive.

There is nothing left to dispute: when the family is weakened in its essential role and function, so too is society. Just measure the growth of the welfare state since the 1960s, not only in terms of per capita dollar appropriations but also equally in terms of the expansion of state functions and services regarding family support. What functions and services are now offered by the state in place of those traditionally performed by families that were not offered 40 years ago?

One easy measure of this question is to isolate and closely examine the roles and functions of public schools. As the quintessential emissary of the state our public schools provide a clear picture of familial displacement. A child can now receive just about any form of care and attention at school as he can at home – day care, food, health care, coping and emotional advice, career planning, neighborhood service opportunities, entertainment, socialization, group morality, sexuality instruction and, of course, a basic education.

Many people applaud this growth and see its imposition not as displacing the family, but as a necessary support. But as author Robert Nisbet pointed out 50 years ago,

There is an optimistic apologetics that sees in this waning of the family’s institutional importance only the beneficent hand of Progress. We are told by certain psychologists and sociologists that, with its
loss of economic and legal functions, the family has been freed of all that is basically irrelevant to its “real” nature; that the true function of the family – the cultivation of affection, the shaping of personality, above all, the manufacture of “adjustment” – is now in a position to flourish illimitably, to the greater glory of man and society…. 

But… “people do not live together merely to be together. They live together to do something together.” To suppose that the present family, or any other group, can perpetually vitalize itself through some indwelling affectional tie, in the absence of concrete, perceived functions, is like supposing that the comradely ties of mutual aid which grow up incidentally in a military unit will long outlast a condition in which war is plainly and irrevocably banished…. 

In hard fact no social group [i.e., the family] will long survive the disappearance of its chief reasons for being, and these reasons are not, primarily, biological but institutional (54).

The institution of the family is just as important as the role of the family in society. When the state through coercive means, or any other competing institution, displaces or replaces the traditional functions of families (i.e., rearing children, feeding them, teaching them values, educating them, even providing for them, etc.), it helps to destroy essential allegiances and loyalties among family members. Moreover, it destroys the family’s reason for being.

Help to the Family through Public Policy

Public policy might not be able to single-handedly restore the essential roles of family members so necessary to a progressive and enduring civilization. However, it can serve to restore the institution
of the family so that these roles can flourish and be cherished. That is, public policy might not be able to make men and women cherish their roles as husbands and wives, mothers and fathers, but it can reduce the adverse pressures on home and family, thereby helping to unburden the very entity we rely on for progress and freedom.

This family policy handbook was created for that purpose: to re-enshrine the family as the fundamental unit of society.

The policies included in this handbook are not exhaustive of the entire field of policies that would help accomplish this task. For instance, tax policies favoring the family are extremely important issues. Those policies included here do, however, cut to the core of the problem faced by the family institution today. We touch on seven policies: child welfare and parental rights, education, family impact statements and a definition of the family, the aged, divorce, pornography, and abortion.

The first two issues, child welfare/parental rights and education, address the primary question of ultimate control of children. What institution has ultimate authority over children, the state or the family? The answer to these questions will determine, to a large degree, which institution we place at our center.

The next three issues, family impact statements/definition of the family, the aged, and divorce, address secondary questions about the direct effect of public policy on the family. How do our laws and regulations affect the family? Do our public policies tend to strengthen marriages and families or weaken them? The answer to these questions will determine to a large degree the priority we give the family in public policy.

The last two issues, pornography and abortion, address tertiary (but no less important) questions about public morality and its effect on the family. How do these issues affect the heart and soul of the family? How does their growing acceptance impact the essential existence of the family institution? And what are the nuances of public policy that balance our individual rights with our
intermediate responsibilities? The answer to these questions will help to determine to a large degree the moral fiber extant throughout society necessary to sustain the family.

A Family-Friendly State

On the one hand, it is our claim that any state legislature that passes all seven of the recommended polices in this handbook will be a true family-friendly state. On the other hand, it is not our claim that social and legal problems arising from these issues will go away. Our contention is only that the passage of these recommended policies will help to preserve the vital institution of the family as the fundamental unit of society, as these problems are inevitably addressed.

Each policy recommendation was drafted with simplicity in mind, both in content and realistic application. Each is specific in its request. Each is not necessarily ideal in nature. For instance, two issues – pornography and abortion – are constrained by judicial edicts; barring a complete overhaul of judicial opinions on the subject, we are left with few policy alternatives to the policies suggested. Nevertheless, the ones suggested are significant and will serve to firm up the foundation of family.

We encourage every state legislator in America to find the determination to make their state a true family-friendly state by passing each of these seven policy recommendations. Your freedom to pursue every other policy interest, no matter how big or small, might depend on it.

The Sutherland Institute, 2003
The Purpose of the Child Welfare System

Child welfare policies exist to protect children from parents or custodians whose conduct or condition falls below acceptable standards. In the case of marriage and divorce, and to a great extent adoption as well, it is individuals who initiate state action; in child welfare matters it is the state itself that initiates action by intervening directly in family life in its historic role of *parens patriae*, that is the exercise of its sovereign power of guardianship over persons under disability, primarily children. Also, while parents and members of the public often find it difficult to distinguish between the two, the purposes of the *criminal law* and the child welfare system are distinct. The criminal law seeks to prosecute and punish adults for criminal behavior against children. Child welfare proceedings are geared, at least ostensibly, to protect children from the behavior of parents that while harmful, does not rise to the seriousness of criminality. The primary means the state has of doing this is by the removal of children from the care of parents or custodians deemed unfit.

For most of the history of the Nation and especially the state of Utah, the idea that it was in the best interest of children to be reared in a traditional family which maintained age old roles between men and women was simply taken for granted. Even though many living arrangements fell well short of this ideal, the social consensus in favor of the traditional family was such that protective legislation was considered unnecessary. After all, just 50 years ago, who would have dreamed that a constitutional amendment might be needed to protect the family and define marriage as the union between a man and a woman? Historically, the honored place of the family and the “zone of privacy” surrounding it served as an important
restraint on the intrusiveness of the state when acting on behalf of children.

Indeed, the sanctity of the family has been upheld for most of our history by a consistent body of law supporting parental rights as constitutionally protected. These rights have been referred to as “intrinsic,” “fundamental,” and something conferred on human being by their creator and existing prior to government itself; not a special kind of privilege or stewardship created by government and conferred upon worthy citizens. Like the fundamental rights of all citizens protected the constitution, whether deserving or not, parental rights cannot be enlarged or diminished by legislation or agency rules or they cease to be fundamental rights and become nothing more than legislatively created privileges.

Expanded Mission, Inherent Conflicts

Whatever the reasons, the enlarged role of government in family life is an undeniable reality. The view that the social problems of our society have become so big and so complex that only government has the resources and authority to successfully address them enjoys wide acceptance.

Present state child welfare policies tend to gloss over divergent approaches to child rearing and generally assume, often incorrectly, a non-existent consensus on what is best for children. Challengers to present day child welfare activists are few and far between because most people naturally shy away from the stigma of negative labeling this entails. After all, who wants to be characterized as opposed to protecting children or as being a defender of parents who neglect or abuse children. Yet laws and public policies which seek to accommodate special interest pressures, some of which urge endorsement of alternative lifestyles, can and often do undermine the basic integrity of the family unit and the constitutional provisions designed to protect it. When this happens, confusion in the minds of the young as to family structure and purpose is compounded, and the disintegration of the family, the single biggest cause of social pathology in our society today, continues unabated.
Opponents of our current child welfare system cite many abuses of government power in recent years and are alarmed by the perceived anti-family philosophy behind the way the system operates. These opponents tend to adhere to assumptions more compatible with those of the founders of the American republic. Namely, that parental rights are properly and logically within the package of “inalienable rights” mentioned in the Declaration of Independence and are entitled to the same kind of constitutional protection as other “inherent” rights. Further, these opponents would argue that that these rights should be protected and respected for all parents even though there may be some who abuse their rights and do not deserve such protection.

On the other hand, there are many who assume that traditional ideas and beliefs are fairly and adequately represented in current policies and perceive no conflict. To these the protection of children is always paramount and respect for parental rights must give way when the two seem to collide. To those so persuaded there is a tendency to characterize the intrinsic and fundamental nature of parental rights as mere platitudes and annoying obstacles to the higher goals of assuring the protection and safety of children. In this view, state policy planners and officials who are motivated by such important aims should not be hampered by “legalistic” notions of the rights of parents or the constitutional separation of powers.

Child protection and parental rights are not opposing concepts even though they are often regarded as such in public discourse. Under the historic doctrine of parens patriae, the state is the ultimate protector and guardian of the young, the infirm and the destitute. There is no question about this duty and the need that it be discharged competently in behalf of children, the most vulnerable group in society. This need has become even more acute over the past decade with the growing problem of drug addicted parents. However, the state, parents, and children are not simply co-equal players in the game of child rearing with the state acting as the super-parent adjusting the roles of each and redefining the terms of parental stewardship as social circumstances warrant. The trend toward this view of things, which has come to be fairly popular over
the past two decades even if not expressed in exactly this fashion, risks becoming completely ingrained in law and practice.

Once the state comes to be regarded as the source of parental rights, an idea often reinforced by current child welfare policy, it follows logically that the state may tell parents how they should live their lives and may determine for them what is in the best interest of their children.iii

Brief Historical Perspective

Child welfare policies have undergone significant transformation over the past fifty years. They are often the result of different approaches to the protection of children and the collective desire to meet their needs. Child welfare policies have been shaped by both legislation and judicial rulings, which in turn are a product of the political and social climate of the time.

Until the 1950’s, child welfare laws were very limited in scope. The primary focus was on the criminal law to control and punish irresponsible and abusive behavior by adults. Civil guardianship proceedings were the primary means used to deal with cases of neglect, dependency and abandonment. During the early decades of the 20th century the supervision of errant parents under court direction in Utah was handled by private entities known as “children’s aid societies” rather than state agencies. This practice ended during the 1930’s.iv

Historically, child welfare cases (as opposed to delinquency) made up only a small part of the juvenile court’s total workload. Cases of dependency, neglect and abuse (referred to in court circles as DNA jurisdiction) remained relatively constant for decades at about 15-20% of the court’s overall workload in Utah until the 1980’s when it began to increase slightly. Then during the 1990’s it jumped dramatically to nearly two thirds where it is today. By any standard, this is a significant indicator of government’s enlarged intervention in the child welfare area. Experts continue to debate whether the
increase is attributable to sharp increases parental neglect and abuse during the 1990’s or to bigger government and better reporting.

A major turning point in the development of juvenile justice and child welfare law came in 1967 with the decision by the U.S. Supreme Court in the case of *In re Gault*.

This case extended due process rights to children charged with criminal conduct for the first time since the beginning of the juvenile court movement in the United States. This decision, and others that followed during the next ten years, gradually extended most of the rights of adult criminal defendants to juveniles, except for the right to bail and jury trial.

Although not the court’s intent, the *Gault* case and others of like nature addressing the due process of rights of juveniles, stimulated efforts to expand the rights of children to areas well beyond criminal due process protections. The new focus on children’s rights was used to greatly enlarge their ability to make independent choices free of adult and parental supervision. A wide range of issues would be impacted by this increased independence, such as premarital sex, abortion, dress and behavior in schools, and even adolescent emancipation from parents.

This new emphasis on children’s rights (placing them above parental rights in the minds of many) has tended to weaken not only parental authority but also all forms of adult authority. Child advocates, and self-identified public interest law firms, have gained significant ability to threaten parents and schoolteachers with litigation and government intervention when their demands are not met. This trend to bring about change by litigation rather than the democratic process, reflecting the will of the people, has contributed significantly to expanded government intervention in family life on behalf of children.

The Great Society period of the 1960’s witnessed significant growth in the federal role in child welfare. Federal funding began to have a much greater impact on the way state child welfare agencies
operated. Considerable emphasis during this period was placed on greater uniformity in state laws and regulations. Federally funded and produced "standards" were developed to guide state lawmakers. These documents were typically presented with a façade of professional objectivity and impartiality, and claimed to represent, in the words of a 1966 document, "... a general consensus of the thinking and experience of many outstanding persons in the social and legal professions." Interestingly, this document has a great deal to say about desirable outcomes for children but virtually nothing as to the legal grounds that must be found by a court to justify termination of the parent child relationship.\textsuperscript{vii}

Another important legacy of this period was the widely held belief that because juvenile court proceedings were quasi-medical in nature, and entirely beneficial and benign in purpose, they did not require procedural safeguards like other judicial proceedings. This view, that the mission of the juvenile court, which is the centerpiece of child welfare system, consists more in the delivery of therapy than justice persists to this day.

In contrast, by the 1980's considerable disillusionment had set in with the perceived permissiveness of the juvenile justice system. Major legislative initiatives around the country were launched to reverse what had come to be known as the “medical” or therapeutic model governing the juvenile justice and child welfare system. The reforms of this period were aimed at improved accountability within the system. Emphasis was also placed on greater individual responsibility as opposed to the prior period, which had emphasized collective responsibility.\textsuperscript{viii}

With the advent of the 1990's the emphasis in juvenile justice and child welfare shifted once again. Although not a complete replication of the past, legislation and child welfare policies adopted during this period manifested considerable harmony with those of the 1960's. This is well illustrated by the Utah Child Welfare Reform Act of 1994. It is not an overstatement to say that this legislation marks the greatest single example of the expansion of state power over family life and the diminishment of parental rights in Utah's history. In
addition to the extensive increase in mandatory hearings, timetables, and requirements placed directly on judges to control both the pace and the outcome of child welfare proceedings, this legislation centralized child welfare prosecutions at the state level and dramatically increased the number of child welfare caseworkers and prosecutors. Additional judges were appointed to handle the increased demands of the legislation. Further, it created a state Office of the Guardian ad Litem within the judicial branch of government, and mandated participation of state guardians at all stages of the proceedings, rendering them essentially co-prosecutors. With this legislation came the new concept of the “child protection team” composed of the state prosecutor, the assigned guardian ad litem and child welfare workers, all under the supervision of the juvenile court judge to whom they were assigned.

**Sound Principles to Guide Child Welfare Policy**

Despite the sincerity of efforts and the noblest of intentions on the part of those in government, they simply cannot hope to fix all the damage done to children by parents’ bad choices. The evidence, both anecdotal and statistical, is overwhelming that children living in intact two-parent families are less likely to be victims of abuse and neglect, are less likely to be raised in poverty, and are less likely to use drugs, drop out of school, commit crimes, or suffer emotional and medical problems. In short, the further away we get from the intact married two-parent family, the greater the financial and social costs. Studies have shown that despite all the advantages more affluent foster parents can provide them, many children still prefer to live with their natural parents notwithstanding their limitations and deficiencies.

Thus, aside from the powerful legal and moral arguments that can be advanced, if for no other reason than practical economics a state ought to endorse and support pro-family policies. The best and only effective antidote to the scourge of child abuse and neglect is not bigger and more paternalistic government, but the growth of stronger and more committed families.
There is no question that when parents fail in their duty to properly care for their children the state must act. Parents or custodians who physically or sexually abuse children, or who fail to provide them with the necessities of life, must be held accountable in accordance with law. But state child welfare policy should not be so framed that it appears to be in conflict with the traditional values associated with the family as the fundamental unit of society.

The time is appropriate for new directions in child welfare policy. Assumptions that funding levels and the good intentions of those who design and carry out child welfare programs are more important than the soundness of the ideas or principles upon which the programs are based need to be reevaluated. In order to set a sound course for child welfare in the future, the following important principles should be considered:

First. The greatest threat to child welfare is illegitimacy and family disintegration. Child welfare policies should clearly recognize that it is in the best interest of children to be reared in an intact family unit with a married mother and father whenever possible. While important, giving children “rights” can never be a substitute for loving care and discipline in an intact family.

Second. Laws authorizing state intervention in cases of neglect and abuse should be as narrow and specific as possible, consistent with community standards of childcare. The part of the child welfare system that has to do with the investigation, prosecution and supervision of parents should be kept separate from the part of the system which has to do with non-coercive social casework services. The aims and purposes of the two are quite different.

Third. Only one standard should govern termination of parental rights, that being parental fault, not a disguised form of “best interest of the child.” Specifically, a judicial determination that the conduct, omission, or condition of a parent amounts to abandonment, abuse, chronic or severe neglect, or unfitness which is seriously detrimental to the child. The constitutional rights of
parents facing the permanent loss of their children should not be accorded less respect than the rights of criminal defendants.

Fourth. An unequivocal recognition that child welfare proceedings are not exempt from adherence to the constitutional requirements of the 4th amendment, and that children may not be removed from their homes absent exigent circumstances or a warrant from a court based on probable cause. It should not be easier to seize children from their homes and the custody of their parents than it is to repossess an automobile.x

Fifth. More room for “diversity” and “second opinions” in court ordered social services. Parents who are found to be deficient or neglectful in the discharge of their parental responsibilities, who are court ordered to receive social services through state designed treatment plans, should have greater options to utilize social and educational services though licensed and available private faith based providers.

Sixth. Child welfare proceedings, and especially post adjudication hearings that may have a bearing on the ultimate outcome of the case, should be consistent with principles of due process and the separation of powers.

Important Policy Options

Reforming the child welfare system is no easy undertaking. Simple solutions find themselves quickly burdened with a host of mitigating factors and dire predictions about the dangers to children if any changes are made. Yet existing problems are often systemic and some fundamental reevaluation of and change within the system may be essential. A few are briefly mentioned here:

Clarifying the Role of the Division of Child and Family Services

Protective service workers receive, classify and respond to reports of child abuse and neglect and act to remove children from their homes when deemed necessary for their protection. As such their primary
function is to investigate child neglect or abuse cases; they are the detectives of the child welfare system and help build the case against parents as part of the prosecution team.\textsuperscript{xii}

The service they provide is to the state not parents. Caseworkers on the other hand, are the parental probation officers of the child welfare system. They develop the plans containing the terms and conditions parents must meet to earn return of their children; or if the children have not been removed, what parents must do to prevent removal while the children are under protective supervision. They are also a key part of the prosecution team and frequently appear in court as such.

These quasi-law enforcement, prosecutorial and probation functions should be separated from the remedial service delivery part of the system, including health and economic assistance. To regard such members of the state prosecution team as neutral providers of therapeutic services is a fiction. Only the service providers designated in state plans fulfill this role. A new and distinct state division could be established. A suggested title might be the “Division of Child Protection and Parental Supervision,” CPPS for short. Whether this new division should be organizationally attached to the Attorney General’s Office or some other department of state government is something that would require further study.

\textit{Scaling back child welfare legislation}

This should be undertaken to redefine and simplify much of the confusing overburden that characterizes the present body of child welfare law. In response to highly emotional appeals over the past two decades on behalf of children, this body of law and regulation has grown enormously in volume and complexity in an effort to anticipate every problem and control every outcome. This kind of approach to the conduct of child welfare proceedings makes it difficult for judges to do justice in individual cases. Overly broad statutory definitions of neglect and abuse should be narrowed to restrain state intervention and to preserve the presumption of parental innocence.
Safeguarding constitutional protections in child welfare proceedings

When state officials have the power to determine what is in the best interest of other people’s children there is always great temptation for abuse. The ultimate responsibility for upholding basic constitutional safeguards rests with the judiciary. The ideal of the impartial fact finder and detached magistrate needs to be restored and given a much more respected place than it enjoys under the present system which is designed more to guarantee particular outcomes than it is to assure a fair process and respect for fundamental rights.

Constitutional protections are lacking in a process where judges are required to conduct compliance reviews in accordance with strict timetables, ratify agency actions based on “reports” which parents cannot effectively challenge, and later sit in judgment of their own prior orders in proceedings which permanently strip parents of their parental rights. These post-adjudication “review” hearings customarily do not provide parties with advance notice of the matters at issue before the hearings begin and what kind of orders the state and/or the guardian ad litem are going to request. Moreover, the legislative mandates governing these hearing seldom allow adequate time or opportunity for parents or other parties to challenge the content of the “reports” upon which court decisions are based or to present evidence in opposition. Treatment progress or compliance reviews are ill suited to lawyer driven adversary proceedings in the judiciary and should properly take place in the executive branch.

Only when remedies provided exclusively by the judicial branch of government are needed should court action be sought by way of motion and notice, providing an opportunity for all affected parties to be heard. Examples of such actions include restoration of custody to the parents, the modification of the terms and conditions of state custody because of changed circumstances, the need to enforce court orders by contempt proceedings, and most important, the review of agency action for abuse of discretion.
**Greater choice of social service providers**

Parents caught up in the state system where the custody of their children is at issue, and their parental rights are at risk, presently have virtually no choice with respect to the kind of background, orientation or professional philosophy state approved providers possess. Judges routinely order parents to participate in state provided treatment but have extremely limited ability, if any, to vouch for the content of such treatment or the particular bias of those who provide it. Parents are in a precarious position. They must accept and cooperate with caseworkers and state sponsored social service providers or risk permanent loss of their children.

Allowing parents the opportunity to elect to receive mental health counseling, parent training or a combination of such services through providers more compatible with their religious values could have great benefits. This is a concept that is bound to be controversial but one worthy of careful consideration. There are obvious church-state constitutional issues that would need to be addressed. But with thoughtful and thorough legal research and vigorous advocacy these could be overcome.

**Parental Fault as the Standard for Termination of Parental Right**

Maintaining a fault based standard for termination of parental rights is absolutely crucial because without it the state has virtually unrestrained leverage over parents and can force even innocent parents to bargain for their children. Demands for protection, permanency and speed are powerful emotional arguments advanced in the interests of meeting children’s needs. However, these arguments should not be used to overwhelm the rights of parents; rights which while not absolute, can only be forfeited when the conduct or condition of the parent falls far outside the norm and is seriously detrimental to the child.
Policy Recommendation

One single step that can have a significant influence on the entire child welfare system is the revision and careful crafting of the grounds for termination of parental rights. Of all the powers the state possesses in child welfare proceedings, the ability to permanently terminate the legal rights of parents is the ultimate and most drastic. Allowing the state to do so on grounds less than parental fault is inconsistent with the constitutional status of parental rights. Unless a fault based standard is rigorously maintained, it is all too easy to slide into the practice of placing the burden on parents to prove their fitness to the state or face loss of their children rather than the burden being the other way around. As the majority opinion in the previously cited of case of In re J.P. stated:

There is no surer way to preserve pluralism than to allow parents maximum latitude in rearing their own children. Much of the rich variety in American culture has been transmitted from generation to generation by determined parents who were acting against the best interest of their children, as defined by official dogma. Conversely, there is no surer way to threaten pluralism than to terminate the rights of parents who contradict officially approved values imposed by reformers empowered to determine what is in the ‘best interest’ of someone’s else’s child.xv

Model Legislation

§ Termination of Parental Rights

(a)(1) Notwithstanding any other provision of [this code], the court may not order the involuntary termination parental rights unless the court finds that there has parental fault or incapacity such that the conduct or condition of the parent or parents have exceeded the natural and legal limits of parental discretion.
(a)(2) Accordingly, the court must find by clear and convincing evidence that the parent or parents have either:
   (1) abandoned,
   (2) abused,
   (3) chronically or severely neglected the child or children, or
   (4) that the parent or parents are unfit or incompetent by reason of conduct or condition which is seriously detrimental to the child or children and that the parent or parents are unable or unwilling to correct such unfitness or incompetence within the time period provided by law.

(a)(3) The court may not consider whether it is in the best interest of the child to terminate parental rights until it has first made an express finding of parental fault or incapacity.
While many citizens fully accept and embrace the idea that family is the fundamental unit of society, it certainly is not evidenced within the realm of public education. To the contrary, in practice, many Americans support the coercive nature of the institution and by their actions imply that the state is the fundamental unit of society.

