

Inconsistent Ethical Models: Abortion Opposition Ignores Foster Care

by Michael Katz

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Introduction

Not all pro-life movements are equivalent. Some states are pushing harder to ban abortion than others. These states are focal points for the pro-life movement, and are therefore most telling as to the ethics of the movement as a whole.¹ In 2006, South Dakota took the lead enacting legislation to ban abortion, in direct challenge of the Supreme Court's decision in *Roe v. Wade*.² According to the non-profit Alan Guttmacher Institute, as of April 2007, an additional two states introduced legislation that would automatically ban abortion if *Roe* were to be overturned and five states introduced legislation that express their intent to restrict the right to legal abortion to the maximum extent permitted by the U.S. Supreme Court in the absence of *Roe*.³

To gauge the ethical basis for pro-life legislation, this paper takes a closer look at these nine states that form the locus of the country's pro-life movement.⁴ Possible ethical models are posited as foundations for state legislation opposing abortion, and then used as the analytical basis to test the ethical consistency of the pro-life movement. Specifically, this paper considers whether these states apply an ethically consistent approach to one likely outcome of outlawing abortion – an increased need for foster care.

Why foster care? There is a great deal of overlap between key factors influencing both the need

¹ “We're trying to get a consensus [among states attempting to outlaw abortion]” said Terri Herring, president of Pro-Life Mississippi. “What we don't want is five different pro- life voices out there.” Stephanie Simon, *Ban Disrupts Abortion Politics*, Cincinnati Post (OH), Mar. 7, 2006 at A1.

² “South Dakota's abortion law was intentionally sweeping and was designed, as Gov. Mike Rounds has described it, as a ‘full frontal attack’ on *Roe v. Wade*.” Monica Davey, *National Battle Over Abortion Focuses on South Dakota Vote*, N.Y. Times, Nov. 1, 2006, at Section A.

³ *State Policies in Brief: Abortion Policy in the Absence of Roe*, Guttmacher Institute, Apr. 1, 2007, available at http://www.guttmacher.org/statecenter/spibs/spib_APAR.pdf.

⁴ These states are the focus of a national pro-life effort. “The same strategy at work in Mississippi is being used all across the country. According to the National Abortion Federation, 500 state-level antiabortion bills were introduced last year, and 26 were signed into law. The number of abortion providers dropped 11 percent between 1996 and 2000, and almost 90 percent of U.S. counties lack abortion services. At the national level, Republicans are working to strengthen these restrictions; last week, the Senate passed a bill making it a crime to take a minor across state lines to evade parental consent laws.” Michelle Goldberg, *Abortion Under Siege in Mississippi*, Salon.com, Aug. 1, 2006, <http://www.salon.com/news/feature/2006/08/01/mississippi/index.html> (last visited Apr. 26, 2007).

for abortion and the need for foster care. If abortion is criminalized, women who would have sought an abortion will be left with one of two options: attempt an illegal abortion or decide to have a child when they otherwise would not. Overlapping indicators suggest that children in this demographic are in danger of being born into a troubled home and are prime candidates for later requiring the services of state foster care programs. Accordingly, a predictable outcome of outlawing abortion is a significantly increased burden on state foster care programs. Because foster care data is tracked on a state-by-state basis, state funding and governmental interest in foster care can be correlated with legislation to outlaw abortion on the state level – thereby, providing valuable insight into the ethical model used by the pro-life movement in an arena closely connected to their main objective.

Overall, an examination of state foster care programs indicates that these nine states are not taking an ethically consistent approach to the interrelated issues of abortion and foster care. Yet because each state approaches the issues differently, there is a spectrum across states in how consistently they have applied ethical models that drive abortion legislation when developing programs that impact foster care, a related and equally vulnerable group.

Methodology

This paper begins by providing a brief summary on the abortion debate to date and a discussion of the different ethical models that best support the pro-life movement. Next, a review of the underlying legal framework provided by the Constitution and Congress, interpreted by the Supreme Court, is provided along with an overview of state legal developments in response to this current legal framework. The paper then turns to the structure of the foster care system and identifies the points of overlap between issues central to the need for foster care and the demand for abortion. This paper then relies on foster care program data in each of the nine states, collected by the Urban Institute Child

Welfare Research Program, as indicators of state effort and program effectiveness. A comparison of abortion legislation in each of these nine states against foster care program data provides perspective as to the consistency of each state's posited ethical model.

The Search for a Middle Ground

The debate around abortion in the United States is fierce and ongoing, with little middle ground between those who believe that a woman's right to choose – to decide whether to conceive and carry a child to term – is fundamental, and those who believe that life begins at conception and that, therefore, ending a pregnancy by a positive act is equivalent to murder.⁵ Increasingly, however, these diametrically opposed views do find a middle ground in agreeing, at the very least, that abortion is an outcome that both sides prefer to avoid and would rather prevent.⁶ “There are 1.3 million abortions every year in our country, one in every five pregnancies is ending in abortion . . . certainly too many to the average American.”⁷ This tenuous middle ground has led to legislation and research into the best

⁵ “Instead of funneling federal dollars into comprehensive crisis pregnancy centers that supply women with misinformation to steer them away from having abortions, Paltrow argues that lawmakers should finance programs that have an honest interest in helping women in need. As one example, she points to the dearth of drug treatment programs for pregnant women and mothers. ‘Increasingly, women with untreated drug or alcohol problems are being targeted for arrests based on the claim that pregnant women can be considered child abusers even before they have given birth,’ she writes. ‘A low-income pregnant drug-using woman in Amarillo, Texas, who would have several pregnancy crisis centers to choose from -- would find that there is not a single drug treatment program that provides care to pregnant and parenting women within 100 miles [We should] advocate for policies that genuinely support maternal health and well being and create a true culture of life -- one that values the women who give that life.’” Lynn M. Paltrow, *On the Anniversary of Roe v. Wade*, Jan. 19, 2007, <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2007/01/19/EDGC7N75DC1.DTL> (last viewed April 26, 2007). *But see* Julie Rovner, Interview of Rachel Laser, *Political Strategies Shift in New Abortion Landscape*, NPR All Things Considered, Mar. 17, 2006 (“We need to rein in on this killing fields which has claimed the lives of over 47 million unborn children since 1973. A holocaust, a baby a holocaust.” (Quoting Representative Chris Smith, Republican, New Jersey)).

⁶ Not all pro-choice advocates agree. “[S]ome abortion-rights activists feel they must acknowledge the sentiment behind the South Dakota ban by assuring America that they, too, regard abortion as a grave moral concern. But such language outrages others in their movement, especially abortion doctors, who feel it stigmatizes and alienates their patients.” Davey, *supra* note 2. *See also* Frances Kissling, *Should Abortion be Prevented?*, Salon.com, Oct. 10, 2003, <http://www.salon.com/opinion/feature/2006/10/03/abortion/> (last viewed Apr. 26, 2007).

⁷ Says Rachel Laser of Third Way, a group that develops strategies for Democrats to appeal to political moderates. Rovner, *supra* note 5.

ways to avoid the need for abortions, yet work continues on the opposing ends of the debate.⁸

Pro-choice advocates have worked to promote contraception and education in efforts to minimize the number of unwanted and accidental pregnancies, see poverty and drug use as other key causes for unwanted pregnancies, and because no form of contraception works 100% of the time, work to ensure that needed abortions are safe.⁹ Pro-life advocates promote a far different platform. The current movement promotes abstinence as the best way to prevent unwanted pregnancies and refers women who are pregnant, but have decided that they do not want a child, to adoption services.¹⁰ With great practical effect, pro-life advocates have worked within limits set by the Supreme Court to significantly constrain access to abortion clinics at the state level through restrictive regulatory and

⁸ “At the state level, more than 860 choice-related bills [were] introduced or carried over in the first two months of the 2006 legislative session.” Jon Platner, *States Move to Ban Abortion*, Mar. 9, 2006, <http://www.plannedparenthood.org/news-articles-press/politics-policy-issues/abortion-access/abortion-ban-6168.htm> (last updated Mar. 25, 2006, last viewed Apr. 6, 2007).

⁹ “There is . . . widespread support among abortion-rights advocates for contraception Planned Parenthood affiliates have prevented more abortions by providing family planning than have groups like Priests for Life and the American Life League, who remain adamantly opposed to abortion and refuse to support contraception, the best hope for reducing the need for abortion.” Kissling, *supra* note 6. See also *Half of Women Who Underwent Abortion in 2002 Had Previous Abortions*, *Guttmacher Report Says*, Nov. 27, 2006, http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=41245 (last viewed Apr. 26, 2007). (“[M]ost women who had an abortion in 2002 were using contraception at the time of conception”). See also Rebecca Traister, *The Abortion Morality Question*, *Broadsheet*, Salon.com, Feb. 1, 2006, http://www.salon.com/mwt/broadsheet/2006/02/01/pollitt_and_saletan/index.html (last viewed Apr. 14, 2007). (“There will never be . . . zero abortions in America -- or anywhere else in the world. Women who use birth control experience unwanted pregnancies. Women who don't use birth control experience unwanted pregnancies. Unwanted pregnancies are a fact of life. Why would we stigmatize those who will inevitably experience one of the most basic facts of life?”).

¹⁰ “It's been a central plank of George Bush's social policy: to stop teenagers having sex. More than \$1bn of federal money has been spent on promoting abstinence since 1998 - posters printed, television adverts broadcast and entire education programmes devised for hundreds of thousands of girls and boys. The trouble is, new research suggests that it hasn't worked. At all. A survey of more than 2,000 teenagers carried out by a research company on behalf of Congress found that the half of the sample given abstinence-only education displayed exactly the same predilection for sex as those who had received conventional sex education in which contraception was discussed.” Ed Pilkington, *\$1bn 'Don't Have Sex' Campaign a Flop as Research Shows Teenagers Ignore Lessons*, *The Guardian*, Apr. 16, 2007, available at <http://www.guardian.co.uk/usa/story/0,,2058066,00.html> (last viewed Apr. 26, 2007).

funding decisions.¹¹ The political climate has become more favorable to the pro-life movement since the 2000 national election and, in 2006, two open seats on the Supreme Court of the United States were filled by Justices whose judicial history suggests that they will be more open to the pro-life platform.¹² These political and judicial changes have led states with strong, aggressive pro-life movements to introduce and pass legislation designed to specifically challenge Supreme Court precedent and, ultimately, to allow states to outlaw abortion if they so choose.¹³

As success means removing options for women and an increase in unwanted pregnancies carried to term, victorious legislation will have a ripple effect.¹⁴ Further, this pro-life legislation is being promoted at great expense to private groups and to taxpayers, with careful forethought and long-

