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**AN INTERPRETIVE APPROACH:  
A CALL FOR STATE STATUTORY REFORM GOVERNING  
FETAL TISSUE DONATION**

Kirsten Eckroad\*

The controversy involving a sting of “leaked videos” of Planned Parenthood representatives discussing fetal tissue research starting July 2015 sparked public debate, threats of a federal government shutdown, and state legislative action across the United States.<sup>1</sup> Although the federal government narrowly avoided a shutdown over federal funding for Planned Parenthood,<sup>2</sup> pro-life advocates are still pushing for action to defund Planned Parenthood nationwide at the state level. Four states, Arkansas, New Hampshire, Texas, and Utah defunded the organization, while other states have introduced legislation with intentions to defund Planned Parenthood.<sup>3</sup>

The controversy started in mid-July 2015, when an anti-abortion group, Center for Medical Progress (“CMP”), released footage of Planned Parenthood’s senior director, Dr. Deborah Nucatola, discussing the organization’s fetal tissue donation program.<sup>4</sup> In the video, Dr. Nucatola responds to fetal tissue procurement and

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<sup>1</sup> Jennifer Gerson Uffalussy, *Catching Up on the Planned Parenthood Controversy: Everything You Need to Know*, YAHOO! NEWS (Oct. 9, 2015), <http://news.yahoo.com/catching-up-on-the-planned-parenthood-controversy-184348775.html>.

<sup>2</sup> Ted Barrett & Dierdre Walsh, *Congress Avoids Government Shutdown*, CNN POLITICS (Sept. 30, 2015, 5:49 PM), <http://www.cnn.com/2015/09/30/politics/government-shutdown-2015-funding-vote-senate-continuing-resolution/> (“Just seven hours before federal agencies ran out of money, the House of Representatives on Wednesday passed a bill funding the federal government through Dec. 11.”).

<sup>3</sup> Deborah Netburn, *After Texas Stopped Funding Planned Parenthood, Low-Income Women Had More Babies*, LA TIMES (Feb. 3, 2016), <http://www.latimes.com/science/sciencenow/la-sci-sn-planned-parenthood-texas-births-20160203-story.html>.

<sup>4</sup> Steve Almasy & Elliott C. McLaughlin, *Planned Parenthood Exec, Fetal Body Parts Subject of Controversial Video*, CNN (July 15, 2015, 7:34 PM), <http://www.cnn.com/2015/07/15/health/planned-parenthood-undercover-video/>.

donation inquiries with undercover CMP members, posing as representatives of a human biologics company.<sup>5</sup> That video was only the first of at least ten videos released by CMP<sup>6</sup> accusing Planned Parenthood of profiting off of aborted fetuses.<sup>7</sup> These videos not only channeled a long-standing disconnect between pro-life and pro-choicers involving the debate surrounding abortions, but it seriously called into question the legitimacy of donating fetal tissue for research for the first time in over 25 years.<sup>8</sup>

Independent forensic analysis of the tapes revealed heavily edited footage; large portions of the videos were cut out and separate footage was paired together, transcripts were typed incorrectly,<sup>9</sup> and a stolen stillborn photograph was taken off the web, portrayed to be a 19-week aborted fetus.<sup>10</sup> Moreover, experts say that the reimbursement estimate per specimen<sup>11</sup> given by Dr. Nucatola in the

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<sup>5</sup> *Id.*

<sup>6</sup> Rachana Pradhan, *Anti-Abortion Group Releases 10<sup>th</sup> Video*, POLITICO (Sept. 15, 2015, 10:14 AM), <http://www.politico.com/story/2015/09/planned-parenthood-undercover-video-10th-213633>.

<sup>7</sup> David Daleidan, *Planned Parenthood's Top Doctor, Praised by CEO, Uses Partial-Birth Abortions to Sell Baby Parts*, THE CENTER FOR MEDICAL PROGRESS (July 14, 2015, 8:00 AM), <http://www.centerformedicalprogress.org/2015/07/planned-parenthoods-top-doctor-praised-by-ceo-uses-partial-birth-abortions-to-sell-baby-parts/>.

<sup>8</sup> In 1988, a temporary moratorium was placed on federal funds for fetal tissue research while researchers studied the likelihood that research with fetal tissue would increase the frequency of induced abortions. Although that panel of researchers reported that the use of fetal tissue for research was acceptable public policy, the moratorium wasn't lifted until President Bill Clinton took office in 1993. See James E. Goddard, *The NIH Revitalization Act of 1993 Washed Away Many Legal Problems with Fetal Tissue Transplantation Research but a Strain Still Remains*, 49 SMU L. REV. 375, 383–384 (1996).

<sup>9</sup> Laura Bassett, *"Sting" Videos of Planned Parenthood Are Totally Manipulated, Forensic Analysis Finds*, HUFFPOST POLITICS (Aug. 28, 2015, 11:09 AM), [http://www.huffingtonpost.com/entry/planned-parenthood-sting-videos-forensic\\_55df2334e4b029b3f1b1be9f](http://www.huffingtonpost.com/entry/planned-parenthood-sting-videos-forensic_55df2334e4b029b3f1b1be9f).

<sup>10</sup> Drew Griffin and David Fitzpatrick, *The Real Story Behind Those Planned Parenthood Videos*, CNN POLITICS (Oct. 20, 2015, 8:46 AM), <http://www.cnn.com/2015/10/19/politics/planned-parenthood-videos/>.

<sup>11</sup> When asked, Dr. Nucatola quoted a \$30 to \$100 price range per patient for fetal tissue procurement. This price range was later portrayed by CMP as an attempted price quote to conduct a sale of fetal tissue parts. See Dave Levitan, *Unspinning the Planned Parenthood Video*, FACTCHECK.ORG

footage, later attacked by opponents, is actually a “reasonable charge for clinical operations to recover costs”—an act that is not against federal law.<sup>12</sup>

This Comment argues that states should legalize fetal tissue donation. By taking an interpretative approach, this Comment will demonstrate that state statutory language governing fetal tissue donation introduces unnecessary ambiguity. Section I will analyze the legal status of fetal tissue donation at the federal and state levels.<sup>13</sup> After sorting through the ambiguity of state statutes governing fetal tissue, this Comment will then analyze the legality of Planned Parenthood’s actions. Section II will address the multitude of arguments comprising the fetal tissue donation debate to highlight the importance of fetal tissue donation.<sup>14</sup> Section III will propose a two-part revision for state legislators in order to resolve ambiguity and effectively enable fetal tissue donations.<sup>15</sup>

## I. LEGAL STATUS: FETAL TISSUE DONATION

### A. Federal Law

Federal law is an important starting point in understanding fetal tissue donation rights in the United States. Federal law provides a minimum level of rights that states may not fall below, commonly referred to as the “federal floor” of rights.<sup>16</sup> However beyond this floor, states are free to enact additional statutory and court-made state rights.<sup>17</sup> Although state law provides an additional source of rights to state citizens, this section will first address federal standards concerning fetal tissue donation.