Every moral argument in support of the coercive nature of public schooling rests upon the presumption that parental obligations to the state and society are more important than parental obligations to children and families. In essence, many citizens hold that coercive public schooling is essential to the survival of this nation, and that, absent “public education,” freedom and democracy would collapse.

Candidly, the choice for ultimate educational authority is simple: either we must uphold the family as the fundamental unit of society in regard to education or we must uphold the state in the same light. The coercive nature of the state requires that a choice be made. Are parents or government the primary caretaker of children? Do we educate children for the purposes of the state, or for the personal and familial benefit of the individual?

To choose both parents and government, in some kind of civil balancing act, is to doom society to an endless cycle of conflict caused by divisive, brute political force. A broad, coercive public schooling system cannot, by its very nature, long serve both masters.

The current system of coercive government schooling does not enshrine the family as the fundamental unit of society. The current system substitutes state for family.
We stress this point because the *institution* of the family is just as important as the *role* of the family in society. When the state, through coercive government schooling or any other program, displaces or replaces the traditional functions of families (i.e., rearing children, feeding them, teaching them values, educating them, dictating social relationships, etc.), it helps to destroy essential allegiances and loyalties among family members.

For instance, one crucial aspect of problems between youth and their parents today is that youth are torn between the influence of mom and dad versus the more exciting influences of the world into which mom and dad send them each day. Under these competitive circumstances, and within this context of conflicting loyalties, no one should be surprised that children choose peers and outside surroundings to home life, especially as society’s institutions increasingly reject traditional parental values.

Today, with the ever-expanding paternalistic roles of society’s institutions, the coercive nature of public schooling is just one more “brick in the wall” between parents and their children. The strait and narrow path out of this social dilemma is to re-enshrine the paramount importance of the family as the fundamental unit of society.

A second sentiment that must be accepted within this context is that parents must willingly and eagerly assume full and direct responsibility for the education of their children. To assume full and direct responsibility is to be, or strive to become, self-reliant as a family in the education of your children. That is, put over-simplistically, parents alone are responsible for their children in all ways. This responsibility never vanishes from the role of a parent even when others are around to assist in this process when needed.

Concerning its relevance to our current situation, this point means clearly that where this responsibility exists, so too does its reciprocal right. What good is the *act* of responsibility without a complementary *right* of responsibility? The coercive nature of the current public education system robs families of this right and
essentially throws buckets of cold water on this parental responsibility.

A whole community of family, friends, and neighbors exists to assist those parents who need help in assuming and maintaining this responsibility. Citizens can even gather under the imprimatur of society to create a “public interest” in helping these struggling families (i.e., legitimate justification to create a government school system). But to coercively tie all families to government schools in the name of the public interest is to throw the baby out with the bath water. To do so destroys a vital right and an essential responsibility for parents.

Parental Rights and Responsibilities in an Educational Context

Parents of school-age children are frequently reminded of their responsibilities as parents, but what are their rights? Just what is the legal, moral, and historical context of their parental rights in relation to coercive public education?

Americans, indeed all of western civilization, have revered education. We, as a society and personally, give education a social and moral importance rarely equaled, as a society and personally. Indeed, we have always held that the future of our nation depends largely on good education today.

In his farewell address of 1796, George Washington commented on the benefits of education:

Promote then, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened.\textsuperscript{xvi}
Likewise, after his retirement in 1816, Thomas Jefferson said,

> If a nation expects to be ignorant and free in a state of civilization it expects what never was and never will be.... There is no safe deposit [for the functions of government], but with the people themselves; nor can they be safe with them without information.\(^{xvii}\)

James Madison wrote,

> A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or, perhaps, both. Knowledge will forever govern ignorance: and a people who mean to be their own governors must arm themselves with the powers which knowledge gives.\(^{xviii}\)

Clearly, education is essential to progress and future civilization. If we do not learn the lessons of life well, we perish from life’s natural, and often harsh, consequences. And yet, recognizing the importance of education is not to determine how we are to be educated.

Education is not schooling. Washington spoke of “institutions for the general diffusion of knowledge.” But these institutions could easily have meant the press, churches, and families as much as schools and universities.

Nor, does the importance of education automatically translate into the coercive state action we experience today. For over a hundred years, education in America rested on the shoulders of parents, and voluntarily so. State compulsory schooling is a more recent phenomenon in western history. In fact, our eighteenth and nineteenth centuries were witness to an ongoing debate over educational freedom versus compulsion. Serious distinctions were drawn at that time between compulsory education, compulsory schooling, and compulsory attendance. The former is where we began the public debate 200 years ago and the latter is where we have now settled.
The Key to Understanding the Question of Educational Authority

Understanding the real problems detracting from the success of government schooling is relatively simple. First, the underlying morality and the inherent conflict must be understood between the desires of parents to provide the best possible education for their own children versus society’s collective desire for the education of all children. Second, the protracted balancing act, within law, of those conflicting interests must be understood and eventually appreciated. And third, as it pertains to viable solutions, it must be understood that both parties are best served when families are encouraged to be self-reliant and government is encouraged within its proper role.

The first keys to understanding how to solve the problems of education today are these common and persistent legal, historical, and moral themes:

1) There exists a fundamental constitutional prior right of parents to control the education of their children.
2) A fundamental constitutional right to education does not exist.

A productive search for solutions to our educational woes can only begin when these realities are firmly engrained in our collective understanding.

The United States Constitution and Parental Rights

In America, parental rights have always superceded any claimed interests of the state in all but seriously exigent circumstances and sharply defined aspects of the “general welfare.” This persistently acknowledged legal and moral right was indelibly set in the canons of American jurisprudence with the passage of the Fourteenth Amendment in 1868. The United States Supreme Court’s affirmation of the fundamental rights of parents to control the education of their children is unequivocal. It is interesting to note, and no small coincidence, that the Fourteenth Amendment doctrine of parental
rights received its 20th century expressions through the Court because of education issues.

In *Meyer v. Nebraska* (262 U.S. 390, 1923), a case regarding a state law disallowing instruction in foreign languages, the Court held that,

> Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life…. That the state may do much more, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights that must be respected.

Two years later the same Court added to the insights from *Meyer* in *Pierce v. Society of the Sisters of the Holy Name of Jesus* (268 U.S. 510, 1925),

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the duty, to recognize and prepare him for additional obligations.

Punctuating these decisions was another, *Prince v. Commonwealth of Massachusetts* (321 U.S. 158, 1944), oddly enough a case that actually ruled in favor of state intervention, wherein the Court held,

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder…. And it is in recognition of this that these
decisions have respected the private realm of family life, which the state cannot enter.

Much later, in Wisconsin v. Yoder (406 U.S. 205, 1972), the Court sided with an Old Order Amish community whose members had been convicted of violating Wisconsin’s compulsory public school attendance law. In support of parental rights the Court found,

The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

But perhaps the most definitive statement in support for parental rights from the Court is also a more recent statement (Troxel et vir. v. Granville No. 99-138, 2000). Writing for the majority, which includes Chief Justice Rehnquist and Justices Ginsburg and Breyer, with Justices Souter and Thomas concurring, Justice Sandra Day O’Conner explained the constitutional basis of parental rights:

*The liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in Meyer v. Nebraska we held that the “liberty” protected by the Due Process Clause includes the right of parents to “establish a home and bring up children” and “to control the education of their own.” Two years later, in Pierce v. Society of Sisters we again held that the “liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.”* We returned to the subject in Prince v. Massachusetts and again confirmed that there is a dimension to the right of parents to direct the upbringing of their children....
After reciting a dozen other examples in support of parental rights she concludes,

> In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

**Parens patriae**

So what is the role of the state in assisting in the welfare (education) of children? Obviously, no right is absolute and all such rights are weighed against competing interests. A counter-weight in the courts to the fundamental rights of parents is a legal doctrine known as *parens patriae*. *Parens patriae*, literally “parents of his country,” reserves the right of the state to act in the name or “best interests” of society. This legal doctrine is the basis for state intervention on behalf of abused children, mentally ill persons, a raft of economic and environmental issues, and most relevant here, in support of government schooling.

Utah State Code, for instance, is clear that, “It is the public policy of this state that parents retain the fundamental right and duty to exercise primary control over the care, supervision, upbringing, and *education* of their children who are in their custody.” It is also clear that, “[It is] the public policy of this state that children have the right to protection from abuse and neglect… Therefore… the state, as *parens patriae*, has an interest in and responsibility to protect children whose parents abuse them or do not adequately provide for their welfare” (Utah State Code 62A-4a-201).

Ideally, these two stewardships are compatible: parents have a fundamental right over their children until they abuse, neglect, or do not adequately provide for their welfare. Conflict between these two stewardships occurs in the legislative statutory and executive rulemaking processes of the state wherein the terms “abuse,” “neglect,” and “adequately provide” are defined. Loose definitions
or definitions too broadly applied create conflict with the fundamental rights of parents.

The United States Supreme Court has also spoken on these types of conflicts. In the *Troxel* case cited above, where grandparents sued the mother of their grandchildren for certain visitation rights, the Court held in favor of the mother. The ruling was partially granted on grounds that a parent is determined to be competent unless compelling proof shows otherwise.

The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s child.

**A Right to Education? No.**

While both “family” and “public education” are no where to be found in the literal text of our United States Constitution, the Court has found through the legal methodology of “substantive due process” the existence of a very fundamental right of parents to control the education of their children. The same fundamental right has not been found regarding government schooling.

The Court has always been quick to point out the high status and regard for education in America, but no where has it found education, public or not, to be a fundamental right in the Constitution.
Justice Lewis Powell, a self-identified liberal on the Court, wrote in *San Antonio School District v. Rodriguez* (411 U.S. 1, 1973),

This theme, expressing an abiding respect for the vital role of education in a free society, may be found in numerous opinions of Justices of this Court writing both before and after *Brown* was decided…. [T]he key to discovering whether education is “fundamental” is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing…. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected…. We have carefully considered each of the arguments supportive of the District Court’s finding that education is a fundamental right or liberty and have found those arguments unpersuasive.

In a subsequent ruling, another self-identified liberal justice, William Brennan, concisely summarized the Court’s opinion,

Public education is not a “right” granted individuals by the Constitution (*Plyler v. Doe* (457 U.S. 202, 1982)).

Again, this is not to say that education is not important or even our highest social priority. This simply means that education is not a fundamental constitutional right. Reflect on language from *Brown v. Board of Education*,

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an
opportunity, where the state had undertaken to provide it, is a right, which must be made available to all on equal terms.

The “right” invoked by the Court is the right to the opportunity of an education; and even then, only “where the state had undertaken to provide it,” and only then “made available.” To clarify this point: this “right” pertains to the availability of government schooling, but speaks nothing to the general right to an education or education that is provided privately.

It is interesting to note, parenthetically, that “a right to education” is a very elusive concept even for proponents of such a right. Education historian and author Joel Spring, in the preface of his book, The Universal Right to Education, ultimately argues that such a right exists, beginning with this stark admission,

My original intention was simply to explore human rights education, which I thought had lost touch with its primary mission. However, I discovered that no universal justification for “the right to education” was provided when this idea was proclaimed in 1948 in Article 26 of the [United Nation’s] Universal Declaration of Human Rights. Indeed, no one had even bothered to define the meaning of education in “the right to education” except to say that everyone was entitled to elementary schooling....

Without a universal justification for the “right to education” and a universal definition of “education” as provided for in this right, the right is very difficult to protect and implement.¹⁶

“To Promote the General Welfare”

The state interest in education is sometimes invoked within the context of the “general welfare” clauses contained in the Preamble
and Article I, Section 8, of our United States Constitution. The Preamble reads,

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

A quick reference to understanding the role of the Preamble in law – one consistently accepted by all Courts – is provided by former Justice Joseph Story in his Commentaries on the Constitution of the United States. Justice Story, appointed to the Court by President James Madison, wrote in 1833 of the Preamble,

Its true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them. For example, the preamble declares one object to be, “to provide for the common defense.” No one can doubt that this does not enlarge the powers of Congress to pass any measures which they deem useful for the common defense.

As we have offered, education, let alone government schooling, is not mentioned in the Constitution. The “general welfare” clause does not substantively create its appearance in the document nor does the clause “enlarge the powers” of Congress or anything else to create such a substantive claim. Still, the federal government uses similar language found in Article I, Section 8, of the Constitution to fund education with federal taxes in the name of “general welfare.” This states, “The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States.” In funding government schools, Congress explicitly holds that government schooling meets the standard of the “general welfare.”
Politics and Power: The Roots of Coercive Education

Why does our current government school system exist today? What forces have made government schools what they are? The answers to these questions are important as we consider possible solutions to current school problems.

In doing so, it should not be surprising that we view our current circumstances largely in political terms. After all, government schooling is a government program subject to all the outside influences and machinations that attach to any political issue.

It is a truism that “no single set of reasons or social forces” brought government schools into existence. But clearly all school problems in America today can be traced back to very specific political and educational philosophies enforced on society through the power of the state.

The success of the common school movement [i.e., government schools] represents the victory of one political philosophy over another. Most individuals who supported and worked for a common school system believed that government should play an active role in ensuring the success of the economic and social system and that this was best achieved by centralizing and standardizing governmental processes. Many who opposed the development of the common school system believed that the government that governed best governed least…. They opposed the centralizing tendencies of government and hoped to maximize popular control of the political process by maintaining local control.xx

It is not the intent of this essay to delve into the complex world of political or educational philosophy. But in establishing the political basis of government schooling in America and elsewhere – an
understanding necessary to unravel the current quagmire – a most profound influence must be acknowledged:

The prime controversy surrounding government schooling – that is, the central issue giving rise to all other government school controversies – is the coercive nature of its system.

Historically, there have been many arguments and visions in support of a vast government school system. None of these arguments or visions would hold any significance for us broadly, were it not for the fact that they have been enforced upon us through coercive political power.

Typically, these political and educational philosophies are utopian in nature. Nearly every one has been developed to bring about “the good society.” This ideal is not harmful or divisive in and of itself. Indeed, freedom-loving people, such as Utah’s early pioneers, held to this ideal. Only when the coercive power of the state is used to enforce one individual’s preferential ideal on society as a whole does it become harmful or contentious.

Consider for a moment the most dominant arguments and visions expressed historically for the creation of coercive government schooling.

In pre-Colonial times among the Puritans –
- Maintain the authority of government and religion
- Maintain social distinctions
- Improve material prosperity

After the Revolution –
- Build nationalism
- Shape the “good citizen”
- Reform society
In the early Nineteenth Century –
• Impose particular moral and political values
• Use institutions to perfect man
• Properly socialize children from poor families

In the 1830s and 1840s (the beginning of the common school movement) –
• Decrease political and social conflict
• Solve social problems
• Control local schools through a centralized power
• Shape, form, and direct human nature through government institutions

The Horace Mann era, the 1850s (long held as the godfather of government schooling) –
• Facilitate a means of social salvation
• Create a common set of moral and political beliefs to achieve political consensus
• Eliminate class consciousness
• Eliminate economic disparities

The influence of unions or the “workingmen’s parties” –
• Protect workers from the exploitation of the rich
• Gain political and economic power
• Eliminate distinctions between rich and poor

Religious bigotry (late nineteenth century) –
• Keep the Catholic Church from political power
• Keep Latter-day Saints from political power in Utah

Early Twentieth Century themes –
• Prevent and reduce poverty
• Increase workforce productivity
• Eliminate wrongheaded economic thinking
• Reduce tensions among social classes
• Destigmatize poor classes
• Prepare citizens for the right to vote

The “New Factory” model of the post-Depression era –
• Train and discipline the masses to serve the needs of industrial and urban America
• Socialize students to the requirements of the new factory system

All of these arguments for and visions of government schooling through our American experience boil down to four interconnected philosophies:

1. Political – government schools should play an active role in ensuring economic and social success.
2. Cultural – government schools should broadly promote a specific culture and set of values.
3. Economic – government schools should be used to prepare workers for jobs within a centralized and controlled economy.
4. Social – government schools should be used to achieve social control and social stability of the masses.

These four interconnected philosophies are at the heart of the controversy over our government school system today. First, they assert the social desire to create the “good society.” And second, they express the ugly reality that the “good society” can be brought about only by coercion and a certain enlightened and benighted class of citizen (i.e., someone else knows what is best for us).

This is the broad problem.

The objections, of course, are complementary to the problem. Not everyone agrees on the concept of the “good society.” Nor does everyone agree that the coercive power of the state should be the vehicle to achieve it.

There exists another basic objection. Many Americans largely agree that family is the fundamental unit of society; it is families and their voluntary organizations, such as church, willfully and freely exercising their moral agency, that create the “good society.” In
conjunction with this widely accepted belief, many Americans also see parents as the essential class of people, the “enlightened ones,” to bring about the “good society.”

Herein lays the ultimate conflict.

Former Utah Supreme Court Justice Dallin H. Oaks’ words are worth noting on this conflict:

Family autonomy helps to assure the diversity characteristic of a free society. There is no surer way to preserve pluralism than to allow parents maximum latitude in rearing their own children. Much of the rich variety in American culture has been transmitted from generation to generation by determined parents who were acting against the best interest of their children, as defined by official dogma. Conversely, there is no surer way to threaten pluralism than to terminate the rights of parents who contradict officially approved values imposed by reformers empowered to determine what is in the ‘best interest’ of someone else’s child (In Re: J.P., 1982).

In other words, either the family is the fundamental unit of society or the fundamental unit is something else. Staunch defenders of the primacy of government schools implicitly support the view that the state is the fundamental unit of society; that is, citizens exist for the smooth operations of the state. Justice Oaks’ statement is a dividing line of sorts that attacks the centrality of the four interconnected philosophies of government schooling. It neatly defines the struggle at hand. Either the “bulwark of democracy” is government schooling or it is families; and this title cannot be mutually shared because coercion of the family is the mechanism utilized to impose government schooling.

This last point deserves brief emphasis. The title, “bulwark of democracy,” can only be claimed naturally and rightfully, not by
coercion. It is folly to presume that government schools and parents can ever be “partners in democracy.” Compulsory government school attendance laws, by their very coercive nature, preclude an equal relationship: a master and his subjects are far from equal, let alone partners. Schools and parents can only be partners in the future of children when their relationship is based on voluntary association and mutual agreement over the task at hand.

If the state is the fundamental unit of society and government schooling is indeed the bulwark of democracy, then a powerful case can be made to prohibit any exception to the rule of government schools. But, if indeed, family is the fundamental unit of society and families are the real bulwarks of democracy, then we need to rethink the box in which we have placed ourselves.

“Coercion Equals Freedom” and the “Public Good”

The irony of a free people – or a people who believe they are free – revering a coercive education system is perhaps best expressed in this one question:

**Does the survival of a free society require that its citizens be “unfree” in at least one area: the area of education?**

Many good people will answer this central question with a resounding “no.” For these individuals, a free society houses inherent and unavoidable risks. When friends and neighbors fail or when others cannot provide for themselves, we will be willing to help. They view the ultimate requirement of a lasting, free society as one that encourages the ideal of self-reliance on the part of each member.

Additionally, many people of good many good people will answer this question in the affirmative. These people may feel that most parents cannot be trusted with sole responsibility to ensure their children’s education, and that the personal and societal stakes are simply too high to be left to the freedom of individuals and parents.
Government schooling is arguably seen in this view as an antidote to poverty, crime, civic apathy, social inequality, and a host of other societal ills. Solutions to these problems, it is thought, are too important to leave up to the initiative and self-interest of parents who are viewed as not expressing sufficient interest in or value for the education of their children.

So, what ideal outweighs freedom? What factor is so compelling as to coerce even the most self-reliant of citizens to set aside their independence and voluntary sense of community for the perceived higher moral call of government schooling?

The answer is typically the “public good.”

The Context of “Public Good”

While economists have their diverse understandings of the term, our personal understandings of “public good” are typically laced with more personal sentiments of sacrifice. In other words, we find ourselves willing to give up something private (i.e., our children, time, money, resources, etc.) to benefit something public. In this case, we are willing to support a government program of schooling for a variety of higher idealized reasons. We want to do it because we recognize that we have a common interest in making sure that our neighbors and their children are literate, trained, and on their way to becoming good and productive citizens. In our long-term self-interest – sometimes called the “national interest” – to protect our personal property and lives from the machinations of crooked politicians, potential criminals, ill-informed neighbors, and dependent bums, we create a common social interest to train all children in what it means to be a good and productive citizen. This is what is typically meant when government schooling is referred to as a “public good.”

This concept of “public good” creates deep loyalties. We have great personal feelings for our fellow man and sometimes, as with government schools, we take the dramatic step of forcing our ideals onto others by law.
In the past, “old days,” government schooling also served to complement a sense of community fostered in strong families and active churches. There was something very comforting about a community wherein everybody shared the same values, worked, played, and went to school together. No doubt this longing still persists today.

Another quality emanating from the modern tradition of government schools is its emphasis on teachers. Teaching is viewed as a noble profession. More frequently than not, schoolteachers are caring, loving, competent servants. Sadly, in government schools, they are given a thankless job within an immovable institution. Parents often wrongfully blame teachers for their own children’s shortcomings, leaving teachers frustrated, demoralized, and defensive. On the other hand, teachers’ unions, supposedly their advocates, exploit and frighten good-hearted teachers for a variety of onerous political purposes. Meanwhile, good and decent teachers are set adrift in a sea of ingratitude. Perhaps the goodness in the hearts of many of its teachers is the only virtue keeping government schools afloat today.

Following are three examples of the “good” we might perceive as coming from government schooling. Perhaps there are more such examples to add to this list. Unfortunately, most suggested additions are subject to deep and obvious flaws of logic and law.

The “Public Good” Arguments

From Horace Mann to John Dewey to the National Education Association and its state affiliates, government schooling is revered as a public good; perhaps the highest public good. It is necessary, they say, because education is vital to a free society – so vital to freedom, in fact, that we cannot afford any freedom in education. If education is vital to lasting democracy, then certainly we are justified in requiring it of everyone. And if required of all, it must be coerced upon all.
The “public good” argument comes in a variety of forms. Essentially, the argument rests upon three pillars: 1) there are some things only government schools can do; 2) there are some things that we trust only government schools to do; and 3) “providing public schools ranks at the very apex of the function of a State” (*Wisconsin v. Yoder*, 1972).

Unfortunately for government school-only advocates, each pillar has within it a major deficiency. Each point is flawed.

Consider the first point: there are some things only government schools can do; and we will assume that by this we mean “positive” things. To flush this out, we formulate this claim in the form of statements based on the strongest, most often cited virtues of government schooling.

**Only government schools can properly:**

...**educate children.** Children are “properly,” and more importantly, effectively educated in a variety of ways and settings outside of government schools.

...**educate poor children.** It may be argued that it is a good thing that a safety net exists for poor children in government schools. This point is without merit as an argument for government exclusivity in light of many modern opportunities for poor children to attend private, parochial, and even home schools. There are many ways to deliver welfare services without government providing the services itself. Our food stamp program is a good example: the imperative to help the poor does not mean that we open government grocery stores. Nobel Prize winning economist Milton Friedman has written, “Assumption of responsibility by government for educating all children does not require that schooling be delivered in government institutions.”

...**promote equality.** This point implies that the generous sentiment of treating one’s neighbor as oneself cannot be taught in the home or at church. Or perhaps there is some other meaning for equality in
government schools? In terms of human productivity and prosperity, we know that pure equality does not exist in our nation or anywhere in the world, let alone in government schools. In fact, it could be strongly argued that the government school system promotes only one thing: mediocrity. Within this reality, equality and excellence are mutually exclusive goals.