¹¹ "Making 'abortion rare through laws and stigma,' . . . has worked incredibly well; in 2005, the state legislature passed five new laws restricting abortion. Earlier this month a task force made recommendations to the legislature for 2006, including 'requiring that a woman watch an ultrasound of her fetus, that doctors warn women about the psychological and physical dangers of abortion, and that women receive psychological counseling before the abortion, among other measures.'" Hillary Frey, *The Last Clinic Standing in South Dakota* (quoting The Washington Post), Broadsheet, Salon.com, Dec. 27, 2005, <http://www.salon.com/mwt/broadsheet/index.html?blog=/mwt/broadsheet/2005/12/27/abortion/index.html> (last viewed Apr. 25, 2007). For more on Medicaid restrictions, see Lynn Harris, *Medicaid and Abortion*, Broadsheet, Salon.com, May 10, 2006, http://www.salon.com/mwt/broadsheet/2006/05/10/medicaid_and_abortion/index.html (last viewed Apr. 26, 2007). ("Before the Hyde Amendment banning the use of Medicaid for abortion . . . Medicaid covered about one-third of abortions nationwide. Now, in states with full coverage, Medicaid still covers almost one-third of abortions. In states with coverage only in cases of rape, incest and life endangerment, Medicaid covers less than 1 percent."). See also Lynn Harris, *Mississippi: Last Clinic Standing Under Attack*, Broadsheet, Salon.com, Dec. 28, 2005, http://www.salon.com/mwt/broadsheet/2005/12/28/mississippi_clinic/index.html (last viewed Apr. 14, 2007). ("Mississippi already has on the books 35 pages of requirements for clinic facilities, even down to parking lot size Another requirement: the clinic's doctors must have hospital admitting privileges. Thing is, the doctors . . . fly in from out of state because, Hill says, 'We can't find anyone local who'll do it.' ('They know we have out of state doctors,' she adds, referring to those who came up with the requirement.) . . . To have admitting privileges, you must live in the state.'").

¹² Some in the pro-life movement, including South Dakota's Republican Governor Mike Rounds, argue that it would be more effective to "rely on the Roberts court to steadily chip away at abortion rights without overturning *Roe* outright." Mary Kay Culp, executive director of Kansans for Life, states that "As a pro-lifer, I feel guilty saying this, because people are out there all excited, but a ban is actually counterproductive." Simon, *supra* note 1. See also Evelyn Nieves, *S.D. Makes Abortion Rare Through Laws And Stigma*, The Wash. Post, Dec. 27, 2005, at A01, <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/26/AR2005122600747.html> (last viewed Apr. 14, 2007). ("Alito wrote [a memo] in 1985 in which he mentioned passing restrictions on abortion as a way to mitigate the effects of *Roe v. Wade*.").

¹³ "State Representative Roger Hunt [S.D.] . . . pointed to the appointments of Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr., both conservatives, and what he described as the 'strong possibility' of the retirement of Justice John Paul Stevens in the near future and the naming of a conservative as his successor. 'This is our time.'" Monica Davey, *South Dakota Bans Abortion, Setting Up a Battle*, N.Y. Times, Mar. 7, 2006

¹⁴ Strict regulation and restrictions are not enough for many pro-life advocates. "Many legislators who are opposed to legal abortion have discovered the hard way that embracing contraception diminishes their support from hard-line antiabortion groups. A case in point is Robert Casey A progressive Democrat, he supports more economic support for low-income and poor women who become pregnant, and for children and families. He also supports contraception, including emergency contraception for adults over the counter. As a result, Casey has gone from being a pro-life Catholic poster boy to the whipping boy of antiabortion groups." Kissling, *supra* note 6.

term planning by its proponents.¹⁵ Pro-life advocates have thought through their actions, but are these actions grounded in a consistent ethical base? As the pro-life movement is founded on the principle that life begins at conception and that it is immoral to end another's life, and as so much planning has gone into pro-life legislation that will have wide-reaching effect, it is important that these plans are being made in an ethically consistent manner.¹⁶

Ethical Models

Consistent, effective policy is based on a unified, ethical foundation. “The average American sees abortion as a morally complex issue.”¹⁷ Optimally, however, legislation will do what it can to minimize complexity. Adhering to an approach that is ethically consistent with both societal values and the purported cause and effect of legislation is one means to reach that end. The more ethically consistent a legislative policy, the clearer the goals and approach. The clearer the goals and approach, the more acceptable the bill should be to the general public and the more likely the bill’s proponents will be in garnering support for their legislation.

To better understand the position of those who aim to outlaw abortion, it is therefore useful to define what ethical model underlies their policy, and to search for any ethical consistency upon which abortion proponents have based their claims. In *Ethical theory in the Medical Context*, John Arras and Robert Hint advance three primary ethical models as the basis for the majority of American medical law. Of these models, the Kantian model and the natural rights model are most likely to provide insight

¹⁵ See Simon, *supra* note 1. (“An anonymous donor already has pledged \$1 million to help South Dakota defend the ban in court”). See also Davey, *supra* note 2. (“The battle [in South Dakota] over a statewide ballot measure to install one of the country's strictest anti-abortion laws is playing out in television commercials, yard signs and Sunday sermons.”).

¹⁶ “I think the pendulum is turning in our favor because people are finally waking up that abortion is violence against children.” Laser, Quoting Representative Chris Smith (Republican, New Jersey), *supra* note 5.

¹⁷ Laser, *Id.*

into the motives and legislation being promoted by abortion opponents.¹⁸

The Kantian categorical imperative states that “I ought never to act except in such a way that I can also will that my maxim should become a universal law.”¹⁹ The basis for Kantian ethics is the principle of the moral equality of all persons. Kant described perfect duties, which are duties “that can *never* be right for us to violate. To say we have a perfect duty to refrain from unjustly harming another . . . means that no . . . consideration could ever justify treating a person as a mere means to an end.”²⁰ “[P]erfect duties are matched by perfect rights; specifically, the perfect duty to refrain from violating the liberty or integrity of others is matched by a corresponding *right* to be free from such violation.”²¹ By contract, imperfect duties, or moral obligations, generate no corresponding right. Kant would argue that “persons alone possess dignity, or intrinsic worth, which cannot be reduced to a market value.”²² As such, a “Kantian conception of rights generally trumps against a claim of social utility.”²³ For example, “[n]o matter what the proposed gains, we refuse on Kantian grounds to enlist persons as cannon fodder in the war against disease.”²⁴

Natural law ethics “provide principles for interpreting the general ethical directives of the Christian faith,” principles which are inherent and common as directives in religious faith generally.²⁵ Natural law is defined “as the law inscribed by God into the nature of things.”²⁶ Key is “the ability to

¹⁸ Arras & Hunt, *Ethical Theory in the Medical Context*, reprinted in Barry R. Furrow et al., *Bioethics: Healthcare Law and Ethics* 6 (5th ed., West 2004).

¹⁹ *Id.* at 14.

²⁰ *Id.*

²¹ *Id.* at 15.

²² *Id.* at 16.

²³ *Id.* at 19.

²⁴ *Id.*

²⁵ *Id.* at 21.

²⁶ *Id.*

live according to the dictates of reason;” to choose to “do good and avoid evil’ . . . no matter what the cost.”²⁷ This basic precept is mitigated in practice by the principle of double effect, which will only justify an action if the action meets the following conditions: “(1) the evil must not be the means of producing the effect, (2) the evil may not be ‘directly’ intended, and (3) there must be a proportionate reason for performing the action, in spite of its evil consequences.” The principle of double effect can be “used to justify the use of pain-relieving drugs that also shorten life.”²⁸

Legal Background

The Supreme Court's 1973 decision in *Roe v. Wade* affirmed that the right of a woman to control her own body was fundamental.²⁹ A woman's right to have an abortion, the Court held, is grounded in the liberty prong of the substantive due process clause. To reach this holding, the Court balanced the privacy interest of the mother with the State's interest in the potential life of her child and the health of the mother. During the first two trimesters of a pregnancy, the mother's right to choose trumped the State's interest in the health of the fetus. The *Roe* Court held that the balance swung back to the State at the start of the third trimester, at which stage the fetus is deemed viable. Even then, however, the health of the mother remained prime.

In 1992, *Planned Parenthood v. Casey* eliminated *Roe*'s trimester framework and viability distinction.³⁰ The *Casey* Court found that the state has a pre-viability interest in the health of the fetus. The holding in *Casey* forbids States from placing an undue burden in the path of a woman seeking an abortion, so any legislation that has the purpose or effect of creating a substantial obstacle to a woman's

²⁷ *Id.* at 21-22.

²⁸ *Id.* at 22.

²⁹ *Roe v. Wade*, 410 U.S. 113 (1973).

³⁰ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

ability to have a legitimate choice will be declared unconstitutional.

Since *Casey* was decided, states with strong anti-abortion movements have worked within the limits of *Casey* to minimize access to abortion within the borders of their states. A number of approaches have been taken. Private actors have organized grass-roots protests, promoted and educated from the pro-life perspective, and have even threatened and committed violence against abortion providers, seekers and proponents. On the legislative level, efforts to oppose abortion manifest as funding restrictions, strict regulation of abortion providers, and the placement of impediments into the path of women seeking abortion by state legislatures set to the maximum level allowed by *Casey*. Proposed and accepted impediments include, 24 hour waiting periods before performance of the procedure, requiring ultrasounds prior to abortion, parental notification or consent in cases where minors are seeking abortions, requiring information be given to patients about the possibility that a fetus may be able to feel pain and banning the use of insurance or federal funding for abortions.³¹ These pro-life actions have been exceedingly effective, leaving only one abortion clinic and zero abortion doctors in each of three states and making the path to abortion a treacherous one in 19 other states.³²

In April 2007, the Supreme Court affirmed Congress' decision to outlaw partial-birth abortions in *Gonzales v. Carhart*.³³

In a 5-4 decision, the . . . [C]ourt said the federal law, signed by President Bush in 2003, does not unconstitutionally burden the right to an abortion, even though it provides no exemption to take a woman's health into account - a provision the court has in the past said was a prerequisite for abortion restrictions.³⁴

³¹ *State Policies in Brief: An Overview of Abortion Laws*, Guttmacher Institute, Mar. 1, 2007, available at http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf.

³² *Id.*

³³ *Gonzales v. Carhart*, Slip Opinion, Decided Apr. 18, 2007.

³⁴ Jason Wiest, *Arkansas Right to Life Satisfied With Supreme Court Decision*, Arkansas News Bureau, Apr. 19, 2007, <http://www.arkansasnews.com/archive/2007/04/19/News/341771.html> (last viewed Apr. 28, 2007).

If interpreted broadly, this decision and the language of the federal statute “could be interpreted to outlaw abortion procedures used very early in the second trimester (not to mention those used for women who have learned via amniocentesis, as late as 20 weeks or more, that they're carrying a fatally abnormal fetus).”³⁵ Further, this decision is expected to give states opposing abortion much greater leeway in legislating to ban abortion.³⁶ In states with strict regulations and limited access, all but the earliest abortions may now be, in practice, no longer available.