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(July 21, 2015), <http://www.factcheck.org/2015/07/unspinning-the-planned-parenthood-video/>.

<sup>12</sup> *Id.* Dr. Sherilyn J. Sawyer, director of Harvard University and Brigham and Women’s Biorespository, added that given all of the costs associated with storage and collection, “In reality, \$30 [to] \$100 probably constitutes as loss” for Planned Parenthood. *Id.*

<sup>13</sup> *See infra*, Section I.

<sup>14</sup> *See infra*, Section II.

<sup>15</sup> *See infra*, Section III.

<sup>16</sup> Michael E. Solimine & James L. Walker, *State Court Protection of Federal Constitutional Rights*, 12 HARV. J.L. & PUB. POL’Y 127, 151 (1989).

<sup>17</sup> *Id.*

Tissue donation policy begins with the understanding that abortion is legal.<sup>18</sup> In 1973, the United States Supreme Court held that women have a constitutionally protected right to abortion in the landmark decision, *Roe v. Wade*.<sup>19</sup> Despite ongoing challenge, a woman's right to choose was reaffirmed in 1992 Supreme Court decision *Planned Parenthood v. Casey*,<sup>20</sup> which also confirmed state regulations on abortion, as long as the regulations do not impose an "undue burden" on women seeking an abortion.<sup>21</sup> Thus, with the understanding that abortion is legal in the United States—in fact 1.2 million legal abortions occur every year—the question of what to do with aborted material emerges.<sup>22</sup>

Federal law allows and funds fetal tissue donation, subject to certain restrictions. Section 42 U.S.C. §289g-1 was enacted to allow research involving fetal tissue donation, "regardless of whether the tissue is obtained pursuant to a spontaneous or induced abortion or pursuant to a stillbirth."<sup>23</sup> The statute provides federal funding for donation of fetal tissue after an induced abortion under three conditions: (1) The abortion was performed in accordance with any state law, (2) the aborting woman's consent for the abortion "was obtained prior to requesting . . . consent for a donation of the tissue," and 3) there was "no alteration of the timing, method, or procedures used to terminate the pregnancy."<sup>24</sup>

Individuals involved in fetal tissue donation are prohibited from certain actions in 42 U.S.C. §289g-2. First, purchase of fetal tissue for "valuable consideration" is prohibited in section 42 U.S.C.

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<sup>18</sup> *Roe v. Wade*, 410 U.S. 113 (1973) (holding in part that under the Due Process Clause of the Fourteenth Amendment that there is a constitutional right to abortion within the first trimester of pregnancy).

<sup>19</sup> *Id.*

<sup>20</sup> 505 U.S. 833 (1992)

<sup>21</sup> *Id.* at 874 (citing Justices O'Connor, Kennedy, and Souter).

<sup>22</sup> Rachel K. Jones & Kathryn Kooistra, *Abortion Incidence and Access to Services in the United States, 2008*, 43 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 41, 41 (2011), <http://www.guttmacher.org/pubs/psrh/full/4304111.pdf>.

<sup>23</sup> 42 U.S.C. § 289g-1(a) (2012).

<sup>24</sup> 42 U.S.C. § 289g-1(b)(2)(A) (2012). Section (a)(1) of 42 U.S.C. §289g-1 provides the general establishment of the program, stating, "The Secretary may conduct or support research on the transplantation of human fetal tissue for therapeutic purposes." 42 U.S.C. § 289g-1(a)(1) (2012).

§289g-2(a),<sup>25</sup> although the term valuable consideration does not include “reasonable payments associated with the transportation, implantation, processing, preserving, quality control, or storage of human fetal tissue.”<sup>26</sup> This section also prohibits the acceptance of donated tissue from an induced abortion where the donation is either “made pursuant to a promise” that it will be used in a specific way, or if the abortion was deliberately induced to provide fetal tissue.<sup>27</sup> Section 42 U.S.C. §289g-2(d) sets out criminal penalties to any person who violates these prohibitions.<sup>28</sup>

The Code of Federal Regulations restricts federal funding for certain actions by researchers.<sup>29</sup> 45 C.F.R. §46.204 states that “no inducements, monetary or otherwise, will be offered to terminate a pregnancy.”<sup>30</sup> This provision also restricts researchers’ involvement with women considering abortions, or in determining the viability of a fetus that is aborted alive.<sup>31</sup> Specifically, 45 C.F.R. §46.204(i) provides that “individuals engaged in research will have no part in any decisions as to the timing, method, or procedures used to terminate a pregnancy,” nor in “determining the viability of the neonate.”<sup>32</sup>

Thus under federal law, fetal tissue donation is legal and federally funded so long as researchers comply with the restrictions discussed above. Individuals violating prohibitions associated with fetal tissue donation risk criminal penalties. However, beyond this federal floor of rights many states have enacted their own legislation concerning fetal tissue donation.

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<sup>25</sup> 42 U.S.C. § 289g-2(a) (2012).

<sup>26</sup> 42 U.S.C. § 289g-2(e)(3) (2012).

<sup>27</sup> 42 U.S.C. §§ 289g-2(b), 289g-2(c) (2012).

<sup>28</sup> Individuals who violate this section may be subject to fines and/or prison sentences of up to ten years. 42 U.S.C. § 289g-2(d) (2012).

<sup>29</sup> The authority for 45 C.F.R. § 46.204 is set out in 42 U.S.C. § 289(a). *See* 42 U.S.C. § 289(a) (2015) (“The Secretary, acting through the Director of NIH, shall by regulation require appropriate technical and scientific peer review of . . . applications made for grants and cooperative agreements under this chapter for biomedical and behavioral research”).

<sup>30</sup> 45 C.F.R. § 46.204(h) (2015).

<sup>31</sup> 45 C.F.R. § 46.204(i) (2015).