...ensure that common values are disseminated throughout society. The irony of this point is that common values are the only values that do not have to be disseminated; that is why they are viewed as common. This point usually refers to “common values” deemed official by some authority, totally disregarding the essential power and truth underlying former Justice Oaks’ statement concerning the importance of group diversity created by family autonomy.

...socialize children. There is a common belief among government school advocates that children are only properly socialized outside the home, away from the stifling influence of the family. Typical of this mind set is a classic statement from the Encyclopedia Britannica (1974) under the heading of “Education, Social Aspects of.” It states,

Adolescent peer groups serve very real functions in society. They provide a way in which children can learn to become independent of family authority. In modern society maturity is equated with independence, with the ability to formulate one’s own judgments, and with the capacity to take independent action and live by the consequences of that action.

Peer groups provide children with experience of egalitarian relationships not possible in the family. Through peer groups the child is exposed to the values and experiences of dozens of other families, many of which may be greatly different than his own. Through these contacts the child’s horizons are broadened, his perceptions widened.
In order for peer groups to serve these important functions, the child must get outside of the family and interact freely with children of his own age. The school is ideal for this purpose. Its corridors and classrooms, clubs and activities provide a natural setting for the young to socialize.

In addition, schools provide an environment in which boy-girl relationships and understanding may be developed. This mixing of the sexes in youth performs a valuable function in Western society, in which the selection of mates is based largely on personal choice. Adolescence is a time for testing relationships and forming standards of selection.

While laughable today in the face of long, quantifiable experience regarding the negative socialization that occurs in government schools, it remains a common opinion. What any impartial observer is likely to find in the character of government school children generally, left to the mercies of peer dependency, are manifestations of selfishness, rudeness, inconsideration, jealousy, exclusion, and a pervasive culture of destructive conformity unparalleled in society. That many public school children are absent any of these social handicaps is simply a testament of virtuous counter-socialization at home – the constant struggle of attentive parents to undue the negative effects of public school socialization learned throughout the day. In other words, constructive, positive socialization happens in the home or not at all.

The second pillar of “public good” – that there are some things that we trust only government schools to do – is of a more subjective nature than the first. This pillar is a matter of pure subjective sentiment absent any real quantifiable evidence. That is, it is an opinion, just as good as any other carrying the moral significance of such. Defenses of this pillar are typically long on platitudes and short on particulars. Government schools somehow “safeguard democracy” in a fashion like no other institution in America.
This argument, perhaps best stated in Amy Gutman’s book, *Democratic Education*, is based on the central idea that the freedom enjoyed through family autonomy and the competitive marketplace cannot be trusted to educate children properly. In all fairness, she also argues that the state should not be the sole arbiter of educational authority either. Ms. Gutman propounds a theory of “democratic education” that is inclusive of shared authority:

A democratic state of education recognizes that educational authority must be shared among, parents, citizens, and professional educators even though such sharing does not guarantee that power will be wedded to knowledge, that parents can successfully pass their prejudices on to their children, or that education will be neutral in competing conceptions of the good life…

The broad distribution of educational authority among citizens, parents, and professional educators supports the core value of democracy: conscious social reproduction in its most inclusive form…. A democratic state is therefore committed to allocating educational authority in such a way as to provide its members with an education adequate to participating in democratic politics, to choosing among (a limited range of) good lives, and to sharing in the several sub-communities, such as families, that impart identity to the lives of its citizens.\textsuperscript{xxii}

Gutman goes on to argue that the state must advocate two constraining principles – “nonrepression” and “nondiscrimination” – to fill its mandate to “socially reproduce” itself.

But this is exactly the dilemma in Gutman’s analysis: the state is the final authority. Parents, she writes, “cannot be counted upon to equip their children with the intellectual skills necessary for rational deliberation.” In other words, parents who are deeply religious
cannot be counted upon to teach their children about the diversity and equality of life around them. Some parents will teach their children to hate others based on race, for instance. Other parents will insulate their children from worldly theories such as evolution. Such children, she argues, cannot be expected to grow up to become mature, rational adults capable of functioning in a democracy. Only the state can ensure model citizens.

The “shared authority” model is specious. Somebody or some entity has the final say. It must always be so. The final authority within this “democratic education” model is the state – John Dewey redux with a twist.

Furthermore, its underlying assumption is specious: parents cannot create rational citizens out of their children. Like the socialization argument before, the truth is that only parents can create mature, rational adults and, in fact, do so in spite of what governments teach children in factory schools.

This second pillar of the “public good” reasons that governmental judgment is superior and that government itself is an almost perfect provider. At the heart of this sentiment is a desire among us for security over freedom – and the belief that the tests of time will be passed as long as all members of society can be forced to obey the master plan. It is very difficult to fail when failure is not allowed or is defined out of existence; this last point is most readily made manifest in the continual effort to “dumb down” standards of performance.

The third and last pillar of government schooling asserts that the state has the primary responsibility for educating America’s children. Inevitably, the name of Thomas Jefferson is invoked. For instance, Jefferson stated, “Establish the law for educating the common people. This it is the business of the state to effect and on a general plan.”

Government schooling advocates fail to recognize Jefferson’s distinction between education and schooling. Jefferson, like most
of our founding fathers and other defenders of freedom throughout the history of western civilization, cherished education; he even saw education as an essential virtue of a free people. He and the others did not, however, believe in compulsory government schooling. In fact, it would be safe to argue that Jefferson would be rightly appalled at modern government schooling.

The United States Supreme Court keenly addressed, in Wisconsin v. Yoder, Jefferson’s real sentiments on education,

> When Thomas Jefferson emphasized the need for education as a bulwark of a free people against tyranny, there is nothing to indicate he had in mind compulsory education through any fixed age beyond a basic education. Indeed, Amish communities [defendants in this case that opposed compulsory attendance laws] singularly parallel and reflect many of the virtues of Jefferson’s ideal of the “sturdy yeoman” who would form the basis of what he considered as the ideal of a democratic society.

In a footnote to this point the Court added,

> While Jefferson recognized that education was essential to the welfare and liberty of the people, he was reluctant to directly force instruction of children “in opposition to the will of the parent.”

To agree that the state has a vital role in education is not the same thing as arguing that the state must coerce all children into government schools. A long and distinguished legal history concurs with this important distinction.

The “Essential Services” Argument

Another argument often used by government school advocates is the “essential services” comparison. These advocates claim that education is every bit as essential to community life as police or fire
departments. No one complains, they continue, about paying a share for those services, even when they do not personally use them. Neither is the public constantly bombarded with propaganda to privatize those services.

Consider this argument in greater depth. A fire department exists to protect homes and businesses against fire damage. It functions much like an insurance policy. Taxpayers pay into the system believing that they will receive adequate fire protection, when needed, but hoping that they will never need its services. In other words, taxpayers willingly and knowingly support a service they hope never to utilize. Police departments are treated much the same way by taxpayers. We are glad to have the services available, but hope to never have a need for them ourselves.

Likewise, taxpayers pay for government schools, but most of them use the public school system everyday.

Pushing a little further, nearly every home in America is equipped with a water hose, water taps, and even a fire extinguisher. When a small fire breaks out it is conceivable that a homeowner can contain the fire himself. The large resources of the fire department are available only if needed. Most homeowners also have the opportunity to protect their homes from criminals with a firearm or some other weapon of choice. If the police are called after a failed attempt at crime, they usually are called for the purpose of adding to or updating the database of criminal activity in that neighborhood.

In both of these cases, these essential public services are support systems to self-reliant families. No rational person who could put out a fire or stop a criminal himself would feel compelled first to call the fire or police departments. In fact, any self-reliant citizen who would rely wholly upon these services rather than act himself would be seen as irresponsible. The essential service analogies do not support the claims of government school advocates. They do, however, support a welfare model of education: pay into the system generally on behalf of those who need to utilize the service.
Policy Background

Any serious discussion of the political basis of government schooling must also include a brief analysis of its power to compel compliance: compulsory attendance laws. Understanding the brief history and nature of this coercive act is necessary to show how arbitrary such power is and how it need not be imposed to allow true education reform.

The legal foundation of compulsory education, schooling, and attendance has its roots in the “Poor Laws” of England circa the late 16th century. These statutes required that the poor and their children be provided minimal maintenance and “apprenticeship” training to keep them from being an undue burden on society. Given our nation’s historical relationship with England, similar laws were established in early America.

The first compulsory education law in America was enacted in 1642 in the colony of Massachusetts Bay. This law required all parents to provide both trade skills and book learning for their children. Parents were the sole agents for the education of their children. Parents failing to live up to these obligations were fined and risked losing their children to other citizens that would provide properly for them. The act was amended in 1648 to allow for the support of schools through local taxation.

In 1647 the governor of Massachusetts passed the nation’s first compulsory schooling act, known as “The Old Deluder Satan Act.” Its enactment was “motivated by the fear of Satan who supposedly used ignorance to keep people from knowledge of the Scriptures thereby damning the race.” This legislation provided other firsts: schooling, not just education, was compulsory and teachers were appointed to community schools.

In explaining the creation of this compulsory school system, George Martin, an early historian of the Massachusetts public school system, stated,
It is important to note here that the idea underlying all this legislation was neither paternalistic nor socialistic. The child is to be educated, not to advance his personal interests, but because the state will suffer if he is not educated. The state does not provide schools to relieve the parent, nor because it can educate better than the parent can, but because it can thereby better enforce the obligation which it imposes.\textsuperscript{xxiii}

Oddly enough, during this period of New England education, attendance was not compulsory. Education was compulsory (i.e., parents were under obligation) and then schooling was made compulsory (i.e., local townships were under obligation), but attendance was not.

Just forty years later, all compulsory attendance laws were repealed in New England (the colonial South never implemented such laws) and remained so until the period preceding the American Revolution.

Several factors led to the reinstatement of compulsory education and schooling laws throughout the post-Revolutionary 19\textsuperscript{th} century. First, Americans challenged all notions of an aristocratic society where only some people were worthy of education. Second, there was an increasing revolt against theocratic rule, especially that of the Puritan era. Third, the huddled masses were pouring into the New World and public sentiment was that these immigrants needed “Americanizing.” Fourth, in the post-Civil War years, it was felt that education was essential to protect democracy. Fifth, social reformers saw education as a means to reduce crime, poverty, and illiteracy. And sixth, rapid industrialization required more skilled and literate workers.

But, as authors Lawrence Kotin and William F. Aikman explain, there was great opposition to the breadth of these laws that now included compulsory attendance,
There was bitter opposition to the compulsory nature of the laws. Many felt that such legislation deprived parents of their inalienable right to control their children, and was an unconstitutional infringement upon individual liberty guaranteed by the Fourteenth Amendment. Opponents also claimed that compulsory education laws were ‘monarchical’ and that already powerful state governments were arrogating new powers. Claims that the laws were ‘un-American’ and inimical to the spirit of free democratic institutions were raised.

This same spirit of opposition to compulsory attendance laws has been expressed eloquently by the United States Supreme Court, as previously noted, and by many organized proponents of educational freedom and parental control.

Many states experienced the same struggle. For instance, in Utah only statehood forced compulsory attendance on its citizens. Prior to that time attendance was voluntary and left up to parents, even amidst the great Mormon influence to seek all learning.

Utah State Code now requires all children ages six through seventeen to be enrolled in, or accountable to, government schools. Most of these children are enrolled in government schools, some are educated at home, and even fewer are enrolled in private schools. Other exceptions to compulsory attendance exist, but government officials determine all exceptions.

Utah’s compulsory attendance laws (Utah State Code 53A-11-101, 102, 103) are statutory laws set by the state legislature through the State Board of Education. That is, they are arbitrary. Similar laws throughout the United States vary in age criteria and jurisdiction. For instance, Utah’s first compulsory attendance law applied to children ages eight to fourteen.

One increasingly important factor in determining the scope and breadth of compulsory attendance laws is the growing welfare state.
The movement toward cradle to grave state care pushes for ever declining age limits. The age ceiling of these laws is always seventeen because the legal definition of a minor is any person under the age of eighteen. But a legal age floor does not exist and there is always a chorus of supporters to lower the age for compulsory attendance from six, typically, to three or four. This movement stems from a combination of pressures: academic opinions, welfare policies, and feminist philosophy encouraging mothers to leave the home and socioeconomic factors.

Again using Utah as an example, for a school age minor to be excused from government school attendance, parents must apply for exemption to their local public school board. A school age minor \textit{may} be exempted from compulsory attendance if:

- the minor has already completed the work required for graduation from high school
- the minor is taught at home according to the requirements of the state
- the minor suffers from physical or mental conditions which would preclude attendance
- the minor is a chronic discipline problem. Of course, school-age children may attend a state-licensed private school at any time

Punishment for violating these laws, or “truancy,” is a class B misdemeanor for the parent of a truant.

\textbf{Policy Recommendation}

Amend state law to recognize and empower the supremacy of parental authority in education.

Legal components of such amendment, implicit or explicit in law, should include the following characteristics:

- no requirements to notify the state or school district of intent to home school
• no requirements to seek approval of state or school district to home school
• no requirements for mandated curriculum
• no requirements to test home schooled children
• no requirements to file forms of any kind
• no requirements for teacher certification
• the burden rests with the state to prove that parents are not teaching their children.

Model Legislation

§ Compulsory Attendance

(a) This section does not apply if

(1) a child is being educated in the child’s home by a parent or legal guardian, or
(2) a child is attending a private school
On September 2, 1987, President Ronald Reagan issued executive order 12606, *The Family,* “to ensure that the autonomy and rights of the family are considered in the formulation and implementation of policies by Executive departments and agencies.” Though its career was stunted, the idea of a family impact statement is an important one that has not entirely disappeared from public debate.

**Family Impact Statements in the Law**

Executive Order 12606 provided a list of seven questions by which policies should be addressed and charged agencies with identifying “proposed regulatory and statutory provisions that may have significant potential negative impact on the family well-being.” A rationale for these policies would then be required. The Office of Management and Budget was charged with ensuring this information was acted on and the Office of Policy Development was to review current regulations and advise the president “on policy and regulatory actions that may be taken to strengthen the institutions of marriage and family in America.” Finally, an annual report from the Office of Policy Development to the Domestic Policy Council was requested. The specific questions identified in the Order were:

(a) Does this action by government strengthen or erode the stability of the family, and, particularly, the marital commitment?
(b) Does this action strengthen or erode the authority and rights of parents in the education, nurture, and supervision of their children?
(c) Does this action help the family to perform its functions, or does it substitute governmental activity for the function?
(d) Does this action by government increase or decrease family earnings? Do the proposed benefits of this action justify the impact on the family budget?
(e) Can this activity be carried out by a lower level of government or by the family itself?
(f) What message, intended or otherwise, does this program send to the public concerning the status of the family?
(g) What message does it send to young people concerning the relationship between their behavior, their personal responsibility, and the norms of our society?xxv

Then, on April 23, 1997, President Bill Clinton issued a new executive order (13045, “Protection of Children from Environmental Health Risks and Safety Risks”). This much longer order contained as its very final sentence: “Executive Order 12606 of September 2, 1987 is revoked.” Senator Spencer Abraham and 11 others then introduced the Family Impact Statement Act of 1997 to legislatively require what President Clinton had revoked.xxvi A legislative requirement of this sort had been discussed in Congress beforexxvii but this bill did not go anywhere.

Similarly, a number of states have considered this kind of legislation.xxviii In 2001, a Utah House Joint Resolution called for a study on the possibility of adding a family impact statement to the bottom of each bill.xxix Bills calling for family impact statements have been successful in a number of states. Illinois requires such a statement “indicating how the agency’s actions have strengthened and promoted stability within Illinois families” in the regularly submitted agency plan required by the Welfare and Rehabilitation Services Planning Act.xx Utah’s Division of Child and Family Services is required to publish a statement on “the impact of [a] rule
or policy on the authority of parents to oversee the care, supervision, upbringing, and education of children in the parents’ custody.”

Two states have adopted a more expansive requirement. In 1999, the Montana legislature enacted a bill allowing for administrative rule review committees to request “family impact notes” for proposed rules. The presiding officer of the house in which a bill is introduced, the bill’s sponsor, a majority of the chamber, or a committee considering a bill may also all request a family impact note on a bill. The note is prepared by an executive branch agency. The family impact note would include:

1. any services that the bill would provide to families;
2. any deleterious effects that the bill might have on families;
3. an estimate of the number or percentage of families that would be affected by the bill;
4. an estimate of the short-term and long-term costs or costs savings that the bill would have for the average family;
5. ways in which the bill might strengthen the stability of the family;
6. any effect the bill might have on the rights of parents, the rights of children, and their rights in relation to each other and to state and local government;
7. whether the bill would help the family perform its functions;
8. whether the bill substitutes state or local government activity for an activity traditionally engaged in by the family; and
9. whether the bill sends a message to parents, children, or both regarding personal responsibility and the norms of society.
Interestingly, all of these family impact note requirements are temporary and will expire October 1, 2003, although there are currently a number of bills pending to extend that date.\textsuperscript{xxxvi}

The most significant requirement is in place in Louisiana. This bill was also enacted in 1999. It requires each state agency to give a written family impact statement for each proposed rule.\textsuperscript{xxxvii} The questions addressed in the statement are:

1. The effect on the stability of the family.
2. The effect on the authority and rights of parents regarding the education and supervision of their children.
3. The effect on the functioning of the family.
4. The effect on the family earnings and family budget.
5. The effect on the behavior and personal responsibility of children.
6. The ability of the family or a local government to perform the function as contained in the proposed rule.\textsuperscript{xxxviii}

A computer search of Louisiana regulations discloses over 150 proposed rules with family impact statements. Of these, twenty-three have family impact statements that suggest the rule would have some effect on the family. These suggest the possible strengths and weaknesses of such statements. A number note the possibility that increases or decreases in government assistance or benefits might affect family budgets.\textsuperscript{xxxix} Only the rules proposed by the Department of Social Services provide substantive responses to these questions, which is not surprising since these regulations are most likely to directly affect families.\textsuperscript{x} None however, suggest any possibility that the proposed regulations would have a negative impact on the family.

One weakness in some of the statements is the lack of serious consideration of the final question regarding whether the family or local government could perform the function described in the
regulation. One regulation on the number of instructional days in the public school calendar candidly says “yes” to this question which presumably indicates a recognition that parents could educate their children or that local school districts could establish minimum days for instruction. Nearly all of the regulations from the Department of Social Services routinely say that the function described is “strictly an agency function.” However, while it may be correct in the technical sense that a family cannot run a state’s program for providing assistance to low income families, it does not note the reality that in the past, many of the services provided by the state were offered by families (including extended families), religious or other groups, or local governments. An excellent exception is a teen pregnancy prevention program which notes that “[a]lthough the family (parents) should be the primary teacher, the program aims to reinforce values and practices, and/or to actually assist the family when consent is given for active participation.” More troubling is that some of the asserted impacts are probably untrue. All of the gambling regulations, for instance, claim a “positive yet inestimable” impact on the family.

On the whole, though, these statements take very seriously the intent of the statement and force policymakers to think about the way their rules may impact families and some are very thoughtful. There does not appear, however, to be any review process for challenging the information in a statement. It also is not clear how the statements are used beyond provoking thought among state employees about possible impacts of proposed rules.

Rationales for Family Impact Statements

One commentator has characterized Louisiana’s requirement of a family impact statement as an “apparent concession to special interests.” This characterization portrays the family as a group of people with a common interest seeking their own self-interest through favorable legislation and social policy. It assumes that the “family” in family impact statements really means “families,” existing stakeholders in the political process. Like small businesses or veterans, they are, in this view, a discrete and insular grouping
existing either as a creation of, or at the sufferance of, the state and
must curry the state’s favor in order to gain advantages or prevent
liabilities. They have political power, presumably through
representation by some organization with leadership and
spokespersons.

A “Functional” Model of the Family

Indeed, some discussion of family impact statements has proceeded
along these lines. The most prominent organization discussing
family impact statements, the Policy Institute for Family Impact
Seminars (FIS), notes the absence of any “explicit, national family
policy” in contrast to many European countries.\textsuperscript{xlv} It proposes a
complex series of assessments based on an equally complex set of
assumptions and strongly disavows support for family impact
statements from “the far political right” and “conservative
Republicans.”\textsuperscript{xlvi} These are accused of concentrating “on defending
the needs of their individual constituents.”\textsuperscript{xlvii} In contrast, FIS
disavows any “single definition of family” especially a “normative”
one, instead taking “the pragmatic position that the definition of
family will vary depending upon context and use.”\textsuperscript{xlviii} While this
would appear to avoid the “special interest” charge, it actually has
the opposite effect, because if family is understood as an entity with
no fixed status, a wide variety of relational configurations can vie for
recognition as family in order to protect their own interests. Then, it
becomes the responsibility of family policy to sort out these
competing claims and divide up the legislative and administrative
spoils among contenders.

This approach concentrates on a “functional” definition of the
family. Thus, it identifies the relevant entity for assessment of
impact as “families” (meaning existing relationships that provide
certain benefits such as companionship, child-rearing, economic
sharing, etc.), rather than “the family” (meaning a normative unit).
This approach tends to focus on existing relationships and
configurations and stresses the process of interaction within these
relationships rather than their structure, so that the “family” begins
to be identified in terms of households or the commitment of two or more people to one another.\textsuperscript{36}

Basing its understanding of family on this functional view dramatically affects the outcome of any family impact assessment. Gambling for instance, may or may not adversely impact a “functional” family. At least the determination of whether it will or not will likely be extremely complex and may have to be based on expensive and time consuming social science data which will ultimately be provisional and subject to change. In addition, a slight change in variables could dramatically affect the answer to whether a particular policy is good for families in this approach. To take an obvious example, if marriage is not central to the “functional” understanding of the family, then a policy that encourages unmarried couples to live together could very well be a policy that benefits this kind of family (i.e. gets more people involved in “family” life). If on the other hand, marriage is central to the understanding of family, the assessment of such a policy would be completely different.

In its discussion of its approach, FIS notes the complexity of the enterprise it is engaged in.

The idea of proposing family impact statements is a disarmingly simple one. To ask, “What effect will this proposal have on families and on the family as an institution?” sounds like an eminently sensible idea. The work of FIS and other related efforts have demonstrated that although the question sounds simple, the answers are very complicated. . . . In FIS’s experience, family impact analysis is a technical enterprise that requires considerable expertise and knowledge of family research and programs.\textsuperscript{1}

It also notes the obvious ramification, that legislative and administrative staff without special technical training will not be able to conduct effective analyses. This is unfortunate because it
may severely limit the ability of policymakers to engage in family impact studies. This is a problem given that many of the principles identified by FIS for guiding family are very wise and appropriate.

A Normative Model of the Family

If however, the basic unit of analysis is not “families” (existing configurations whose viability derives from state recognition), but “the family” (a normative status whose viability precedes state recognition), a true ecological approach to family impact statements is possible. This approach recognizes that the family is the fundamental unit of society, and therefore the family must be preserved to ensure the survival of society and the flourishing of the individual.

Other kinds of impact statement requirements recognize the need to preserve an existing entity such as the environment or the market, but no other unit is so profoundly important, rather foundational, to the existence of everything else. It recognizes that the family is an entity that, while not created by outside force, is affected by those forces and which affects them in return. Just as the decision to excavate a mine, dam a river, or develop a plot of land affects the balance of biological and environmental factors, legal and cultural forces make more or less likely the possibility that the family can be maintained and its integrity and functionality preserved.

