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FETAL TISSUE RESEARCH: STATE REGULATION OF THE DONATION OF ABORTED FETUSES WITHOUT THE CONSENT OF THE "MOTHER"

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INTRODUCTION

Much controversy surrounds the issue of fetal tissue experimentation on voluntarily aborted fetuses for the purpose of medical research and advancement.¹ This controversy involves many legal, ethical and moral dilemmas.² Among these dilemmas is the question of whether the law should permit a woman who decides to abort a fetus to subsequently consent to fetal tissue research on that fetus.³

Prior to 1985, hospitals performing abortions used a general consent form which gave them permission to dispose of the fetal remains in an appropriate manner.⁴ During this time, the issues

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¹. See Nikki M. C. Bell, Regulating Transfer and Use of Fetal Tissue in Transplantation Procedures: The Ethical Dimensions, 20 AM. J.L. & MED. 277, 278 (1994). Abortion is controversial and is the major constraint in the use of fetal tissue in medical research. Id. Anti-abortionists fear abortion will remain permanently legal if aborted tissues become medically useful and beneficial to society. Id. at 282.

². Nicolas P. Terry, 'Alas! Poor Yorick,' I Knew Him Ex Utero: The Regulation of Embryo and Fetal Experimentation and Disposal in England and the United States, 39 VAND. L. REV. 419, 425 (1986). Fetal research involves "difficult ethical, philosophical and legal questions regarding both our response to indicia of life and our legal definition of personhood." Id. Fetal tissue experimentation exacerbates the fear of anti-abortionists as did the decision in Roe v. Wade, 410 U.S. 113 (1973), because they may encourage more women to undertake abortions with the hopes of increasing the supply of fetuses for medical research. Id.

³. Gregory Gelfand & Toby R. Levin, Fetal Tissue Research: Legal Regulation of Human Fetal Tissue Transplantation, 50 WASH. & LEE L. REV. 647, 676 (1993). Allowing an aborting woman to consent to the organ retrieval from a fetus is problematic since the aborting woman, in most cases, chose to deny life to the fetus. Id. Some critics believe that an aborting woman waives her right to determine the disposition of a fetus once she elects to have the fetus aborted. Id.

⁴. Bell, supra note 1, at 289. Hospitals normally disposed of the fetal remains by cremation and burial. Id. Hospitals typically handled removed or-
surrounding the disposal of fetal remains received little or no media attention. Since then, many hospitals, and some states, have adopted protocol providing that the "mother" of the aborted fetus ultimately retains the legal right to determine whether the aborted fetus will be the subject of medical experimentation. The Uniform Anatomical Gift Act (the "UAGA") and various state and federal laws respecting fetal tissue research, essentially give the mother this right. The UAGA recognizes an aborting woman's right to determine the disposition of a fetus. This recognition is based on the theory that the aborting woman is in the best position to consent to such research and no other plausible decision-maker exists.

5. Id.


7. Gelfand & Levin, supra note 3, at 676. The decisional authority regarding the donation of fetal tissue resulting from an elective abortion ultimately rests with the woman aborting the fetus in accordance with the 1987 Uniform Anatomical Gift Act. Id.


9. See, e.g., ARK. CODE ANN. § 20-17-802(b)(2) (Michie 1991) (providing that "[n]o person shall perform any biomedical or behavioral research on any fetus born dead as the result of a legal abortion, or on any fetal tissue produced by an abortion, without the permission of the mother").


11. See Gelfand & Levin, supra note 3, at 676 (discussing who possesses the authority to donate a decedent's tissues or organs). After the mid-1970s, many states hastily enacted fetal tissue research laws to prohibit fetal tissue research. Gary L. Reback, Fetal Experimentation: Moral, Legal, and Medical Implications, 26 STAN. L. REV. 1191, 1207 (1973). This deterred the growth of fetal experimentation that occurred prior to the Supreme Court's decision in Roe v. Wade, 410 U.S. 113 (1973). Id. State legislatures incorporated the majority of these laws into their abortion laws, applying them only to aborted tissue. Marilyn J. Clapp, Note, State Prohibition of Fetal Experimentation and the Fundamental Right of Privacy, 88 COLUM. L. REV. 1073, 1073 (1988).


