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NOTE

A WOMAN'S RIGHT TO CHOOSE: DESIGNATION OF FETAL TISSUE DONEES

I. INTRODUCTION

Women have the constitutional right to abort a pregnancy.1 Although women may elect to terminate their pregnancy, an abortion may also occur due to an ectopic pregnancy2 or a spontaneous abortion.3 What remains after any aborted pregnancy are the tissue and cells expelled from the woman's body.4 The question then arises as to whether these materials constitute a deceased fetus or merely a mass of unused cells, akin to those that fall to the floor of a barber shop. Regardless, a product remains that must be dealt with. This Note addresses the resulting implications of what a woman might do with these remaining fetal tissues. It also argues that when an elective abortion occurs, regardless of the reasons for the abortive act, the aborting woman should be allowed to designate to whom these remains are to be donated. To deny a woman the right to designate the recipient of her donation would unconstitutionally infringe upon a woman's fundamental right to make an abortion decision without being unduly burdened.5

2. An ectopic pregnancy is defined as "the development of an impregnated ovum outside the cavity of the uterus." STEDMAN'S MEDICAL DICTIONARY 1252 (25th ed. 1990) [hereinafter STEDMAN'S DICTIONARY]. "If the ectopic pregnancy is not treated promptly, rupture can occur causing sterility or even death." Laparoscopy Proves to be a Viable Alternative to Treat Ectopic Pregnancy, BUS. WIRE, Jan. 11, 1994, available at LEXIS, Business Wire file.
3. A spontaneous abortion is more commonly known as a miscarriage. See STEDMAN'S DICTIONARY, supra note 2, at 973. A miscarriage is defined as the "spontaneous expulsion of the products of pregnancy before the middle of the second trimester." Id.
5. See Casey, 505 U.S. at 877 (joint opinion of O'Connor, Kennedy & Souter, JJ.).
Part II of this Note discusses the National Institutes of Health ("NIH") Revitalization Act of 1993\(^6\) and the Uniform Anatomical Gift Act ("UAGA").\(^7\) Part III explores the benefits of fetal research. It surveys different diseases and conditions where fetal research holds promise or has already proven effective. A description of how transplanted fetal cells may affect certain conditions is included.\(^8\)

Part IV explains that current law prevents women from designating a donee to receive their fetal remains and how the various statutory safeguards preclude designation. Additionally, Part IV highlights major policy reasons why some oppose permitting women to designate a donee. Part IV.A discusses the likelihood of designation increasing the overall number of abortions because of the possible incentive for women to abort and donate the remains to family members in need of fetal tissues. It also analyzes the possibility that an ability to designate would sway women who are undecided in regard to ultimately choosing abortion. Part IV.B evaluates the claim that fetal remains are deceased children and that research and donation of this fetal tissue devalues and dehumanizes these children. Part IV.B also addresses the controversy surrounding the proper disposal of fetal remains and the steps society must follow in order to provide the respect they deserve.

Part V counters Part IV and proposes a statutory change that would allow women to designate a donee for their fetal remains. Part V.A addresses the argument that allowing a woman to designate a donee will lead to an increase in the number of abortions. Such a policy would actively promote and encourage the ability of women to designate a donee. This section also describes and debunks the notion that the ability to designate a donee would effectively sway a woman’s decision to abort. Part V.B discusses the “value” or “worth” of the fetus, its status as a person, and the proper handling of fetal remains.

Part VI discusses and evaluates the constitutionality of the current law prohibiting designation. It argues that prohibiting aborting women from designating a donee for their fetal remains violates their

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\(^6\) 42 U.S.C §§ 289g to 289g-2 (1994) (codifying the National Institutes of Health ("NIH") Revitalization Act of 1993).


constititionally protected right to choose abortion. Analysis in this Part focuses mainly on the “undue burden” standard articulated in Planned Parenthood v. Casey.9

Finally, this Note concludes that current state10 and federal11 statutes that prohibit aborting women from designating a donee to receive the fetal remains should be revised because they infringe upon a woman’s constitutional right to privacy.

II. STATUTORY ANALYSIS

On January 22, 1993, President Clinton lifted the moratorium12 on federal funding for fetal tissue research.13 By June 10, 1993, the President’s directive became law with the passage of the NIH Revitalization Act of 1993.14 This Act revamped a number of federal laws pertaining to the public health, including the donation of fetal remains and fetal research.15 Although the Act permits a woman to donate the remains of her aborted fetus for research or transplantation

11. See 42 USC §§ 289g to 289g-2 (1994).
12. See Nikki Melina Constantine Bell, Regulating Transfer and Use of Fetal Tissue in Transplantation Procedures: The Ethical Dimensions, 20 AM. J.L. & MED. 277, 281 (1994). The moratorium on the federal funding of fetal tissue research began in October 1987 under President Reagan’s administration. See id. at 278. Despite the 1988 findings of the NIH Human Fetal Tissue Transplantation Research Panel (voting 19-2 in favor of lifting the moratorium), President Bush’s administration refused to lift the moratorium. See id. at 279. The Bush administration did, however, propose to create a fetal tissue bank from all ectopic and spontaneously aborted pregnancies. See id. By continuing the moratorium and proposing to create a fetal tissue bank, the Bush administration hoped to “appear sympathetic to the needs of medical science while maintaining its close bond with anti-abortion forces.” Id. For a detailed description of the history of the federal moratorium, see id. at 278-82.
14. 42 U.S.C. §§ 289g to 289g-2 (1994); see also Babbo, supra note 13, at 407.
15. See 42 U.S.C. §§ 289g to 289g-2.
purposes,\textsuperscript{16} she may not receive any form of payment for the fetal remains.\textsuperscript{17} She must also declare in a signed, written statement that:

\begin{enumerate}
\item[(A)] the woman donates the fetal tissue for use in research [on the transplantation of human fetal tissue for therapeutic purposes] . . . ;
\item[(B)] the donation is made without any restriction regarding the identity of individuals who may be the recipients of transplantations of the tissue; and
\item[(C)] the woman has not been informed of the identity of any such individuals.\textsuperscript{18}
\end{enumerate}

The Act also makes it unlawful to “solicit or knowingly acquire, receive, or accept a donation of human fetal tissue . . . [if] the donated tissue will be transplanted into a relative of the donating individual."\textsuperscript{19}

Thus, in response to the end of the moratorium era, lawmakers, recognizing the medical value of fetal tissue, pressed forward with their continued effort to promote research and transplantation of fetal tissue.