At the very least, these factors can provide the context in which the family does its crucial work and make that work easier or more difficult. This concept is not alien to the law which provides complex statutory schemes for protecting sites of historic value and animal species. Most importantly, this approach recognizes that the family is an existing reality that must be approached on its own terms. It is not a tool for accomplishing social goods and it cannot be manipulated at will, as if family policy were akin to fiscal policy. This ecological approach, focusing on conserving the ideal family structure rather than fine-tuning family processes, will share much with the approach described at the beginning of this section. It is possible that it will use the same questions as those described by FIS.
in assessing the impact of policies and actions, but the answers to these questions might be quite different. The focus is maintaining an ideal and making it attainable, not merely policing the status quo.

Defining “Family”

Obviously, at the core of this ecological view of family impact statements is a normative definition of the family. That is, the identification of the institution we are trying to maintain and which will be affected positively or adversely by government policies and actions, legal developments and cultural trends. As noted above, FIS uses the working definition of “two or more individuals related by blood, marriage or adoption.” This is a good, pragmatic definition which identifies the broad range of familial relationships. It recognizes the importance of family interactions to individuals and the reality that these interactions have a more profound impact on individuals than government or other institutions can. It is also non-normative so that few are left out of its scope. Indeed, (again, as noted above) if it is broadened to include any legally recognized intimate relationship it will be much more inclusive. It does not, however, reflect the importance of family structure to society and individuals. It seems to assume that all structures are equal.

The ecological view assumes that some family structures have inherent value and some relationships which could be defined as “families” are more in need of protection than others. In fact, it recognizes a crucial fact alluded to in the last section, that at times the interests of different family forms and configurations may actually be at odds. Instead of glossing over that fact, it seeks to “take sides” to protect society’s most valuable resource.

A family impact statement that relies on a normative definition of the family would be at odds with the increasingly prevalent “functional view” which focuses on family processes rather than family structure. Put colloquially, the functional view could be summarized as follows: if there’s love and nurturing, then there’s a family. This cannot suffice for identifying the entity to be protected
by the family impact statement since this is merely another way to identify *individual* interests for recognition and protection.

The traditional normative definition, by contrast, recognizes the critical nature of family structure. It identifies the ideal family as a mother and father who are married to one another and their children. By extension, it includes the influence of extended family members. It recognizes that an individual does not make a family by willing that his or her relationships be considered such. It recognizes love and commitment as necessary but not sufficient to create a family. To take an analogy from genetics, it has been noted that “the DNA of human beings and chimpanzees is 98 to 99 percent identical.” Since the technical difference may be slight, the implications of that difference are vast. Similarly, marriage and unmarried cohabitation, for instance, may look very similar but the differences are profound.

An approach to family impact statements that seeks to provide protection to this normative ideal wisely recognizes the profundity of the differences in various family structures and thus embraces the optimal setting for childbearing, childrearing and human flourishing. As Maggie Gallagher has noted, “By socially defining and supporting a particular kind of sexual union, the society defines for its young what the preferred relationship is and what purposes it serves.”

**Building an Effective Policy**

**Context**

Family impact statement legislation must identify how the various laws and policies are to be assessed. The laws described above illustrate four different ways in which this could be done. A first approach is represented in President Reagan's executive order and the Louisiana law to require administrative agencies to perform a family impact statement for proposed regulations. A second approach, represented by Utah and Illinois, takes the same approach but is specific to certain agencies. A third approach, embodied in a
joint resolution from Utah, asked for each bill to include a family impact statement. A fourth and final approach, represented by Montana, applies both to legislation and regulations allowing administrative rule review committees to request a family impact statement for rules and specific legislators to request one on legislation.

The first approach may be too loose because there seems to be no way of responding to administrative actions that affect the family. The second is probably too narrow because many agencies without a specific role related to children and families may promulgate laws that nevertheless affect the family. The third is helpful but would not affect administrative agency decisions. The Montana approach seems the most useful since it affects both administrative and legislative actions, and allows for some specificity of the regulations reviewed so as not to overburden agencies enacting regulations which are not likely to affect the family.

A hybrid approach combining principles from all of these laws would be extremely valuable. It would require all bills to include a family impact statement similar to the fiscal impact statements required for legislation in some states. Then, it would also allow for legislative oversight of administrative action in a way analogous to the Congressional Review Act of 1996. Proposed agency actions also would require a family impact statement. These statements would be submitted to the legislature and could be disapproved by a resolution of the legislature (subject to veto by the executive).

It would also be appropriate to assess existing law, perhaps through a blue-ribbon panel charged with examining whether a state’s current policy is “family friendly.”

Substance

Once a family impact statement has defined the appropriate unit for analysis and the vehicle for performing the analysis, it must include some questions to be used to assess legislation, policies and actions that would affect the family. The questions in existing statements
range from generalities ("the effect on the stability of the family") to specifics ("an estimate of the short-term and long-term costs or cost savings that the bill would have for the average family").

It is possible to assess the impact of policy or legislation on the maintenance of the ideal family through a series of three questions that combine the concepts that are included in existing laws. These questions focus on three broad issues: (1) status, (2) benefits, and (3) noninterference. An action is assessed by either concrete harms in these areas or by the message it sends in regard to each.

**Question One:** Does this action encourage marriage or threaten the status of marriage and the marriage-based family as a uniquely favored legal institution?

Answers to this question will likely range along a spectrum from enhancing the status of marriage to redefining it or replacing it with some other kind of recognition. A law may, for instance, affirm the definition of marriage as the union of a man and a woman. On the other extreme, it may define marriage as the union of any two people.

Affirm  Redefine

**Question Two:** Does this action encourage people to become parents and commit themselves to their children?

Actions may provide benefits to the family (for example, through per-child tax credits) or may penalize the family (for example through prohibitive levels of taxation that coerce marketplace participation by both spouses).

Benefits  Penalties

**Question Three:** Does this action help the family perform its functions or does it substitute governmental activity for the function?
Governments can allow families to function without interference or micromanage their work. Policies that intrusively monitor non-abusive parenting, for example would be on the far end of a spectrum.

Noninterference  Micromanagement

Question Four: Does this action strengthen bonds between generations?

Although government cannot coerce family relationships, it can act in a way that discourages bonding between generations of a family. This approach allows for assessments of actions that are not necessarily consistently “family friendly.” For instance a bill may provide significant economic benefits to families but only after dramatically redefining the family.

The use of only three interrelated questions prevents analysis from becoming merely a tally of yes-and-no questions. For instance, asking whether gambling would increase or decrease the family budget can yield two possible answers depending on whether the gambler wins. However, the more general question of benefits and liabilities can take into consideration loss of family time, addiction and child neglect.

Two specific policy proposals, one entrenched and the other relatively new, provide examples of how these proposals might be worked out in a specific context. These brief vignettes just signal how a family impact statement might assess existing policies.

Example One: No-Fault Divorce

In the 1960s and early 1970s the laws of the various states were amended to provide either that a divorce could be granted without reference to “fault” on the part of one of the parties (i.e. for “irreconcilable differences”) or by adding a no-fault ground to the existing grounds for divorce, in rapid succession. Thus, the family
impact statement can include a retrospective element (what has this law in fact done?).

Utilizing the family impact questions, the assessment of no-fault divorce would have to be negative. Most significantly, it treats marriage as a potentially disposable relationship which could be dispensed with little thought or effort. Not only has it contributed to an increase in divorce rates, but it has created a “divorce culture” in which commitments and relationships are less reliable.\textsuperscript{lviii} No-fault divorce has also provided severe penalties to children. The costs to children whose parents divorce have been serious and long-lasting.\textsuperscript{lix} It discourages family commitment and invites intrusive government involvement in family life. Parents involved in a divorce may have a court decide their vacation schedule, when they can visit their children, even what they can talk about with their children. In addition, financial hardship (particularly for mothers) often must be alleviated by welfare spending. The consequences of divorce do not necessarily counsel an outright ban because abusive relationships are also bad for parents and children, but a legal regime that makes divorce for insignificant reasons simple and painless is bad policy.

\textit{Example Two: Domestic Partnership}

Unlike no-fault divorce, providing legal recognition to unmarried couples through “domestic partnership” laws is a relatively new development. In Vermont, same-sex couples may register in “civil unions” which make them eligible to receive all of the benefits of marriage. In California, same-sex couples may register as domestic partners, a status which is rapidly gaining significant benefits. In addition, a number of municipal governments provide for some kind of domestic partnership registration. These laws generally apply to both same-and opposite-sex couples and provide few tangible benefits beyond the symbolic statement of social acceptance.

The impact of such laws on the unique status of marriage is uniformly negative. It encourages couples who might otherwise
marry to live together and gain some of the benefits that would have been reserved to married couples. It also treats unmarried cohabitation as similar to or even equivalent to marriage. The laws also redirect resources that might have gone to married couple families to cohabiting couples. Children in such relationships also seem to be at a greater risk than children living with married parents. Finally, when family regulation is estranged from recognition of the natural family, governmental intrusion is provoked. For instance, the state must intervene to determine parental rights of couples in same-sex relationships because one of the partners, by definition, will not be the biological parent of a child conceived in that relationship (such as by artificial insemination). The same is true in unmarried relationships involving opposite sex couples since the normal default ruled that would apply on marriage dissolution will not apply to these couples.

Policy Recommendation

Two social phenomena, the increasing complexity and intrusiveness of the law and the increasing fragility of family relations, argue strongly for a mechanism that maintains the core unit of society. A recognition that the normative family is the fundamental unit of society which must be preserved would go far to impose discipline on the law’s interactions with the home. A family impact statement is an important tool in maintaining this discipline, and is most likely to be successful if it: (1) recognizes the pre-existing nature of the family, (2) includes a normative definition of the family, (3) includes a check on actions that would be unfriendly to the family, and (4) provides tools for assessing whether an action will maintain or undercut the family.

A two-tiered approach with the enactment of family impact statement legislation and appointment of a commission to assess the impact of current law on the family could go far to ensure that a state is truly “family friendly.”
Model Legislation

§ Family Impact Statements

(A) Legislative Impact

(a)(1) All proposed legislation shall include a statement, provided by the author of the legislation, describing the potential impact, if any, of proposed legislation on the family consisting of a husband and wife and any dependent children.

   (A) The statement shall respond to the following questions:

   (i) Does this action encourage marriage or threaten the status of marriage and the marriage-based family as a uniquely favored legal institution?
   (ii) Does this action encourage persons to become parents and commit themselves to their children?
   (iii) Does this action help the family perform its functions or does it substitute governmental activity for the function?
   (iv) Does this action strengthen bonds between generations?

(B) Administrative Impact

(a)(2) Each state agency shall prepare a family impact statement for every proposed rule or major action to be taken by any department under its administration. In each case, once formally proposed, a thirty day window to receive public comment shall be required. Following this public comment period, these statements, along with complete records of all public comments, shall be submitted to the relevant committee of the State legislature for review and which can, by a majority vote, call for a joint resolution of both houses of the legislature, disapproving any proposed rules or major actions deemed harmful to the family. Such a resolution shall be subject to veto by the governor which can only be overridden by a 2/3 vote of the legislature.
(a)(3) One year from the effective date of this legislation, the Governor shall appoint a panel consisting of nine members which shall study the current laws of this State and make recommendations consistent with the purpose of the family impact statement for ensuring that the laws of this State support the family as the fundamental unit of society.
A recent report from the U.S. Department of Health and Human Services indicates that the rate of divorce in the United States (excluding California, Colorado, Indiana and Louisiana) in 2001 was 4 per 1,000 people.\textsuperscript{LXI} A more exhaustive study of marriage and divorce statistics in 1996 indicates that “nearly half of recent first marriages may end in divorce” citing a National Health Statistics report “which found that 43 percent of first marriages end in separation or divorce within 15 years.”\textsuperscript{LXI} The study also notes that “first marriages which end in divorce last 7 to 8 years, on average.”\textsuperscript{LXIII} Clearly, divorce is a part of American life.

Professor Kathryn Spaht has suggested that marriage is characterized by three core elements: (1) sexual complementarity, (2) mutual faithfulness, and (3) permanence.\textsuperscript{LXIV} The legal meaning of marriage is under attack regarding each of these elements such as in the attempt to redefine marriage to include same-sex couples and wink at adultery. The permanence of marriage is harder to assail directly because most, if not all, married persons expect their marriages to last and all marriages will unless some affirmative step is taken to end the marriage.\textsuperscript{LXV}

However, the availability of divorce can weaken the element of marital permanence, so a legal regime that makes divorce simple and trivial constitutes an attack on marital permanence.

The Rise of No-Fault Divorce

In 1964, the California Assembly Interim Committee on the Judiciary began an examination of the state’s divorce law, including a series of hearings.\textsuperscript{LXVI} At the outset of the hearings, Professor Herma Hill Kay of the University of California–Berkeley’s Boalt Hall School of Law
raised the possibility of a ground for divorce that did not suggest fault on the part of either spouse. In 1966, Governor Edmund Brown appointed a “Governor’s Commission on the Family” which held no public hearings, but issued a report a few weeks before Governor Brown left office. This report included a proposal to eliminate “all fault grounds for divorce and replac[e] them with the requirement that irreparable breakdown of the marriage exists.”

Prior to this, a person seeking a divorce could get a decree only on a showing of adultery, cruelty, desertion, neglect, drunkenness, felony conviction or insanity. The California Family Law Act of 1970 removed all grounds for divorce based on marital fault. In order to receive a divorce decree in California, a spouse need only show “irreconcilable differences, which have caused the irreremediable breakdown of the marriage” or “incurable insanity.”

Immediately, the National Conference of Commissioners on Uniform State Laws included the “irretrievable breakdown” standard in the Uniform Marriage and Divorce Act. California’s no-fault revolution spread throughout the next decade so that currently, 13 states have only no-fault divorce grounds, with additional states including no-fault grounds along with the more traditional fault grounds. As Dr. Bryce J. Christensen has noted, “when legislators made this revolutionary break with legal tradition, they were not responding to widespread public pressure, but rather acceding to the well-orchestrated lobbying of a few activists.”

The Legacy of No-Fault

Professor Lynn Wardle has noted a number of serious social problems caused by the rise of unilateral no-fault divorce. A few of these will be described in turn.

Weakening of Marriage

One study has demonstrated that “the switch from fault divorce law to no-fault divorce law led to a measurable increase in the divorce rate.” In addition, “parental divorce increases the risk that
offspring will see their own marriages end in divorce."lxxvii This is especially true if both of the spouses “experienced parental divorce.”lxxviii Specifically, “parental divorce increases the odds of disruption within the first five years of marriage by 70 percent.”lxxix Fault grounds signaled the seriousness of breaking the marital promise to the community, the parties, and their children. Norval Glenn has suggested that the relative ease of securing a divorce has also led to a decline in marital happiness,lxxx

Harm to Parties

Proponents of no-fault divorce promised that it would decrease the hostility in divorce proceedings. However, it has merely shifted this to the post-divorce stage, including to disputes over custody and visitation. No-fault divorce puts the state in league with the party wanting a divorce against the spouse seeking to avoid that outcome. An obvious consequence of parental divorce is facing the prospect of having a court decide their vacation schedule, when they can visit their children and even what they can talk about with their children. The parties to a divorce may also experience great anger that may last for years and which may be “intensified by the perception that the state passively acquiesces in a spouse’s infidelity.”lxxxi Thus, “divorced men and women suffer from poorer physical and mental health than married men and women.”lxxxii In addition, recent research indicates that the personal happiness promised by divorce has not, in fact, materialized.lxxxiii

An economist notes that a “subtle impact” of no-fault divorce “has been a reduction in the quality of life for divorced women and their families because no-fault divorce reduced the incentives for spouses to increase their specialization during marriage.”lxxxiv He notes that “[w]ithout the limited protection provided by the fault grounds for divorce, many people who increased their specialization during marriage, especially as housewives and mothers, are worse off under no-fault divorce if their marriage is dissolved.”lxxxv This is clearly a lose-lose situation. These costs are not ameliorated by awards granted on divorce.lxxxvi Thus, “among divorced women who do not remarry, ‘in the initial years of divorce, economic well-being declines
by more than 30 percent and remains at that same low level for many years.” One commentator has noted that “by the late 1980s, half of all single-parent families had dipped below the poverty line, and 70 percent of those families were headed by divorced or separated women.” A study from the U.S. Census Bureau reports that:

Separations and divorces are often followed by sharp reductions in income due to the loss of a spouse. While 12 percent of recently separated men were below poverty, 29 percent of recently separated women were below poverty. . . . The data suggest that marital disruption results in much poorer economic circumstances for women than for men.

Harm to Children

Dr. Paul Amato has noted studies that show that “parental divorce is associated with negative outcomes in the areas of academic achievement, conduct, psychological adjustment, self-esteem and social relations” and that “adults who experience parental divorce as children, compared with those from continuously intact families of origin, have poorer psychological adjustment, lower socioeconomic attainment and greater marital instability.”

Maggie Gallagher and Linda Waite summarize the research on children in single-parent households (whether because of divorce or unmarried childbearing):

Children raised in single-parent households are, on average, more likely to be poor, to have health problems and psychological disorders, to commit crimes and exhibit other conduct disorders, have somewhat poorer relationships with both family and peers, and as adults eventually get fewer years of education and enjoy less stable marriages and lower
occupational statuses than children whose parents
got and stayed married.\textsuperscript{xci}

They note specifically that “on average, divorce causes a child’s
standard of living to drop by about one-third;” that “adult children
whose parents divorce . . . are about 40 percent less likely than
children whose parents remained married to say they see either their
mother or father at least several times a week;” that, according to one
researcher, “divorce made it 50 percent more likely a child would
have health problems;” and “that 11 percent of young adults from
divorced families had seven or more symptoms [of emotional and
psychological health problems] . . . compared to eight percent of
those from intact two-parent families.”\textsuperscript{xcii}

Another commentator cites evidence that “[a]mong children of
divorced parents who live with their mothers, less than half will see
their fathers at all during a given year” and “that among children not
living with a divorced father, only 10 percent maintained ‘regular
contact’ over a five-year period and only five percent maintained
regular contact over 10 years.”\textsuperscript{xciii}

One study showed that “five years after the split, over one-third of
the children suffered from moderate to severe depression.”\textsuperscript{xciv} An
important qualitative study which follows children of divorce over
many decades indicates that the serious negative emotional and
psychological impact of divorce is extremely long lasting.\textsuperscript{xcv} One
researcher notes that there is evidence that “young adults who grew
up in divorced families are more pessimistic about the chances of
life-long marriage and evaluate divorce less negatively than do other
young adults.”\textsuperscript{xcvi}

\textit{Harm to Commitment}

An influential family law scholar notes the irony that “[d]espite
considerable contractual freedom, couples today are unable to
undertake a substantial legal commitment to marriage.”\textsuperscript{xcvii} Dr.
Christensen points out that “by making it easy to void a wedding
vow without incurring legal guilt, the state discourages self-sacrifice
and emotional commitment to the marriage.” As Barbara Dafoe Whitehead has noted, the lesson of “the school of divorce” is “that families break up, relationships end, and love is not forever.”

An Important Lesson Learned the Hard Way

Ms. Whitehead has explained: “Divorce has been damaging not only because it has contributed to the widespread trend toward family fragmentation and the parental abandonment of children, but also because it has won influential adherents in the society who defend family breakup as necessary for individual psychological growth and freedom.” Professor Mary Ann Glendon of Harvard Law School notes: “The American story about marriage, as told in the law and in much popular literature, goes something like this: marriage is a relationship that exists primarily for the fulfillment of the individual spouses. If it ceases to perform this function, no one is to blame and either spouse may terminate it at will.”

Professor Spaht asserts that “[t]here is no question that law played an important role in defining marriage as a relationship without lifelong commitment.”

Those who oppose reform of the no-fault divorce regime either (1) do not believe that no-fault divorce has weakened marriage, (2) believe reform will hurt women, for instance by trapping them into abusive or disadvantageous marriages, (3) believe that children will be trapped with parents in bad relationships, or (4) believe that reintroduction of fault grounds will increase the hostility in divorce proceedings. Since these arguments generally ignore the substantial social science evidence about current divorce practice, they should not be allowed to prevent reform. It should be noted, though, that reintroduction of fault in divorce proceedings is not likely to be a trap for women and children experiencing abuse since abuse would be a fault ground justifying divorce.

Divorce, which has always been recognized as an individual tragedy, has now, due to the influence of no-fault divorce law, become a social nightmare. Recent “good news” about a leveling off of the divorce rate is cold comfort. A plateau the elevation of Mt.
McKinley is a high plateau. Any attempt to leverage the law to reduce the prevalence of divorce and the sense that marriage is a disposable relationship will be difficult and encounter opposition from entrenched interests as well as cultural practices. However, the severe consequences of a failure to address the problem make the effort indispensable.

The tragic consequences of the divorce culture have led to increasing efforts to reform the law to address the breakdown in marriage. Two important developments have resulted.

**Covenant Marriage**

The most wide-ranging legal reform is the creation of “covenant marriage.” In 1997, Louisiana adopted a law which allows couples who are getting married to opt-in to a civil covenant whereby they agree that their marriage will be a “lifelong relationship” (thus, a “covenant marriage”). Unlike a typical civil marriage, the parties must have participated in pre-marital counseling aimed at helping them understand the responsibilities of marriage. They also sign a “Declaration of Intent to Form a Covenant Marriage” which provides legal accountability for their agreement, specifically that the marriage cannot be dissolved without a showing of marital fault such as adultery, felony conviction, abandonment, abuse or a two-year separation. Couples who were already married may choose to “upgrade” their marriage to a covenant marriage. Practically, by reintroducing fault grounds into the covenant marriage, it may provide some protection for an individual opting to contract a covenant marriage.

Since Louisiana’s law has been enacted, Arizona (in 1998) and Arkansas (in 2001) have adopted similar laws. In the current legislative session, five states considered legislation to create the status of covenant marriage.
Other Reforms

A number of modifications to state divorce laws have also been enacted or considered. A proposed Georgia law would have provided that a no-fault divorce cannot be granted if it is unilateral and children are involved. Nineteen states mandate education for divorcing couples, with eight applying to all parents and 11 to those directed by court order. Two states provide for longer waiting periods between a petition for divorce and the grant of a divorce when children are involved. A recent report published by the U.S. Department of Health and Human Services notes that “eight states offer mediation services through the courts.” In Utah, mediation is mandated for all couples, and in California, Iowa and Wisconsin, only for custody and visitation disputes.

Policy Recommendation

Covenant marriage provides an attractive possibility for reform since it is voluntary for the parties involved. However, this also may mean that it is more likely to attract couples with a high level of commitment to ensure they do not divorce, whereas some couples who most need legal incentives to make their marriage work will not receive them.

The piecemeal reforms are also attractive, especially those that recognize the severe impact of divorce on children. These tend, however, to focus on modifying the way a divorce takes place, not discouraging a divorce in the first place.

In the final analysis, only a forthright admission that no-fault divorce is detrimental for couples, children and society will be truly effective. The corollary of this admission is that fault grounds need to be reintroduced into the law of marital dissolution. This will allow the law to serve as a check on unilateral divorce and ensure that marriages are not dissolved for frivolous or trivial reasons. It will also signal to prospective married couples that the law expects them to take seriously their commitments and that they ought to think deeply and prepare well before marrying. As it shifts cultural
trends, it can also provide assurance for children that their families will not be shattered unless they are really at risk. Given research that indicates that, over time, even couples in unhappy marriages will eventually begin to appreciate their partner again and experience a happy marriage, a change in the divorce culture might enhance the individual happiness of adults.\textsuperscript{cxvi}

The best public policy on divorce would reintroduce fault grounds where a marriage is longstanding or where children are involved.