13. Id. The only "practical solution" in deciding the disposition of a fetus for research purposes is for the government to give the decisional authority to the aborting woman "as nature has." Id. The authors also state that although an argument can be made for requiring the father's consent, especially if the mother and father are married, little will be gained by requiring this paternal
This Comment analyzes the ethical and legal aspects of the donation of electively aborted fetuses for the purposes of fetal tissue research. It explores the reasoning behind lawmakers' decisions to vest the right of consent to fetal tissue research in aborting women. Moreover, this Comment examines various doctrines and legal principles which are intertwined with the issue of whether an aborting woman is indeed the best, or the only practical, person to consent to the disposition of an aborted fetus.

Part I discusses the history and purposes of fetal tissue research and the controversy surrounding this research. Part II presents an overview of the doctrine of informed consent and its inclusion in the UAGA relating to the donation of organs and tissues for research purposes. Part III discusses the effect of the UAGA's application to the donation of fetal tissue from elective abortions. Part III further asserts that the language of the UAGA does not effectively allow aborting women to consent to such donations. Part IV proposes that state enacted legislation regulating fetal tissue research is a reasonable alternative to affording an aborting woman the right to consent to the donation of fetal tissue for research purposes. In addition, Part IV argues that such legislation will not affect the constitutional rights of an aborting woman.

I. HISTORY AND PURPOSES OF FETAL TISSUE RESEARCH AND THE CONTROVERSY SURROUNDING THE RESEARCH

Scientists and medical practitioners have performed fetal tissue research for over fifty years. Fetal tissue research shows great potential for advancement in the treatment and cure of various diseases and in the area of tissue transplantation. However, much controversy surrounds this research because scientists obtain the majority of fetal tissue used in such research from elective abortions.

14. James E. Goddard, Comment, The NIH Revitalization Act of 1993 Washed Away Many Legal Problems with Fetal Tissue Transplantation Research But a Stain Remains, 49 SMU L. REV. 375, 383 (1996). Scientists have used fetal tissue for research in the United States since the 1930s. Id. However, it did not become the subject of public outcry until 1973 when Roe v. Wade legalized abortion and "researchers decapitated a dozen live fetuses and kept the fetal heads alive through artificial means." Id. (citing 410 U.S. 113 (1973)).

15. Id. at 381. Scientists promote and justify fetal tissue research because they recognize its potential to cure and improve the life of persons suffering from various diseases and disorders. Id. at 378.

16. Id. at 381. Researchers contend that it is essential that they use fetal tissue obtained from elective abortions to increase the likelihood of successful tissue transplantation. Id.
A. History and Purposes of Fetal Tissue Research

Fetal tissue research played an enormous role in the development of both the polio and rubella vaccines.\(^\text{17}\) Fetal tissue research has also been instrumental in developing and improving various prenatal diagnostic tests including amniocentesis,\(^\text{18}\) chorionic villus sampling,\(^\text{19}\) and ultrasound.\(^\text{20}\) Moreover, fetal tissue research proved to be beneficial to pregnant women, couples wishing to reproduce and even to the embryo itself.\(^\text{21}\)

Today, medical researchers suggest that fetal tissue transplantation\(^\text{22}\) may be useful in the cure or treatment of Alzheimer's disease, Huntington's chorea, spinal chord injuries, diabetes, leukemia, Down's syndrome, Tay Sachs disease, epilepsy, cancer and various other medical traumas.\(^\text{23}\) Because of this research, there is a dramatic increase in the demand for fetal tissue.\(^\text{24}\) Electively aborted fetal tissue is most conducive to successful fetal tissue
transplantation.\textsuperscript{25}

Since the legalization of abortion in 1973,\textsuperscript{26} medical researchers found that fetal tissue obtained from spontaneous abortions\textsuperscript{27} and ectopic pregnancies\textsuperscript{28} is generally inadequate for the purpose of fetal tissue transplantation.\textsuperscript{29} Elective abortions provide medical researchers with an almost limitless supply of fetal tissue.\textsuperscript{30} There is also a lower risk of infecting a tissue recipient with genetically-defective tissue.\textsuperscript{31} The controversy surrounding abortion, however, places obstacles in the way of this new medical technology.\textsuperscript{32}