Even before the NIH Revitalization Act of 1993 was adopted, state legislative measures of the 1970s and 1980s foreshadowed the federal legislative action that would follow an end to the moratorium on fetal research.\textsuperscript{20} All fifty states and the District of Columbia have adopted the 1968 version of the UAGA, with fifteen states since adopting the revised 1987 version.\textsuperscript{21} Most states have also added regulations of their own.\textsuperscript{22}

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\item[16.] See generally id.; see also Babbo, supra note 13, at 407.
\item[17.] See 42 U.S.C. § 289g-2(a) ("It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration if the transfer affects interstate commerce.").
\item[18.] 42 U.S.C. § 289g-1(b)(1)(A)-(C); see also Babbo, supra note 13, at 407-08.
\item[19.] 42 U.S.C. § 289g-2(b)(2); see also Babbo, supra note 13, at 408.
\item[22.] See, e.g., FLA. STAT. ANN. § 873.05(1) (West 2000) ("No person shall knowingly advertise or offer to purchase or sell, or purchase, sell, or otherwise transfer, any human embryo for valuable consideration."); 720 ILL. COMP. STAT. ANN. § 510/6-7 (West 1993) ("No person shall sell or experiment upon a fetus produced by the fertilization of a human ovum by a human sperm unless such experimentation is therapeutic to the fetus thereby produced."); LA. REV. STAT. ANN. § 9:122 (West 2000) ("The sale of a human ovum, fertilized human ovum, or human embryo is expressly prohibited."); OHIO REV. CODE ANN. § 2919.14 (West 1997) (prohibiting the sale of "the product of human conception which is aborted"); R.I. GEN. LAWS § 11-54-1(a)(1), (f) (2000) (stating that "no
The UAGA promotes the donation of anatomical gifts. It incorporates informed consent into its provisions and provides that next of kin may make anatomical gifts of the organs and tissues of a deceased family member. Under the UAGA, a "decedent" is defined to "include[] a stillborn infant or fetus." The UAGA, however, does not distinguish between non-viable fetuses resulting from elective abortions, and those resulting from spontaneous abortions or ectopic pregnancies. Additionally, the UAGA creates a "Chinese wall" that separates the treating physician from those involved in the donation.

Together, the UAGA and the NIH Revitalization Act of 1993 work to promote the most utilitarian approach toward the disposal of fetal remains while striving to maintain a strict sense of fetal worth and a respect for life. While the UAGA promotes the donation of organs and fetal tissues generally, it attempts to strike down any procedure that may encourage a non-altruistic motive for donation. Acknowledging this concern, the NIH Revitalization Act of 1993 attempts to articulate situations that lawmakers are not willing to risk, fearing that fetal harvesting may occur because of these conflicts of interest. This legislation attempts to “eliminate[] the possibility that a woman’s intention to abort will be influenced by considering the social benefits of fetal tissue transplantation.”

In addition, this legislation aims at

person shall knowingly sell, transfer, distribute, or give away any fetus for a use which is in violation of the provisions of this section,” and specifying that the word “[f]etus’ includes an embryo”.


24. The UAGA provides that an adult may consent to the donation of his organs or tissues upon his death. See UNIF. ANATOMICAL GIFT ACT § 1, 8A U.L.A. 29-30. If no consent is given or objected to by the decedent, the decedent’s next of kin may make an anatomical gift of the decedent’s organs and tissues. See Seifert, supra note 20, at 287.


26. UNIF. ANATOMICAL GIFT ACT § 1; see Seifert, supra note 20, at 287.

27. The United States Supreme Court has described the concept of viability as “the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb.” Planned Parenthood v. Casey, 505 U.S. 833, 870 (1992) (joint opinion of O’Connor, Kennedy & Souter, JJ.); see also Roe v. Wade, 410 U.S. 113, 163 (1973) (stating that a fetus reaches the point of viability when it “presumably has the capability of meaningful life outside the mother’s womb”).


29. See UNIF. ANATOMICAL GIFT ACT § 8(b), 8A U.L.A. 56 (“Neither the physician or surgeon who attends the donor at death nor the physician or surgeon who determines the time of death may participate in the procedures for removing or transplanting a [body] part unless the document of gift designates a particular physician [to do so].”); Gelfand & Levin, supra note 23, at 673.

30. See Gelfand & Levin, supra note 23, at 671-75.

31. See Babbo, supra note 13, at 407-08.

32. Id. at 408.
preventing a “dead fetus market” and conception for the express purpose to later abort and donate the tissue.\textsuperscript{33}

These safeguards, however, may be more harmful than beneficial. Not only do they infringe upon a woman’s right to choose to abort a pregnancy, they hamper medical research and treatment using fetal remains that is quite valuable to society. For the current legislation governing the disposition of fetal remains to be most effective, the legislatures must amend the laws to allow women to be able to designate a donee to receive any fetal remains from her aborted pregnancy.

III. THE BENEFITS OF FETAL RESEARCH

Donation of electively aborted fetal tissue for research or transplantation is essential to the growth of this flourishing branch of medical science.\textsuperscript{34} Therefore, it is imperative to allow an aborting woman to donate the fetal remains to any person or institution of her choice. By allowing her this choice, she may be more inclined to facilitate some positive result from what may be perceived as an otherwise negative occurrence.