The *Carhart* ruling “culminates a 12-year campaign by the National Right to Life Committee to outlaw the procedure that its leaders first dubbed ‘partial-birth abortion.’ They said the procedure was akin to ‘infanticide’ because the fetus was killed just as it emerged from the woman's body.”³⁷ Meanwhile, President “Bush praised the decision as a step toward ‘protecting human dignity and upholding the sanctity of human life.’ He signed the ban into law four years ago, but it had been struck down as unconstitutional by three lower courts.”³⁸ Critics argue that

“Partial-birth abortion” is [the] term that has been widely adopted by the media, despite being a political construct that refers to no known medical procedure. The . . . Act was sold

³⁵ Lynn Harris, *Supreme Court Upholds Ban on "Partial-Birth" Abortion*, Salon.com, Apr. 19, 2007, http://www.salon.com/mwt/feature/2007/04/19/scotus_ban/ (last viewed Apr. 26, 2007). (“In general, critics of ‘partial-birth abortion’ bans -- which are also on the books in 26 states (though enjoined in 18) -- have long argued that not only is there no such medical term as ‘partial-birth abortion,’ but that such laws define it so as to appear to also include a variation of dilation and evacuation (D&E), by far the most common -- and safest -- method of second-trimester abortion (which is relatively rare itself; at least 85 percent of abortions take place in the first trimester). In other words, the ban could be interpreted to outlaw abortion procedures used very early in the second trimester (not to mention those used for women who have learned via amniocentesis, as late as 20 weeks or more, that they're carrying a fatally abnormal fetus).”)

³⁶ See Ted Keenan, *Supreme Court Decision Marks Setback for Women's Health and Privacy: Court's Ruling Opens Door for More Political Interference in Personal, Private Medical Decisions*, Apr. 18, 2007, http://www.naral.org/news/press-releases/2007/pr04182007_scotus.html (last viewed Apr. 26, 2007) (quoting Nancy Keenan). (“The Court has disregarded the medical opinion of leading doctors who oppose the ban. The American College of Obstetricians and Gynecologists— which represents 90 percent of the OB GYNs in this country — says the ban is harmful to women's health and interferes with medical decision making”). See also Judy Peres, *States See New Fights on Abortion*, Chicago Tribune, April 27, 2007, at 1. (In the week following the *Carhart* decision, “North Dakota's legislature passed a law that would ban virtually all abortions, the Missouri House voted to tighten regulation of abortion clinics and two federal appeals courts were asked to lift injunctions blocking enforcement of state abortion bans.”)

³⁷ David G. Savage, *Historic Shift on Abortion*, Los Angeles Times, Apr. 19, 2007, <http://www.stltoday.com/stltoday/news/stories.nsf/nation/story/9C9D5041409DAE2C862572C20012B4B3?OpenDocument&highlight=2%2C%22Roe%22> (last viewed Apr. 26, 2007).

³⁸ *Id.*

to the public as banning one procedure late in pregnancy, when in fact the vague language could ban a wide variety of abortions, even before fetal viability.³⁹

Supporters of the decision contend that “the court stuck to the legal issues rather than second-guessing policy in deciding this case [...] . . . A majority of justices said the American people and their elected representatives, not judges, should decide this issue.”⁴⁰

State Legislation Opposing or Outlawing Abortion

In 2006, South Dakota passed legislation banning abortion. "In the history of the world, the true test of a civilization is how well people treat the most vulnerable and most helpless in their society," said Gov. Michael Rounds while signing the bill into law.⁴¹ "The sponsors and supporters of this bill believe that abortion is wrong because unborn children are the most vulnerable and most helpless persons in our society. I agree with them" he said. The law would have made it “a felony for a doctor in South Dakota to perform abortions except to prevent the death of the pregnant woman legislators had voted down amendments that would have allowed abortions in cases of incest, rape or in instances when the pregnant woman's health would be jeopardized (though not fatally).”⁴² Though “the Legislature passed a law banning almost all abortions, . . . voters rejected it in a referendum.”⁴³ South Dakota also passed a “trigger law”, a law which automatically bans abortion in the state if *Roe* is overturned.

³⁹ Miranda Kennedy, *Partial Truth Abortion Coverage*, Fairness & Accuracy In Reporting (FAIR), March/April 2000, <http://www.fair.org/index.php?page=1028> (last viewed April 28, 2007).

⁴⁰ Heather May, *Utah Foes of Abortion Pepped Up by Ruling*, The Salt Lake Tribune, Apr. 19, 2007, http://www.sltrib.com/news/ci_5701491 (last viewed Apr. 28, 2007).

⁴¹Davey, *supra* note 13.

⁴²Davey, *supra* note 2.

⁴³ Libby Sander, *South Dakota: Abortion Bill Rejected*, N.Y. Times, Feb. 22, 2007, http://www.nytimes.com/2007/02/22/us/22brfs-ABORTIONBILL_BRF.html?ex=1177905600&en=58b1842e61e77742&ei=5070 (last viewed Apr. 1, 2007).

Louisiana and Utah passed bans on abortion which were enjoined by permanent court order.⁴⁴ Mississippi and South Dakota also passed “trigger” laws, as previously done by Louisiana.⁴⁵ Utah considered an outright ban on abortion but changed course and is currently considering a trigger law.⁴⁶ Arkansas, Illinois, Kentucky, Missouri and North Dakota have expressed an intent to limit abortion to the maximum extent permitted under *Roe* and *Casey*.⁴⁷ Due in large part to heavy state regulation, Mississippi, North Dakota and South Dakota each have only one remaining in-state abortion provider.⁴⁸

The State Of Foster Care

“In the United States in 2002, 129,000 children were in foster care systems nationwide waiting to be adopted. These children found themselves in this circumstance because their parents could no longer provide for their care.”

Foster care is generally a long-term process that involves private actors, the courts and the state, and may represent one of the most invasive actions by government into homes and families. States are required to annually track data by the Federal government on their foster care programs; the most recent, complete data available are from 2002, collected by the Urban Institute Child Welfare Research Program. “The Foster Care Program is a permanently authorized entitlement,” contained in the Social

⁴⁴ *State Policies in Brief: Abortion Policy in the Absence of Roe*, *supra* note 3 at 2.

⁴⁵ *Id.*

⁴⁶ May, *supra* note 40.

⁴⁷ *State Policies in Brief: Abortion Policy in the Absence of Roe*, *supra* note 3 at 2.

⁴⁸ Frey, *supra* note 11. *See also* Nieves, *supra* note 12. (“The last doctor in South Dakota to perform abortions stopped about eight years ago; the consensus in the medical community is that offering the procedure is not worth the stigma of being branded a baby killer.” Instead, four doctors from Minnesota fly in “on a rotating basis to perform abortions”). *See also* Harris, *supra* note 35. (“Ironically, however, some clinics will not have to spend any time at all figuring out how to comply with [*Carhart*]. That is because certain state regulations -- such as those prohibiting surgical abortions in outpatient clinics -- already constitute de facto bans on second-trimester abortions. (Earlier in pregnancy, abortions are normally performed with suction, a procedure that is not currently in question.”). *See also* Goldberg, *supra* note 4. (“A decade ago, there were six clinics in Mississippi, but the combination of constant harassment and onerous state regulations led one after another to shut down; since 2004, Jackson Women's Health Organization has been alone. ‘They're using the tactics of a war of attrition What you do is you [attack] in the hinterlands, don't hit them in their strong point until you become so strong that you can penetrate it. So they target, and then they move on. Close that clinic, move to the next. It's a classic strategy.’”)

Security Act, “that provides open-ended matching payments to States for the costs of maintaining certain children in foster care, and associated administrative, child placement, and training costs.”⁴⁹

[F]unds include both nonentitlement authorizations (for which the amount of funding available is determined through the annual appropriations process) and authorized entitlements (under which the Federal Government has a binding obligation to make payments to any person or unit of government that meets the eligibility criteria established by law).⁵⁰

Funding via title IV-E of the Social Security Act pays for the majority of spending on adoption and related activities, along with a required state match.⁵¹

Federal funds are “provided to States to administer child welfare programs. State grant programs have their own matching requirements and allocations, and all require that funds go to and be administered by State child welfare agencies.”⁵² Medicare provides another funding source in many states,⁵³ and private groups and individual citizens also contract to and independently interact with

⁴⁹ *Foster Care: Federal Child Welfare Programs Today*, <http://law.enotes.com/everyday-law-encyclopedia/foster-care> (last viewed 4/26/07).

⁵⁰ *Id.*

⁵¹ “The federal government currently spends approximately \$5 billion per year to reimburse States for a portion of their annual foster care expenditures. Foster care services are intended to provide temporary, safe alternative homes for children who have been abused or neglected until such time as they are able to return to their parents' care safely or can be placed in other permanent homes. Federal foster care funds, authorized under title IV-E of the Social Security Act, are paid to States on an uncapped, “entitlement” basis, meaning any qualifying expenditure by a State will be partially reimbursed, or “matched,” without limit. Definitions of which expenses qualify for reimbursement are laid out in regulations and policy interpretations which have developed, layer upon layer, over the course of many years [A] child's title IV-E eligibility entitles a State to federal reimbursement for a portion of the costs expended for that child's care.” *Federal Foster Care Financing: How and Why the Current Funding Structure Fails to Meet the Needs of the Child Welfare Field*, Aug. 2005, <http://aspe.hhs.gov/hsp/05/fc-financing-ib/ib.pdf> (last viewed Apr. 26, 2007). *See also Foster Care: Federal Child Welfare Programs Today*, *supra* note 49 (“Services include: programs to help reunite children with their biological families, if appropriate, or to place them for adoption or another permanent arrangement; programs to prevent placement of children in foster care, including intensive family preservation services; programs to provide follow-up services to families after a child has been returned from foster care; respite care to provide temporary relief for parents and other care givers (including foster parents); and services to improve parenting skills.”).

⁵² *Foster Care: Federal Child Welfare Programs Today*, *supra* note 49.

⁵³ *Id.*

much of the system and do most of the work of providing foster care for children.⁵⁴ While Title IV-E does provide a majority of the funding for foster care, the federal regulations are heavily criticized as being too stringent as use of the funding is limited to aspects of foster care that keep children in the system.⁵⁵ Federal funding provides for such a large percentage of the cost of foster care that it “drives state decisions in directions that don't always reflect a child's best interests.”⁵⁶ As such, “[c]hildren remain in foster care an average of three years and change families an average of three times.”⁵⁷ The Courts are also often criticized as being inefficient and ineffective, further weakening the state’s ability to quickly place children into permanent, safe homes.⁵⁸

Despite these limitations, States still have discretion in how they handle their own foster care

⁵⁴ While federal funding pays for much of the foster care system, “States are currently reimbursed by the federal government [only] for caring for children in foster care.” As such, States are “extremely limited in their ability to spend those same federal dollars on services like mental health and substance abuse treatment or alternatives like subsidized guardianship that give abused and neglected children more stable, permanent homes.” Nevertheless, . . . some states--when granted flexible use of federal funding through "waivers" --have succeeded in reducing the number or length of stay of children in foster care in part by using federal funds to pay for . . . alternative services.” Justin Kennedy, *State Foster Care Reform Efforts Face Federal Financing “Straitjacket,” New Report Shows*, Grantee Press Release, The Pew Charitable Trusts, Mar. 11, 2004, http://www.pewtrusts.org/ideas/ideas_item.cfm?content_item_id=2247&content_type_id=7&issue_name=Foster%20care%20reform&issue=30&page=7&name=Grantee%20Press%20Releases (last viewed Apr. 26, 2007).