\section*{B. The Controversy Surrounding Fetal Tissue Research}

Federal and state governments regulate the use of fetal tissue.\textsuperscript{33} Legislatures enacted laws that not only regulate fetal tissue

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\item Gelfand & Levin, \textit{supra} note 3, at 652. Theoretically, researchers could use fetal tissue obtained from spontaneous abortions and ectopic pregnancies in tissue transplantation. \textit{Id.} However, in practice, they do not. \textit{Id.}
\item Roe \textit{v. Wade}, 410 U.S. 113 (1973).
\item See \textsc{The American Medical Association Encyclopedia of Medicine} 690 (1989) (defining a spontaneous abortion as the loss of the fetus before the point of viability).
\item See \textit{id.} at 389 (defining ectopic pregnancy as a pregnancy which develops outside the uterus).
\item Bell, \textit{supra} note 1, at 279. Researchers have found the above mentioned sources of fetal tissue unsuitable. \textit{Id.} They reason that by the very nature of such sources, there is an increased probability that the tissue is defective and unusable. \textit{Id.} A National Institute of Health (NIH) spokesperson generously estimates that approximately twenty-four fetuses per year can be used for fetal tissue transplantation from ectopic pregnancies and miscarriages. \textit{Id.}
\item Gelfand & Levin, \textit{supra} note 3, at 658. Hospitals and clinics perform approximately 1.5 million elective abortions annually. \textit{Id.}
\item Goddard, \textit{supra} note 14, at 381. Only 3.8 percent of spontaneous abortions provide tissues capable of transplantation. \textit{Id.} at 381 n.45. Approximately 99 percent of ectopic pregnancies are associated with tubal hemorrhage which causes early organ death in fetuses, making the organs unsuitable for transplantation. \textit{Id.}
\item Bell, \textit{supra} note 1, at 281. In 1992, President Bush vetoed H.R. 2507 which proposed programs for various health research projects, including fetal tissue research. \textit{Id.} at 280. One of the President's reasons for vetoing the bill was “because of its (fetal tissue research using electively aborted fetuses) potential for promoting and legitimating abortion.” \textit{Id.} Subsequently, in January of 1993, President Clinton removed the ban on federal funding of fetal tissue research, stating that he intended to “free science and medicine from the grasp of politics, and give all Americans access to the very latest and best medical treatments.” \textit{Id.} at 281.
\item Andrews, \textit{supra} note 21, at 30. Generally, federal regulations defer to state laws with respect to fetal tissue research on aborted fetuses. \textit{Id.} However, in 1988, the Secretary of Health and Human Services instituted a moratorium on federal funding of research involving the use of fetal tissue from elective abortions. \textit{Id.}
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research, but also the donation of fetal tissue. The UAGA, and state laws in accordance therewith, regulate the donation of fetal tissue for the purpose of experimentation. Because lawmakers promulgated the UAGA prior to the advancement of fetal tissue research, many controversial issues arise with the UAGA's strict application to this type of research. One such issue is the focus of this Comment: who should consent to the donation of an aborted fetus for the purpose of fetal tissue experimentation?

Opponents of the use of fetal tissue from elective abortions argue that researchers should restrict the type of fetal tissue to fetal tissue obtained from sources other than elective abortions. This argument essentially lays the foundation for the controversy surrounding the issue of consent with respect to the donation of aborted fetal tissue. Fetal research adversaries fear that women who would usually be hesitant to have an abortion may be swayed toward choosing an abortion because of the possibility of the subsequent beneficial use of fetal tissue.

Those who oppose research on aborted fetuses contend that because a woman who chooses to have an abortion shows a disregard for the fetus, she should not, in turn, have any legal rights with respect to the fetus.