Fetal tissue research and transplantation is widely regarded as offering hope to cure or control an incredible number of debilitating diseases and disorders of the human body.\textsuperscript{35} This “biological motherlode” or “human repair kit” has caught the medical world in a wave of excitement and hope for significant breakthroughs in the ongoing fight against human frailty.\textsuperscript{36} Various conditions for which fetal research proves promising include Parkinson’s disease,\textsuperscript{37} Alzheimer’s

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\item \textsuperscript{33} See id.
\item \textsuperscript{34} See Gelfand & Levin, supra note 23, at 652.
\item \textsuperscript{35} Fetal tissue research itself is not a particularly new field of practice. As early as 1928, scientists attempted to use fetal tissue to fight diabetes in an eighteen-year-old patient through the transplantation of fetal pancreatic tissue. See Brian E. Edwards et al., The Human Pluripotent Stem Cell: Impact on Medicine and Society, FERTILITY & STERILITY, July 2000, at 1, 1-2.
\item \textsuperscript{36} See Vincent Branick & M. Therese Lysaught, Stem Cell Research: Licit or Complicit?, HEALTH PROGRESS, Sept.-Oct. 1999, at 37, 38.
\item \textsuperscript{37} Parkinson’s disease is defined as “a neurological syndrome usually resulting from deficiency of the neurotransmitter dopamine as the consequence of degenerative, vascular, or inflammatory changes in the basal ganglia; characterized by rhythmical muscular tremors, rigidity of movement, festination, droopy posture, and masklike faces.” See STEDMAN’S DICTIONARY, supra note 2, at 1141; see also Curt R. Freed, M.D., et al., Survival of Implanted Fetal Dopamine Cells and Neurologic Improvement 12 to 46 Months After Transplantation for Parkinson’s Disease, 327 NEW ENG. J. MED. 1549, 1549 (1992). For a recent synopsis of the first cell transplantation therapies for Parkinson’s disease, see Edwards et al., supra note 35, at 2.
\end{itemize}
disease, aplastic anemia, leukemia, spinal cord injuries, thalassemia, AIDS, DiGeorge syndrome, and diabetes, though this list is not exhaustive.

Because of its immaturity, researchers and physicians hold fetal tissue in high regard. "Fetal cells are immunologically naive." Although this is generally true for electively aborted fetuses, it is not

38. Alzheimer's disease is defined as "progressive mental deterioration manifested by memory loss, confusion, and disorientation beginning in late middle life and resulting in death in 5-10 years." STEDMAN'S DICTIONARY, supra note 2, at 444; see also David R. Liskowsky, From the Congressional Office of Technology Assessment: Neural Grafting, 265 JAMA 3225, 3225 (1991).

39. Aplastic anemia is "characterized by a greatly decreased formation of erythrocytes and hemoglobin, usually associated with pronounced granulocytopenia and thrombocytopenia, as a result of hypoplastic or aplastic bone marrow." STEDMAN'S DICTIONARY, supra note 2, at 72; see also Robert P. Gale, Fetal Liver Transplantation in Aplastic Anemia and Leukemia, 10 THYMUS 89, 89 (1987).

40. Leukemia is characterized by the "progressive proliferation of abnormal leukocytes found in hemopoietic tissues, other organs, and usually in the blood in increased numbers." STEDMAN'S DICTIONARY, supra note 2, at 858; see also Gale, supra note 39, at 89.

41. Thalassemia is defined as "[a]ny of a group of inherited disorders of hemoglobin metabolism . . . ; several genetic types exist, and the corresponding clinical picture may vary from barely detectable hematologic abnormality to severe and fatal anemia." STEDMAN'S DICTIONARY, supra note 2, at 1581-82. See generally Jean L. Touraine et al., Fetal Tissue Transplantation and Prospective Gene Therapy in Severe Immunodeficiencies and Enzyme Deficiencies, 10 THYMUS 75 (1987).

42. AIDS (Acquired Immunodeficiency Syndrome) is "a disease characterized by opportunistic infections . . . and malignancies . . . in immunocompromised persons; caused by the human immunodeficiency virus transmitted by exchange of body fluids . . . or transfused blood products." STEDMAN'S DICTIONARY, supra note 2, at 37-38; see also Rachel Benson Gold & Dorothy Lehrman, Fetal Research Under Fire: The Influence of Abortion Politics, 21 FAM. PLAN. PERSP. 6, 7 (1989).

43. DiGeorge syndrome is defined as the "congenital absence of the thymus and parathyroid glands, without agammaglobulinemia but with frequent infections and delayed development." STEDMAN'S DICTIONARY, supra note 2, at 1526. See generally C.S. August et al., Implantation of a Foetal Thymus Restoring Immunological Competence in a Patient With Thymic Aplasia (DiGeorge Syndrome), 2 LANCET 1210 (1968).

44. Diabetes mellitus is "brought about by decreased insulin production or, more commonly in older patients, by the inability of the body's cells to use insulin properly, resulting in high blood sugar." MICHAEL F. O'KEEFE, EMERGENCY CARE 369 (1998); see also Shauna S. Roberts, Potential Cure, Ethical Questions, DIABETES FORECAST, Aug. 1995, at 43, 44.

45. Fetal cells lack distinctive antigens that often cause a recipient's body to reject transplanted tissue. Because the fetal tissue is immature, the risk of it attacking the host tissue is greatly reduced. See Mark W. Danis, Note, Fetal Tissue Transplants: Restricting Recipient Designation, 39 HASTINGS L.J. 1079, 1084 (1988); see generally Larry Thompson, Fetal Tissue Research on the Rebound, 263 SCIENCE 601 (1994) (noting that "fetal tissue's low immunogenicity" allows procedures to be completed without "tissue matching," "preparative regimens to destroy the recipient's bone marrow," "immunosuppressive drugs," or risking "graft-versus-host diseases").

46. Gelfand & Levin, supra note 23, at 651.
necessarily so for spontaneous abortions and ectopic pregnancies. In
general, electively aborted fetal remains have not had exposure to many
diseases and can readily adapt to new physiological environments. Although they may be able to provide adequate tissue and cells for transplantation, fetal tissue remains resulting from ectopic pregnancies or spontaneous abortions often carry the burden of the defective fetal pathology that may have triggered the abortion. As a result, and depending upon the cause of the fetal “death” and method of expulsion from the mother, it may be more difficult to collect viable cells from certain fetuses.

Fetal cells develop and grow at a much faster rate than older, more
developed cells. The ability of fetal cells to multiply and rapidly repair a donee’s damaged cells is significantly increased, providing faster results when time may be of the essence in the fight against a disease. Apparently, fetal cells are also more readily frozen than older cells and maintain their viability longer.