⁵⁵ “The Title IV-E waiver program was intended to promote innovative programs, and has led to practices that support alternatives to foster-care placements. In San Francisco, for example, the county works with nonprofit agencies on ‘differential programs,’ helping at-risk families through domestic-abuse programs, substance-abuse programs and employment services. The goal is to help stabilize the family rather than remove the child from the home. However, because such services are not covered by federal dollars, the county has been using a one-time state grant, along with county funds, meaning the services are in constant danger of being cut. With the waiver, such preventive services could be secured and expanded in San Francisco, as well as other counties.” Editorial, *Feds Abandon Foster-care Plan*, San Francisco Chronicle, Feb. 27, 2006, <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2006/02/27/EDGU9GJCNS1.DTL> (last viewed Apr. 26, 2007).

⁵⁶ Bill Frenzel & Bill Gray, *To Fix Foster Care: Reform Courts, Funding*, The Christian Science Monitor, May 19, 2004, <http://www.csmonitor.com/2004/0519/p09s01-coop.html> (last viewed Apr. 26, 2007).

⁵⁷ Theola Labbé, *Nation's Courts Faulted on Foster Care*, Washington Post, May 19, 2004, <http://www.washingtonpost.com/ac2/wp-dyn/A38143-2004May18?language=printer> (last viewed Apr. 26, 2007).

⁵⁸ “No child enters or leaves foster care except by judicial order. The commission said the nation's courts lack procedures to monitor the system's revolving-door tendencies. Too often, children return to foster care after being reunited with their families, adopted or placed with a legal guardian.” *Id.*

system.⁵⁹ States can organize their internal system and regulate it as they choose, provided that they are within federal guidelines set by the 1997 Adoption and Safe Families Act (ASFA), the adoption of which led to a rapid increase in the number of children adopted each year for the years 1998-2002.

Per child expenditures vary greatly from state to state, and while a number of impediments exist at different points of the foster care process, many are funding-related.⁶⁰ For example, one of the more commonly mentioned barriers to placement involves problems with case management. This problem is resource and funding related and “includes staff turnover (i.e., a new caseworker “starts fresh” each time), high caseloads, insufficient staff training, lack of communication with the courts, delays when cases are transferred from an ongoing case unit to an adoption unit, and incomplete case records.” As such, state attention and funding choices have a direct effect on the foster care system – greater funding and resources should lead to a more effective foster care system.

Further, long term effects on the children and per child costs to the state for children that remain in the system until adulthood are great. “Research shows that foster children do not perform as well in school as other children.”⁶¹ Adolescents in middle school who have been abused are found to be at greater risk for juvenile delinquency and failure in school than other children.⁶²

[F]oster children fac[e] unique obstacles that their classmates d[o] not—they [a]re distracted by worries about their biological families and [a]re frequently absent from school because of court appearances and doctor's appointments. They also

⁵⁹ For example, "the State of Washington, at its own expense, “provides foster care to certain children removed from their parents' custody, and it also receives and manages social security benefits for many of the children involved, as permitted under the Social Security Act and regulations. The question here [was] whether the state's use of social security benefits to reimburse itself for some of its initial expenditures violates a provision of the Social Security Act protecting benefits from 'execution, levy, attachment, garnishment, or other legal process.' [The court held] that it does not." Elizabeth Oppenheim, *Policy & Practice of Public Human Services*, Mar. 1, 2003.

⁶⁰ “Differing claiming practices result in wide variations in funding among States. The average annual amount of federal foster care funds received by States ranges from \$4,155 to \$33,091 per eligible child, based on three year average claims from FY2001 through FY2003. It is unlikely these disparities are the result of actual differences in the cost of operating foster care programs or reflect differential needs among foster children.” *Federal Foster Care Financing*, *supra* note 51.

⁶¹ *Educational Obstacles for Children in Foster Care*, Vera Institute of Justice, http://www.vera.org/project/project1_1.asp?section_id=7&project_id=15 (last updated Mar. 23 2003, last viewed Apr. 26, 2007).

⁶² *Id.*

frequently withdr[a]w from peers and from class participation to hide their foster care status.”⁶³

A college student who spent six years in foster care speaks of its legacy of insecurity: "To this day, we struggle with security - it is like the bottom can drop out from underneath us, and it seems that disaster is just around the corner."⁶⁴ With proper state effort, however, these problems can be overcome.

Research has shown that “academic achievement can help foster children overcome their disadvantages and avoid later involvement with violence and delinquency.”⁶⁵

Overlap Between Abortion and Foster Care

Children are a state and nation's most important resource. The young ones are our futures, our nexus to vibrant leadership in government, productivity and innovation needed to provide a good quality of life for all citizens. No one would argue that to make this so, our children need to be well educated and healthy.⁶⁶

“A moral discourse that calls on individuals to act responsibly toward the creation of life cannot be separated from a call for social justice.”⁶⁷ According to a 2005 study by the Guttmacher Institute, the reasons most frequently cited as the primary causes for abortion “were that having a child would interfere with a woman’s education, work or ability to care for dependents (74%); that she could not afford a baby now (73%); and that she did not want to be a single mother or was having relationship problems (48%).”⁶⁸ In 2004, the two most common reasons for abortions, as given by women interviewed for the study were “having a baby would dramatically change my life” (74%) and “I can’t

⁶³ *Id.*

⁶⁴ Frenzel & Gray, *supra* note 56.

⁶⁵ *Educational Obstacles for Children in Foster Care*, *supra* note 61.

⁶⁶ Viewpoint, *Infant Deaths Erode Our Future*, Memphis Commercial Appeal, Mar. 14, 2007, at A10.

⁶⁷ Kissling, *supra* note 6 at 2.

⁶⁸ Lawrence B. Finer et. al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, Perspectives on Sexual and Reproductive Health, 110 at 113, Vol. 37, Num. 3, Sep. 2005.

afford a baby now” (73%).⁶⁹ “A large proportion of women cited relationship problems or a desire to avoid single motherhood (48%).⁷⁰ Nearly four in 10 indicated that they had completed their childbearing, and almost one-third said they were not ready to have a child.”⁷¹

The most common sub-reason given was that the woman could not afford a baby now because she was unmarried (42%). Thirty-eight percent indicated that having a baby would interfere with their education, and the same proportion said it would interfere with their employment. In a related vein, 34% said they could not afford a child because they were students or were planning to study.⁷²

“Children in foster care comprise one of the most vulnerable groups in society. Most come from families living in poverty; two-thirds are children of color; many were born in disadvantaged neighborhoods, and all share the pain of damaged parental relationships.”⁷³ “Foster care is a vital, life-saving refuge for children who have been abused and neglected. Unfortunately, too many children languish in foster care, moving from temporary home to temporary home.”⁷⁴

These children often have significant behavior problems and adaptive functioning deficits with rates far exceeding those in the general population. Most have experienced some form of abuse or neglect or suffer from issues around separation from their families. Because of this they are likely to be at greater risk for mental health problems.⁷⁵

In 1980, about 300,000 children in the United States spent some time in foster care placement. By 2001, there were nearly 800,000 children in foster care, with 540,000 children in the system at any given time. The majority of these children were the victims of abuse. The emergence of widespread homelessness, substance abuse (especially crack and methamphetamines), unemployment, increased incarceration

⁶⁹ *Id.* at 114.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Child Welfare and Youth Services Research*, Vera Institute of Justice, http://www.vera.org/project/project1_1.asp?section_id=7&project_id=73 (last updated Aug. 12, 2005, last viewed Apr. 15, 2007).

⁷⁴ Frenzel & Gray, *supra* note 56.

⁷⁵ Harman JS, Childs GE, Kelleher, KJ, *Mental Health Care Utilization and Expenditures by Children in Foster Care*, Arch Pediatr. Adolesc. Med. 154:1115, 2000.

rates, street violence, and HIV/AIDS have all impacted poor communities.⁷⁶

Poor children are more likely to be in foster care than middle-class children because their families have fewer resources. Illness or loss of a job may be devastating to a poor family with no savings and no relatives who can afford to assist them. These children are also more likely to stay in foster care longer or to have been in foster care since infancy. Also, children of alcoholics or drug abusers are at high risk for neglect or abuse, and comprise 75 percent of all placements.⁷⁷

Absent fathers, young mothers, and cost of care are all key reasons given by women seeking abortions. A majority of children who wind up in foster care come from homes afflicted by these same problems. No segment in society is more clearly vulnerable and in need of help by others than children in foster care. If the State is to have responsibility for or offer care towards anyone, foster children should clearly fall within the umbrella of governmental protection. Further, because government can directly affect the future of these children, any long term problems or costs to society can be traced directly back, at least in part, to care provided by the State. As such, there should not only be an ethical imperative to take proper care of these children, but there should also be a long term social demand and economic cost/benefit impetus for ensuring that these children are taken care of and quickly placed in a safe, stable home.

Abortion Demographics

According to the Alan Guttmacher Institute, over six million women become pregnant each year in the U.S. Approximately half (49%) of all pregnancies are unintended, and 42% of unintended pregnancies (or 20% of all pregnancies) are terminated by abortion. According to the Center for Disease Control (CDC), in 2003, nearly 850,000 legal abortions were performed across the U.S.

Between 1987 and 2002 the overall rate of legal abortions declined by 22%, however “between

⁷⁶ *Foster Care Demographics*, Encyclopedia of Children’s Health, <http://www.answers.com/topic/foster-care> (last viewed Apr. 25, 2007).

⁷⁷ *Id.*

1999 and 2000, the proportion of women having abortions who were poor increased Some 60% were below 200% of the federal poverty line, including 30% who were living in poverty,” yet “[m]ore than half had attended college or received a college degree.”⁷⁸ “[M]ost women who had more than one abortion were over age 30.”⁷⁹ Further, “one in three U.S. women have given birth to an infant that resulted from an unintended pregnancy and . . . one in 10 women have had more than one unintended birth.”⁸⁰

As shown in Table 1, all of the states at issue are well below the national average in numbers of abortions per 1,000 live births and number of abortions per 1,000 women aged 15-44 years. Regulatory actions taken by abortion opponents in these states appear to have been successful in limiting the number of abortions in these states. Especially striking is Louisiana, with only 9 abortions for every 1,000 live births. Across these nine states, a total of 78,845 legal abortions were performed in 2003. If pro-life advocates are successful in banning abortions, states must consider what actions would need to be taken to ensure that the children from families effected by the ban are provided an opportunity to grow up in a safe environment.