**Model Legislation**

§ *Divorce*

(a) Irreconcilable differences shall not be grounds for divorce if:

(i) there are living minor children of the marriage; or
(ii) the parties have been married 10 years or longer; or
(iii) one of the spouses contests the divorce.
Fueled by the aging and longevity of the baby-boom generation, the escalating cost of long-term care (or LTC) for the frail elderly is a time bomb ticking away within federal and state budgets in the decades ahead. The census of 2000 counted 4.3 million Americans age 85 and over. By 2030 that number should grow to 7.7 million. Two decades later, by 2050, it should almost double again to an estimated 14.5 million Americans. The federal government expects that the number of nursing home residents, which reached 1.65 million in 1999, will climb to 2.5 million by 2020 and to 4.5 million by 2060. The number of functionally disabled persons age 65 or over living in community-based care should reach 15.2 million in that latter year—again, about three times today’s number.

Individual costs will likewise soar. In recent years the LTC industry has recorded cost increases averaging between 6 and 8 percent, more than three times the overall inflation rate. By the year 2030 the American Council of Life Insurers predicts LTC costs to rise fourfold: adult day care, from $50 per day in 1999 to $220 per day (or $56,100 per year); home health aide visits, from $61 per daily visit to $260 per visit (or $68,000 per year); assisted living facilities, from $25,000 per year to $109,300; and nursing home care, from an average of $44,000 per year to $190,000 per year in 2030.

When these rising human numbers and costs are factored together, the results are numbing. Nursing home costs alone, which totaled $72.8 billion in 1990, would soar to $571.8 billion by 2030—a staggering sevenfold increase. Much of this burden would fall, inevitably, on government Medicaid and Medicare entitlements.

Was this situation inevitable? Even factoring in gains in longevity, the answer is certainly no. For the whole of human history, until the
middle decades of the 20th century, the care of the frail elderly was provided by their families or their neighbors: what social welfare analysts now call “informal care.” The common American assumption, inherited from colonial times, reinforced by the founding era, and continuing through the 1920s, was that each true family represented a continuum with a past, a present, and a future: a living bond between the generations of a family. Writing 55 years ago, the renegade economist Ralph Borsodi ably summarized the ideal vision of this vital family and the obligations that it conveyed:

This [family] continuum is a corporate entity; with a corporate name, corporate values, corporate history and traditions, corporate customs and habits, corporate reputation and good will; with a corporate estate, real and personal; composed not only of its present membership, but a membership in the past, and a membership in the future, of which the members in being and in occupation—the living family group—are representatives, entitled to the usufruct [or the use] of the family’s corporate heritage, but obligated, as trustees for their posterity, to the conversation of that heritage.

Again, the family was understood to be at least three-generational and assumed care for its frail elderly as a matter of duty and as an expression of its continuity. Indeed, adults in their productive years recognized in some manner the need they had to marry and successfully rear children themselves so as to provide for their own security. The intentionally childless broke the great chair of heritage and also put themselves at risk.

Is all this nothing more than the myth of the three-generational family? Did not industrialization and urbanization scatter families and end significant family-centered care?

At least from the perspective of 1929, nearly a hundred years into the industrial revolution, the answers were no. In all states, law and custom continued to reinforce the obligation of adult children to provide for their elderly parents when the latter could no longer provide for themselves. Simply put, there was no “crisis” in long-term care. It is true that the normally unpleasant “poor houses” and
“poor farms,” usually run at the municipal and county levels, found a growing proportion of their residents to be in the “never married” and/or “childless” categories. But few people actually lived in these places: perhaps 50,000 during the 1920s, about .67 of 1 percent of those aged 65 and over. This was hardly a social crisis.

As historian W. Andrew Achenbaum concludes in his definitive work, _Old Age in the New Land_, had it not been for the Great Depression, the family-centered approach to elder care would probably have continued into the future. The pressure for change was simply not strong enough, circa 1929, to suppress the inherited American values of family integrity and personal responsibility. Achenbaum argues that most workers would have remained in the labor force as long as possible, secured their own retirements through savings and private annuities, and relied on their children, other family members, and their communities for back-up security.

The Great Depression Hits the Family

But the Great Depression did come, and with it record levels of unemployment, widespread bank failures and loss of savings, bankruptcy of numerous insurance firms carrying private annuities, and so on. Even so, patterns of elder care remained largely unchanged. As the Committee on Economic Security, charged by President Franklin Roosevelt with crafting a new system, admitted in 1935, “Children, friends and relatives have borne and still carry the major costs of supporting the aged.” Yet, true to its charge, the committee went on to recommend the creation of a new system of publicly financed social insurance for old age and disability.

It is important to note that in crafting this new order, the committee embraced certain assumptions about the American future:

_First, the committee members assumed that the American birthrate would steadily decline._
In a widely cited essay, to which the committee’s report made reference, the noted demographer P.K. Whelpton predicted in 1930 that U.S. fertility, which had recently fallen near to the zero-growth level, would tumble still further, with “no stopping…place…indicated on the surface.” This pointed to a rapid shift in the age structure of the United States that made imperative an “overhaul” of American social institutions to care for the sharply growing proportion of elderly...  

Second, the Committee on Economic Security held that the American family was inevitably weakening. The volume Recent Social Trends in the United States, commissioned by President Herbert Hoover, appeared in early 1933. Its impact was considerable. Behind its scientific veneer, however, lurked a technocratic and socialist ideology. Relative to the family, University of Chicago sociologist William F. Ogburn argued from his “functionalist” angle that American families were in irreversible decay. “Working wives” and the turn to professionals were signs of this change. Already, American homes had shed virtually every function that they had once held. Social evolution pushed toward “the individualization of the members of the family” and the expansion of “society’s” role—meaning government’s role. In keeping with this ideological commitment, Ogburn saw no future prospects for significant levels of family care for the elderly. This function, too, must pass to government-paid experts.  

Third, the architects of the Social Security system assumed that economic stagnation would be permanent and the number of future jobs limited.  

This made it all the more urgent to create social security pensions for the relatively old, in order to lure them into retirement and give their jobs to younger workers. Assumptions Take on Life  

Telling, not one of these assumptions proved to be true. For example, the very next year—1936—saw the U.S. birthrate start to climb again;
by 1947, the “baby boom” was in full swing and it would last until 1963. Nor did family care of the elderly disappear. As late as 1982, 78 percent of functionally impaired elderly persons living in a community relied exclusively on the unpaid, informal care of family members, friends, and neighbors. Finally, relative to the number of jobs, there were 135.2 million Americans in the civilian work force in 2000—an increase of 350 percent since 1935. The real increase in Gross Domestic Product during this time was of a magnitude of 2,000 percent.

All the same, the three assumptions noted above—declining fertility, weakening and functionless families, and economic stagnation—gradually became part of Social Security. Over the decades, they gained a life and influence of their own, and began producing the very effects that they had assumed.

To focus on how this happened, let’s turn to an unusual source: Karl Marx. One of the doctrines in Marx’s scheme was his belief that the internal contradictions of capitalism would inevitably bring the system down. As he wrote in Das Kapital: “Capitalist production begets, with the inexorability of a law of nature, its own negation.” As citizens of 2002, we know that Marx made grave miscalculations—that the Marxist regimes of the Soviet Union and Eastern Europe beat capitalist societies to history’s graveyard. Nonetheless, Marx’s concept of a system’s “internal contradictions” remains a useful intellectual tool. Specifically, it can help us understand the deep flaws in America’s policy regarding care for the elderly.

The Contradictions of Elder Care

Indeed, that there are five “internal contradictions” to elder care in America: (1) the institutional contradiction; (2) the altruism contradiction; (3) the family contradiction; (4) the demographic contradiction; and (5) the efficiency contradiction. These aspects of the system have not only hurt the very persons who are supposed to be helped; they endanger the good order of society.
First: the “institutional” contradiction.

The architects of the new Social Security system were firm on one point: there would be no support for aged persons living in the homes, farms, and almshouses run by counties and municipalities. A 1925 Department of Labor report had found that “dilapidation, inadequacy, and even indecency” characterized these institutions, compounded by the “ignorance, unfitness, and complete lack of comprehension” of their managing personnel. Title I of the Social Security Act of 1935 created a federal program of grants-in-aid to the states for old-age assistance (or OAA). Designed as a noncontributory, means-tested pension program, OAA would support the impoverished elderly until the new, contributory Social Security system could be fully implemented. Relative to the future, the plan contained one key clause: OAA benefits could not be paid to any “inmate of a public institution.” The effect of this, as intended, was to drive most municipal homes, county farms, and almshouses out of business. But there was an unintended effect, as well. Just as the frail elderly without family support were being turned out of the despised public homes, they suddenly had a little OAA cash in their pockets. With few choices as to where to go, they began turning out of necessity to the privately run “rest homes” and convalescent home” that existed on the margins of the health care world in the 1930s. Most of these were also poorly staffed, dilapidated, and unsafe. Nonetheless, since they were clearly not “public institutions,” these proprietary homes found a new federally inspired revenue stream, and new life.

In short, the “nursing home industry” was born as “an inadvertent,” unanticipated byproduct of poorly thought-out public policy. Over time, the OAA grants were replaced by other federal programs—eventually, Medicaid and Medicare. The industry grew in size and political clout. A 1954 amendment to the Hill-Barton Act did try to “medicalize” the nursing home business, providing federal grants to public and nonprofit entities to construct nursing homes. All the same, proprietary homes run for profit remained dominant in the field. In 1999 they numbered 12,000, or two-thirds of all nursing homes. Although ownership was private, three-quarters of nursing
home revenue still came from federal and state sources, making the nursing home business as much a “government industry” as, say, Lockheed or Grumman Aircraft. In short, the Social Security Act of 1935 aimed at freeing the frail elderly from institutionalization in locally run homes and farms, but ended up re-institutionalizing them in a vastly larger and more politically potent industry, one that proved to be beyond the scope of effective local regulation.

Second: an innate problem found in old age care in America, the “altruism contradiction.”

Advocates for the modern welfare state argue that their system rests on the principles of altruism and reason. Unlike informal care, they say, the state alternative is fair, compassionate, and rational. In practice, though, the welfare system ends up tangled in a web of stupidity and irrationality. Long-term care, for example, is available under Medicare for only limited reasons and for a limited number of days. Medicaid provides most government-paid LTC, but only if the recipient is first impoverished. The actual results range from the destruction of small to middle-sized family patrimonies—a government-inspired end of “the family’s corporate heritage” described by Borsodi—to “planned impoverishment,” where wealthier persons with good lawyers formally divest themselves of assets in order to stand “impoverished” at the Medicaid door.

More broadly, the “rational” welfare state succeeds only when its citizens behave in irrational fashion. While making limitless promises, called entitlements, the system can succeed only when citizens restrain their claims and behave as though the public programs did not exist; for example, with most of the frail elderly drawing their care from informal, unpaid sources. However, the system itself penalizes these very persons—givers and receivers alike—for their altruistic behavior. In effect, public authorities reward families who turn their elderly members over to public care and penalize, through taxation, those families providing informal care. As the Danish analyst Bent Andersen has explained:
The rationally founded welfare state has a built-in contradiction: if it is to fulfill its intended function, its citizens must refrain from exploiting to the fullest its services and provisions—that is, they must behave irrationally, motivated by informal social controls, which, however, tend to disappear as the welfare system grows.

And so, a system crafted in the name of reason and altruism ends up penalizing altruism and relying on irrationality to survive.

*Third: a related indictment, the “family contradiction.”*

The public long-term care system assumes weakened, scattered, and unwilling families and offers its compassionate arms as a substitute. In fact, as already noted, two-thirds of disabled elderly persons living in community currently receive all of their assistance from informal sources, *primarily* family members. Even among persons who enter a nursing home, a daughter in the family triples the possibility of a “live exit”—revealing nursing-home jargon for a return home by the patient; the existence of a living spouse raises the possibility of “live exit” an extraordinary 26 times. This informal care, according to independent analysts, is “more flexible, usually more caring, and more reciprocal.” Moreover, arguments that broad social change, such as the entry of women into the labor market, dooms informal care keep running into very different realities. According to one careful recent report:

Many women work and provide informal care at the same time. In addition, it is often overlooked that about one third of all informal caregivers are themselves elderly, and often retired. Finally, mortality trends suggest that more elderly women in the future will have their husbands with them longer… [M]ale spouses have been shown to be as equally committed to caring for their wives as female spouses are committed to their husbands. In short, the much advertised “dwindling supply” of future informal family caregivers need not occur.

However, in a perverse way, this “dwindling supply” is created by government policy itself. In a revealing study of Medicaid home-
care benefits, for example, Susan Ettner of Harvard Medical School found new government aid driving out informal family care. Specifically: “…the Medicaid subsidies induced a substantial replacement of voluntary care by family and friends by formal paid care for services that are non-medical in nature,” such as meal preparation and bathing.\footnote{cxxxvii} With burning clarity, we see here how a Medicaid project justified by inaccurate assumptions actually creates the problem it claims to solve: diminished family-centered care. The net result is less loving and less personal care for the frail elderly, the deterioration of the local community, and higher public expenditures.

Fourth: an internal problem of social insurance, “the demographic contradiction.”

Simply put, publicly provided old age, health, and LTC social insurance rewards the childless and penalizes those who raise children. And since “pay-as-you-go” social insurance is, in essence, a pyramid scheme, requiring new babies who will grow up to be new workers who can be taxed to pay for the system in the future, we can also see how social insurance tends to undermine its own foundations.

Consider the situation of rational, incoming-maximizing 22-year-olds in the year 2003. As they look to the future, they see their foolish older siblings and acquaintances who married and produced children. These irrational people are now investing most of their income in their children, driving old mini-vans, living in heavily mortgaged homes, eating tuna casserole, and calling a day-at-the-beach “our vacation.” They also can see that if they remain childless, they will have substantial amounts of extra future income that can be spent on fine automobiles, elegant apartments, gourmet meals, and lavish vacations in Greece, Cancun, and Tahiti. And when old-age comes, the social insurance system treats both choices exactly the same: the frivolous childless and the responsible child-rich receive the same pension and the same access to long-term care under Medicare and Medicaid rules. The system conveys a message: “Children are expensive, time-consuming, and noisy. Let your older siblings or
your neighbors spend the money to raise children who can then be taxed to support you in your old age.” Those who listen become “free riders” on the system; but there is only reward, and no penalty, for this. Once again, the American social insurance scheme actually tends to produce the problem that it assumed at its beginning: low fertility.

We are not the first researchers to notice this problem. Indeed, in his 1941 Godkin Lectures at Harvard University, the Swedish economist Gunnar Myrdal warned that America’s new Social Security system had dangerously inverted the value of children: they were now a burden rather than an asset, a perverted result that would undermine the nation’s very existence in the long run. During the 1980s, Charles Hohm of the University of California-San Diego checked this “social security-fertility hypothesis” in a detailed study of 19 developed and 62 underdeveloped nations. He found that “after controlling for relevant developmental effects, the level and scope of a country’s Social Security program is causally and inversely related to fertility levels.” Translated: higher benefits meant fewer children. Even the reverse hypothesis proved to be true: “Reduced fertility levels result in subsequent increases in Social Security expenditures,” as the system devours itself. This explains developments in Europe, where depopulation, old age pensions, and tax burden now advance in tandem.

More recently, economists Isaac Ehrlich and Francis T. Lui have shown that a pay-as-you-go old age security system “discourages families’ incentives for self-reliance,” drives fertility ever downward, reduces savings, and damages “investment in human capital,” meaning children. These effects, according to Ehrlich and Lui, portended both social disintegration and “financial collapse.”

Fifth: Social Security’s “efficiency contradiction.”

Even a cursory study of the nursing home industry reveals a tale of corruption, fraud, and abuse. The curiosity, though, is how the fraud and abuse constantly reappear. Back in the 1960s, Mary Adelaide Mendelson’s book, Tender Loving Greed, exposed the kickbacks that nursing home operators received from pharmacies
and funeral homes, the frequent charges to government for non-delivered products and care, the maximum reimbursements claimed for patients needing minimum care, the lack of blankets, the starvation diets, the idle rehabilitation equipment, the cheap bread, the stolen meat, the fake water sprinklers, the filthy clothes, the deliberate withholding of soap and toilet paper, the outrageous “extra charges,” the staff intimidation of some patients with others “drugged into oblivion,” the fake diagnoses, the “gang visits” by physicians. Regulatory reforms followed. A decade later, Bruce Valdeck’s *Unloving Care: The Nursing Home Tragedy* chronicled a similar list of behaviors still endemic to the system. Regulatory reforms followed. In 1998, *Time* magazine reported another epidemic of beatings, malnutrition, dehydration, and neglect found in Medicaid-funded nursing care centers. One of the nation’s largest nursing home chains, Beverly Enterprises, pled guilty that same year to massive Medicaid fraud and received a fine of $175 million. The company’s crimes included phony nurse sign-in sheets and fabricated medical-treatment records. The Inspector General of the U.S. Department of Health and Human Services also warned in 1998 of a new kind of fraud devised by nursing homes and hospices, this time based on kickbacks for Medicare and Medicaid referrals for end-of-life care. In recent years, California—to choose just one state—has seen a string of arrests and convictions for nursing home elder abuse, for knowingly hiring “certified care givers” who had prior criminal convictions for assault, grand theft, and drug trafficking, and for the now-familiar phony Medicaid claims.

Why do we find this recurring tale of fraud and abuse in elder care? Some will cite the easy government money (indeed, back in the 1970s, word on Wall Street had it that “it is impossible to lose money” in the nursing home business). Others will point to inadequate regulation. The real problem actually runs much deeper: namely, in the total failure of the “industrial model” when applied to the care of the very young and the very old.

The industrial revolution rested on a very few principles: specialization, the division of labor, standardized products. The
Favoring the Family

system has worked miraculously well when the products are light bulbs and automobiles. But some Americans pushed the idea too far, right into the care and nurture of human beings. Starting in the mid-19th century, reformers took family-centered schooling and reorganized it on an industrial model: The massive public school system was born, itself operating as a kind of education factory. In the 20th century, we saw a similar effort to industrialize the care of infants and toddlers (we call it “day care”) and elder care. The hope for the latter was that organizing the old in standardized beds and rooms to receive standardized care from specialists would generate efficiency, and therefore wealth. But it does not work. Human beings are not light bulbs or Dodge Caravans. Each person is unique and requires personal attention and care—the very opposite of what the industrial principle delivers. The recurring cases of fraud, neglect, and abuse in structured elder care, I believe, derive from this misplaced quest for efficiency and profit through services or actions that cannot—by their very nature—be successfully industrialized. Put another way, the quest for “efficiency” and “profit” in the nursing home will inevitably produce neglect and abuse, because, in this locale, the quest itself is dehumanizing. (A similar tale could be told about the industrialized group care of infants and toddlers, but that story must be saved for another day.)

Will Reform Work?

What then is to be done? Can we reform a structure that rewards institutionalization, penalizes altruism, discourages the multigenerational family, punishes child bearing, and auto-generates its own version of abuse, fraud, and neglect? Rephrased positively, can we restore the familial bonds of the generations?

Some small steps or reforms might be considered.

Medicare and Medicaid can be altered to provide vouchers to persons (or their families) who might otherwise qualify for nursing home care. This voucher would expand family choices in the purchase of in-home assistance, adult daycare, respite care, foster care, and small group homes. With limited exceptions, though,
the use of vouchers still involves primarily the purchase of services from outside vendors. While the nursing home might be avoided, this would do little to reconnect the members of a family.

Give special tax incentives to persons providing informal care to the elderly. Several states have experimented with this idea. Idaho has given a $1,000 tax deduction or a $100 credit to taxpayers who provide care to persons over age 65. Arizona has offered taxpayers a $600 exemption if they have paid 25 percent or more of an elderly person’s institutional or home health costs or at least $800 toward their general medical costs. In the first program, 80 percent of the caregivers turned out to be children of the elderly persons being helped. Three-quarters of the taxpayers in both states found the incentives to be of value in continuing their family responsibility and care. Federal tax deductions build on these principles and of similar or greater magnitude could have the same effect.

Modify the law governing Child/Elder Care Reimbursement Accounts (CECRA), available to employees at companies and organizations with “cafeteria benefit” plans. At present, this use of pretax dollars for elder-care can only occur if the person is mentally and/or physically incapable of self-care and claimed as a dependent on the income tax. Changes could include loosening or discarding these restrictions and raising the cap on the pretax dollars available. Such measures would encourage more family-centered care.

A related approach would be to grant a special tax break to a family with an elderly relative residing in its home. The Republican Party’s 1999 tax plan proposed giving an extra personal exemption to households containing a relative over age 65, even if not a dependent, for taxation purposes. In 2000, Democratic presidential candidate Al Gore proposed creating a federal tax credit of up to $3,000 for Americans providing long-term care to elderly relatives or friends. In 2001, the New York State Senate considered a tax credit of 20 percent for expenses incurred through the care of an elderly relative living with the taxpayer, up to $3,000.
A more sweeping idea is for Medicare and Medicaid simply to hire a family member as the caregiver for someone qualifying for public support, an idea already tried in France. Susan Ettner proposes a variation on this, allowing insurers (including presumably Medicare and Medicaid) “to offer to pay informal caregivers (at a lower rate) to provide services for which the insurer would otherwise have to pay the home health agency.”

These are all worthy ideas. Combined into a package, they would predictably have a measurable positive effect.

Policy Recommendation

As far as specifying a single policy at the state level, we find the extra personal exemption alternative most compelling. That is, we recommend that each state allow for one extra personal tax exemption for each relative, through blood or adoption, dependent or not, over the age of 60. This policy to bind the generations through informal care and intergenerational reliance will help to preserve the family as the fundamental unit in caring for our aged.

Model Legislation

§ Aged Exemption

(a) “Personal exemptions” means the total exemption amount an individual is allowed to claim for the taxable year under Section 151, Internal Revenue Code, for:

(i) the individual;
(ii) the individual’s spouse;
(iii) the individual’s dependents; and
(iv) the individual’s, or individual’s spouse’s, relative age 60 or over living in the individual’s home.
By John L. Harmer

Perhaps as much as any single public policy issue, the debate over the extent of pornography and obscenity in one’s community reveals starkly the opposing worldviews of atomistic individualism and the family. On one hand, with the individual as the fundamental unit of society, pornography is a victimless personal preference to be left to the individual to self-regulate. On the other hand, with the family at society’s center, pornography is a terrible scourge destroying the very source of our freedom and progress, the family.

While anecdotal evidence might suggest that pornography actually benefits couples in their intimate relationships, thereby raising their overall quality of married life, much more real and hard research exists to show that pornography does indeed destroy marriages and families.

Beyond individual matters of morality and claimed civil liberties based on personal preferences, this growing mountain of medical and scientific evidence regarding the destructive influences of pornography and obscenity alone is sufficient reason to carefully pursue public policies designed to protect the family institution from this scourge.

Prosecuting Obscenity

Anti-obscenity laws in the United States are nothing new. An 1815 Pennsylvania case, Commonwealth v. Sharpless, represented the first reported conviction in the United States for the common law crime of obscene libel. Massachusetts followed six years later, in Commonwealth v. Holmes, and at about the same time Vermont passed the country’s first statute prohibiting the publication or distribution of obscene materials. Other states followed, and by the
middle of the nineteenth century the production and distribution of obscene materials was a crime throughout most of the United States.

The legal justification for anti-obscenity laws, and the reason that obscenity has never been regarded as protected under the United States Constitution, is the collective right and responsibility of citizens, through the instrument of the state, to prevent the production, distribution, or commercial exploitation of language, images, or sounds that can or will destroy the peace and safety of the community. Even with great latitude a societal decorum based on self-restraint, common decency, and religious morality has always existed in America.