In addition to its many possible uses in the field of medicine, fetal tissue is plentiful. With over 1.3 million abortions each year, a tremendous amount of tissue is available for research and transplantation.

Fetal research and transplantation may provide a vast array of medical help in the near future. Though controversy surrounds the collection of such material, fetal research has benefited society’s interest in medical research.

49. See id. at 652.
50. See Kinney, supra note 8, at 263.
51. See Gelfand & Levin, supra note 23, at 652.
52. See id. But see Edwards et al., supra note 35, at 6 (noting that some studies suggest that stem cells from adult tissues have proven equally effective in certain circumstances and may provide a way to avoid the complex ethical problems inherent in fetal stem cell research). In October of 1998, Scotland-based PPL Therapeutics labs in Blacksburg, Virginia, received a $1.9 million grant from the National Institute of Standards and Technology (“NIST”). The NIST designated this grant for research on reprogramming adult cells to be pluripotent, mimicking the condition of fetal stem cells. The grant only allows researchers to work with livestock and non-human primates. Currently, there are at least five other companies, based in the United States, researching adult stem cells. See Erika Jonietz, Sourcing Stem Cells, TECH. REV., Jan.-Feb. 2001, at 32, 32.
53. See Goddard, supra note 8, at 382.
55. See Goddard, supra note 8, at 382.
56. See id. at 383.
in improving medical science. Permitting women to designate a donee for their fetal remains will increase the number of fetuses available for research and transplantation by encouraging women to donate rather than destroy these remains.

IV. REASONS AGAINST DESIGNATING A DONEE

A. Promoting Abortions and the Incentive to Abort

Opponents to permitting an aborting woman to designate a donee to receive any fetal remains argue that designation will promote abortions.58 The legal ability to abort or to become pregnant and abort only to donate may convey the message that not only is it acceptable for women to abort, but that abortion is valuable to medical research and the public health. Because the state would effectively create a system that rewards women who abort by permitting them to choose a donee, women may become more inclined to abort in the hopes of reaping some emotional or social benefit.59 This could lead to the practice of women conceiving for the specific purpose of aborting the fetus to donate its remains to a relative in need.60

The donation of fetal remains from spontaneous abortions and ectopic pregnancies is less problematic.61 These conditions are unavoidable circumstances of nature. The pregnant woman did not choose to end the pregnancy. She was not motivated or encouraged to abort in the hope of aiding another person. The distinction is one of intent.

Even very strict anti-abortionists should not have difficulty accepting the use of tissue from abortions that are not preventable. Although they oppose a woman’s right to choose to abort and any policy

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58. See Gelfand & Levin, supra note 23, at 656; see also Bell, supra note 12, at 282-83 (discussing the fear that women would become “fetal tissue ‘farms’” and foster the growth of “abortion mills”).
59. See Bell, supra note 12, at 283.
60. See Gelfand & Levin, supra note 23, at 656-57 (reporting several cases of women who desire conception for the sole purpose of aborting the fetus for use in research or transplantation); Emanuel Thorne, Trade in Human Tissue Needs Regulation, WALL ST. J., Aug. 19, 1987, at 16 (discussing a woman who considered conceiving a fetus to abort with her father’s sperm in order to aid her ailing father).
61. It can be argued that if research is allowed and encouraged on some fetal remains, this would create a slippery slope that would eventually spread to elective abortion. If fetal research on spontaneously aborted fetuses becomes highly successful, the demand for fetal remains will increase and cause scientists to look toward elective abortions as a source of material.
that would encourage the protection of that right, there is no choice made in this situation and no policy interest furthered. In these circumstances the woman did not choose the abortion and did not overtly intend to terminate the pregnancy. Allowing the use of unintentionally aborted fetal remains will not encourage a policy to promote elective abortions because the element of intent is separate and distinct in either case.

Although ectopic pregnancies and spontaneous abortions will occur, that does not excuse the practice of performing elective abortions in the eyes of many right-to-life activists. Therefore, any law that distributes the fruits of an elective abortion will certainly cause problems for those morally horrified by the very nature of abortions. Despite the value of these cells to medical research, Pope John Paul II announced that “Christians, like all people of good will, are called upon under grave obligation to conscience not to cooperate formally in practices which even if permitted by civil legislation are contrary to God’s law.” This statement promotes a type of civil disobedience, or more precisely, civil non-observance. Consequently, although research on an electively-aborted fetus may be legal, no “good” Christian may partake in or support such a practice that is “contrary to God’s law.” This broad decree may affect numerous and diverse practices ranging from paying taxes in support of local hospitals, to counseling a friend or family member considering an abortion, or performing research on fetal tissues in a laboratory.

Because many people see abortion as evil, “any direct participation in an act against innocent life or sharing the immoral intention of the person committing it” is complicit with that evil. The Roman Catholic

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62. See John A. Robertson, Abortion to Obtain Fetal Tissue for Transplant, 27 SUFFOLK U. L. REV. 1359, 1374 (1993) (reporting that those strictly opposed to abortions are usually strictly opposed to the use of fetal tissue). It is illogical, however, for those who hold this view to oppose fetal research and transplantation when a pregnancy is terminated by natural or accidental causes. Robertson specifically states that “one can be opposed to abortion but still agree that if an abortion occurs, fetal tissue is better donated for transplant than buried or burned.” Id. This mode of thinking would not interfere with the anti-abortionist’s fundamental belief that choosing to abort is morally wrong and the use of the remains creates complicity with the immoral act. For a brief discussion on complicity according to Catholic doctrine, see Branick & Lysaught, supra note 36, at 39-41.

63. See Robertson, supra note 62, at 1374 (stating that even those strictly opposed to abortion “[may] not otherwise oppose the transplantation of fetal tissue arising from abortions occurring anyway”).

64. Branick & Lysaught, supra note 36, at 39 (quoting John Paul II, EVANGELIUM VITAE ¶ 74).

65. See id.

66. Id.

67. Id. (quoting John Paul II, EVANGELIUM VITAE ¶ 74).
Church teaches that “ensoulment and human life occur at conception.” For those adhering to this Roman Catholic teaching and Pope John Paul II’s decree, receiving organs or tissues from an aborted fetus or benefiting from research on fetal remains may be viewed as an “active collaboration in the deed itself.”