TABLE 1. REPORTED NUMBER, RATIO, AND RATE OF LEGAL ABORTIONS BY RESIDENCE (2003)

| STATE | NUMBER OF LEGAL ABORTIONS | NUMBER OF ABORTIONS PER 1,000 LIVE BIRTHS | NUMBER OF ABORTIONS PER 1,000 WOMEN AGED 15-44 YEARS |
|--------------|---------------------------|---|--|
| South Dakota | 971 | 88 | 6 |
| Louisiana | 593 | 9 | 1 |
| Utah | 3494 | 79 | 6 |
| Mississippi | 6725 | 159 | 11 |
| Arkansas | 5335 | 141 | 10 |
| Illinois | 39724 | 218 | 15 |
| Kentucky | 5865 | 106 | 7 |
| Missouri | 15205 | 107 | 13 |

⁷⁸ *Half of Women Who Underwent Abortion in 2002 Had Previous Abortions, Guttmacher Report Says*, Nov. 27, 2006, http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=41245 (last viewed Apr. 14, 2007).

⁷⁹ *Id.*

⁸⁰ *Id.*

| | | | |
|----------------------------|---------------|------------|-----------|
| North Dakota | 933 | 117 | 7 |
| Nine-State Subtotal | 78845 | | |
| National | 848163 | 241 | 16 |

Source: Strauss, L.T. et al., *Abortion Surveillance -- United States, 2003*, Centers for Disease Control. Atlanta, GA, Nov. 24, 2006, <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5511a1.htm#tab3> (last viewed Apr. 29, 2007).

Empirical Analysis of State Foster Care Programs

This paper asserts that states attempting to ban abortion or greatly restrict access to abortion but fail to not provide sufficient support for their foster care systems are acting in an ethically inconsistent manner. States that are acting to outlaw abortion but are also working to adequately fund and improve internal foster care systems are acting in a more ethically consistent manner than states that are ignoring their responsibility to children who end up in foster care.

To determine whether each state is developing policies in an ethically consistent manner, this paper examines two indicators of state support for foster care programs: (1) spending on adoption services per child in the foster care program and (2) the percentage of children adopted whose families receive an adoption subsidy. Adoption subsidies, also known as Adoption Assistance Payments (AAP), are monthly payments made to parents who adopt children from the U.S. foster care system. In creating the adoption subsidy program, Congress essentially enabled a larger proportion of families to consider adoption, thereby increasing overall adoption levels across the country. However, the level of adoption assistance can vary significantly from state to state and evidence suggests that greater adoption subsidy support is positively correlated with increased adoption levels.⁸¹ In the following sections, abortion legislation and foster care program data are reviewed and compared for each of the nine states and preliminary conclusions are drawn with respect to that state's ethical consistency. State are presented in descending order from most restrictive to least with equivalent states listed alphabetically.

⁸¹ Mary Eschelbach Hansen & Bradley A. Hansen, *The Economics of Adoption of Children from Foster Care*, Department of Economics Working Paper Series, at 6 (American University, Sep. 2005) <http://www.american.edu/cas/econ/workpap.htm> (last viewed Apr. 30, 2007).

South Dakota

As of September 30, 2002, \$1.9 million per year was spent on 1,406 children in foster care (\$1,351 per child), with 448 children waiting to be adopted. Of the 148 children adopted in 2002, 96% received a subsidy, 8% above the national average. Further, of children who were victims of maltreatment in 2003, South Dakota, at just over 14.4%, had the highest rate among reporting states of children experiencing maltreatment recurrence within a six-month period.

South Dakota is widely recognized, by both abortion opponents and advocates alike, as the leading national laboratory for testing the limits of state laws restricting abortion.⁸² In 2007, South Dakota continued its pro-life efforts introducing another bill to ban abortion, but this time allowing exceptions for cases of rape and incest. Yet because of strict reporting requirements and a lack of privacy controls to protect victims, the bill's opponents argue:

[t]he bill's feigned sympathy for rape and incest victims underscores what these South Dakota legislators are all about: destroying *Roe*. The first time around, they failed to get the measure past voters, so they've made a slight compromise in the interest of ultimately furthering their cause. It's an interesting irony that an abortion ban that aims to be less restrictive comes off -- on the surface, at least -- as even more horrific because of the way it so plainly details when a woman's body is hers to control and when it's a ward of the state.⁸³

“The abortion ban threatens to make true for all South Dakota women what low-income women in the state have faced for 30 years.”⁸⁴ Due to Congress’ banning of “federal funding under the Hyde Amendment in 1976,” “poor women in South Dakota have been effectively denied their right to

⁸² Nieves, *supra* note 12.

⁸³ Tracy Clark-Flory, *Return of the South Dakota Abortion Ban*, Blueprint, Salon.com, <http://www.salon.com/mwt/broadsheet/2007/01/31/abortion/index.html> (last updated Jan. 31, 2007, last viewed Apr. 26, 2007).

⁸⁴ Stephanie Poggi & Sarah Horsley, *Press release: National Group Pledges to Ensure Right to Abortion for Women in South Dakota*, National Network of Abortion Funds, Apr. 3, 2006, http://www.nnaf.org/south_dakota.html (last viewed Apr. 14, 2007).

abortion care[, as] South Dakota and 32 other states virtually eliminated Medicaid coverage of abortions”.⁸⁵ In 2005,

[a] 17-member abortion task force . . . issued recommendations to the legislature . . . that included some of the most restrictive requirements for abortion in the country. The report states that science defines life as beginning at conception and recommends a law that gives fetuses the same protection that children get after birth, thus banning abortion.⁸⁶

Although foster care is not a relatively large program in South Dakota, it is clear that state officials put little effort forth, while high rates of maltreatment recurrence suggest that legislators are only concerned about banning abortion. Foster children are only slightly less vulnerable than fetuses. Refusing to acknowledge this in policy decisions while treating women as only the means, a tool toward reaching an arguably legitimate end, is highly inconsistent and very difficult to justify.

That the stated goal is “to give fetuses the same protection that children get after birth” puts the focus of the legislation on the rights of the fetus. Taken on its face, this legislation appears to respect a Kantian perfect right to life, created at the moment of conception. Though some exceptions to the ban are included, opponents argue that they would be meaningless in practice. Thus, as women who become pregnant as the result of their being victim of a horrible violation are only grudgingly and mildly protected, these women are not being treated as the moral equals of the fetuses they carry. Furthermore, unless the protection children receive after birth is limited to being free of murder, failure to provide more support for these at risk children is ethically inconsistent.

From a natural rights perspective, positing that “science clearly defines the beginning of life as beginning at the moment of conception” when no such consensus exists is disingenuous at best and is not an argument made according to the dictates of reason. Further, ignoring the opinion of experts as to the practical effect of legislation on pregnant women suggests that the end game, banning abortion at

⁸⁵ *Id.*

⁸⁶ Nieves, *supra* note 12.

all costs, is all that matters to proponents of this pro-life legislation. Applying the principle of double effect, if this legislation were to take effect proponents may argue that the danger to these women, and to the children who would be born into at-risk homes, is not the means of ending abortion. They would argue that these impacts are not positive acts and are not directly intended, and, that preventing murder justifies any evil consequences. This argument, however, would require that “direct intent” be defined loosely. It would further require ignoring the state of South Dakota foster care and the lack of real exceptions for women who are the victims of crime, or at the very least labeling these effects as only indirect consequences of the law. As such, the South Dakota legislation, when matched with the sacrifices demanded of women who fall under its authority and with the likely effects on at-risk children and the foster care system, goes too far to be accepted as consistent when applying the principle of double effect to the natural rights model.

Louisiana

As of September 30, 2002, \$17.4 million per year was spent on 4,829 children in foster care (\$3,603 per child), with 1,472 children waiting to be adopted. Of the 487 children adopted in 2002, 90% received a subsidy, 2% above the national average.

In 1991, the state passed an anti-abortion bill allowing abortions only to save a mother's life and in cases of rape and incest, but it was vetoed by then-Gov. Buddy Roemer. The Legislature overrode Roemer's veto, the first time in modern political times that has occurred in Louisiana. In 1992, federal courts threw out the law, leaving the state without a statute to govern abortions. The Legislature has gone on record outlining a policy stating that abortion would automatically be prohibited in Louisiana if *Roe* is reversed, but [Sen. Ben Nevers, D-Bogalusa] and others said that isn't enough.⁸⁷

In 2006 Louisiana Governor Kathleen Blanco signed a trigger bill, passed overwhelmingly by the state House, which allowed “for no exception for rape or incest.”⁸⁸ “[D]octors found guilty of

⁸⁷ Ed Anderson, *Committee OKs ban on most abortions*, New Orleans Times Picayune, Apr. 20, 2006.

⁸⁸ Katharine Mieszkowski, *Move over South Dakota?*, Jun. 2, 2006, Salon.com, <http://www.salon.com/mwt/broadsheet/2006/06/02/louisiana/index.html> (last viewed Apr. 26, 2007).

performing abortions would face up to ten years in prison and fines of 100-thousand dollars.”⁸⁹

Governor Blanco “believe[d] an exception for rape and incest victims to get an abortion, a proposal rejected by both the House and Senate, would have ‘been reasonable,’ . . . [but] said she wouldn't reject the bill for that reason.”⁹⁰ “Originally, the bill would have allowed abortions only to save the life of the pregnant woman. The House added a provision to allow abortions in cases involving permanent harm to the woman's health.”⁹¹ The law will “only take effect if the Supreme Court overturns *Roe v. Wade* or if the U.S. Constitution is amended to allow states to ban abortion.”⁹²

Senator Nevers said he did not want to have exceptions for rape and incest victims because it would subject victims of crimes of violence to "another violent act. . . . That child (conceived in rape or incest) had nothing to do with that awful crime.”⁹³

Louisiana’s legislation banning abortion allows for an exception only for the health of the mother. While the Governor pushed an exception for rape and incest victims, it was explicitly rejected by the Legislature. Louisiana’s legislature has expended a great deal of time and effort putting forth this legislation, first by overturning the Governors veto in 1991 – a first for Louisiana’s modern day legislature when dealing with any state issue – and more recently by proposing and adopting a trigger law, despite known consensus among legislators regarding state desire to limit abortion to the maximum extent possible under the law.

The state’s trigger bill treats a fetus as a human life and puts extremely stringent criminal penalties in place for performing an abortion. Further, the fetus is treated as an individual, separate

⁸⁹ Blanco says she'll sign abortion bill, <http://www.katc.com/Global/story.asp?S=4978210>, (last viewed Apr. 26, 2007.)