For nearly two centuries of American history normative morals and values informed jurisprudence in matters of public virtue and decency. As one might imagine, this strain of concern was especially strong among colonists during the time leading up to the American Revolution – flamed by Enlightenment-influenced politicians promoting the personal self-discipline required for limited government and Great Awakening-energized Christians pushing for the personal virtue required for holy government.

But as America matured, so too did its attitudes about decency, virtue, morality, and community standards. Two world wars exposed culturally isolated generations of Americans to the very different world around them, and sent millions of women into the work force, destabilizing the family unit. This served to facilitate the fires of cultural revolution already stoked by expanding technological advances. By the 1960s most Americans found they were in the midst of a rapidly changing cultural climate.

Anti-obscenity laws were typically enforced privately through community organizations such as the Watch and Ward Society in Boston and the New York Society for the Suppression of Vice. But the laws and their enforcement were not always precise or uniform. Until the 1960s therefore, the law operated largely in two different roles. On one hand, and more visible, were the prosecutions of books and films that actually contained substantial merit and were directed
at and available to a general audience. But on the other hand were enforcement efforts against much more explicit material, distributed in much more surreptitious fashion, as to which serious constitutional or definitional issues never arose. It was not until the late 1950s and early 1960s, when the United States Supreme Court began to actively scrutinize the contents of material found to be obscene. At that time, attempted prosecutions of unquestionably serious works largely withered, and most of the legal battles concerned the kinds of material more commonly taken to be pornographic.

This active Court scrutiny had its roots in the 1957 case of Roth v. United States, in which the First Amendment was first taken to limit the particular works that could be found obscene. Soon afterward, cases such as Jacobellis v. Ohio had made this close scrutiny a reality, and by 1966 the range of permissible regulation could properly be described as "minimal." In that year, the Court decided the case of Memoirs v. Massachusetts, which held that material could be restricted only if, among other factors, it was "utterly without redeeming social value." The stringency of this standard made legal restriction extraordinarily difficult, and shortly thereafter the Court made it even more difficult by embarking on a practice of reversing obscenity convictions with respect to a wide range of materials, many of which were quite explicit.

The result, therefore, was that by the late 1960s obscenity regulation became essentially dormant, with a consequent proliferation of the open availability of quite explicit materials. This trend was reinforced by the issuance in 1970 of the Report of the President’s Commission on Obscenity and Pornography, which recommended against any state or federal restrictions on the material available to consenting adults. Although the Report was resoundingly rejected by President Nixon and by Congress, it nevertheless reinforced the tendency to withdraw legal restrictions in practice, which in turn was one of the factors contributing to a significant growth from the late 1960s onward in the volume and explicitness of materials that were widely available.
Two Court decisions in 1973, most notably Paris Adult Theatres I v. Slaton and Miller v. California, reversed the “utterly without redeeming social value” standard and made clear once again that the First Amendment did not protect anything and everything that might be sold to or viewed by a consenting adult. These decisions tended to recreate the environment in which obscenity regulation was a practical possibility. Since 1973, however, the extent of obscenity regulation has varied widely throughout the country. In some geographic areas, aggressive prosecution has ended the open availability of most extremely explicit materials; more commonly, prosecution remains minimal, and highly explicit materials are widely available.

The Threshold of Controversy: Unprotected Expressions

Although speaking and printing are the subjects of the First Amendment, closer examination reveals that the First Amendment cannot plausibly understood to protect, or even to be relevant to, every act of speaking or writing. Government may plainly sanction the written acts of writing checks backed by insufficient funds, filing income tax returns that understate income or overstate deductions, and describing securities or consumer products in false or misleading terms. In none of these cases would First Amendment defenses even be taken seriously.

The same can be said of sanctions against spoken acts such as lying while under oath, or committing most acts of criminal conspiracy. Although urging the public to rise up and overthrow the government is protected by the First Amendment, urging your brother to kill your father so that you can split the insurance money has never been considered the kind of spoken activity with which the First Amendment is concerned. Providing information to the public about the misdeeds of their political leaders is central to the First Amendment, but providing information to one’s friends about the combination to the vault at the local bank is not a First Amendment matter at all.
The regulation of pornography in light of the constraints of the First Amendment must thus be considered against this background – that not every use of words, pictures, or a printing press automatically triggers protection by the First Amendment. Indeed, as the examples above demonstrate, many uses of words, pictures, or a printing press do not raise First Amendment concerns. As Justice Holmes stated the matter in 1919, "the First Amendment … cannot have been, and obviously was not, intended to give immunity for every possible use of language."\(^{clxv}\)

Both the states and the federal government have long regulated the trade of sexually explicit materials under the label of "obscenity" regulation. And until 1957, obscenity regulation was treated as one of those forms of regulation that was totally unrelated to the concerns or the constraints of the First Amendment. If the aim of the state or federal regulation was to control obscenity, then the First Amendment did not restrict government action, without regard to what particular materials might be deemed obscene and thus prohibited.\(^{clxv}\)

In 1957, however, in \textit{Roth}, the Supreme Court confronted squarely the tension between the regulation of what was alleged to be obscene and the constraints of the First Amendment. In other words, the Court was attempting define obscenity such that distinctions could be made between works of social merit and works of true obscenity. After \textit{Roth}, it was not simply the form of regulation that immunized a prosecution from the First Amendment. The Court made clear, and even clearer in subsequent cases\(^{clxvi}\) that the simple designation of a prosecution as one for obscenity does not cause the First Amendment considerations to be abandoned. If the particular materials prosecuted are themselves protected by the First Amendment, the prosecution is impermissible. After \textit{Roth}, mere labels could not be used to justify the restriction of protected materials, and mere labels could not justify circumventing the protections of the First Amendment.

The Court also made clear in \textit{Roth} that some materials were themselves outside the coverage of the First Amendment, and that
obscenity, carefully delineated, could be considered as "utterly without redeeming social importance." As a result, the Court concluded that obscene materials were not the speech or press included within First Amendment protections, and could thus be regulated without the overwhelming evidence of harm that would be necessary if materials of this variety were included within the scope of the First Amendment.

In the Court's Roth decision, that scope was limited to material containing ideas. All ideas, even the unorthodox, the controversial, and the hateful, were within the scope of the First Amendment. But if there were no ideas with "even the slightest redeeming social importance," then such material could be considered not to be speech in the relevant sense, and therefore outside the realm of the First Amendment.

The general Roth approach to obscenity regulation has been adhered to ever since 1957, and remains today the foundation of the somewhat more complex but nevertheless fundamentally similar treatment of obscenity by the Court. This treatment involves two major principles.

Permissibility

The first, reiterated repeatedly and explained most thoroughly in the Court's Paris decision, is the principle that legal obscenity is either treated not as speech at all, or not the type of speech deemed within the purview of any of the diverse aims and principles of the First Amendment. As a result, legal obscenity may be regulated by the states and by the federal government without having to meet the especially stringent standards of justification, often generalized as a "clear and present danger," and occasionally as a "compelling interest," that would be applicable to speech. This includes a great deal of sexually oriented or sexually explicit speech that is within the aims and principles of the First Amendment. Instead, legal obscenity may constitutionally be regulated as long as a mere "rational basis" exists for the regulation, a standard undoubtedly
drastically less stringent than the standard of "clear and present danger" or "compelling interest."

That legal obscenity may be regulated by the states and the federal government pursuant to Roth and Paris does not, of course, mean that the states must regulate it, or even that they necessarily should regulate it. It is in the nature of our constitutional system that most of what the Constitution does is to establish structures and to set up outer boundaries of permissible regulation, without in any way addressing what ought to be done within those outer boundaries. There is no doubt, for example, that the speed limits on the highways could be significantly reduced, that states could eliminate all penalties for burglary, and that the highest marginal income tax rate could be increased from 50 percent to 90 percent without creating a valid constitutional challenge. None of these proposals seems a particularly good idea, and that is precisely the point – the fact that an action is constitutional does not mean that it is wise. Thus, although the regulation of obscenity is, as a result of Roth, Paris, and many other cases, constitutionally permissible, this does not answer the question whether such regulation is desirable. Wisdom or desirability are not primarily constitutional questions.

Inappropriate, But Perhaps Not Obscene

Thus the first major principle is the constitutional permissibility of the regulation of obscenity. The second major principle is that the definition of what is obscene, as well as the determination of what in particular cases is deemed obscene, is itself a matter of constitutional law.

If the basis for obscenity’s First Amendment exclusion is that the First Amendment was not originally intended to protect obscene speech or press, then special care must be taken to ensure materials within the boundaries of First Amendment protection, including those dealing with sex, are not subject to restriction. Although what is on the unprotected side of the line between the legally obscene and constitutionally protected speech is obviously not protected by the First Amendment, the location of the line itself is a constitutional
matter. That obscenity may be regulated consistent with the First Amendment does not mean that anything perceived by people or by legislatures as obscene may be so regulated.

As a result, the definition of obscenity is largely a question of constitutional law, and the current constitutionally permissible definition is found in another 1973 case, *Miller v. California*.\textsuperscript{clxvii}

According to *Miller*, material is obscene if all three of the following conditions are met:

1. The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest [in sex]; and
2. the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state [or federal] law; and
3. the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Among the most significant aspects of *Miller* was the fact that it rejected as part of the definition of obscenity the requirement that before material could be deemed obscene it had to be shown to be "utterly without redeeming social value," the standard which had its roots as part of the test for obscenity in *Memoirs* case.

Virtually every word and phrase in the *Miller* test has been the subject of extensive litigation and substantial commentary in legal literature. The result of this is that there is now a large body of explanation and clarification of concepts such as "taken as a whole," "prurient interest," "patently offensive," "serious value," and "contemporary community standards."

Moreover, there are many constitutionally mandated aspects of obscenity law that are not derived directly from the definition of obscenity. For example, no person may be prosecuted for an obscenity offense unless it can be shown that the person had knowledge of the general contents, character, and nature of the
Community Standards

The procedures surrounding the initiation of a prosecution, including search and seizure, are also limited by constitutional considerations designed to prevent what would in effect be total suppression prior to a judicial determination of obscenity. Different principles and substantially different legal standards than those governing obscenity govern the entire subject of child pornography.

The constitutionally based definition of obscenity is enforced not only by requiring that it be used in obscenity trials, but also, and more importantly, by close judicial scrutiny of materials determined to be obscene. This scrutiny, both at trial and appellate levels, is designed to ensure that non-obscene material is not erroneously determined to be obscene. The leading case here is the 1974 unanimous Court decision in _Jenkins v. Georgia_, which involved a conviction in Georgia of the Hollywood motion picture _Carnal Knowledge_. In reversing the conviction, the Court made clear that regardless of what the local community standards may have been, the First Amendment prohibited any community, regardless of its standards, from finding that a motion picture such as this appealed to the prurient interest or was patently offensive. Thus, although appeal to the prurient interest and patent offensiveness are to be determined in the first instance by reference to local standards, it is clear after _Jenkins_ that the range of local variation the Supreme Court will permit consistent with the First Amendment is in fact quite limited.

In the final analysis, the effect of _Miller, Jenkins_, and a large number of other Supreme Court and lower-court cases is to limit obscenity prosecutions to “hard core” material devoid of anything except the most explicit and offensive representations of sex. It should be plain both from the law, and from inspection of the kinds of material that the law has allowed to be prosecuted, that only the most thoroughly explicit materials, overwhelmingly devoted to patently offensive and explicit representations, and unmitigated by any significant amount of anything else, can be and are in fact determined to be legally obscene.
Is the Supreme Court Right?

In light of the facts that the Supreme Court did not in Roth or since unanimously conclude that obscenity is outside the coverage of the First Amendment, and that its 1973 rulings were all decided by a scant 5-4 majorities, there is no doubt that the issue was problematic. Moreover, we recognize that the bulk of scholarly commentary is of the opinion that the Court’s resolution of and basic approach to the First Amendment issues is incorrect. With dissent existing even within the Court, and with disagreement with the Court majority’s approach predominant among legal scholars, one could hardly ignore the possibility that the Court might be wrong on this issue.

There are both less and more plausible challenges to the Court’s approach to obscenity. Among the least plausible, and usually more rhetorical device than serious argument, is the view that the First Amendment is in some way an “absolute,” protecting, quite simply, all speech. Even Justices Black and Douglas, commonly perceived as “absolutists,” would hardly have protected all spoken or written acts under the First Amendment. On closer inspection, all those accused of or confessing to “absolutism” would at the very least apply their absolutism to a range of spoken or written acts smaller than the universe of all spoken, written, or pictorial acts. This is not to dispute that under the views of many, including Black and Douglas, what is now considered obscene should be within the universe of what is absolutely protected. But “absolutism” in unadulterated form seems largely a straw man.

Much more plausible is the view that all spoken, written, or pictorial acts are at least in some way covered, even if not ultimately protected, by the First Amendment. That is, even if the government may regulate some such acts, it may never do so unless it has a reason substantially better than the reasons that normally are sufficient to justify governmental action. Whether this heightened standard of justification is described as a “clear and present danger,” “compelling interest,” or some standard less stringent than these, the Court maintains that regulating any spoken, written, or pictorial acts requires a particularly good reason.
Another Reasonable Objection

Still another view exists: the Court should not have attempted to define obscenity at all. In this view, the Court merely opened the floodgates of pornography in attempting to define obscenity. The assumption made by the Court was that once they defined that which could be regarded as obscene in the eyes of the law, and then the prosecution of obscene speech or communication would be facilitated. The repeated attempts by the Court to provide a suitable definition of obscenity failed. Almost without exception, each time the court attempted to define what might be prosecuted as obscene, the results were just the opposite. Instead of clarifying and enhancing legislative enactments, the Court opened the way for more extreme obscenities to become commonplace in America.

This failure came about primarily because the Court approached the issue from the Absolutist perspective. On the heels of the McCarthy era, defenders of obscenity skillfully manipulated a horrible image of state-based censorship. By continually raising the specter of government censorship, industry attorneys successfully twisted the courts and legislative bodies into imposing all sorts of absurd restrictions and procedural requirements upon the police power of the state.

Instead of providing effective tools to prohibit obscenity, the Roth decision actually resulted in opening the floodgates to the production and distribution of obscene materials. Again perhaps without intending to do so, the Roth decision imposed an unreasonable burden of proof upon the prosecution of obscene materials, making it nearly impossible for prosecutors to obtain convictions. The Court’s misguided attempt to define the nature of obscenity resulted in local prosecutors literally giving up trying to abide by the Court’s convoluted burden of proof. Many local prosecutors stopped prosecuting the production and distribution of pornography altogether.

Instead of realizing the mistaken approach in Roth and reverting to a more rational basis for a burden of proof, the Court insisted on
attempting to revise and refine the definition of obscenity set forth by Justice Brennan in the Roth case. That effort was terminated in the Miller case.

In reality, the Miller decision was no more helpful to local prosecutors than Justice Potter Stewart’s now famous observation, “…I know it when I see it.” In the words of corporate strategist B.J. Youd, “…the Miller test could be translated into Mandarin or Swahili and offer as much practical guidance from it as we get from it in English.”

From the very beginning of this effort, from Roth and Miller to current Court decisions involving congressional attempts to regulate the tidal wave of obscenity through electronic media, the Court has produced a state of such complex confusion that the nation’s prosecutors and law enforcement officials have essentially abandoned any effort to deal with the situation. Thus, the Court has been the primary culprit in making it possible for obscenity to flourish throughout the land.

Neither the Court, nor Congress, nor state legislatures have been successful in dealing with the tidal wave of increased production of pornographic materials because of the misguided approach to the problem that originated with the series of Court decisions noted above.

A Long-Term Solution

Until the post World War II era it was never felt necessary to reduce to a written statute the accepted public policy that obscenity had no constitutional protection. Everyone knew what the existing laws intended. When it became necessary to state the public values that had been the framework for law enforcement entities and the courts, the Supreme Court tragically failed to fulfill that responsibility. Instead of citing century-old values, traditions, and culture, and then allowing individual states to provide a reasonable means for the legitimate educational, literary and scientific publication of otherwise obscene materials, the Court presumed to ascribe to itself
the wisdom and the superior knowledge necessary to formulate a
definition of obscenity that, it hoped, would fulfill the necessity to
protect the public from obscenity’s the crass commercial
exploitation. In that attempt the Court failed, and that failure has
brought us to the state of all pervasive obscenity that now challenges
our future existence.

Civil libertarians and industry attorneys who argue that an all
embracing prohibition against such forms of speech would prevent
the legitimate use of such images for educational, literary, or
scientific research ignore the reality that, for centuries, Americans
have had a very well-established means of protecting those
disciplines from unjustified regulation. It is done every day in the
form of regulatory licensing. The state, through its properly
delegated entities or subdivisions, could easily establish a licensing
procedure that would make possible the approval of any exceptions
to this rule when such materials are intended solely for scientific or
educational purposes.

We have numerous examples of constitutionally valid situations in
which a citizen is required to obtain the permission of the state
before engaging in what would otherwise be considered an unlawful
endeavor, including those that would ordinarily be considered a
form of speech. The recent emergence of terrorist threats against the
United States will undoubtedly increase the number and
inconvenience of these regulations. It is no more a limitation upon
individual freedom to require prior approval of the state for the
production and distribution of matter that would otherwise be
considered obscene than it is to require the appropriate approval
before purchasing or assembling the items necessary to create an
explosive device or an addictive drug or narcotic.

Advancing this public policy in state legislatures and the courts
would allow creation of positive incentives to protect families and
individuals from the ravaging effects of pornography and obscenity
while maintaining the precious and essential balance of free speech
considerations. It would also protect diverse communities under
their current standards, the community standards of Utah might be
wholly contrary to the community standards of California and yet both communities would be protected, autonomous, and diverse in how each would choose to address pornography and obscenity.

**Policy Recommendation**

In the short term, however, we must find a way to allow this same effect to take shape. We must allow divergent and diverse communities to regulate the existence, flow, and content of pornography and obscenity.

The simplest way to do this is to increase the penalty for pandering obscenity from a misdemeanor to a felony. Most states only penalize pandering with a misdemeanor, hardly an incentive for prosecutors to spend precious time and resources on protecting communities from obscenity. Increasing pandering penalties from a misdemeanor to some degree of felony would create an incentive for prosecutors, already inclined to attend to these legal matters, to do so.

**Model Legislation**

§ Pandering obscenity

(a)(1) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(A) Create, reproduce, or publish any obscene material, when the offender knows that the material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when the offender is reckless in that regard;
(B) Promote or advertise for sale, delivery, or dissemination; sell, deliver, publicly disseminate, publicly display, exhibit, present, rent, or provide; or offer or agree to sell, deliver, publicly disseminate, publicly display, exhibit, present, rent, or provide, any obscene material;
(C) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial
exploitation or will be publicly presented, or when the offender is reckless in that regard;
(D) Advertise or promote an obscene performance for presentation, or present or participate in presenting an obscene performance, when the performance is presented publicly, or when admission is charged;
(E) Buy, procure, possess, or control any obscene material with purpose to violate division (a)(1)(B) or (D) of this section.

(a)(2) It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(a)(3) Whoever violates this section is guilty of pandering obscenity, a felony of the [insert] degree. If the offender previously has been convicted of a violation of this section, then pandering obscenity is a felony of the [insert] degree.

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:
(5) Create, reproduce, or publish any obscene material, when the offender knows that the material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when the offender is reckless in that regard;
(6) Promote or advertise for sale, delivery, or dissemination; sell, deliver, publicly disseminate, publicly display, exhibit, present, rent, or provide; or offer or agree to sell, deliver, publicly disseminate, publicly display, exhibit, present, rent, or provide, any obscene material;
(7) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when the offender is reckless in that regard;
(8) Advertise or promote an obscene performance for presentation, or present or participate in presenting an obscene performance, when the performance is presented publicly, or when admission is charged;

(9) Buy, procure, possess, or control any obscene material with purpose to violate division (A) (2) or (4) of this section.

(B) It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

Whoever violates this section is guilty of pandering obscenity, a felony of the [insert] degree. If the offender previously has been convicted of a violation of this section, then pandering obscenity is a felony of the [insert] degree.
In 1973, seven Supreme Court justices invented the constitutional right to abortion in *Roe v. Wade*. Since that time, there has been approximately 1.2 to 1.6 million abortions in America each year.\textsuperscript{clxxv}

Of those 35 to 45 million abortions, only a tiny fraction, perhaps one percent, involved mothers or babies with serious health problems. Another one percent involved pregnancies resulting from rape or incest. The remainder involved healthy mothers with healthy babies, and pregnancies resulting from consensual sex.

The most obvious impact of abortion on the family has been the loss of tens of millions of children. This is a catastrophic loss by any measure. But the evidence suggests other impacts as well – impacts that are harder to quantify but nonetheless are devastating.

It has been said that ideas have consequences. Abortion culture and law rests upon a foundation of ideas that inevitably lead to the weakening of the institution of the family. First, abortion rests upon the notion of the individual as the fundamental unit of society. Instead of a culture that calls upon adults to subordinate their interests to the good of the next generation, abortion on demand tells adults they may simply kill their developing child if the child is inconvenient.

Second, abortion demeans life and the fundamental constitutional right on which life rests under the law. Instead of a culture that cherishes and respects life, abortion demands a culture in which the unborn child has no intrinsic worth, dignity or rights. The child lives or dies at the whim of the mother, up to the moment of delivery.
Third, abortion destroys the essential role of fatherhood within the institution of the family. Instead of a culture that reinforces the bonds between father and child, abortion law has created a culture in which the father is marginalized. He has responsibilities, of course, if the mother chooses to bear the child. But he has no legal way to protect his child from abortion, even if he is willing and eager to take responsibility for the child.

**Diminished Love and the Fruit of Abortion Culture**

Common sense tells us that one result of the increased acceptance of the foregoing ideas would be the weakening of the commitment of both mothers and fathers to their children. If the increase in child abuse and family dissolution since 1973 are any indicators, that is what has happened.

Dr. Patrick F. Fagan of the Heritage Foundation has compiled data on child abuse, abortion, and fragmented families – phenomena he labels collectively as “child rejection” – showing the correlation among them. The following chart, published in “The Child Abuse Crisis: The Disintegration of Marriage, Family and Community,” shows the number of children whose parents divorce or were never married increasing as the number of abortions increases.

Dr. Fagan cites government data showing the rate of physical abuse of children increasing 84% since 1980, and the rate of sexual abuse of children increasing 350% since 1980. The data also show that, contrary to popular belief, the mother is more likely to be the abuser than is the father.
Some researchers draw a direct link between abortion and child abuse. Dr. Philip Ney, a psychiatrist and clinical professor at the University of British Columbia, has concluded after years of research, “mothers who have had a previous pregnancy loss, particularly abortion, are less likely to bond with their children. Parents not bonded with their children are more likely to abuse and neglect them.”

In the early years of the campaign for abortion on demand, abortion advocates claimed to be concerned about the welfare of children, arguing that when every child was a “wanted” child, there would be less child abuse. They were clearly wrong. In all likelihood, legalized abortion on demand is both a cause and an effect of the continuing erosion of respect for life, parenthood and family, and the increase in family disintegration and child abuse.
The Development of the “Right to Privacy” and Abortion

The constitutional right to abortion was justified by a slim majority of Supreme Court judges who held that it was part of an unenumerated “right of privacy” existing within the United States Constitution. The most recent application of this “right of privacy” is in Lawrence et al. v. Texas, (June 2003), in which the Court held that homosexual behavior is constitutionally protected.