Critics also focus on the incentive to abort that a statute allowing the designation of donees for fetal tissue from elective abortions would create. Women may be encouraged to abort in two ways: (1) by the social or familial benefit that the aborted tissue may bring, or (2) as a justification for an accidental and undesired pregnancy.

Critics of designation contend that women who are indecisive about whether to continue their pregnancy will be swayed to abort if numerous, positive uses for the fetal remains are available. Opponents fear that if a woman, undecided about her plans to continue or terminate her pregnancy, learns of a relative or friend in dire need of fetal cells to battle a debilitating disease or knows of an infant child that needs a new liver or heart, she will be pushed toward aborting her pregnancy in order to donate the fetal remains to someone already dear to her heart. If a woman cannot decide whether to terminate her pregnancy or keep the child, she will undoubtedly look to her family, friends, and physician for advice and guidance. An opportunity to donate to a loved one may not only cloud an undecided mother’s judgment, but provide the additional incentive an incredibly distressed, unwilling mother needs to justify terminating her pregnancy.

Permitting women to designate a donee to receive any fetal remains from an elective abortion causes serious concerns for the woman’s mental health and the moral legitimacy of abortion. Opponents of designation fear that too much pressure will be placed upon a woman to terminate her pregnancy because of the demand for electively aborted fetal tissue. By increasing this demand, as well as possible pressures on

69. Id.
70. See Gelfand & Levin, supra note 23, at 656.
71. See id.
72. See id. at 660.
73. See Boer, supra note 54, at 464 (noting that “it is conceivable that a woman who is ambivalent about a decision to induce abortion could be influenced to opt for terminating pregnancy if she were told that the organs or tissues of her conceptus can be used therapeutically”).
74. It has also been suggested that physicians may sway a woman to abort so as to receive fetal tissue to aid their own research or that of their colleagues. However, the “Chinese wall” technique built into the UAGA effectively prevents this practice. See Gelfand & Levin, supra note 23, at 659.
women, critics fear that the practice of abortion will gain further moral legitimacy as fetal research becomes more accepted and valued in society. By allowing women to designate a donee, a Pandora's Box may open that could strike a severe blow to the very heart of the anti-abortion struggle.

B. Fetal Worth and the Commodification of Women and Birthing Ability

In addition, the debate rages over whether an aborted fetus is a deceased child or merely a mass of discarded cells.\(^7\) This argument encompasses many issues, including the manner in which the mother aborts the pregnancy, the current gestation of the fetus, and the viability of the fetus.\(^6\) Beliefs about the beginning of life span a wide range. The Roman Catholic Church believes ensoulment to occur at conception.\(^7\) The French government has indicated that "an embryo, from the time of fertilization, is a 'legal subject.'"\(^8\) The European Council maintains that "'human life' continually develops from the point of fertilization."\(^9\) The arguments are numerous, sensible, and often deeply personal.

For those who understand life to begin at conception, any fetus aborted, for any reason, is still a human being.\(^9\) Abortion, for many people, is akin to murder and will only increase in frequency by treating a fetus like a commodity and not a person.\(^8\) In the eyes of some, the fetus becomes "an exploitable minority" that is "not worthy of the same respect as other human beings."\(^8\) Abortion and subsequent tissue donation effectively mutilate a fetus and, therefore, demonstrate disrespect for human life and devalues the worth of the fetus.\(^8\) According to those who believe life starts with conception, a dead body should not be mutilated but treated with respect.\(^8\) Although "some scientific advances will be forfeited . . . the potential for human

\(^{75}\) See Gelfand & Levin, supra note 23, at 663.

\(^{76}\) See generally id. at 655-64.

\(^{77}\) See Bromham, supra note 68, at 90; see also Sheryllann Flandaca, Comment, In Vitro Fertilization and Embryos: The Need for International Guidelines, 8 ALB. L.J. SCI. & TECH. 337, 358 (1998).

\(^{78}\) Flandaca, supra note 77, at 358.

\(^{79}\) Id.

\(^{80}\) See Goddard, supra note 8, at 385; see also Gelfand & Levin, supra note 23, at 663.

\(^{81}\) See Goddard, supra note 8, at 385.

\(^{82}\) Babbo, supra note 13, at 409.

\(^{83}\) See Gelfand & Levin, supra note 23, at 663-64.

\(^{84}\) See id. at 663.
development and respect for life outweigh any benefits which might be otherwise unattainable."

Although it may be argued that a fetus does not have any real interests, its treatment should not be that of merely another human body part. A fetus is "a symbol of human life that should not be regarded as unimportant." A fetus more closely resembles a human than any other organ or tissue, thus, it commands a greater respect from society for its uniquely human qualities that a kidney or liver cannot possess. Though the interests of a living person may outweigh the interests of even a viable fetus, the state maintains an interest in protecting the fetus.

James T. Burtchaell contends that donation of electively aborted fetuses is highly objectionable for three main reasons:

1. Once a woman has an abortion, she has abandoned her parental capacity to authorize research on the fetus;
2. any researcher acts with moral complicity in the destruction of the fetus after the fact if he or she participates in research on the tissue; and
3. there are other sources of fetal materials available for use in research.

Further, Kathleen Nolan suggests that since the electively aborting woman acts as the "agency of death" to the fetus, she is precluded by law as acting as a decision maker for the fetus. This analysis is analogous to the idea that someone who kills a relative may not then be able to make a decision regarding the donation of the decedent's organs or tissues.

Both Burtchaell and Nolan, though opponents of elective abortion, would accede to the use of fetal cells from ectopic pregnancies or spontaneous abortions. This position views ectopic pregnancies and

85. Fiandaca, supra note 77, at 376.
86. See Bell, supra note 12, at 292.
87. Id.
88. Id.
89. Id.
90. An extreme example is the woman who does not wish to abort, but, due to complications with the pregnancy, must do so in order to save her own life.
92. James T. Burtchaell is a theologian at the University of Notre Dame and was a member of the human fetal research panel. See Goddard, supra note 8, at 384 n.81.
94. See Goddard, supra note 8, at 385.
95. See id.
96. See id. at 385.
spontaneous abortions as natural instances of life. The fetus, in these cases, was not destined to become viable and create a human life. Therefore, it is appropriate to use this remaining tissue, for that is all it ever could be, to save or enhance other lives. Elective abortions, however, are preventable and are not necessary. Therefore, any practice, such as designating a donee, which would foster the act of abortion in even the most remote instance is immoral and unnatural.