<sup>32</sup> *Id.*

*B. State Law*

While federal law sets the floor of rights that states may not reduce, state law is often the source of most individual rights.<sup>33</sup> State law governing fetal tissue donation varies considerably and is often vague and confusing. The Uniform Anatomical Gift Act (UAGA), first promulgated in 1968, was a remedial attempt by the National Conference of Commissioners on Uniform State Laws (NCCUSL) to create uniform laws for organs transplant provision across the states.<sup>34</sup> The 2006 version of the UAGA has been enacted in forty-seven states plus the District of Columbia.<sup>35</sup>

Despite nearly uniform enactment of the latest UAGA, considerable variability still exists in regards to the legality of fetal tissue donation in the states. Although the 2006 UAGA unanimously restricts the sale of donated materials, such clarity does not exist across the states for the general legal status of donating fetal tissue. This is due to the fact that the 2006 UAGA left open the option for states to include additional restrictions governing fetal tissue donation.<sup>36</sup> Thus, even jurisdictions that enacted the 2006 UAGA vary considerably when it comes to fetal tissue donation.<sup>37</sup> Language of state statutes governing fetal tissue donation fall into three different categories: language that allows fetal tissue donation, language that does not prohibit fetal tissue donation, and language that prohibits fetal tissue donation after an induced abortion.

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<sup>33</sup> Solimine & Walker, *supra* note 16, at 151.

<sup>34</sup> UNIFORM LAW COMMISSION, *Anatomical Gift Act (2006) Summary*, [http://www.uniformlaws.org/ActSummary.aspx?title=Anatomical%20Gift%20Act%20\(2006\)](http://www.uniformlaws.org/ActSummary.aspx?title=Anatomical%20Gift%20Act%20(2006)) (last visited Mar. 5, 2016) [hereinafter *Anatomical Gift Act (2006)*]

<sup>35</sup> UNIFORM LAW COMMISSION, *Legislative Fact Sheet – Anatomical Gift Act (2006)*, [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Anatomical%20Gift%20Act%20\(2006\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Anatomical%20Gift%20Act%20(2006)) (last visited Mar. 5, 2016).

<sup>36</sup> *Id.*

<sup>37</sup> See 755 ILL. COMP. STAT. 50/1-10 (2014) (defining “decedent” which may be donated as an anatomical gift broadly to include “stillborn infant or fetus”); *but see* KY. REV. STAT. ANN. § 311.1911 (West 2016) (defining “decedent” to include fetus, but not a “fetus that was the subject of an induced abortion”).

### 1. State Statutory Language that Allows Fetal Tissue Donation

The first category is of states that allow fetal tissue donation. Typically, these state UAGA's include "fetus" in the definition of a "decedent" that may be donated as an anatomical gift.<sup>38</sup> The definition of decedent suggested by the NCCUSL in the 2006 UAGA is "a deceased individual whose body or part is or may be the source of an anatomical gift."<sup>39</sup> The 2006 UAGA includes language stating that decedent "includes a stillborn infant and, *subject to restrictions imposed by law other than this [act]*, a fetus" [emphasis added].<sup>40</sup> However, the states in this category do not include the phrase "subject to restrictions imposed by law other than this [act]" in their state UAGA definition of decedent, unambiguously allowing the donation of fetal tissue.<sup>41</sup> Nine states currently fall into this category.<sup>42</sup> States falling into the remaining two categories are much less clear on the question of whether or the manner in which fetal tissue may be donated.

### 2. State Statutory Language that Does Not Prohibit Fetal Tissue Donation

The majority of state statutory language is much less explicit regarding the legality of fetal tissue donation. Most states do not explicitly *allow* fetal tissue donation—they merely do not *restrict* it. These states fall into one of two subcategories. The first, which twenty-six states fall into, includes states that define "decedent" to include fetal tissue donation subject to "other restrictions imposed by

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<sup>38</sup> *Id.*

<sup>39</sup> UNIFORM LAW COMMISSION, *Revised Uniform Anatomical Gift Act (2006) (Last Revised or Amended in 2009)*, [http://www.uniformlaws.org/shared/docs/anatomical\\_gift/uaga\\_final\\_aug09.pdf](http://www.uniformlaws.org/shared/docs/anatomical_gift/uaga_final_aug09.pdf).

<sup>40</sup> *Id.*

<sup>41</sup> An example of such language defining decedent is as follows: "'Decedent' means a deceased individual and includes a stillborn infant or fetus." DEL. CODE ANN. tit. 16, § 2710 (West 2016).

<sup>42</sup> See DEL. CODE ANN. tit. 16, § 2710 (West 2016); GA. CODE ANN. § 44-5-141 (West 2016); 755 ILL. COMP. STAT. 50/1-10 (2014); MASS. GEN. LAWS ANN. ch. 113A, § 2 (West 2016); MONT. CODE ANN. § 72-17-102 (West 2016); N.J. STAT. § 26:6-78 (2015); N.Y. PUB. HEALTH LAW § 4300 (2016); OR. REV. STAT. § 97.953 (2013); 20 PA. STAT. AND CONS. STAT. § 8601 (2000).



law,” yet no other restrictions exist.<sup>43</sup> An illustration of this category of state statutes is as follows: “‘Decedent’ means a deceased individual whose body or part is or may be the source of an anatomical gift. The term includes a stillborn infant and, subject to restrictions imposed by law other than this article, a fetus.”<sup>44</sup>

The second category includes four states that are silent as to fetal tissue donation.<sup>45</sup> These states do not specifically enumerate fetal tissue in their UAGA definition, and have no other legislation governing fetal tissue donation. The following is an example of the definition of “decedent” that these states have adopted: “‘Decedent’ means a deceased individual whose body or body parts may be, or are, the source of an anatomical gift.”<sup>46</sup> Since these states are silent on the subject of fetal tissue donation, they do not restrict fetal tissue donation.

### 3. State statutory language that prohibits fetal tissue donation after an induced abortion

The remaining twelve states expressly prohibit fetal tissue donation from induced abortions.<sup>47</sup> These states define decedent in

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<sup>43</sup> See ALA. CODE § 22-19-161 (2015); ALASKA STAT. ANN. § 13.52.173 (West 2015); ARIZ. REV. STAT. ANN. § 36-841 (2016); ARK. CODE ANN. § 20-17-1202 (West 2015); CAL. HEALTH & SAFETY CODE ANN. § 7150.10 (West 2016); COLO. REV. STAT. ANN. § 12-34-102 (West 2015); CONN. GEN. STAT. ANN. § 19a-289a (West 2015); D.C. CODE § 7-1531.01 (2015); HAW. REV. STAT. § 327-2 (LexisNexis 2015); IDAHO CODE ANN. § 39-3402 (West 2015); IND. CODE ANN. § 29-2-16.1-1 (West 2015); KAN. STAT. ANN. § 65-3221 (West 2015); ME. REV. STAT. tit. 22, § 2942 (2015); MISS. CODE ANN. § 41-39-103 (West 2015); NEV. REV. STAT. ANN. § 451.520 (West 2015); N.H. REV. STAT. ANN. § 291-A:2 (2015); OHIO REV. CODE ANN. § 2108.01 (West 2015); OKLA. STAT. ANN. tit. 63, § 2200.2A (West 2015) R.I. GEN. LAWS ANN. § 23-18.6.1-2 (West 2015); TENN. CODE ANN. § 68-30-102 (West 2015); TEX. HEALTH & SAFETY CODE ANN. § 692A.002 (Vernon 2015); UTAH CODE ANN. § 26-28-102 (West 2015); VT. STAT. ANN. tit. 18, § 5250b (West 2015); VA. CODE ANN. § 32.1-291.2 (West 2015); W. VA. CODE ANN. § 16-19-3 (West 2015); WYO. STAT. ANN. § 35-5-202 (West 2015).