⁹⁰ *Id.*

⁹¹ The Associated Press, *Anti-Abortion Law Passes in Louisiana*, Jun. 6, 2006, N.Y. Times, <http://www.nytimes.com/2006/06/06/us/06brfs-brief-004.html?ex=1175572800&en=ba5eb329cfa034aa&ei=5070> (last viewed Apr. 1, 2007).

⁹² Mieszkowski, *supra* note 88.

⁹³ Anderson, *supra* note 87.

from the mother and her experiences. As such, an abortion, though desired by the mother, would be considered another violent act – this time against the fetus – by the State. In stating that the “child (conceived in rape or incest) had nothing to do with that awful crime,” Senator Nevers is implying that the fetus, as a vulnerable member of society, did not cause any harm and deserves full protection by the State... even if the fetus’ mother, who also did no wrong, must be forced to carry that fetus, created by a violent act against her and an invasion of her body, against her wishes.

Louisiana’s policy lacks Kantian or natural law ethical consistency. In Kantian terms, the mother is being enlisted as “cannon fodder” in the “war” against fetal murder. While proponents might argue that the right to life is a perfect right, the intrinsic worth of the mother takes a back seat to the dignity of the unborn child. It could be argued that pregnancy by a rape victim is a nine-month span of the mother’s life taken by the state to save the longer life of the child, an outcome that Kantian ethics would not allow.

When approached via a natural law ethical framework, Louisiana’s policy towards abortion and foster care also lacks reasoned ethical consistency. While the proposed abortion policy does seem to be based on the dictates of reason and may meet the conditions of double effect, that the individuality and worth of the fetus as an innocent future child is a consideration in outlawing exceptions in case of rape or incest is inconsistent with the lack of effort being focused by the state on foster care. While political energy and resources were expended to override the Governor’s veto and to add a trigger bill deemed redundant by the Legislature, little effort was being put into the necessary outcome of this legislation – an increased need for foster care. If the innocence and vulnerability of a fetus is of great concern and is the reasoned basis for its protection in the womb, reason suggests that the effort to protect innocent and vulnerable children should be equivalent. Louisiana’s abortion rate is only nine abortions per thousand live births, one of the lowest rates in the nation and well below the national average. Louisiana has

already nearly succeeded in eliminating in-state abortion. Meanwhile, though they spend nearly triple the federal funds spent by South Dakota, Louisiana officials are still far below the national average in caring for their foster children. Until Louisiana works to protect this vulnerable aspect of society in the same way it wishes to protect the fetus, Louisiana's policy will never achieve ethical consistency.

Utah

As of September 30, 2002, \$8.4 million per year was spent on 2,025 children in foster care (\$4,148 per child), with 456 children waiting to be adopted. Of the 335 children adopted in 2002, 78% received a subsidy, 10% below the national average.

“Utah law [currently] prohibits abortion after 20 weeks except when the woman's life is at stake, her health might be gravely damaged, or the child would be born with grave defects.”⁹⁴ Current law has had great effect, as only seven of the 3,453 abortions during 2005 took place after the twentieth week.⁹⁵

Utah Rep. Paul Ray “cites the court's declaration that the government has a ‘substantial interest in preserving and promoting fetal life’ and it may use its authority to ‘show its profound respect for the life within the woman.’ ‘That language spurs me on to ban abortion,’ Ray said. ‘We have an unborn child here. It's a life. We have a duty and obligation to protect it.’”⁹⁶

State Senator Chris Butters is willing to consider an exception in the proposed trigger bill “for the life of the mother, but not her health ‘If you just consider the health of the mother, is it “Will she be tired more often?” or is it something much more serious in the ladder of health deterioration?”⁹⁷

While Butters' rhetoric is extreme, on the whole, legislators in Utah seem to be considering the

⁹⁴ May, *supra* note 40.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

implications for their actions. “Women seeking abortions in Utah are typically in their 20s and cite therapeutic reasons.”⁹⁸ More importantly, in abandoning the full ban on abortion and switching to a trigger bill, two-thirds of Utah Legislators “cited concern that Utah's challenge would cost millions to fight in court, with little chance of success.”⁹⁹ “The substitute bill now directs the money that would have been spent on a court challenge to be used for birth defects prevention and early childhood intervention programs.”¹⁰⁰

Pro-choice advocates in Utah are still concerned that the remaining third of Utah’s legislature “will feel emboldened to try to enact measures . . . that will further restrict women's rights.”¹⁰¹ They feel that *Carhart* has given the authority [to lawmakers] to go ahead and make all abortions a criminal procedure,” the “first step on a slippery slope to outlawing all abortions.”¹⁰²

A majority who are consistently applying Kantian ethics seem to be trumping a minority who would prefer to inconsistently apply natural law ethics to the question of abortion in Utah. Current Utah law strikes a balance between protecting the mother and protecting the fetus, banning abortion past twenty weeks with limited health exceptions for both the mother and fetus. The results are clear, as only 7 abortions were performed past twenty weeks in 2002. While the effect may be to need more foster care than if abortion were allowed after twenty weeks, Utah does a fair job acquiring federal funds and finding stable foster homes for children. Tellingly, in abandoning the full ban on abortion and switching to a trigger bill, two-thirds of Utah Legislators “cited concern that Utah's challenge would cost millions to fight in court, with little chance of success”, instead directing “the money that would

⁹⁸ *Id.*

⁹⁹ Julie Rose, *Utah House Rejects Abortion Ban, Chooses Trigger Instead*, KCPW, Feb. 12, 2007, <http://www.kcpw.org/article/2930> (last visited Apr. 28, 2007).

¹⁰⁰ *Id.*

¹⁰¹ May, *supra* note 40.

¹⁰² *Id.*

have been spent on a court challenge to be used for birth defects prevention and early childhood intervention programs.”

This decision by the Utah legislature shows clear understanding of the cost and implications of their policy, and of a desire to protect the fetus from as early as possible under the law as well as through the child’s formative years. Utah’s policy represents a reasoned approach which respects the moral equality of all persons, mother, fetus and child.

Mississippi

With only one remaining abortion provider in the state, Mississippi recently passed a trigger law, which will ban abortion in the state if *Roe* is overturned.¹⁰³

Republican Gov. Haley Barbour [has] declared an official "week of prayer regarding the sanctity of human life" before the anniversary of *Roe v. Wade*. . . . [T]he state leads the nation in antiabortion legislation. It's one of only two states in America where teenagers seeking abortions need the consent of both parents, and one of only two where abortion providers are required to give patients medically inaccurate information linking abortion to breast cancer. Abortion facilities must comply with 35 pages of regulations, including vague directives like one mandating that clinics be located in an “attractive setting.”¹⁰⁴

Under a 2004 law, for purposes of state laws dealing with homicide and certain other violent crimes, “the term ‘human being’ includes an unborn child at every stage of gestation from conception until live birth and the term ‘unborn child’ means a member of the species *homo sapiens*, at any stage of development, who is carried in the womb.”¹⁰⁵ Sadly, in Mississippi, “11 . . . children out of every 1,000 live births are dying before their first birthday. That's twice the national average, and it's

¹⁰³ For details on activism opposing the last abortion clinic in Mississippi, see Goldberg, *supra* note 4.

¹⁰⁴ *Id.* at 3.

¹⁰⁵ *State Homicide Laws That Recognize Unborn Victims*, National Right to Life Committee, Dec. 30, 2006, http://www.nrlc.org/Unborn_Victims/Statehomicidelaws092302.html (last viewed Apr. 28, 2007).

rising.”¹⁰⁶ The state government has targeted infant mortality as a key goal of a 15 year plan for the Mississippi Delta Regional Revitalization Task Force, but that plan will have little effect on the current generation.¹⁰⁷

Each week, 147 babies are born prematurely in the state, 95 are born with low birth weights and 8 babies die. Most of these infants are black and poor. They're born mostly to teen mothers. Many are clustered in Mississippi's Delta region . . . one of America's poorest in one of the nation's poorest states.”¹⁰⁸

As noted in a recent editorial, “the state's legislative leaders expended a substantial amount of political capital to pass [the trigger bill] It would be nice if that same passion and energy to protect the unborn from abortions could be employed to guarantee the unborn a healthy birth and long life.”¹⁰⁹ Nsombi Lambright, executive director of the American Civil Liberties Union in Mississippi, laments that legislators and non-profit organizations “spent so much time and taxpayers' resources” on abortion legislation.¹¹⁰ Instead, legislators have ignored the Memphis Commercial Appeal’s demand that “Mississippi's leaders must show the same passion for protecting newborns as they have for protecting the unborn.”¹¹¹

As of September 30, 2002, \$5.2 million per year was spent on 2,686 children in foster care (\$1,936 per child), with 3,117 children waiting to be adopted - an almost 100% increase from the 1,582 children waiting to be adopted in 2001. Of the 216 children adopted in 2002, 65% received a subsidy, 23% below the national average.

¹⁰⁶ *Infant Deaths Erode Our Future*, *supra* note 66.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Shelia Byrd, *Abortion-banning Bill Goes Nowhere in Debate -- House Failed to Satisfy Senate Concerns About Future Court Challenges*, Memphis Commercial Appeal, Mar. 28, 2006.

¹¹¹ *Infant Deaths Erode Our Future*, *supra* note 66.

Meanwhile, because access to abortion facilities are already so limited in Mississippi, those who run the state's last clinic expect *Carhart* to have little effect.

"This ruling will not impact any of our clinics," said Susan Hill, president of the North Carolina-based National Women's Health Organization, which runs Mississippi's only abortion clinic and facilities in five other states. "Most providers I've talked to said, 'This isn't going to bother us.' The other restrictions have been devastating -- the 24-hour waiting period, the ultrasounds. But practically speaking, this doesn't have much impact on us. It was a political battle."¹¹²

Mississippi has the highest teen birth rate in the nation, a problem that has not been addressed. Sharon Lerner of *The Nation* suggests that Mississippi is "a bellwether. 'Pro[-]choice activists see Mississippi as a glimpse of what might become the norm in a possible post-Roe future.'"¹¹³ For pro-choice advocates, "[i]t's the canary dying in the mine."¹¹⁴ Because of such limited access in Mississippi, *Carhart*, in practice, may mean that abortion is no longer available for the states rural and poor.

[O]ne study found that after a 24-hour waiting period was instituted, . . . second-trimester abortions rose by about 53 percent among women closest to an in-state provider. Women living in the poorest region of the state must drive a good three or four hours to reach the clinic, sometimes sleeping in their cars overnight in the parking lot, even in 100-degree weather, because they can't afford a motel room. Often, they have their children with them, because they can't afford child care or find someone to care for their children for two days.¹¹⁵

If *Carhart* is interpreted broadly in Mississippi and essentially outlaws abortions after the first trimester, this same 53% of women who would normally have sought an abortion will instead either need to travel out of state to have the desired abortion, have an illegal abortion, or carry the fetus to

¹¹² Harris, *Supreme Court Upholds Ban on "Partial Birth" Abortions*, *supra* note 35.