Another serious consideration in this debate is the extent to which the ability to designate will affect societal views of women, fetuses, and birthing ability as commodities. Professor Margaret Jane Radin, in her book *Contested Commodities*, explores the differences and consequences of market and non-market regimes regarding trade in sex, children, body parts, and other things.

Radin argues that in order to facilitate altruistic trade in such objects, a market regime must be banned. If not, according to Radin’s “domino theory,” altruism will be pushed into extinction by “a market regime encompassing everything people value.” If a market were to grow for the sale of fetal tissues, for example, donors would be less likely to donate for totally altruistic motives. Though the donor may refuse to accept payment, the monetary value is essentially transferred to the donee. Now, as Radin argues, the act of giving cannot be clearly seen as a purely altruistic act of caring. Either the money is the reason the donor donated (at least we could never be completely certain), or the money is transferred to the donee, thus monetizing the fetal remains. Once the market places a price upon something as close to human values and personhood as fetal tissues or the ability to give birth, the possibility of treating such valuable objects as commodities and reducing their inherent worth and respectability becomes dangerously apparent.

97. See id.
98. Although, if an abortion were needed to save the mother's life, it is arguable that it would now become necessary.
100. See generally id.
101. See id. at 100.
102. Radin summarizes her “domino theory” as “a slippery slope leading from toleration of any sales of something to an exclusive market regime for that thing; and there is a further slippery slope from a market regime for some things to a market regime encompassing everything people value.” Id. at 99-100.
103. Id. at 100.
104. For a possible scenario, see id. at 97.
105. See id.
106. See id.
Where would designation fit into this discussion about worth and respect for life? Simply, if designation is sanctioned and, as many critics argue, increased pressures are placed upon women to produce and donate fetal tissue that has a real and tangible value, women and fetuses will become commodified. As such, society now can and will attribute "worth" to women of childbearing age and ability, genetic make-up of fetal remains, and quantity of fetal remains recovered by various procedures (i.e., from ectopic pregnancies, miscarriages, or elective abortions).

Placing a price on fetal remains or the ability of a woman to give birth is an "injury to [her] personhood." Women risk becoming tissue banks if society creates a market for fetal tissue that places monetary value on the tissue. Particularly at risk would be women of Third World countries who are economically disadvantaged, in large supply, and often governed by less strict laws and lower levels of enforcement than those in the United States.

Although both the NIH Revitalization Act of 1993 and the UAGA specifically prohibit the sale of fetal remains, it is possible that designated donation may create an avenue around legal prohibitions of sale. Because a donor may select a donee, both potential donors and potential donees can know each other's identities. Additionally, potential donors and donees can know the identities of other interested parties. Donees could screen donors by genetic traits, breeding, or need. A donee could, for example, refuse to receive tissue from a white woman or a woman of Italian descent. Fetal remains from an Asian woman or ones from a pure Brazilian heritage may be placed at a premium. Additionally, with some research, unscrupulous donees could easily select women of lower intelligence and financial resources to pressure into elective abortion and donation. A black market of producing and/or selling tissue for secret payment in kind or in services may ensue. The creation of a black market in fetal tissue based on underground monetization of fetal remains and birthing ability may seem fanciful, but is certainly in the realm of possibility.

107. See Goddard, supra note 8, at 384-85. See generally Nolan, supra note 93 (criticizing elective abortions).
108. See RADIN, supra note 99, at 137-38 (detailing the effect of commodifying babies in the context of "baby-selling").
109. Id. at 138.
111. See 42 U.S.C. §§ 289g to 289g-2 (1994).
Valuable arguments against designation include the fear that women will be pressured to abort in order to donate and fear that fetuses and women will be perceived and treated as commodities with a known value. By creating a value for either women of childbearing age or fetal remains, unscrupulous donees may be able to create a black market for fetal remains and coerce women into “donating” tissue to them. Designation, if allowed, must protect the integrity of women and fetal remains.

The ability to designate must protect women as autonomous and valuable members of society. It cannot allow indiscriminate abuse of women and their fetal tissues as the market may demand. It is essential that designation ensure the treatment of fetal remains as valuable gifts provided for purely altruistic motivations, otherwise commodification of fetuses and women and a black market may arise. With the commodification of fetal remains and women of childbearing age, we risk “transforming intimate personal relationships into alienated commercial exchanges . . . [where] pregnancy [and donation] become[] [services] comparable to prostitution, . . . and reproductive materials . . . are turned into mere objects.”

V. REASONS SUPPORTING DESIGNATING A DONEE

A. The Ability to Choose a Donee Will Neither Promote Abortions Nor Sway Undecided Women to Abort

A woman has the right to choose to abort a pregnancy for any number of personal reasons. These reasons range from dire financial straits, youth, or sickness, to a desire to donate tissue. Although the reason a woman may decide to abort varies and is deeply personal, women do have that fundamental right to choose. Just as it is the right of adults to donate a kidney or blood or bone marrow. Just as it is a right of adults to donate the organs and tissues of their deceased relatives to science or transplant donees. Not everyone agrees with adult organ donation, but it would be extremely difficult to find someone who feels that legalized organ donation is seriously capable of increasing the murder rate.

115. See Kinney, supra note 8, at 282.
116. See id.
Similarly, the right to choose a donee for aborted fetal tissues will not promote abortions. The state permits good use to come from what may be perceived as an otherwise tragic event if it permits designation. It is not promoting the practice of abortion, but implementing some form of damage control. If nothing good came from an abortion, society would lose resources. Elective abortion admittedly removes a potentially productive human being from society. However, refusing to donate the remains of this abortion may prevent numerous current members of society from either becoming productive, returning to productivity, or improving their productivity. From a utilitarian perspective, allowing donation of fetal remains enables society to recover resources it loses because of abortions by increasing the health of current members of society. One fetus alone can provide enough tissue for many people to benefit. Allowing designation will only add to this positive aspect society may salvage from elective abortions.