The right of privacy was first defined by the Court in Griswold v. Connecticut, 381 U.S. 479 (1965), in which the Court held that a state may not prohibit contraceptive use by married couples. The Court defined the right of privacy as arising from the “penumbras” of several constitutional provisions, such as the First Amendment (protecting rights of private association as well as the right of parents to guide the education of their children), the Third Amendment (prohibiting the quartering of soldiers in private homes), the Fourth Amendment (prohibiting unreasonable searches and seizures), and the Fifth Amendment (protecting against self-incrimination).

Interestingly, Griswold pertained only to legal circumstances within marriage. In Eisenstadt v. Baird, 405 U.S. 438 (1972), the Court extended the constitutional right to use contraception to unmarried couples.

“...the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”

The Court then decided, in Roe v. Wade, 410 U.S. 113 (1973), that the right to privacy encompassed a right to abortion. The Court held that states could not prohibit abortion in the first two trimesters, but
could do so after viability – then considered to be the third trimester. States could not prohibit abortion even after viability, however, where it was necessary to preserve the mother’s life or health. In the companion case, *Doe v. Bolton*, 410 U.S. 179 (1973), the Court defined “health” very broadly, to include not only physical, but also emotional, psychological, familial, and age factors.

Since *Roe*, there has been a remarkable number of abortion cases, as the Court has attempted to shape this completely invented right. The Court has erected protections around the invented right to abortion that infringe upon the very rights cited to justify the right to privacy in the first place.

In *Griswold*, the Court referred to past legal protection of the rights of parents and the sanctity of the home as evidence that the Constitution was intended to protect privacy. Yet, in the Court’s abortion litigation, it has incrementally allowed the right to abortion to trump more longstanding rights.

In *Planned Parenthood Association of Central Missouri v. Danforth*, 428 U.S. 52 (1976), the Court struck down a Missouri statute which required parental consent before a minor could obtain an abortion, and spousal consent before a married woman could obtain an abortion. The Court brushed aside Missouri’s arguments about the importance of marriage and the principle that important changes in family status, such as abortion, should be made jointly. Consequently, the Court held that the state of Missouri could not delegate a veto power to a husband, when the state could not constitutionally exercise such a veto itself. The Court similarly dismissed the state’s arguments about the importance of protecting family authority, and struck down the parental notice provision, stating, “Any independent interest the parent may have in the termination of the minor daughter’s pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.”
Legal Deceptions

It is interesting to note the degree to which the right to abortion has been built upon a foundation of cynical lies, designed to manipulate the courts and the public. There is a saying: “Hard cases make bad law.” Abortion law arises out of two contrived cases, and abortion proponents have continued to use a strategy of deceiving the courts.

In Roe v. Wade, the plaintiff’s lawyers said the plaintiff had been the victim of a gang rape. That was a lie, designed to make the plaintiff’s case more compelling. The plaintiff in that case has since revealed that she became pregnant as the result of a consensual affair, and she has become a pro-life activist.

In Doe v. Bolton, the plaintiff’s lawyers said the plaintiff had wanted an abortion, but had been turned away because she was poor. The truth was that the plaintiff was being pressured by her lawyers to have an abortion. She didn’t want one. She never wanted one. And she ran away to escape the pressure.

Controversy over Utah’s 1991 abortion statute provides just one more example. In order to persuade the court to preliminarily enjoin Utah’s statute, the plaintiffs’ lawyers submitted an affidavit giving a list of examples of women who, the lawyers claimed, could not have obtained an abortion under Utah’s statute. Each case was a heart-wrenching combination of unfortunate circumstances – women who were beaten, women whose husbands were in prison, women who had give birth to mentally handicapped children and feared another. And each case was a lie, fabricated to give moral weight to the plaintiffs’ case.

If bad cases make hard law, what kind of law do phony cases make?

The declaration of a constitutional right to abortion has distorted American law in numerous respects touching on the value of life and children. Where the law once considered the value of a child or the value of life itself to be inestimable, Roe v. Wade has opened the door
to such grotesque notions as “wrongful birth” lawsuits, wherein parents would seek damages because some hapless physician failed to tell them something that would have prompted them to have an abortion. Worse are “wrongful life” lawsuits, where the plaintiff argues that, had the physician properly informed his parents, his parents would have aborted him. He would have been better off dead, the reasoning goes, so the physician must compensate the plaintiff for the very fact that he is alive. States can and have limited or abolished these causes of action.

Can Anything Be Done to Defend the Family in Abortion Policy?

The current constitutional legal regime makes it impossible for motivated state legislators to stop most abortions. Then again, Roe v. Wade makes clear that there is much room for the state to regulate abortion:

… appellant and some amici argue that the woman’s right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree…. The Court’s decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate…. a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one’s body as one pleases bears a close relationship to the right of privacy previously articulated in the Court’s decisions. The Court has refused to recognize an unlimited right of this kind in the past…. We, therefore, conclude that the right of personal privacy
includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

In defense of the family, dedicated legislators can work around the edges of the issue, and stop some abortions and proscribe the abortion culture. Legislators can work to promote ideas that discourage abortion, such as respect for life, the importance and wonder of parenthood, commitment to family, and protection of religious belief and practice.

The current abortion battleground is, in many ways, in the hearts and minds of the next generation. The pro-abortion forces certainly realize this, as they continue to attack any law which so much as suggests that the unborn have independent worth, to attack pro-life religions, and to attempt to insinuate themselves between parents and children by making abortion available to vulnerable young people without parental knowledge. Those who value life and family must not cede the battleground to them. While state legislatures cannot act to prohibit most abortions, they can take actions that discourage them. Here are a few stands that courageous state legislators could take to defend the family

(a) States can take steps to assure that all women and men have complete information about fetal development. Informed consent laws requiring information on fetal development prior to an abortion are one way to approach this issue. Laws requiring such training in public high schools are another.

(b) States can act to encourage adoption. They can require counseling about the availability of adoption and pro-adoption resources prior to an abortion. States can offer tax and other incentives for adoption.

(c) States can act to protect viable unborn children. If states have not already done so, they can limit abortion on demand to some degree after viability.

(d) States can prevent the commercial use and abuse of fetal remains. While there are already some laws regulating this
practice, loopholes can be closed.

(e) States can require parental consent for abortion if there are so-called “judicial bypass” provisions. While these provisions usually result in the judge rubber-stamping any minor’s request for abortion, they do provide some level of discouragement for a minor considering obtaining an abortion without her parents’ consent or knowledge.

(f) States can keep abortion providers and advocates out of the public schools, where they can proselytize children without their parents’ knowledge. Or, states can require parental notification or consent for classroom discussions of abortion.

(g) While a state cannot currently give a father the right to protect his unborn child from abortion, states can and should reinforce the value of fathers at every opportunity in other laws, and promote fairness to fathers.

(h) In the past several years, the powerful and well-funded abortion lobby has begun attacking religious freedom, because the religious beliefs of tens of millions of Americans are perceived as a threat to abortion on demand. Abortion proponents are constantly attempting to force religious hospitals to offer services that offend religious beliefs. One important ongoing effort is the effort by abortion proponents to force individual medical students to take training in abortion, or to force nurses to participate in abortion, whether or not it offends their religious or moral beliefs. Where the Hippocratic Oath once forbade abortion, the abortion lobby now seeks to make the willingness to kill a prerequisite for participation in the healing professions. States can and should act to bolster the constitutional freedom of individuals and religious institutions to refrain from this act, which many consider murders, without jeopardizing their professional existence.

To this day, when the American public is polled on the subject, a substantial majority believes that abortion should be available only in the “hard cases,” that is, where pregnancy has resulted from rape or incest, or where the pregnancy poses a serious threat to the life or health of the mother. But Americans do not favor ending the life of a
healthy unborn baby being carried by a healthy mother who became pregnant as the result of a consensual act.

To the extent that state legislators can respond to the human desire to protect the most vulnerable among us – the unborn – they will help to strengthen the attitudes and practices that are more likely to result in strong, healthy families.

**Policy Recommendation**

Policy that mandates informed consent about abortion gives a woman considering an abortion the right to know the medical risks of the procedure, its alternatives, and nonjudgmental, scientifically accurate medical facts about the development of her unborn child before making this permanent and life-affecting decision.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the United States Supreme Court upheld as constitutional laws that protect the right of a woman to know these facts about abortion. The Court said:

>[It cannot] be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. [R]equiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to insure an informed choice, one which might cause the woman to choose childbirth over abortion.\textsuperscript{xxix}
If advocates of legal abortion were truly "pro-choice" instead of "pro-abortion," they would not object to allowing women with unexpected pregnancies access to all the facts simply because they fear that full knowledge might lead to fewer abortions.

**Model Legislation**

§ *Informed Consent*

**SECTION 1. INFORMED CONSENT.** No abortion shall be performed in this state except with the voluntary and informed consent of the female upon whom the abortion is to be performed. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:

(a) **Information which must be provided by physician.** The female is told the following, by telephone or in person, by the physician who is to perform the abortion or by a referring physician, at least 24 hours before the abortion:

1. The name of the physician who will perform the abortion;
2. The particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, breast cancer, danger to subsequent pregnancies, and infertility;
3. The probable gestational age of the unborn child at the time the abortion is to be performed; and
4. The medical risks associated with carrying her child to term.

The information required by this subsection may be provided by telephone without conducting a physical examination or tests of the patient, in which case the information required to be provided may be based on facts supplied the physician by the female and whatever other relevant information is reasonably available to the physician. It may not be provided by a tape recording, but must be provided...
during a consultation in which the physician is able to ask questions of the female and the female is able to ask questions of the physician. If a physical examination, tests, or the availability of other information to the physician subsequently indicate, in the medical judgment of the physician, a revision of the information previously supplied to the patient, that revised information may be communicated to the patient at any time prior to the performance of the abortion. Nothing in this section may be construed to preclude provision of required information in a language understood by the patient through a translator.

(b) Information which may be provided by agent of physician. The female is informed, by telephone or in person, by the physician who is to perform the abortion, by a referring physician, or by an agent of either physician at least 24 hours before the abortion:

(1) That medical assistance benefits may be available for prenatal care, childbirth, and neonatal care;
(2) That the father is liable to assist in the support of her child, even in instances in which the father has offered to pay for the abortion; and
(3) That she has the right to review the printed materials described in Section 4, that these materials are available on a state-sponsored website, and what the website address is.

The physician or the physician’s agent shall orally inform the female that the materials have been provided by the State of [NAME] and that they describe the unborn child and list agencies which offer alternatives to abortion. If the female chooses to view the materials other than on the website, they shall either be given to her at least 24 hours before the abortion, mailed to her at least 72 hours before the abortion by certified mail, restricted delivery to addressee, which means the postal employee can only deliver the mail to the addressee.

The information required by this subsection may be provided by a tape recording if provision is made to record or otherwise register
specifically whether the female does or does not choose to have the printed materials given or mailed to her.

(c) Certification required. The female certifies in writing, prior to the abortion, that the information described in subsections (a) and (b) of this section has been furnished her, and that she has been informed of her opportunity to review the information referred to in paragraph (3) of subsection (b) of this section.

(d) Copy of certification. Prior to the performance of the abortion, the physician who is to perform the abortion or the physician’s agent receives a copy of the written certification prescribed by subsection (c) of this section.

SECTION 2. PRINTED INFORMATION.

(a) Alternatives to abortion and unborn development data. Within ninety days after this Act is enacted, the [ADD APPROPRIATE AGENCY FOR STATE] shall cause to be published, in English and in each language which is the primary language of 2% or more of the state’s population, and shall cause to be available on the state website provided for in Section 5 of this Act, the following printed materials in such a way as to ensure that the information is easily comprehensible:

(1) Geographically indexed materials designed to inform the female of public and private agencies and services available to assist a female through pregnancy, upon childbirth, and while the child is dependent, including adoption agencies, which shall include a comprehensive list of the agencies available, a description of the services they offer, and a description of the manner, including telephone numbers, in which they might be contacted or, at the option of [NAME OF RELEVANT AGENCY], printed materials including a toll-free, 24 hour a day telephone number which may be called to obtain, orally, such a list and description of agencies in the locality of the caller and of the services they offer; and
(2) Materials designed to inform the female of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from the time when a female can be known to be pregnant to full term, including any relevant information on the possibility of the unborn child’s survival and pictures or drawings representing the development of unborn children at two-week gestational increments, provided that any such pictures or drawings must contain the dimensions of the fetus and must be realistic and appropriate for the stage of pregnancy depicted. The materials shall be objective, nonjudgmental, and designed to convey only accurate scientific information about the unborn child at the various gestational ages. The material shall also contain objective information describing the methods of abortion procedures commonly employed, the medical risks commonly associated with each such procedure, the possible detrimental psychological effects of abortion and the medical risks commonly associated with each such procedure and the medical risks commonly associated with carrying a child to term.

(b) Legibility. The materials referred to in subsection (a) of this section shall be printed in a typeface large enough to be clearly legible. The website provided for in Section 5 of this Act shall be maintained at a minimum resolution of 70 DPI (dots per inch). All pictures appearing on this website shall be a minimum of 200x300 pixels. All letters on the website shall be a minimum of 11 point font. All information and pictures shall be accessible with an industry standard browser, requiring no additional plug-ins.

(c) Availability. The materials required under this section shall be available at no cost from [NAME OF AGENCY] upon request and in appropriate number to any person, facility, or hospital.

SECTION 3. INTERNET WEBSITE. The [NAME OF AGENCY] shall develop and maintain a stable internet website to provide the information described under Section 4. No information regarding
who uses the website shall be collected or maintained. The [NAME OF AGENCY] shall monitor the website on a daily basis to prevent and correct tampering.

SECTION 4. PROCEDURE IN CASE OF MEDICAL EMERGENCY. When a medical emergency compels the performance of an abortion, the physician shall inform the female, prior to the abortion if possible, of the medical indications supporting the physician’s judgment that an abortion is necessary to avert her death or that a 24 hour delay will create serious risk of substantial and irreversible impairment of a major bodily function.

SECTION 5. REPORTING REQUIREMENTS.

(a) Reporting form. Within ninety days after this Act is enacted, the [NAME OF AGENCY] shall prepare a reporting form for physicians containing a reprint of this Act and listing:

(1) the number of females to whom the physician provided the information described in subsection (a) of section 3; of that number, the number provided by telephone and the number provided in person; and of each of those numbers, the number provided in the capacity of a referring physician and the number provided in the capacity of a physician who is to perform the abortion;
(2) the number of females to whom the physician or an agent of the physician provided the information described in subsection (b) of section 3; of that number, the number provided by telephone and the number provided in person; of each of those numbers, the number provided in the capacity of a referring physician and the number provided in the capacity of a physician who is to perform the abortion; and of each of those numbers, the number provided by the physician and the number provided by an agent of the physician;
(3) the number of females who availed themselves of the opportunity to obtain a copy of the printed information described in section 4 other than on the website, and the
number who did not; and of each of those numbers, the number who, to the best of the reporting physician's information and belief, went on to obtain the abortion; and (4) the number of abortions performed by the physician in which information otherwise required to be provided at least twenty-four hours before the abortion was not so provided because an immediate abortion was necessary to avert the female's death, and the number of abortions in which such information was not so provided because a delay would create serious risk of substantial and irreversible impairment of a major bodily function.

(b) Distribution of forms. The [NAME OF AGENCY] shall ensure that copies of the reporting forms described in subsection (a) of this section are provided:

(1) within one hundred twenty days after this Act is enacted, to all physicians licensed to practice in this State;
(2) to each physician who subsequently becomes newly licensed to practice in this state, at the same time as official notification to that physician that the physician is so licensed; and
(3) by December 1 of each year, other than the calendar year in which forms are distributed in accordance with paragraph (1) of this subsection, to all physicians licensed to practice in this State.

(c) Reporting requirement. By February 28 of each year following a calendar year in any part of which this Act was in effect, each physician who provided, or whose agent provided, information to one or more females in accordance with section 3 during the previous calendar year shall submit to [NAME OF AGENCY] a copy of the form described in subsection (a) of this section, with the requested data entered accurately and completely.

(d) Failure to report as required. Reports that are not submitted by the end of a grace period of thirty days following the due date shall be subject to a late fee of five hundred dollars for each additional
thirty day period or portion of a thirty day period they are overdue. Any physician required to report in accordance with this section who has not submitted a report, or has submitted only an incomplete report, more than one year following the due date, may, in an action brought by [NAME OF AGENCY], be directed by a court of competent jurisdiction to submit a complete report within a period stated by court order or be subject to sanctions for civil contempt.

(e) Public statistics. By June 30 of each year the [NAME OF AGENCY] shall issue a public report providing statistics for the previous calendar year compiled from all of the reports covering that year submitted in accordance with this section for each of the items listed in subsection (a) of this section. Each such report shall also provide the statistics for all previous calendar years, adjusted to reflect any additional information from late or corrected reports. The [NAME OF AGENCY] shall take care to ensure that none of the information included in the public reports could reasonably lead to the identification of any individual provided information in accordance with subsections (a) or (b) of subsection (c).

(f) Modifications by regulation. The [NAME OF AGENCY] may by regulation [promulgated in accordance with RELEVANT ADMINISTRATIVE PROCEDURE ACT] alter the dates established by subsections (b)(3), (c) or (e) of this section or consolidate the forms or reports described in this section with other forms or reports to achieve administrative convenience or fiscal savings or to reduce the burden of reporting requirements, so long as reporting forms are sent to all licensed physicians in the state at least once every year and the report described in subsection (e) is issued at least once every year.

SECTION 6. CRIMINAL PENALTIES. Any person who knowingly or recklessly performs or attempts to perform an abortion in violation of this Act shall be guilty of a felony. Any physician who knowingly or recklessly submits a false report under subsection c of section 6 shall be guilty of a misdemeanor. No penalty may be assessed against the female upon whom the abortion is performed or attempted to be performed. No penalty or civil liability may be
assessed for failure to comply with paragraph (3) of subsection (b) of section 3 or that portion of subsection (c) of section 3 requiring a written certification that the female has been informed of her opportunity to review the information referred to in paragraph (3) of subsection (b) of section 3 may be assessed unless the [NAME OF AGENCY] has made the printed materials available at the time the physician or the physician’s agent is required to inform the female of her right to review them.

SECTION 7. CIVIL REMEDIES.

(a) Civil suits for violation. Any person upon whom an abortion has been performed without complying with this Act, the father of the unborn child who was the subject of such an abortion, or the grandparent of such an unborn child may maintain an action against the person who performed the abortion in knowing or reckless violation of this Act for actual and punitive damages. Any person upon whom an abortion has been attempted without complying with this Act may maintain an action against the person who attempted to perform the abortion in knowing or reckless violation of this article for actual and punitive damages.

(b) Suit to compel statistical report. If the [NAME OF AGENCY] fails to issue the public report required by subsection (e) of Section 6, any group of ten or more citizens of this State may seek an injunction in a court of competent jurisdiction against the [DIRECTOR OF NAME OF AGENCY] requiring that a complete report be issued within a period stated by court order. Failure to abide by such an injunction shall subject the [DIRECTOR] to sanctions for civil contempt.

(c) Attorney’s fee. If judgment is rendered in favor of the plaintiff in any action described in this section, the court shall also render judgment for a reasonable attorney’s fee in favor of the plaintiff against the defendant. If judgment is rendered in favor of the defendant and the court finds that the plaintiff’s suit was frivolous and brought in bad faith, the court shall also render judgment for a
reasonable attorney’s fee in favor of the defendant against the plaintiff.

SECTION 8. PROTECTION OF PRIVACY IN COURT PROCEEDINGS. In every civil or criminal proceeding or action brought under this article, the court shall rule whether the anonymity of any female upon whom an abortion has been performed or attempted shall be preserved from public disclosure if she does not give her consent to such disclosure. The court, upon motion or sua sponte, shall make such a ruling and, upon determining that her anonymity should be preserved, shall issue orders to the parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to safeguard her identity from public disclosure. Each such order shall be accompanied by specific written findings explaining why the anonymity of the female should be preserved from public disclosure, why the order is essential to that end, how the order is narrowly tailored to serve that interest, and why no reasonable less restrictive alternative exists. In the absence of written consent of the female upon whom an abortion has been performed or attempted, anyone, other than a public official, who brings an action under subsection (a) of section 8 shall do so under a pseudonym. This section may not be construed to conceal the identity of the plaintiff or of witnesses from the defendant.

SECTION 9. SEVERABILITY. If any one or more provision, section, subsection, sentence, clause, phrase or word of this Act or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of this Act shall remain effective notwithstanding such unconstitutionality. The legislature hereby declares that it would have passed this Act, and each provision, section, subsection, sentence, clause, phrase or word thereof, irrespective of the fact that any one or more provision, section, subsection, sentence, clause, phrase, or word be declared unconstitutional.
<table>
<thead>
<tr>
<th>State</th>
<th>Child Welfare</th>
<th>Education</th>
<th>Policy Making</th>
<th>Marriage &amp; Divorce</th>
<th>Community Standards</th>
<th>Child-Bearing</th>
<th>Caring for Our Aged</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alaska</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Arizona</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Arkansas</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>California</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Colorado</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Connecticut</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Delaware</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Florida</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Georgia</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hawaii</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Idaho</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Illinois</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Indiana</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Iowa</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kansas</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kentucky</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Louisiana</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maine</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maryland</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Massachusetts</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Michigan</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Minnesota</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mississippi</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Missouri</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Montana</td>
<td></td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nebraska</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Nevada</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Hampshire</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Jersey</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Mexico</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New York</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>North Carolina</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>North Dakota</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Oklahoma</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Oregon</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pennsylvania</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rhode Island</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>South Carolina</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>South Dakota</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tennessee</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Texas</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Utah</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Vermont</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Virginia</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Washington</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>West Virginia</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wisconsin</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wyoming</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

✓ = already law
LEGISLATION SUMMARY

Family as the Fundamental Unit in Child Welfare

§ Termination of Parental Rights

(a)(1) Notwithstanding any other provision of [this code], the court may not order the involuntary termination parental rights unless the court finds that there has parental fault or incapacity such that the conduct or condition of the parent or parents have exceeded the natural and legal limits of parental discretion.

(a)(2) Accordingly, the court must find by clear and convincing evidence that the parent or parents have either:

(10) abandoned,
(11) abused,
(12) chronically or severely neglected the child or children, or
(13) that the parent or parents are unfit or incompetent by reason of conduct or condition which is seriously detrimental to the child or children and that the parent or parents are unable or unwilling to correct such unfitness or incompetence within the time period provided by law.

(a)(3) The court may not consider whether it is in the best interest of the child to terminate parental rights until it has first made an express finding of parental fault or incapacity.

Family as the Fundamental Unit in Education

§ Compulsory Attendance

(a) This section does not apply if

(3) a child is being educated in the child’s home by a parent or legal guardian, or
(4) a child is attending a private school.
Family as the Fundamental Unit in Policy Making

§ Family Impact Statements

(A) Legislative Impact

(a)(1) All proposed legislation shall include a statement, provided by the author of the legislation, describing the potential impact, if any, of proposed legislation on the family consisting of a husband and wife and any dependent children.

(A) The statement shall respond to the following questions:

(v) Does this action encourage marriage or threaten the status of marriage and the marriage-based family as a uniquely favored legal institution?

(vi) Does this action encourage persons to become parents and commit themselves to their children?

(vii) Does this action help the family perform its functions or does it substitute governmental activity for the function?

(viii) Does this action strengthen bonds between generations?