<sup>44</sup> ALA. CODE § 22-19-161 (West 2015).

<sup>45</sup> See FLA. STAT. ANN. § 765.511 (West 2015); S.C. CODE ANN. § 44-43-305 (West 2015); WASH. REV. CODE ANN. § 68.64.010 (West 2015); WIS. STAT. ANN. § 157.06 (West 2015).

<sup>46</sup> FLA. STAT. ANN. § 765.511 (West 2015).

<sup>47</sup> See IOWA CODE ANN. § 142C.2 (West 2015); KY. REV. STAT. ANN. § 311.1911 (West 2015); LA. STAT. ANN. 17:2351 (West 2015); MD. EST. & TRUSTS CODE ANN.

their relevant UAGA either to restrict donations to stillborn fetuses, to prohibit donation of a fetus from an induced abortion, or to prohibit donation of any fetus.<sup>48</sup> A clear restriction of fetal tissue donation from an induced abortion is as follows:

(4) “Decedent” means a deceased individual whose body or part is or may be the source of an anatomical gift. The term includes a stillborn infant and, subject to restrictions imposed by law other than [this act], a fetus; however, the term “*fetus*” does not include a *blastocyst, embryo, or fetus that was the subject of an induced abortion*.<sup>49</sup>

Slightly differently worded statutory language defines decedent as “a deceased individual whose body or part is or may be the source of an anatomical gift. The term includes a stillborn infant or an embryo or fetus that has died *of natural causes* in utero.”<sup>50</sup> Both sets of language have the same result: prohibiting fetal tissue donated from an induced abortion.

Other state UAGA provisions in this category are more ambiguous. For example, Iowa’s UAGA expresses that decedent is a “deceased individual whose body or part is or may be the source of an anatomical gift and includes a stillborn infant.”<sup>51</sup> By only mentioning a stillborn infant, the statute can be interpreted to somewhat unclearly prohibit fetal tissue from other sources. Similarly, Missouri’s legislature obscurely prohibits donation of fetal tissue from induced abortions, but allows research with such fetal tissue. For example, Missouri’s UAGA defines decedent as “not includ[ing] an unborn

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§ 4-501; MICH. COMP. LAWS ANN. § 333.10102 (West 2015); MINN. STAT. ANN. § 525A.02 (West 2015); MO. REV. STAT. ANN. § 194.210 (West 2015); NEB. REV. STAT. § 71-4825 (West 2015); N.M. STAT. ANN. § 24-6B-2 (West 2015); N.C. GEN. STAT. ANN. § 130A-412.4 (West 2015); N.D. CENT. CODE ANN. § 23-06.6-01 (West 2015); S.D. CODIFIED LAWS § 34-26-49 (West 2015).

<sup>48</sup> The only state that prohibits donation of any fetus is Louisiana. (“(4) ‘Decedent’ means a deceased person whose body or part is or may be the source of an anatomical gift. The term does not include a stillborn infant and, subject to restrictions imposed by law, a fetus . . . .”) LA. STAT. ANN. §17:2351 (West 2015).

<sup>49</sup> KY. REV. STAT. ANN. § 311.1911 (West 2015) (emphasis added).

<sup>50</sup> MINN. STAT. ANN. § 525A.02 (West 2015) (emphasis added).

<sup>51</sup> IOWA CODE ANN. § 142C.2 (West 2015).

child . . . if the child has not died of natural causes,”<sup>52</sup> while separately prohibiting use of fetal tissue only if the researcher “knows that the abortion was procured for the purpose of utilizing those organs or tissue for such use.”<sup>53</sup> Case law on these state UAGA provisions provide little clarity; of the rare questions courts have considered involving anatomical gifts, the facts are limited to cases involving mature donors after death, not tissue from aborted fetuses.<sup>54</sup>

*C. Federal and State Laws As Applied to Planned Parenthood’s Actions*

By accepting reasonable reimbursements and procuring fetal tissue donations in Washington, Oregon, and California, Planned Parenthood did not violate federal or state laws. In a letter written to the National Institutes of Health (NIH) on October 13, 2015, the president of Planned Parenthood, Cecile Richards, made two admissions that this section’s analysis will be based on. She first admitted that three states or one percent of their health centers — Washington, Oregon, and California—participate in donation of fetal tissue.<sup>55</sup> Ms. Richards also admitted that up until the date of her letter, Planned Parenthood had been accepting reasonable reimbursements under 42 U.S.C. §289g-2. However, Ms. Richards announced on October 13, 2015, that Planned Parenthood would no longer accept reasonable reimbursements.<sup>56</sup> Stating that although the organization never received payments beyond those legal reimbursements, as an attempt to debunk the arguments supplied by opponents, Planned Parenthood would no longer accept such legal payments.<sup>57</sup>

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<sup>52</sup> MO. REV. STAT. ANN. § 194.210 (West 2015).

<sup>53</sup> *Id.* at § 188.036 (West 2015).

<sup>54</sup> See *Mansaw v. Midwest Oregon Bank*, 1998 WL 386327, 1 (W.D. Miss. July 8, 1998) (discussing donation of organs after the death of the parties 15-year-old son); See also *Alchor Life Extension Foundation v. Richardson*, 785 N.W.2d 717, 719 (concerning 82-year-old decedent’s remains which decedent intended to donate to cryonics).

<sup>55</sup> *Id.*

<sup>56</sup> Braktkton Booker, *Planned Parenthood Will No Longer Accept Reimbursement For Fetal Tissue*, NPR (Oct. 13, 2015), <http://www.npr.org/sections/thetwo-way/2015/10/13/448288996/planned-parenthood-will-no-longer-accept-reimbursement-for-fetal-tissue>.