One must also consider the benefits the ability to designate may bring to the aborting woman. It is her body, her feelings, and her social standing that others will scrutinize if she decides to abort and then designate. No one else will feel the same emotional and physical strain. Should she donate her fetal remains, she may feel part of a great moral and physical burden lifted from her. An aborting woman may feel better knowing that this difficult decision has yielded some good. She may be proud to know that she has made a difference in the lives of others. The experience may become even more fulfilling if she knows the identity of the exact person or people she helped. This knowledge may reinforce her resolve that she was able to make some good out of a bad situation. Women have an extremely difficult decision to make when deciding...

117. See Goddard, supra note 8, at 386.
118. One can imagine the following scenarios: (1) Donated fetal organs are transplanted into an infant who would otherwise die. This infant may now grow to become a productive member of society, breed, and produce additional productive members. (2) Donated fetal cells help reconstruct a young man’s spinal cord after a car accident, enabling him to recover from an otherwise completely disabling injury. (3) Donated fetal cells are injected into the brain of a Parkinson’s patient. Should these cells effectively combat the disease, the patient’s ability to participate within society will increase and his use of medical, emotional, and financial resources will decrease.
119. See Gelfand & Levin, supra note 23, at 658.
120. Proponents of designation may have a compelling utilitarian argument regarding the use of remaining fetal tissues, but it may be wise to distance this argument from the utilitarian position regarding abortion. From the utilitarian perspective, “if the circumstances seem to require it, the life or lives of individual human beings may be regarded as instrumental, and expendable for [the] ‘greater good.’” Teresa Iglesias, In Vitro Fertilisation: The Major Issues, 1 J. MED. ETHICS 32, 33 (1984). Promoting designation should not be perceived as promoting abortion. The focus of the argument should be to prevent waste and promote science, not to influence women or supply laboratories.
whether or not to abort. It is unlikely that prospective donation will sway women to abortion.121 Donation does not affect the mother enough to give her a real incentive to choose abortion.122 Real motivation will come from financial concerns, the stage of life of the mother, and under what situation the fetus was conceived (by incest, rape, or some other form of conception).123

Fetal cells are desirable because of their plasticity and their low degree of rejection from the human body.124 It is not necessary for a donee to receive transplanted tissue from only a relative.125 A relative, however, would be in the best position to recognize the potential donee’s needs and appreciate the suffering he may be enduring. Because of this unique position, however, critics of designated donation voice a valid argument that some instances of coercion or pressure could emerge.126

Because humans are certainly fallible, some instances of coercion or unfair pressure could likely occur. On the whole, however, a total ban on all designated donations would be “unduly paternalistic and overbroad. Such a ban would deny women an opportunity that many would freely and fervently embrace in order to protect some who may not so easily be able to make an unencumbered choice.”127 If designated donation is allowed, it would supplement, not replace, current, anonymous donation of fetal remains. A woman who may have been hesitant to donate to an anonymous donee may be inspired to use any fetal remains to help someone she cares for. By swaying women to donate, designation will increase the amount of fetal tissue available for research and transplantation. It is important to remember, however, that this sway should not be a significant factor in a woman’s decision to abort, but only her decision to donate.

With an increased supply of fetal tissue, the needs of loved ones alone will not drive a woman’s decision to abort.128 Even if a relative/donee desired fetal tissue, the relative/donor could more easily refuse knowing that other sources of tissue are readily available. This is so because the relative/donor, who would not otherwise donate, who designates the relative/donee for donation will have prevented the relative/donee from receiving a donation from an anonymous donor.

121. See Gelfand & Levin, supra note 23, at 660.
122. See id. at 659.
123. See id. at 664, 679.
124. See Thompson, supra note 47, at 601.
125. See Gelfand & Levin, supra note 23, at 658.
126. See Robertson, supra note 62, at 1372.
127. Id.
128. See Gelfand & Levin, supra note 23, at 658.
This donation from an anonymous donor may now be used by another donee that does not have a willing relative/donor. The number of fetal remains available for donation will have increased by one.

When designated donation becomes commonplace, fetal tissue supplies would increase dramatically, providing much needed research and transplant material. Accordingly, for those who fear an abuse of fetal harvesting for profit or fame by physicians or researchers, provisions of the UAGA are designed specifically to prevent physicians from unduly influencing women to abort. With society's best interests being served and ample safeguards in place, the amount of fetal remains available for research and transplantation will increase and medical technology will improve tremendously. To deny an aborting woman the right to designate a donee will "deprive [her] of dispositional control over the fetus' cadaver [and] may really be . . . [a] disguised effort to punish her for aborting."  

B. Transplantation and Medical Research Do Not Amount to Mutilation or Disrespect of the Fetus

The man who saves another with his own life is worthy of the utmost respect. Fortunately, medical technology has made it possible for men to save other men without making the ultimate sacrifice of their own lives. The more commonplace donations of a kidney, blood, or bone marrow illustrate the advances medical science has made in mankind's ability to prolong our own existence. To some, however, stripping one body of its natural pieces amounts to no more than mutilation of the human body.  

Mutilation of a dead body is legally and socially acceptable in various forms, including embalming, cremation, donation of organs, and performing an autopsy. From a utilitarian perspective, if opponents are so opposed to the taking of one human life through abortion, why are they not satisfied when the use of that life saves one, three, or twenty other lives? The abortion would happen anyway. Although many opponents view all abortions as tragic and some as murder, they are still powerless to stop them. Without accepting abortion, opponents can separately embrace donation.  

131. See id. at 663.
132. See id. at 663-64.
133. See id. at 663.
abortion beliefs, opponents can repair part of the damage they think abortion creates by favoring the use of the results to aid others in their pursuit of healthy and productive lives.