¹¹³ Harris, *Mississippi: Last Clinic Standing Under Attack*, *supra* note 11.

¹¹⁴ *Id.*

¹¹⁵ Platner, *supra* note 8.

term.¹¹⁶ In February 2007, the Mississippi Senate passed a bill, pending approval by the House, “that would ban most abortions and charge those who perform the procedures with a misdemeanor.”¹¹⁷

Because of the language used by Gov. Barbour in declaring an official "week of prayer regarding the sanctity of human life," it is clear that Mississippi is attempting to follow a natural law ethical model, founded in religious belief. While Mississippi is a state with limited financial resources, it is choosing to use these resources in an ethically inconsistent manner. As noted by the last in-state abortion clinic, *Carhart* will not have much effect in Mississippi because the regulation of abortion there is already so stringent. Even assuming that life begins at conception and that the law inscribed by God into the nature of things, Mississippi’s government is not acting according to the dictates of reason, as its most recent ban on abortion does not adhere to the principle of double effect.

Already, Mississippi’s legislators are aware of the consequences of their legislation. Adding more stringent regulation has forced more women to have abortions later in their pregnancy, a practice that the U.S. Congress has deemed repugnant and is at odds with the state goal of ending abortion. Further, the number of children dying before their first birthday or in need of foster care services has skyrocketed in recent years, and there is no short-term fix in sight. Instead of deciding that abortion has been limited as much as possible under current law and focusing on mortal peril facing the most vulnerable, poor children in the state, Mississippi’s legislature has instead focused on what it can do to enact further limitations on abortion. As is, there is a huge demand for an under-funded foster care system. Families who do participate are also not receiving as much help as families who take care of children in other states. And this need will only grow if Mississippi further bans abortion. Unless legislators are willing to argue that a child is responsible for caring for itself as soon as it is born,

¹¹⁶ For more on the rise on illegal abortions, see Carol Joffe, *Reproductive Regression*, Jan. 24, 2006, <http://www.alternet.org/story/31199/> (last viewed Apr. 14, 2007).

¹¹⁷ *State Senate Advances Bill to Ban Most Abortions*, Chi. Trib., Feb. 8, 2007, at 10.

Mississippi is choosing to value the unborn more highly than other vulnerable aspects of its society and is setting policy without a consistent ethical base.

Arkansas

Being pro-life is not just about protecting the unborn's right to life, but also ensuring that those children will grow up in a safe and nurturing environment, have good schools, and are afforded the best opportunities available to succeed in life. Part of the equation to guarantee the success of children is to make sure they have a mother and a father raising them.¹¹⁸

As of September 30, 2002, \$10.3 million per year was spent on 2,952 children in foster care (\$3,489 per child), with 974 children waiting to be adopted. Of the 297 children adopted in 2002, 81% received a subsidy, 7% below the national average. "In light of many horrific stories about newborns being abandoned," Arkansas passed the Safe Haven Act of 2001."¹¹⁹ Noting that "Arkansas has too many children in residential treatment for mental-health care, . . . [an] arrangement [that] drains state resources without providing reliable information about how effectively that treatment works," current Gov. Mike Beebe is supporting a House proposal "to examine the current system and recommend reforms."¹²⁰

"The 'rights of the unborn' was language used in the 1999 Arkansas' Fetal Protection Act, which punishes attackers separately for crimes against a fetus."¹²¹ An amendment to the state constitution

¹¹⁸ Iowans for Huckabee, quoting from Mike Huckabee, *My Decade as Governor: Stronger Families, Safer Children*, Dec. 14, 2006, <http://iowansforhuckabee.blogspot.com/2006/12/my-decade-as-governor-stronger.html> (last viewed Apr. 28, 2007).

¹¹⁹ *Id.* ("This Act allows a mother to drop off her newborn at any medical facility in the state without fear of repercussion. It is my hope that this act will end the senseless abandonment of defenseless children, save lives, and also provide the opportunity for adoption and a safe environment for these children to live").

¹²⁰ News Release, *Governor Beebe Calls for Reform in Children's Mental Health Care*, Mar. 21, 2007, http://www.arkansas.gov/governor/newsroom/index.php?do:newsDetail=1&news_id=92 (last viewed April 28, 2007) ("Arkansas currently spends \$240 million in Medicaid funds every year on mental-health care for children, a total that has doubled in four years. Ohio, a state with four times as many children, spends less than Arkansas. Much of the expenditure is due to the large number of children who go into residential treatment.").

¹²¹ Kennedy, *supra* note 39.

“bans the use of taxpayer dollars for abortions,” while “state laws require parental consent for a minor to get an abortion, and require that a woman be informed of the possible ramifications of having an abortion, including fetal pain, before the procedure is performed.”¹²² In 1999, Arkansas banned the late-term abortion procedure at the core of *Carhart*.¹²³ “Beebe said he supported the court's decision, noting that he voted for the 1999 ban and still does not support the procedure.”¹²⁴ As such, proponents will likely resurrect the 1999 bill in the near future.

While former Governor and current Republican Presidential Candidate Mike Huckabee’s approach included a desire to outlaw abortion while protecting at-risk children, Governor Beebe’s motivations appear to be more narrowly focused. A proponent of more stringent restrictions on abortion, Governor Beebe’s primary concerns regarding at-risk children primarily focus on reducing costs and improving efficiency, with no mention of any connection to abortion. This approach is inconsistent and likely to lead to further regulation of abortion in Arkansas without a corresponding increase in funding for foster care and related services.

That said, Beebe’s comments do suggest an awareness of need to aid children, within state budgetary constraints. That the House is focusing on child mental health issues suggests that there is some consistent ethical foundation to the actions of Arkansas’ government towards abortion and foster care. Even though language used was more extreme in the past, these actions are not as direct or consistent as those pushed by the state government under Huckabee’s leadership.

Illinois

As of September 30, 2002, \$143.3 million per year was spent on 24,344 children in foster care

¹²² Wiest, *supra* note 34.

¹²³ *Id.*

¹²⁴ *Id.*

(\$5,886 per child), with 6,770 children waiting to be adopted. Of the 3,585 children adopted in 2002, 98% received a subsidy, 10% above the national average.

[In Illinois, the] killing of an "unborn child" at any stage of pre-natal development is intentional homicide, voluntary manslaughter, or involuntary manslaughter or reckless homicide. Ill. Comp. Stat. ch. 720, §§5/9-1.2, 5/9-2.1, 5/9-3.2 (1993). Ill. Rev. Stat. ch. 720 § 5/12-3.1. A person commits battery of an unborn child if he intentionally or knowingly without legal justification and by any means causes bodily harm to an unborn child. Read with Ill. Rev. Stat. ch. 720 § 5/12-4.4.¹²⁵

Though Illinois has a trigger law, "the state's pre-Roe abortion ban was officially repealed—[leading] legal experts [to] think the 1975 trigger law would have little effect: There is no ban to trigger."¹²⁶ Illinois currently has a "100-percent pro-choice Senate president who would never allow an anti-abortion bill to make it out of the Senate."¹²⁷

Although the Alan Guttmacher Institute identifies Illinois as a state that plans to outlaw abortion to the maximum extent possible, there is a fairly consistent ethical foundation to the laws in Illinois. Recognizing the great demand for foster care in this populous state, officials provide funding to a much higher degree than in the other eight states reviewed for this paper. In addition, Illinois provides nearly all foster homes with an adoption subsidy, thereby enabling a greater number of children to be adopted.

Furthermore, the trigger law on the books has no teeth, and the statute criminalizing "intentionally or knowingly, without legal justification and by any means, causing bodily harm to an unborn child" can be justified as providing added protection to pregnant women or harsher penalties to those who would assault a pregnant woman. In practice all, outside of the toothless trigger law, are consistent in attempting to provide equal protection and care for at-risk women and children. The

¹²⁵ *State Homicide Laws That Recognize Unborn Victims*, *supra* note 105.

¹²⁶ Judy Peres, *States Set Stage For Ban On Abortion*, Chig. Trib., Jun. 12, 2006, at 1.

¹²⁷ Dave McKinney, *How Abortion Ruling Could Affect Illinois*, Chig. Sun-Times, Apr. 19, 2007, <http://www.suntimes.com/news/nation/348857,CST-NWS-abort19.article> (last viewed Apr. 28, 2007).

language in the criminal statute is inconsistent with larger state policy and of its underlying Kantian ethical model, but without further discussion of protection of the unborn at the expense of others, there is no ethical conflict.

Kentucky

As of September 30, 2002, \$18.9 million per year was spent on 6,814 children in foster care (\$2,774 per child), with 1,932 children waiting to be adopted. Of the 552 children adopted in 2002, 81% received a subsidy, 7% below the national average.

In a reader editorial, Janice Jakeman of Munfordville, KY argues that she supports House Bill 489 to ban abortion and weeps for “the nearly 50 million babies aborted since 1973”; “for the nearly 50 million women who aborted those babies and now live with the devastation, regret, depression or self-loathing caused by that right of choice”; and “because we will never know what medical advances, inventions, novels, humanitarian accomplishments, etc., the world will not see because of that right of choice.”¹²⁸

“Since February, 2004, Kentucky law establishes a crime of ‘fetal homicide’ in the first, second, third, and fourth degrees. The law covers an ‘unborn child,’ defined as ‘a member of the species homo sapiens in utero from conception onward, without regard to age, health, or condition of dependency.’”¹²⁹

Kentucky’s low levels of funding for its crowded foster care system suggests that little effort is being put into protecting at-risk children when compared to the wellbeing of the unborn. In deciding to protect its citizens from conception onward, Kentucky gave the appearance of considering the consequences of its actions. While the 2004 law could be read as similar to Illinois’ legislation, the

¹²⁸ Janice Jakeman, Reader Editorial, *Weep for the Babies*, Lexington Herald-Leader, Mar. 19, 2006, at d3.

¹²⁹ *State Homicide Laws That Recognize Unborn Victims*, *supra* note 105.

matter in Kentucky is still unclear. Because funding of foster care is so limited, Kentucky does not appear to be behaving in an ethically consistent manner.