<sup>57</sup> *Id.*

Planned Parenthood's actions are not in violation of federal law. Despite accusations that Planned Parenthood illegally profited off of "selling aborted baby parts," Planned Parenthood only received reasonable reimbursements for costs associated with procurement, as permitted under federal law.<sup>58</sup> Although Planned Parenthood has decided to no longer receive such reimbursements, human tissue procurement experts agree that the amount previously reimbursed was "reasonable" for clinical reimbursement costs.<sup>59</sup> In fact, experts estimate that the \$30 to \$100 clinical reimbursement figure Planned Parenthood once agreed to receive likely constituted a "loss" for the organization, not a profit.<sup>60</sup>

Nor are Planned Parenthood's actions in violation of state law. None of the three states where Planned Parenthood facilitates fetal tissue procurement prohibit fetal tissue donation. Oregon falls into the first category of states identified above that explicitly allow fetal tissue donation under their state-enacted UAGA.<sup>61</sup> California and Washington are among the second category of states discussed above that do not prohibit fetal tissue donation.<sup>62</sup> Thus, contrary to allegations set forth by CMP, the actions taken by Planned Parenthood in facilitation of fetal tissue donation are not in violation of federal or state law.

## II. THE FETAL TISSUE DONATION DEBATE

Although at the center of the current controversy involving Planned Parenthood, the debate over fetal tissue donation is not a new one.<sup>63</sup> While researchers have been experimenting with fetal tissue since the 1930s, opposition to fetal tissue research began when abortion was legalized in the 1970s.<sup>64</sup> This section will demonstrate

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<sup>58</sup> Reasonable reimbursements under the statute include payments for "transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue." 42 U.S.C. §289g-2 (2012).

<sup>59</sup> See Levitan, *supra* note 11.

<sup>60</sup> *Id.*

<sup>61</sup> OR. REV. STAT. ANN. § 97.953 (West 2015).

<sup>62</sup> CAL. HEALTH & SAFETY CODE § 7150.10 (West 2015); WASH. REV. CODE ANN. § 68.64.010 (West 2015).

<sup>63</sup> Angela M. Skerrett, *Fetal Tissue Research and Abortion: Do They Have a Future Together?* 13 CAMPBELL L. REV. 81, 82 (1990).

<sup>64</sup> *Id.* at 82–83.

that despite ongoing efforts to restrict the use of fetal cells for research, fetal tissue research continues to be imperative. This section will first discuss the importance of fetal tissue donation and then address concerns expressed by opponents.

### *A. The Importance of Fetal Tissue Donation*

Due to the unique characteristics of fetal tissue cells, research with donated fetal tissue has proved particularly promising in extensive areas of health and science. While the search for alternatives to fetal cells continues, the use of fetal tissue cells for research remains imperative to advances in modern medicine.

#### 1. Uniqueness of Fetal Tissue Cells

Fetal tissue has unique characteristics, which make it ideal for successful transplantation and research.<sup>65</sup> Fetal cells have the ability to grow and reproduce rapidly.<sup>66</sup> These properties of fetal tissue, when transplanted, can lead to quick reversal in the donee's area of impairment.<sup>67</sup> Since fetal cells are also extremely adaptable, they can easily survive excision, dissection, and low-oxygen conditions, all which take place either before or during transplantation.<sup>68</sup>

Once transplanted, fetal cells also interact particularly well within the environment of the receiving host.<sup>69</sup> These cells are proficient at responding to environmental cues around them, enabling them to make connections with others cells in the host.<sup>70</sup> Additionally, because fetal cells usually lack lymphocytes and have less histocompatibility antigens present in adult cells, they are less likely to

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<sup>65</sup> Valerie J. Janosky, *Stem Cells: Potential Cures or Abortion Lures?*, 6 DEPAUL J. HEALTH CARE L. 111, 116 (2002).

<sup>66</sup> Jose L. Gonzalez, *The Legitimization of Fetal Tissue Transplantation Research Under Roe v. Wade*, 34 CREIGHTON L. REV. 895, 909 (2001).

<sup>67</sup> For example, patients suffering from Parkinson's Disease can replace dead neurons with fetal brain cell transplantation to "produce necessary neurotransmitters." See Janosky, *supra* note 65, at 118–19.

<sup>68</sup> For example, the affected area of the brain for patients with Parkinson's. *Id.* at 116–17.

<sup>69</sup> *Id.* at 116.

<sup>70</sup> *Id.*

produce “graft vs. host” reactions. These characteristics in fetal cells make them much less likely to be rejected in the host than adult cells.<sup>71</sup>

## 2. Success of Fetal Tissue Research

Due to fetal cells’ unique properties, fetal tissue research has been incredibly successful. Commentators have gone as far as saying that “virtually every person in this country has benefited from research using fetal tissue.”<sup>72</sup> Research with fetal tissue is estimated to have saved millions of lives, including, ironically, the lives of unborn children in the womb, by preventing thousands of miscarriages each year due to creation of the rubella vaccine.<sup>73</sup> Other successful vaccines generated from fetal tissue research include hepatitis A, chickenpox, measles, and rabies.<sup>74</sup>

Perhaps most notably, fetal tissue experimentation has led to treatments for many diseases that were once believed to have no cure.<sup>75</sup> Most recently, research with fetal tissue has produced promising results for Parkinson’s disease. Studies of the over 100 Parkinson’s patients who have received fetal tissue transplantation surgeries have been particularly beneficial, especially for young patients in the early stages of the disease.<sup>76</sup> In addition, scientists estimate that fetal tissue research has the potential to advance other areas of medicine, including a variety of blood disorders and age-related blindness.<sup>77</sup>

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<sup>71</sup> *Id.*

<sup>72</sup> R. Alta Charo, *Fetal Tissue Fallout*, N. ENG. J. MED. 890, 890 (2015), <http://www.nejm.org/doi/full/10.1056/NEJMp1510279#.VcvA8l6Hh3c.twitter>.

<sup>73</sup> Tara Culp-Ressler, *The Use of Aborted Fetuses in Medical Research has ‘Saved the Lives and Health of Millions,’* THINKPROGRESS.ORG (Aug. 13, 2015, 10:16am), <http://thinkprogress.org/health/2015/08/13/3691269/fetal-tissue-moral-case/> (quoting Charo, *supra* note 72).

<sup>74</sup> Collin Binkley & Carla K. Johnson, *Scientists Say Fetal Tissue Remains Essential for Vaccines and Developing Treatments*, PBS, Aug. 11, 2015, <http://www.pbs.org/newshour/rundown/medical-researchers-say-fetal-tissue-remains-essential/>.

<sup>75</sup> See Janosky, *supra* note 65, at 117.

<sup>76</sup> Shari E. Gelber et. al., *Fetal Tissue Research: An Ongoing Story of Professionally Responsible Success*, AM. J. OBSTETRICS & GYNECOLOGY (2015), <http://dx.doi.org/10.1016/j.ajog.2015.09.079>.