VI. PROHIBITING A WOMAN WHO CHOOSES TO ABORT FROM DESIGNATING A DONEE FOR THE FETAL REMAINS IMPOSES AN UNDUE BURDEN ON HER FREEDOM TO TERMINATE HER PREGNANCY

Neither the federal government nor any state may impose restrictions or guidelines regarding abortions, which pose an undue burden upon women. The United States Supreme Court articulated the "undue burden" standard in 1992, with its decision in Planned Parenthood v. Casey. A plurality of the Court held that "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." This is a right, recognized in Roe v. Wade, "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person[, including] the decision whether to bear or beget a child." The state, however, may "enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning." The State has "important and legitimate interest[s] in preserving and protecting the health of the pregnant woman [and] in protecting the potentiality of human life."

A major goal of the UAGA and the National Revitalization Act of 1993 was to prevent women from becoming pregnant with the intention of aborting the fetus later. Legislators wished to guard against the commodification of women and fetuses by preventing fetal farming from becoming a profitable and desired industry. Additionally, legislators sought to prevent the possibility of a woman’s choice to abort being

136. Id. at 877 (joint opinion of O'Connor, Kennedy & Souter, JJ.).
137. 410 U.S. 113 (1973) (protecting a woman’s constitutional right to abort a pregnancy under certain circumstances).
139. Casey, 505 U.S. at 873 (joint opinion of O'Connor, Kennedy & Souter, JJ.).
140. Id. at 875-76 (joint opinion of O'Connor, Kennedy & Souter, JJ.) (alterations in original) (quoting Roe, 410 U.S. at 162).
141. See supra notes 31-33 and accompanying text.
142. See supra note 34 and accompanying text.
influenced by the social benefits of transplantation. Protecting women from undue pressure and from becoming breeders for pre-purchased human cells surely falls well within the "legitimate interests" requirement imposed by Roe and reasserted in Casey. This compelling interest, however, must not place an undue burden upon woman for it to remain valid.

Prohibiting a woman from designating a donee for a fetus she wishes to abort places an undue burden upon that woman in seeking an abortion. As John Robertson explains, "if a woman is free to abort for any reason, a law having the purpose of prohibiting abortions for the particular reason of producing tissue for transplant would be invalid." By depriving women of the ability to designate a donee, the state is effectively preventing a woman from aborting her fetus when her motivation to abort is to designate. This is despite the fact that "the reasons for having an abortion are irrelevant." Precisely, "[i]f the state cannot directly prescribe the acceptable reasons for abortion, it should not be able to limit the reasons for abortion indirectly by making designated donations of fetal tissue criminal." Although a state may have a legitimate interest in protecting a viable fetus, Roe and Casey clearly hold that a woman's right to terminate her pregnancy must supersede any state interest in preserving the fetus before it becomes viable.

By disallowing the designation of fetal remains, a state may effectively limit the scope of a woman's right to bear, or not bear, a child. The Court held that a woman's decision to terminate a non-viable fetus was protected by the Due Process Clause of the Fourteenth

143. See Babbo, supra note 13, at 408.
144. See Casey, 505 U.S. at 875-76 (joint opinion of O'Connor, Kennedy & Souter, JJ.); Roe, 410 U.S. at 162.
145. See Robertson, supra note 62, at 1382.
146. Id. at 1381.
147. Id. at 1382.
148. Id.
149. Id. at 1382-83.
151. See Casey, 505 U.S. at 870 (joint opinion of O'Connor, Kennedy & Souter, JJ.) (stating that "the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy"); Roe, 410 U.S. at 163 (stating that "[w]ith respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability").
152. See Robertson, supra note 62, at 1382.
Amendment. Thus, a state may not formally enact statutes that place "a substantial obstacle in the path of a woman's choice." By prohibiting women from designating a donee, the state has eliminated a choice for women. Women, effectively, may not choose to conceive a fetus for the purpose of aborting and donating the fetal remains to a particular individual. Similarly, an already pregnant woman cannot later decide to end her pregnancy for the purpose of donating any fetal remains to a specific individual. Although the state interest in protecting women from undue pressure is arguably compelling, there are alternative methods to an outright prohibition of designation that would adequately fulfill this goal. With less restrictive alternatives available, States must not disregard their duty not to infringe upon a woman's right to abort.

VII. CONCLUSION

The prospects of fetal research offer a tremendous opportunity to enhance medical research and technology that will help save lives. The unique properties of fetal cells and the inability of medical science to recreate these properties in the laboratory make fetal tissue an invaluable resource. Increased use of fetal tissue in research and for transplantation will not have an adverse effect upon women, society's respect for life, or the moral worth of fetuses. The number of abortions will not increase, yet the number of lives saved or dramatically improved due to the increased use and study of fetal remains will increase exponentially. Although the government does not condemn fetal research, it does restrict it by preventing a woman from designating a donee to receive her aborted fetal remains. This restriction serves only to stunt the growth of medical research and infringe upon a woman's fundamental right to choose abortion. It removes an option that women should have to recover some positive feeling from what may otherwise be unpleasant circumstances. Although women should not be compensated in cash or kind for their fetal remains, they may receive the benefits of health for a

153. See Casey, 505 U.S. at 847, 851; see also U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.").
155. See Robertson, supra note 62, at 1382-83 ("Whether the state action focuses on events before or after the abortion, it has a direct impact on the abortion decision. . . . If the state cannot directly prescribe the acceptable reasons for abortion, it should not be able to limit the reasons for abortion indirectly by making designated donations of fetal tissue criminal.").
156. See id. at 1384 (listing "waiting periods" and "physicians' discretion to refuse donations if they believe the woman has been coerced" as alternatives to outright prohibition of designation).
157. See id.
friend, loved one, or total stranger. A woman’s decision to abort is never easy. It is a complex and emotionally draining evaluation that will remain with her for the rest of her life. It is a completely separate decision, however, from her decision to donate. A woman’s ability to designate a donee will not increase the number of abortions but increase the number of tissue donations from pregnancies that would have been aborted anyway. Accordingly, both the aborting mother and society may reap some benefit from an act that otherwise wastes an actual and potential resource.

The prohibition on designation of aborted fetal tissue should be eradicated because of the undue burden it places upon a woman’s decision to abort a pregnancy and the benefits to be reaped from the extensive use of fetal tissue in medical research and transplantation. Vanquishing the prohibition not only serves to protect the interests of women, but those of the fetus and society as well.

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