Missouri

“Missouri is a case study in how anti-choice state legislators around the country are waging a war intended to undermine the constitutional right to choose abortion.”¹³⁰ As one of the states that have expressed an interest in regulating abortion to the maximum extent possible, Missouri is also likely to interpret Congress’ partial-birth abortion ban broadly. “Missouri state Sen. Jason Crowell -- like his colleagues in South Dakota -- refuses to be satisfied with making abortions harder to obtain. He views the procedure as an unambiguous evil.”¹³¹

As of September 30, 2002, \$35.6 million per year was spent on 13,052 children in foster care (\$2,728 per child), with only 816 children waiting to be adopted. Of the 1,514 children adopted in 2002, 95% received a subsidy, 7% above the national average. Further, in 2003, Missouri had a greater than 40% decline in performance in regard to children experiencing maltreatment recurrence within a six-month period.¹³² This was the fourth worst performance among reporting states from the year prior, “reflecting a considerable decline in performance”.¹³³

In a statement praising the Supreme Court's ruling in *Carhart*, Gov. Matt Blunt said: “I urge the Missouri General Assembly to send me strong pro-life legislation this year so I can sign legislation that reflects the values of Missourians, respects the sanctity of all

¹³⁰ *Abortion in Missouri*, Planned Parenthood, May 4, 2006, <http://www.plannedparenthood.org/news-articles-press/politics-policy-issues/abortion-access/abortion-missouri-6176.htm> (last viewed Apr. 6, 2007) (“The frustrating thing is there are so many other issues that need to be addressed in this state, and when [Planned Parenthood] get[s] involved, and when the other affiliates get involved in legal actions, an enormous amount of time and money is wasted.”).

¹³¹ Simon, *supra* note 1.

¹³² Child Welfare Outcomes 2003: Annual Report, *Safety Permanency Well-being*, The Children’s Bureau of the U.S. Department of Health and Human Services, III-12, <http://www.acf.hhs.gov/programs/cb/pubs/cwo03/index.htm> (last viewed Apr. 30, 2007).

¹³³ *Id.*

human life and will ultimately help to reduce the number of abortions that occur in our state.”¹³⁴

Under current Missouri law, “[o]ne of six patients seeking an abortion at Planned Parenthood facilities in Missouri must travel 100 miles or more for the procedure. Women also face delays in getting abortions because of a 24-hour waiting period that went into effect last year.”¹³⁵

Despite the Governor’s assurances that Missourians respect the sanctity of all human life, Missouri’s poor performance in regard to maltreatment of children in foster care, when combined with its low levels of spending on foster care programs, suggests that Missouri is not preparing for the consequences of outlawing abortion in state. Further, funds that would better be directed to children in need are being funneled to further restricting or outlawing access to abortion, despite statistics showing that Missourians get abortions at a rate of only half the national average. Language used by Missouri politicians suggest that natural law ethics are guiding their decisions, yet their actions are not consistent with the principle of double effect. Until more focus is directed toward the issue of foster care and children at risk, the “evil” consequences of banning abortion will outweigh the gains.

North Dakota

As of September 30, 2002, \$4.6 million per year was spent on 1,197 children in foster care (\$3,843 per child), with 340 children waiting to be adopted. Of the 137 children adopted in 2002, only 51% received a subsidy, 35% below the national average. “North Dakota had 770 abortions last year . . . [or] one out of every 1,000 abortions nationwide.”¹³⁶

¹³⁴ Editorial, *Chipping Away at Roe*, St. Louis Post-Dispatch, Apr. 24, 2007, <http://www.stltoday.com/stltoday/news/stories.nsf/editorialcommentary/story/EECCD0A9C7A23FB9862572C6008279BB?OpenDocument&highlight=2%2C%22Roe%22> (last viewed Apr. 26, 2007).

¹³⁵ *Id.*

¹³⁶ Jonathan Rivoli, *North Dakota Passes Conditional Abortion Ban*, The Bismarck Tribune, Apr. 24, 2007, <http://www.bismarcktribune.com/articles/2007/04/24/news/state/132450.txt> (last visited Apr. 28, 2007).

In 2007, North Dakota passed a trigger law described by opponents as “more extreme than both the failed South Dakota abortion ban and the recent Mississippi abortion ban.”¹³⁷ “[T]he trigger concept”, said the bill's sponsor, Rep. James Kerzman, “was a convenient way for the Legislature to enact its desired policy on abortion without plunging North Dakota into a costly national legal battle.”¹³⁸ The executive director of the North Dakota Catholic Conference, Christopher Dodson, said “[i]t furthers the culture of life so we don't turn our back on unborn children or the women who carry them.”¹³⁹ “[T]he only abortions allowed would be those to protect the life of the mother or in cases of rape and incest.”¹⁴⁰ The House, in a 68-24 vote, also “approve[d] a bill that declares abortion illegal except in cases of rape and incest or if it was done to save the woman's life.” “Proponents of the ban have stated that it would go into effect if [*Roe*] is struck down,” however the law “can be enacted at the discretion of the North Dakota Attorney General.”¹⁴¹

Saying that the North Dakota trigger bill “furthers the culture of life” suggests that natural law ethics are guiding North Dakota policy, and to a moderate degree, the state is behaving in an ethically consistent manner. While funding for foster care in North Dakota is fairly low, and while few foster care homes receive subsidies, legislators are at the very least aware of the financial burden that would accompany a direct challenge to abortion. Further, the legislation specifically protects the mother and provides exceptions for her health. Yet because there are so few abortions in North Dakota relative to the rest of the U.S., and because the Attorney General can trigger the law at any time, there is still risk of inconsistency and lack of preparation for increased demand on the state foster care system.

¹³⁷ Press Release, Kathi Di Nicola, *North Dakota Senate Set to Vote Today on Abortion Ban More Extreme than South Dakota, Mississippi*, Planned Parenthood, Mar. 26, 2007, <http://www.ppmns.org/site/apps/nl/content2.asp?c=gwKTJaN0JyF&b=303759&ct=3702677> (last viewed Apr. 28, 2007).

¹³⁸ *Id.*

¹³⁹ *Id.*

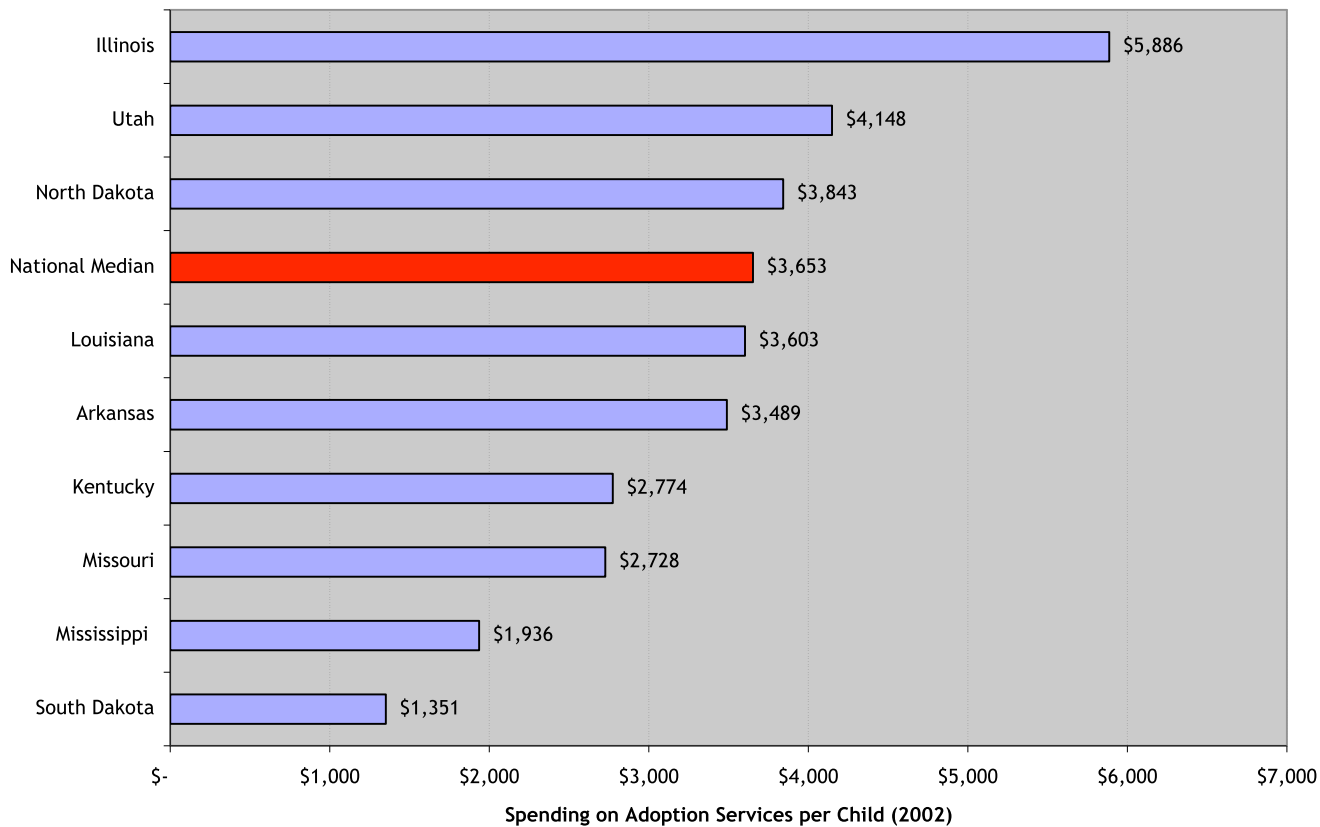
¹⁴⁰ *Id.*

¹⁴¹ Di Nicola, *supra* note 137.

Conclusion

The more consistent a state is, the stronger that state's argument that it is, from an ethical consistency perspective, aware of the consequences of outlawing abortion and is working to mitigate the potential negative effects of its actions. Figure 1 compares per child spending levels across these nine states as well as the national median demonstrating varying levels of state support for foster care.

FIGURE 1. SPENDING PER CHILD BY STATE



Based on this preliminary review of state foster care program data in relation to abortion law, Utah is most consistent in terms of the ethical approach to its policy, despite the fact that Utah has outlawed abortion past twenty weeks into pregnancy. Utah is followed by Illinois, a state which does not seem well prepared or strongly interested in acting to outlaw abortion.

Arkansas once behaved in an ethically consistent manner but, following the leadership of its current Governor, has pushed policy that is narrowly focused on abortion without looking at the other

consequences of its legislation. North Dakota, though it opposes abortion, is aware of the costs of a direct challenge to current law and is choosing to wait for others to pay for a challenge before it will act. Kentucky and Missouri are not taking care of the vulnerable children in need of state protection. Louisiana, South Dakota, and finally, Mississippi lack an ethical foundation and are narrowly focused on stamping out abortion, in Mississippi's case, even at the expense of poor children under the age of one.

Figure 2 places each state along a spectrum of ethical consistency. As previously discussed, Utah and Illinois appear to be implementing state-level policies in the most ethically consistent manner while the remaining seven states show significantly less consistency in their treatment of unborn children relative to other stages of human life. Louisiana, South Dakota, and Mississippi fall at the bottom of the spectrum, lacking ethical consistency in state-level policy-making. If pro-life advocates are successful in banning abortions, the number of children that could potentially be impacted by these laws can be best understood by considering the number of legal abortions in each state. If these states fail to consider the consequence of banning abortion on these children's opportunity to grow up in a safe environment, then they are truly failing to live up to their responsibility to protect their most vulnerable.

FIGURE 2. LEVEL OF ETHICAL CONSISTENCY VERSUS NUMBER OF LEGAL ABORTIONS IN 2003