<sup>77</sup> See Janosky, *supra* note 65, at 117 (“Fetal tissue transplants have been promising for patients suffering from Alzheimer’s disease, spinal cord and other neural tissue

### 3. Alternatives Insufficient

Opponents of fetal tissue research argue that there are sufficient alternatives to replace aborted fetal tissue cells, such as tissue from cadavers and living donors, fetal tissue from non-induced abortions, or 3D bioprints.<sup>78</sup> This Section will demonstrate that contrary to such arguments, each of these proposed alternatives remain insufficient to replace fetal tissue research.

#### *a. Living Donors*

The prevailing shortage of donations from living donors prohibits donations from living donors being a sufficient alternative. The Uniform Anatomical Gift Act was enacted, in large part in response to the longstanding shortage of organ transplants.<sup>79</sup> Despite recent campaigns, technological advances, and federal and state efforts, insufficiency of organs and tissue donations linger.<sup>80</sup> It is estimated that less than 20 percent of accident victims donate their organs,<sup>81</sup> and that one person per hour dies waiting for an organ transplant.<sup>82</sup> Thus, adding fetal tissue research to a waitlist already in a shortage cannot possibly be considered a sufficient alternative to the use of donated fetal tissue cells.

In the ideal world, where there is no shortage of donations from living donors, such donation from organ donors would still not suffice to replace fetal tissue cells. As discussed earlier, fetal tissue cells have unique characteristics that allow them to easily survive research conditions and to react well with receiving host. While fetal cells are able to rapidly grow and reproduce, cells from mature living donors are typically unable to reproduce, limiting the use and number of recipients that can benefit from such cells.<sup>83</sup> Additionally, when

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injuries, diabetes, some forms of blindness, and are used to treat blood-clotting disorders, such as sickle cell anemia, thalassemia, and hemophilia . . .”).

<sup>78</sup> *Id.* at 152.

<sup>79</sup> See generally *Anatomical Gift Act (2006)*, *supra* note 34.

<sup>80</sup> Kimberly Fox Duguay, *Academic Article: Fetal Tissue Transplantation: Ethical and Legal Considerations*, 1 CIRCLES BU. W. J. L. & SOC. POL. 33, 34 (1992).

<sup>81</sup> *Id.*

<sup>82</sup> See *Anatomical Gift Act (2006)*, *supra* note 33.

<sup>83</sup> See Duguay, *supra* note 80, at 34.

used for transplantation, adult cells are more likely to be identified as foreign in a recipient's body due to antigens and other markers, making these (already limited) cells much more likely to be rejected.<sup>84</sup>

*b. Fetal Tissue from Non-Induced Abortions*

Limiting fetal tissue donation to only sources other than induced abortions are insufficient.<sup>85</sup> Over 1.2 million elective abortions occur each year, making such elective, or induced, abortions the most common source of donated fetal tissue.<sup>86</sup> Opponents, presumably recognizing the importance of research involving fetal tissue, argue that fetal cells should be procured, but only from sources that do not include induced abortions, such as stillbirths, miscarriages, or ectopic pregnancies.<sup>87</sup>

Since stillbirths occur at a minimum of 20 weeks of gestation by definition, they are usually not suitable for certain fetal tissue research uses, such as transplantation.<sup>88</sup> Additionally, by the time stillborn fetuses are expelled from the mother's body, the fetal tissue is usually dead and thus unable to be cultured for research.<sup>89</sup> The same is true for miscarriages. While as many as 20 percent of pregnancies end in miscarriage within the first trimester, by the time fetal tissue is expelled, potentially full days after the fetal death, the fetal tissue is usually unsuitable for research.<sup>90</sup> For both stillbirths and miscarriages, the reason for fetal death itself could stand in the way of suitability for fetal tissue research.<sup>91</sup>

Ectopic pregnancies, pregnancies implanted erroneously in areas other than the mother's uterus, are estimated to occur in less than

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<sup>84</sup> *Id.*

<sup>85</sup> Keith J. Allred, *Fetal Tissue Transplants: A Primer with a look Forward*, 28 J. HEALTH & HOSP. L. 193, 195 (1995).

<sup>86</sup> See Jones & Kooistra, *supra* note 22, at 41.

<sup>87</sup> See Allred, *supra* note 85, at 195.

<sup>88</sup> For example, transplantation including neural tissue must be obtained from a fetus twelve weeks gestated or less. *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> See Gregory Gelfand & Toby R. Levin, *Fetal Tissue Research: Legal Regulation of Human Fetal Tissue Transplantation*, 50 WASH. & LEE L. REV. 647, 652 (1993) (noting the possibility that a defective fetal pathology may have caused the fetal death, making it unsuitable for research).



17 of 1000 reported pregnancies.<sup>92</sup> Since the pregnancy would result in the death of the mother if carried to term, there is less opposition to abortions in such cases.<sup>93</sup> However, given common at-home therapies to terminate ectopic pregnancies, no reliable form of collection of such aborted materials exist.<sup>94</sup> Even where less-common surgical removals of ectopic pregnancies take place, fetal materials are commonly “morphologically abnormal,” and unfit for research.<sup>95</sup>

*c. 3D Bioprints*

While other alternatives to fetal tissue, such as computer models, appear promising in their early stages, they are not yet sufficient alternatives to fetal tissue.<sup>96</sup> By way of example, a recent proposed alternative to fetal tissue research is the use of three-dimensional bioprints of human organs. These computer-generated bioprints are formed through compositional analysis and a printed creation of a desired human tissue, produced in a multiple-layer format.<sup>97</sup> These printed “tissues” are built up vertically, and created in a range of 3D formats.<sup>98</sup> However, because biological processes are still not fully understood, these prints can be inaccurate.<sup>99</sup> “If we want to study a process,” a Johns Hopkins professor explains, “it’s best to study the real thing.”<sup>100</sup> Indeed, advances in medicine and technology have given hope of sources such as 3D bioprints, for the research conducted with fetal tissue.<sup>101</sup> Yet since no current sufficient

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<sup>92</sup> See Allred, *supra* note 85, at 195.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Andrea K. McDaniels & Meredith Cohn, *Scientists Say Fetal Tissue Important in Research*, BALT. SUN (Aug. 15, 2015), <http://www.baltimoresun.com/health/bs-hs-fetal-tissue-20150815-story.html>.

<sup>97</sup> Organovo Holdings Inc., *The Bioprinting Process*, YOUTUBE (Apr. 16, 2013), <https://www.youtube.com/watch?v=s3CiJ26YSU>.