(B) Administrative Impact

(a)(2) Each state agency shall prepare a family impact statement for every proposed rule or major action to be taken by any department under its administration. In each case, once formally proposed, a thirty day window to receive public comment shall be required. Following this public comment period, these statements, along with complete records of all public comments, shall be submitted to the relevant committee of the State legislature for review and which can, by a majority vote, call for a joint resolution of both houses of the legislature, disapproving any proposed rules or major actions deemed harmful to the family. Such a resolution shall be subject to veto by the governor which can only be overridden by a 2/3 vote of the legislature.
(a)(3) One year from the effective date of this legislation, the Governor shall appoint a panel consisting of nine members which shall study the current laws of this State and make recommendations consistent with the purpose of the family impact statement for ensuring that the laws of this State support the family as the fundamental unit of society.

**Family as the Fundamental Unit in Marriage and Divorce**

§ *Divorce*

(a) Irreconcilable differences shall not be grounds for divorce if:

(i) there are living minor children of the marriage; or
(ii) the parties have been married 10 years or longer; or
(iii) one of the spouses contests the divorce.

**Family as the Fundamental Unit in Caring for Our Aged**

§ *Aged Exemption*

(a) “Personal exemptions” means the total exemption amount an individual is allowed to claim for the taxable year under Section 151, Internal Revenue Code, for:

(v) the individual;
(vi) the individual’s spouse;
(vii) the individual’s dependents; and
(viii) the individual’s, or individual’s spouse’s, relative age 60 or over living in the individual’s home.
Family as the Fundamental Unit in Community Standards

§ Pandering obscenity

(a)(1) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(F) Create, reproduce, or publish any obscene material, when the offender knows that the material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when the offender is reckless in that regard;

(G) Promote or advertise for sale, delivery, or dissemination; sell, deliver, publicly disseminate, publicly display, exhibit, present, rent, or provide; or offer or agree to sell, deliver, publicly disseminate, publicly display, exhibit, present, rent, or provide, any obscene material;

(H) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when the offender is reckless in that regard;

(I) Advertise or promote an obscene performance for presentation, or present or participate in presenting an obscene performance, when the performance is presented publicly, or when admission is charged;

(J) Buy, procure, possess, or control any obscene material with purpose to violate division (a)(1)(B) or (D) of this section.

(a)(2) It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(a)(3) Whoever violates this section is guilty of pandering obscenity, a felony of the [insert] degree. If the offender previously has been
convicted of a violation of this section, then pandering obscenity is a felony of the [insert] degree.

The Family as the Fundamental Unit in Child-Bearing

§ Informed Consent

SECTION 1. INFORMED CONSENT. No abortion shall be performed in this state except with the voluntary and informed consent of the female upon whom the abortion is to be performed. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:

(a) Information which must be provided by physician. The female is told the following, by telephone or in person, by the physician who is to perform the abortion or by a referring physician, at least 24 hours before the abortion:

(1) The name of the physician who will perform the abortion;
(2) The particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, breast cancer, danger to subsequent pregnancies, and infertility;
(3) The probable gestational age of the unborn child at the time the abortion is to be performed; and
(4) The medical risks associated with carrying her child to term.

The information required by this subsection may be provided by telephone without conducting a physical examination or tests of the patient, in which case the information required to be provided may be based on facts supplied the physician by the female and whatever other relevant information is reasonably available to the physician. It may not be provided by a tape recording, but must be provided during a consultation in which the physician is able to ask questions
of the female and the female is able to ask questions of the physician. If a physical examination, tests, or the availability of other information to the physician subsequently indicate, in the medical judgment of the physician, a revision of the information previously supplied to the patient, that revised information may be communicated to the patient at any time prior to the performance of the abortion. Nothing in this section may be construed to preclude provision of required information in a language understood by the patient through a translator.

(b) **Information which may be provided by agent of physician.** The female is informed, by telephone or in person, by the physician who is to perform the abortion, by a referring physician, or by an agent of either physician at least 24 hours before the abortion:

1. That medical assistance benefits may be available for prenatal care, childbirth, and neonatal care;
2. That the father is liable to assist in the support of her child, even in instances in which the father has offered to pay for the abortion; and
3. That she has the right to review the printed materials described in Section 4, that these materials are available on a state-sponsored website, and what the website address is. The physician or the physician’s agent shall orally inform the female that the materials have been provided by the State of [NAME] and that they describe the unborn child and list agencies which offer alternatives to abortion. If the female chooses to view the materials other than on the website, they shall either be given to her at least 24 hours before the abortion, mailed to her at least 72 hours before the abortion by certified mail, restricted delivery to addressee, which means the postal employee can only deliver the mail to the addressee.

The information required by this subsection may be provided by a tape recording if provision is made to record or otherwise register specifically whether the female does or does not choose to have the printed materials given or mailed to her.
(c) **Certification required.** The female certifies in writing, prior to the abortion, that the information described in subsections (a) and (b) of this section has been furnished her, and that she has been informed of her opportunity to review the information referred to in paragraph (3) of subsection (b) of this section.

(d) **Copy of certification.** Prior to the performance of the abortion, the physician who is to perform the abortion or the physician's agent receives a copy of the written certification prescribed by subsection (c) of this section.

SECTION 2. PRINTED INFORMATION.

(a) **Alternatives to abortion and unborn development data.** Within ninety days after this Act is enacted, the [ADD APPROPRIATE AGENCY FOR STATE] shall cause to be published, in English and in each language which is the primary language of 2% or more of the state's population, and shall cause to be available on the state website provided for in Section 5 of this Act, the following printed materials in such a way as to ensure that the information is easily comprehensible:

(1) Geographically indexed materials designed to inform the female of public and private agencies and services available to assist a female through pregnancy, upon childbirth, and while the child is dependent, including adoption agencies, which shall include a comprehensive list of the agencies available, a description of the services they offer, and a description of the manner, including telephone numbers, in which they might be contacted or, at the option of [NAME OF RELEVANT AGENCY], printed materials including a toll-free, 24 hour a day telephone number which may be called to obtain, orally, such a list and description of agencies in the locality of the caller and of the services they offer; and

(2) Materials designed to inform the female of the probable anatomical and physiological characteristics of the unborn
child at two-week gestational increments from the time when a female can be known to be pregnant to full term, including any relevant information on the possibility of the unborn child’s survival and pictures or drawings representing the development of unborn children at two-week gestational increments, provided that any such pictures or drawings must contain the dimensions of the fetus and must be realistic and appropriate for the stage of pregnancy depicted. The materials shall be objective, nonjudgmental, and designed to convey only accurate scientific information about the unborn child at the various gestational ages. The material shall also contain objective information describing the methods of abortion procedures commonly employed, the medical risks commonly associated with each such procedure, the possible detrimental psychological effects of abortion and the medical risks commonly associated with each such procedure and the medical risks commonly associated with carrying a child to term.

(b) **Legibility.** The materials referred to in subsection (a) of this section shall be printed in a typeface large enough to be clearly legible. The website provided for in Section 5 of this Act shall be maintained at a minimum resolution of 70 DPI (dots per inch). All pictures appearing on this website shall be a minimum of 200x300 pixels. All letters on the website shall be a minimum of 11 point font. All information and pictures shall be accessible with an industry standard browser, requiring no additional plug-ins.

(c) **Availability.** The materials required under this section shall be available at no cost from [NAME OF AGENCY] upon request and in appropriate number to any person, facility, or hospital.

SECTION 3. INTERNET WEBSITE. The [NAME OF AGENCY] shall develop and maintain a stable internet website to provide the information described under Section 4. No information regarding who uses the website shall be collected or maintained. The [NAME
OF AGENCY] shall monitor the website on a daily basis to prevent and correct tampering.

SECTION 4. PROCEDURE IN CASE OF MEDICAL EMERGENCY. When a medical emergency compels the performance of an abortion, the physician shall inform the female, prior to the abortion if possible, of the medical indications supporting the physician’s judgment that an abortion is necessary to avert her death or that a 24 hour delay will create serious risk of substantial and irreversible impairment of a major bodily function.

SECTION 5. REPORTING REQUIREMENTS.

(a) Reporting form. Within ninety days after this Act is enacted, the [NAME OF AGENCY] shall prepare a reporting form for physicians containing a reprint of this Act and listing:

1. the number of females to whom the physician provided the information described in subsection (a) of section 3; of that number, the number provided by telephone and the number provided in person; and of each of those numbers, the number provided in the capacity of a referring physician and the number provided in the capacity of a physician who is to perform the abortion;
2. the number of females to whom the physician or an agent of the physician provided the information described in subsection (b) of section 3; of that number, the number provided by telephone and the number provided in person; of each of those numbers, the number provided in the capacity of a referring physician and the number provided in the capacity of a physician who is to perform the abortion; and of each of those numbers, the number provided by the physician and the number provided by an agent of the physician;
3. the number of females who availed themselves of the opportunity to obtain a copy of the printed information described in section 4 other than on the website, and the number who did not; and of each of those numbers, the
number who, to the best of the reporting physician's information and belief, went on to obtain the abortion; and (4) the number of abortions performed by the physician in which information otherwise required to be provided at least twenty-four hours before the abortion was not so provided because an immediate abortion was necessary to avert the female's death, and the number of abortions in which such information was not so provided because a delay would create serious risk of substantial and irreversible impairment of a major bodily function.

(b) Distribution of forms. The [NAME OF AGENCY] shall ensure that copies of the reporting forms described in subsection (a) of this section are provided:

(1) within one hundred twenty days after this Act is enacted, to all physicians licensed to practice in this State; (2) to each physician who subsequently becomes newly licensed to practice in this state, at the same time as official notification to that physician that the physician is so licensed; and (3) by December 1 of each year, other than the calendar year in which forms are distributed in accordance with paragraph (1) of this subsection, to all physicians licensed to practice in this State.

(c) Reporting requirement. By February 28 of each year following a calendar year in any part of which this Act was in effect, each physician who provided, or whose agent provided, information to one or more females in accordance with section 3 during the previous calendar year shall submit to [NAME OF AGENCY] a copy of the form described in subsection (a) of this section, with the requested data entered accurately and completely.

(d) Failure to report as required. Reports that are not submitted by the end of a grace period of thirty days following the due date shall be subject to a late fee of five hundred dollars for each additional thirty day period or portion of a thirty day period they are overdue.
Any physician required to report in accordance with this section who has not submitted a report, or has submitted only an incomplete report, more than one year following the due date, may, in an action brought by [NAME OF AGENCY], be directed by a court of competent jurisdiction to submit a complete report within a period stated by court order or be subject to sanctions for civil contempt.

(e) **Public statistics.** By June 30 of each year the [NAME OF AGENCY] shall issue a public report providing statistics for the previous calendar year compiled from all of the reports covering that year submitted in accordance with this section for each of the items listed in subsection (a) of this section. Each such report shall also provide the statistics for all previous calendar years, adjusted to reflect any additional information from late or corrected reports.

The [NAME OF AGENCY] shall take care to ensure that none of the information included in the public reports could reasonably lead to the identification of any individual provided information in accordance with subsections (a) or (b) of subsection (c).

(f) **Modifications by regulation.** The [NAME OF AGENCY] may by regulation [promulgated in accordance with RELEVANT ADMINISTRATIVE PROCEDURE ACT] alter the dates established by subsections (b)(3), (c) or (e) of this section or consolidate the forms or reports described in this section with other forms or reports to achieve administrative convenience or fiscal savings or to reduce the burden of reporting requirements, so long as reporting forms are sent to all licensed physicians in the state at least once every year and the report described in subsection (e) is issued at least once every year.

SECTION 6. CRIMINAL PENALTIES. Any person who knowingly or recklessly performs or attempts to perform an abortion in violation of this Act shall be guilty of a felony. Any physician who knowingly or recklessly submits a false report under subsection c of section 6 shall be guilty of a misdemeanor. No penalty may be assessed against the female upon whom the abortion is performed or attempted to be performed. No penalty or civil liability may be assessed for failure to comply with paragraph (3) of subsection (b) of section 3 or that portion of subsection (c) of section 3 requiring a
written certification that the female has been informed of her opportunity to review the information referred to in paragraph (3) of subsection (b) of section 3 may be assessed unless the [NAME OF AGENCY] has made the printed materials available at the time the physician or the physician’s agent is required to inform the female of her right to review them.

SECTION 7. CIVIL REMEDIES.

(a) **Civil suits for violation.** Any person upon whom an abortion has been performed without complying with this Act, the father of the unborn child who was the subject of such an abortion, or the grandparent of such an unborn child may maintain an action against the person who performed the abortion in knowing or reckless violation of this Act for actual and punitive damages. Any person upon whom an abortion has been attempted without complying with this Act may maintain an action against the person who attempted to perform the abortion in knowing or reckless violation of this article for actual and punitive damages.

(b) **Suit to compel statistical report.** If the [NAME OF AGENCY] fails to issue the public report required by subsection (e) of Section 6, any group of ten or more citizens of this State may seek an injunction in a court of competent jurisdiction against the [DIRECTOR OF NAME OF AGENCY] requiring that a complete report be issued within a period stated by court order. Failure to abide by such an injunction shall subject the [DIRECTOR] to sanctions for civil contempt.

(c) **Attorney’s fee.** If judgment is rendered in favor of the plaintiff in any action described in this section, the court shall also render judgment for a reasonable attorney’s fee in favor of the plaintiff against the defendant. If judgment is rendered in favor of the defendant and the court finds that the plaintiff’s suit was frivolous and brought in bad faith, the court shall also render judgment for a reasonable attorney’s fee in favor of the defendant against the plaintiff.
SECTION 8. PROTECTION OF PRIVACY IN COURT PROCEEDINGS. In every civil or criminal proceeding or action brought under this article, the court shall rule whether the anonymity of any female upon whom an abortion has been performed or attempted shall be preserved from public disclosure if she does not give her consent to such disclosure. The court, upon motion or sua sponte, shall make such a ruling and, upon determining that her anonymity should be preserved, shall issue orders to the parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to safeguard her identity from public disclosure. Each such order shall be accompanied by specific written findings explaining why the anonymity of the female should be preserved from public disclosure, why the order is essential to that end, how the order is narrowly tailored to serve that interest, and why no reasonable less restrictive alternative exists. In the absence of written consent of the female upon whom an abortion has been performed or attempted, anyone, other than a public official, who brings an action under subsection (a) of section 8 shall do so under a pseudonym. This section may not be construed to conceal the identity of the plaintiff or of witnesses from the defendant.

SECTION 9. SEVERABILITY. If any one or more provision, section, subsection, sentence, clause, phrase or word of this Act or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of this Act shall remain effective notwithstanding such unconstitutionality. The legislature hereby declares that it would have passed this Act, and each provision, section, subsection, sentence, clause, phrase or word thereof, irrespective of the fact that any one or more provision, section, subsection, sentence, clause, phrase, or word be declared unconstitutional.

ii In re J.P., 648 P2d 1364 (Utah 1982). This is arguably the most important Utah case on the constitutional nature of parental rights.

iii See Section 62A-4a-201 of the Utah Child Welfare Code stating that “courts” (apparently not the state legislature), have recognized a “general presumption” (not constitutional right) of children to be raised by their natural parents.


v In re Gault, 387 U.S. 1 (1967)


ix In re J.P., op cit.

x Clarifying amendments to the Juvenile Court Code were made in 2002 and again in 2003 requiring warrants before the removal of children from their homes.


xii A case handled by the author within a few years after the enactment of the 1994 Child Welfare Reform Act is illustrative. Acting upon information supplied by a school counselor, the state worker went to the home of the children and demanded entry and access to the children out of the presence of the mother. Upon refusal, she obtained the assistance of a plainclothes officer and the two returned to the home several hours later and forced entry through the back door of the home without warrant or warning, and forced the mother to bring all the children into the presence of the caseworker where the young child suspected of abuse was forced to disrobe. Upon seeing what appeared to be a bruise mark on the child’s buttocks, and disregarding the mother’s explanations, all the children were forcibly removed. At the shelter hearing the evidence was found insufficient to justify the state’s removal action even though the state’s attorney and the guardian strenuously urged the court to support removal because of the broad statutory grounds then existing and the need to avoid “taking chances” with the children’s safety.
Favoring the Family

xiii Section 78-3a-312 requires the court to review the reports and evidence of the parents’ failure to comply with treatment plans and to find that the child should be adopted, and then order the filing of permanent termination proceedings to accomplish this. This same evidence will usually be introduced at the subsequent hearing to justify permanent termination of parental rights.

xiv This was the standard from 1965 until legislative changes made in 1992 and 1994. For an example of the application of this earlier standard see In re K.S. Jr., K.S. and B.S., 737 P2d 170 (Utah 1987).

xv In re J.P., op cit., p. 1376.


xvii Ibid.

xviii Ibid.

xix Joel Spring, The Universal Right to Education, Lawrence Erlbaum Associates, Mahwah, NJ, 2000, pg. ix


xxi NY Times, July 2, 2002


xxv The impact of this policy is not clear since there are no references to analysis made on the basis of this policy in the Code of Federal Regulations.


xxviii 2001 Illinois House Bill 275 (asking for a family impact statement in an annual plan of the Department on Aging); 2001 New York Assembly Bill 1157 (calling on the legislature to provide rules on family impact statements to accompany some legislation); 2001 Oregon House Bill 3864 (requiring the Legislative Administrator to prepare family impact statements on proposed bills which would ask if the bill would: “(a) Strengthen or erode the authority and rights of parents in the education, nurturing and supervision of their children. (b) Encourage or discourage an individual’s economic self-sufficiency, personal pride and assumption of responsibility for the individual’s spouse, children and elderly parents. (c)
Strengthen or erode marital commitment. (d) Increase or decrease disposable family income.”.

xxx 20 Illinois Compiled Statutes Annotated §10/6.
xxxi Utah Code Annotated §62A-4a-119.
xxsii Montana Code Annotated §2-4-405.
xxsiii Montana Code Annotated §5-4-501.
xxsiv Montana Code Annotated §§5-4-502 & 503.
xxsv Montana Code Annotated §5-4-504.
xxsvi 2003 Montana Draft 2068 (extending to 2005); 2003 Montana House Bill 541 (same).
xxsvii Louisiana Revised Statutes Annotated 49:972.
xxsviii Id.
xxix 2002 Louisiana Regulation Text 8366 (food stamps); 2002 Louisiana Regulation Text 8579 (temporary assistance); 2002 Louisiana Regulation Text 8326 (child care co-payment); 2002 Louisiana Regulation Text 8647 (co-pay for government insurance); 2002 Louisiana Regulation Text 8642 (same).
xl 2002 Louisiana Regulation Text 8367 (day care); 2002 Louisiana Regulation Text 8656 (child care assistance); 2002 Louisiana Regulation Text 8628 (same); 2002 Louisiana Regulation Text 8711 (substance abuse treatment); 2002 Louisiana Regulation Text 8599 (temporary assistance); 2002 Louisiana Regulation Text 8580 (diversion assistance program); 2002 Louisiana Regulation Text 8507 (assistance in starting small businesses); 2002 Louisiana Regulation Text 8327 (substance abuse treatment); 2002 Louisiana Regulation Text 7975 (child care and other services); 2002 Louisiana Regulation Text 8629 (job skills training).
xli 2002 Louisiana Regulation Text 8442.
xlii 2002 Louisiana Regulation Text 8423.
xlv Theodora Ooms, Taking Families Seriously: Family Impact Analysis as an Essential Policy Tool The Policy Institute for Family Impact Seminars (1995). FIS is a think tank associated with the University of Wisconsin which provides resources and briefings for policymakers and professionals about family impact analysis.
xlvi Id. at 3.
xlvii Id.
xlviii Id. at 10.
Favoring the Family

FIS notes that while it currently understands family to mean any “two or more individuals related by blood, marriage or adoption” it will probably need to adjust its definition to include any relationship receiving legal recognition such as “domestic partners.” Id. at 11.

Id. at 14.

1 Id. at 14.


3 Some of the approaches described above seem to imply a definition, by referring to marriage for instance, but none contain an explicit definition.

4 James F. Crow, Unequal By Nature: A Geneticist’s Perspective on Human Differences Daedalus 81 (Jan. 1, 2002); see also Roy J. Britten, Divergence Between Samples of Chimpanzee and Human DNA Sequences is 5%, Counting Indels 99 Proceedings of the National Academy of Sciences of the United States of America 13633 (Oct. 15, 2002) (noting the correct amount of shared DNA is probably 95%).


7 Pub. L. 104-121 (Requires federal agencies to submit proposed regulations to Congress and the Comptroller General. If it is a “major rule”, the Comptroller General must issue a report on it to the committee with jurisdiction in both Houses. Congress can then pass a joint resolution disapproving the regulation which must be approved by the President, or if vetoed, Congress must vote to override the veto. If a rule is not “major” it need only be submitted to Congress before going into effect because it is not subject to disapproval.


lxiii Id. at 9.
lxvii Id. at 52.
lxviii Id. at 54.
lxix Id. at 55.
lxx Id. at 47 & 184 note 11.
lxxii California Family Code §2310.
lxxiii Kay, supra note 11 at 292.
lxxviii Id. at 638.
lxxix Id. at 628.
lxxs Id.
Id. at 103.
Id. at 104.
Id. at 126, 128, 130, 132.
Id. at §272(A).
cx Indiana (S200 & HB1231), Missouri (HB154), Oklahoma (S427 & S445), Utah (HB213) and Virginia (HB2793 & HB280).
cxi 1997 Georgia House Bill 434.
cxiii Id. at 10.
cxiv Id.
cxv Id.
cxix Found at: http://216.239.33.100/search?q=cache:x_BrXigOLdAC.
Favoring the Family

cxxvi As influential article in this regard was: L. Hersh, “The Fall in the Birth Rate and its Effects on Social Policy,” International Labour Review 28 (Aug. 1933): 159-62.
cxxviii Quotation from Vladeck, Unloving Care, 33.
cxxix Ibid., 242.
cxxv Burwell, "An Analysis of Long-Term Care Reform Proposals," 3.
cxxvi Ibid., 9.

cxli Mendelson, Tender Loving Greed, 3-29.

160
cxlvi See, for example, James L. Wilkes II “Building a Better Long-Term Care System: The Potential of Community-Based Care,” Family Policy 14 (July-August 2—1): 14.
cliii Ettner, “The Effect of the Medicaid Home Care Benefit on Long-Term Care Choices of the Elderly,” 125.
clixii See Victor B. Cline, Pornography’s Effects on Adults and Children, published by Morality in Media, 475 Riverside Drive, New York, NY 10115; also online at http://mentalhealthlibrary.info/library/porn/pornlds/pornldsauthor/links/victorcline/porneffect.htm
cliv Much of the historical & legal background was provided by the 1985 Attorney General’s Commission on Obscenity and Pornography.
clv 2 Serg. & Rawle 91 (1815).
clv 17 Mass. 336 (1821).
clixii 413 U.S. 49 (1973).
Favoring the Family

clxiv Frohwerk v. United States, 249 U.S. 204 (1919).
clxv Dunlap v. United States, 165 U.S. 486 (1897).
clxviii Smith v. California, 361 U.S. 147 (1959). The principle was reaffirmed in Hamling v. United States, 418 U.S. 87 (1974), which also made clear that the defendant need not be shown to have known that the materials were legally obscene.
clxii The third facet of the Miller test, that the work lacks "serious literary, artistic, political, or scientific value," is never in any event to be determined by reference to local standards. Here the frame of reference must in all cases be national. Smith v. United States, 431 U.S. 291 (1977).
clxiii The Supreme Court in fact uses the term in Miller.
clxv B.J. Youd & Associates: A New Front In the War Against Pornography.

clxix The same deception reared its ugly head in the recently decided Texas sodomy case. The case fostering the Court's decision occurred because two homosexual men fabricated a felony crime "in progress" to draw police to their apartment. The men then staged an act of sodomy when police entered their apartment.