<sup>98</sup> *Id.*

<sup>99</sup> See McDaniels & Cohn, *supra* note 96 (“Models can be insufficient in mimicking what we want to study . . . We can make a little bit of skin in the lab or cartilage, but not organs. For that, there is more complicated interplay.”).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

alternative to fetal tissue exists, it is imperative that its use and donation is not restricted.<sup>102</sup>

*B. Arguments Against Fetal Tissue Donation*

Arguments against fetal tissue donation commonly focus on the viewpoint that fetal tissue donation encourages abortion, causes undue influence on pregnant women, and is immoral.<sup>103</sup> Critics argue that if fetal tissue research shows promise, pregnant women will be more likely to have abortions,<sup>104</sup> and more likely to choose to have abortions so they can donate fetal tissue to a cherished cause or to a sick loved one.<sup>105</sup> Essentially, the overall number of abortions will be higher because women are more likely to have an abortion if they know beneficial use can be made of the fetal tissue aborted.<sup>106</sup>

If women are not more likely to choose abortions, opponents alternatively argue that researchers involved with fetal tissue donation will encourage pregnant women to have abortions.<sup>107</sup> Physicians running low on fetal tissue materials will adopt not-so-neutral responses, opponents argue, when women request advice on their right to choose to abort.<sup>108</sup> This idea is grounded in the concept that when fetal tissue donation is an available option, physicians who have personal interests for acquiring fetal tissue will directly, or even indirectly, unduly influence and convince a woman to decide in favor of an abortion.<sup>109</sup>

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<sup>102</sup> See Alison Abbot, *Fetal-Cell Revival for Parkinson's*, 510 NATURE 195, 196 (2014), <http://www.nature.com/news/fetal-cell-revival-for-parkinson-s-1.15387> (“We don’t know yet which source of cell will turn out to be the best, but right now the fetal cell is the gold standard we need to match . . .”).

<sup>103</sup> Cory Zion, Comment, *The Legal and Ethical Issues of Fetal Tissue Research and Transplantation*, 75 OR. L. REV. 1281, 1285–87 (1996).

<sup>104</sup> *Id.* at 1285.

<sup>105</sup> *Id.* For example, a women choosing to abort in order to donate fetal tissue towards transplantation for her father suffering from Parkinson’s disease. *Id.*

<sup>106</sup> Beverly Ray Burlingame, Note, *Commercialization in Fetal-Tissue Transplantation: Steering Medical Progress to Ethical Cures*, 68 TEX. L. REV. 213, 235 (1989).

<sup>107</sup> See Zion, *supra* note 103, at 1286.

<sup>108</sup> See *id.*

<sup>109</sup> See *id.*

As discussed in Part I.A., federal regulations already address concerns surrounding encouragement of abortions. Women are specifically prohibited from having an abortion to donate to a cherished cause, or to choose that the tissue will be transplanted as “specified,” as stated in 42 U.S.C. §289g-2(b).<sup>110</sup> Researchers are additionally prohibited from having any involvement when women could be encouraged to abort. Federal Regulations not only prohibit any inducements to end a pregnancy “monetary or otherwise,” but it restricts researchers from having any “part in any decisions as to the timing, method, or procedures used to terminate a pregnancy.”<sup>111</sup>

Lastly, opponents of fetal tissue donation also argue that the practice is immoral.<sup>112</sup> These opponents argue that because abortion, in their view, is “murder,” fetal tissue donation uses materials produced from murder, and is therefore unethical.<sup>113</sup> This standpoint seems to be most popular in the arguments advanced in the political realm. Former Speaker of the House of Representatives, John Boehner, has described fetal tissue donation as merely a “gruesome industry,”<sup>114</sup> and former presidential candidate Ben Carson has described it as “barbaric.”<sup>115</sup> Senator Ted Cruz suggested constituents to watch the Center for Medical Progress videos and “[a]sk yourself,” he urged, “are these my values?”<sup>116</sup>

Certainly the use of fetal tissue donated from induced abortions requires true moral considerations. Although federal regulations prohibit the actions associated with undue influence or inducements of abortion, no federal statute or regulation can resolve humanity’s moral differences. While individuals are entitled to differences in moral

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<sup>110</sup> 42 U.S.C. § 289g-2(b) (2006).

<sup>111</sup> 45 C.F.R. § 46.204(h)-(i) (2015).

<sup>112</sup> Zion, *supra* note 103, at 1287–88.

<sup>113</sup> *Id.*

<sup>114</sup> Sarah Ferris, *Republicans Double Down on Planned Parenthood Probe*, THE HILL (Oct. 14, 2015), <http://thehill.com/policy/healthcare/256840-republicans-double-down-on-planned-parenthood-probe>.

<sup>115</sup> Daniel Strauss, *Carson Once Squeamish on Anti-Abortion Ad*, POLITICO (July 28, 2015), <http://www.politico.com/story/2015/07/ben-carson-anti-abortion-ad-commercial-squeamish-120720>.

<sup>116</sup> Susan Berry, *Ted Cruz Blasts GOP Leaders for Funding Planned Parenthood*, BRIET BART (Sept. 28, 2015), <http://www.breitbart.com/big-government/2015/09/28/ted-cruz-blasts-gop-leaders-funding-planned-parenthood/>.

opinion, such differences must not stand as a barrier to successful scientific and medical research that has saved the lives and improved the health of countless individuals.

### III. A PROPOSAL FOR CHANGE

#### A. *The Issue*

For fetal tissue donation to continue to be beneficial for society and useful for researchers, state statutes governing fetal tissue must be revised so that they are clear and easy to understand. Specifically, such statutes must clarify to whom they apply, which actions are prohibited, and what the repercussions of violating the statute are. Such revisions will provide states the opportunity to successfully enforce safe and legal donations of fetal tissue.

Despite the overwhelming importance of fetal tissue donation, interpreting state statutory language governing fetal tissue donation is challenging. While fetal tissue donation is plainly allowed under the statutes of nine states, the status of fetal tissue donation in the remainder of states is less clear.<sup>117</sup> Most states are simply silent or ambiguous on the topic of donation of fetal tissue from induced abortions.<sup>118</sup> Although Planned Parenthood only donated fetal tissue in states that do not restrict donation, clinics facilitating fetal tissue donation commonly face restrictive or ambiguous state statutes.

One explanation for the ambiguity involving fetal tissue donation throughout the United States could be the number of ethical challenges surrounding drafting fetal tissue donation legislation<sup>119</sup>; therefore, concerns that fetal tissue will be donated absent consent of the mother, or that unintentionally aborted live fetuses will be subjected to experimentation, must be considered. While state legislators undoubtedly are tasked with the challenge of preventing use of fetal tissue without a woman's consent, or protection of fetuses unintentionally aborted alive, statutory language drafted with clear and

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<sup>117</sup> See *supra* Section I.B.

<sup>118</sup> See *supra* Section I.B.

<sup>119</sup> See James E. Goddard, Comment, *The NIH Revitalization Act of 1993 Washed Away Many Legal Problems with Fetal Tissue Transplantation Research but a Stain Still Remains*, 49 SMU L. REV. 375, 385, 389 (1996) (discussing these concerns).

concise conditions will both satisfy opponents' concerns and allow fetal tissue donation.

### B. *The Remedy*

This Section proposes a two-part revision for state legislation governing fetal tissue donation that state legislatures should implement in order to clearly enact fetal tissue donation legislation. This proposal will adequately remedy opponents' concerns, while also allowing the donation of fetal tissue. Part I applies only to states which do not currently include fetuses from induced abortions in their state UAGA definitions of a decedent. Part II applies to all states.

#### 1. Part I

States that currently do not include fetal tissue in their definitions of decedent, or prohibit fetal tissue from induced abortions, should revise language to include fetal tissue from induced abortions. Since 1.2 million abortions occur each year, excluding aborted fetal tissue from tissue that can be donated results in an unnecessary waste of valuable fetal materials.<sup>120</sup> Any concerns associated with donating fetal tissue from induced abortions will be remedied in Part 2. An example of such a revision is as follows: "Decedent" means a deceased individual and includes a stillborn infant or fetus."<sup>121</sup>

Defining decedent broadly as proposed here would clarify ambiguity as to what sources of fetal tissue may be used for research. Limiting sources of fetal tissue to those other than abortions diminishes the vast majority of suitable tissue available for donation.<sup>122</sup> This definition will remedy the limitations that a restrictive definition imposes, as seen with many state UAGA's, such as Iowa's mentioned above.<sup>123</sup>

#### 2. Part II

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<sup>120</sup> See *supra*, Section 1.A.

<sup>121</sup> See DEL. CODE ANN. tit. 16, § 2710 (West 2016).

<sup>122</sup> See *supra*, Section 2.A(3)(b).

<sup>123</sup> See *supra*, Section 1.A; IOWA CODE ANN. § 142C.2 (2007).

Each state should adopt the following language from Rhode Island's General Laws.<sup>124</sup> This statute, entitled "Experimentation on human fetuses" would work in addition to the relevant state-enacted UAGA definition of decedent to allow donation of fetal tissue only within clearly specified restrictions.

(a) No person shall use any live human fetus, whether before or after expulsion from its mother's womb, for scientific, laboratory research, or other kind of experimentation. This section shall not prohibit procedures incident to the study of a human fetus while it is in its mother's womb, provided that in the best medical judgment of the physician, made at the time of the study, the procedures do not substantially jeopardize the life or health of the fetus, and provided the fetus is not the subject of a planned abortion. In any criminal proceeding the fetus shall be conclusively presumed not to be the subject of a planned abortion if the mother signed a written statement at the time of the study that she was not planning an abortion.

(b) This section shall not prohibit or regulate diagnostic or remedial procedures, the purpose of which is to determine or to preserve the life or health of the fetus involved or the mother involved.

(c) A fetus is a live fetus for purposes of this section when, in the best medical judgment of a physician, it shows evidence of life as determined by the same medical standards as are used in determining evidence of life in a spontaneously aborted fetus at approximately the same stage of gestational development.

(d) No experimentation may knowingly be performed upon a dead fetus unless the consent of its mother has first been obtained, provided, that such consent shall not be required in the case of a routine pathological study. In any criminal proceeding, consent shall be conclusively presumed to have been granted for the

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<sup>124</sup> R.I. GEN. LAWS ANN. § 11-54-1 (2015).

purposes of this section by a written statement, signed by the mother, who is at least eighteen (18) years of age, to the effect that she consents to the use of her fetus for scientific, laboratory, research, or other kind of experimentation or study; that written consent shall constitute lawful authorization for the transfer of the dead fetus.

(e) No person shall perform or offer to perform an abortion where part or all of the consideration for the performance is that the fetal remains may be used for experimentation or other kinds of research or study.

(f) No person shall knowingly sell, transfer, distribute, or give away any fetus for a use which is in violation of the provisions of this section. For purposes of this section, the word “fetus” includes an embryo or neonate.<sup>125</sup>

This “Experimentation on human fetuses” statute provides specific regulations to remedy concerns associated with fetal tissue donation. This statute first addresses concerns over protecting fetuses unintentionally aborted alive in sections (a) and (c). By clearly defining when a fetus is alive in section (c), this language leaves a specific understanding of when donation of fetal tissue is prohibited. Specifically, if a fetus shows any “evidence of life” under medical standards, experimentation is strictly prohibited. Section (a) further clarifies that under no circumstances should a live fetus, “before or after expulsion from its mother’s womb,” be used for experimentation.

This statute also protects against opponents’ concerns involving consent of donated materials. Section (d) provides that experimentation may be performed upon a dead fetus only with “consent of its mother has first been obtained.” Violation of obtaining prior written approval from a consenting mother will result in criminal proceedings, as set out in section (d). The language in section (d) not only protects donations only upon consent, but it also protects researchers from liability by specifically explaining under what conditions consent will “presumed” to have been given.

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<sup>125</sup> *Id.*

Lastly, this statute prohibits inducements for abortion, and clarifies which circumstances the statute applies to. Section (e) responds to concerns over women aborting to donate expressed in Section 2.B. above by restricting abortions procured wholly in or part as consideration for use of resulting fetal tissue in research. Section (f) prohibits sale or any use of an aborted fetus that is in violation of the “Experimentation on human fetuses” section. Lastly, section (b) leaves no room for ambiguity, by clarifying that restrictions imposed by the statute do not apply to diagnostic or remedial life-saving procedures for the mother or fetus. By allowing fetal tissue donation under clear, comprehensive, and concise regulations and restrictions, opponents’ concerns will be effectively remedied.

#### CONCLUSION

Contrary to the recent allegations by anti-abortion group Center for Medical Progress, Planned Parenthood’s actions are not in violation of either federal or state law. The reasonable reimbursements Planned Parenthood formerly received were paid in accordance with federal law, and facilitation of fetal tissue donation in Oregon, Washington, and California is in accordance with state law. Since fetal tissue continues to be vital to scientific and medical research advances, donation of fetal tissue is imperative across the United States. States that prohibit or ambiguously govern fetal tissue donation should revise statutory language in order to resolve ambiguity and remedy concerns expressed against fetal tissue research by opponents. By adopting the language proposed above, states will adequately respond to arguments advanced against fetal tissue donation, while facilitating potentially ground-breaking research.