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34. Gelfand & Levin, supra note 3, at 668.
36. Gelfand & Levin, supra note 3, at 671.
37. Id. The drafters of the UAGA created the model act in 1968 to encourage organ donations from adults who made provisions for such donations upon their death. Id. The drafters did not contemplate donations arising from elective abortions. Id. The UAGA provides that the decisional-authority lies with both parents. Id. at 675. However, because of the practical effect of this provision, decisional-authority, with respect to elective abortions, rests solely with the aborting woman unless the father is available and objects to the donation. Id.
38. Goddard, supra note 14, at 385. Some opponents contend that the aborted fetus is a murder victim and since murderers are prohibited by law to consent to the donation of their victims' organs, the law should not allow an aborting woman to consent to the donation of the aborted fetus. Id. Other opponents of such research on electively aborted fetus argue that the aborting woman abandons her parental role and, therefore, the law should prohibit her from authorizing such research. Id.
39. Gelfand & Levin, supra note 3, at 660. Opponents contend that the law should not vest any rights in the aborting woman, including the right to consent to the subsequent donation of and experimentation on the fetus. Id. at 663. Opponents of abortion believe that some women may ultimately justify their decision to abort because of the lifesaving qualities of the fetal tissue subsequently obtained therefrom. Id.
40. Andrews, supra note 21, at 48. A national commission studying fetal research acknowledged that a constitutional violation may occur when "maternal disqualification" is the basis for allowing a woman to exercise her right to an abortion. Id. See also Keith v. Daley, 764 F.2d 1265, 1271 (7th Cir. 1985) (restating that a woman's decision to abort does not in turn make her an unfit mother for custody purposes if the abortion is unsuccessful and
tal tissue also argue that any laws requiring the consent of the aborting woman with respect to fetal research are inappropriate. In contrast, it is argued that regulations giving consent authority to the aborting woman vest in her the same rights afforded to women who choose to deliver their children and, in effect, give the fetus a moral status similar to that of a child. In response to this argument, adversaries of fetal research on voluntarily aborted fetuses contend that the aborting woman should not have dispositional authority comparable to that of a mother who does not choose to abort because of the inevitable conflict of interest which arises.

Advocates of fetal tissue research argue that if this research proves to be as successful as predicted, elective abortions could ultimately save as many lives as are lost through the abortions. the child is in fact born).

41. Andrews, supra note 21, at 48.
42. Sharon Nan Perley, Note, From Control Over One's Body to Control Over One's Body Parts: Extending the Doctrine of Informed Consent, 67 N.Y.U. L. Rev. 335, 354 (1992). Perley recognizes two possible rationales which lawmakers use in vesting in the aborting woman the right to consent to the donation of the fetal tissue: (1) the fetus has a moral status similar to that of a child and the woman considers the interests of the aborted fetus in making such a donation; or, (2) the fetus does not have any status higher than that of human tissue and the woman, therefore, has a dignitary interest in what happens to her excised body tissue. Id.

43. Id. In consenting to the fetal research, the aborting woman represents the fetus to the same extent as a mother of an already-born child. Id. Federal regulations which allow the aborting woman to consent to the donation of the fetal tissue for medical research acknowledge, de facto, that the fetus, if capable of consenting, would have an interest in whether or not researchers used its tissue. Id.

44. Gelfand & Levin, supra note 3, at 676-77. Ethicists argue that a woman who chooses to abort a fetus should not retain any dispositional authority, including the right to consent to fetal research, over the fetal remains because she intentionally aborted her fetus. Id. at 677. The authors argue that there is no conflict of interest because when the abortion is completed, the mother is no longer obligated to bear the fetus and has nothing to gain. Id. Any effort to deprive the aborting woman of dispositional authority over the fetus may really be an effort to punish her for aborting. Id.

45. Id. at 650. Scientists estimate that transplantation of fetal tissue could aid approximately one million Parkinson's victims; two and one half to three million Alzheimer's disease sufferers; 25,000 Huntington's disease patients; 600,000 Type I diabetics; 400,000 stroke victims; and several hundred thousand persons who have suffered spinal chord injuries. Id. Medical practitioners are currently conducting fetal tissue transplantation research for the possible treatment of other diseases including sickle cell anemia, leukemia, and Acquired Immune Deficiency Syndrome (AIDS). Id.

46. Id. at 661. Proponents of the use of electively aborted fetal tissue in research argue that those opposed to abortions for ethical reasons should be willing to benefit from abortions that they ultimately cannot prevent. Id. Considering the benefits of fetal tissue testing, a delay in the effect on the abortion issue for a couple of decades does not seem like a plausible reason to oppose fetal tissue research on ethical grounds. Id. at 661-62.
Those in favor of fetal tissue research on electively aborted fetuses also contend that the decision to abort and to subsequently donate the fetal tissue for research are two separate and distinct choices. Proponents, therefore, do not recognize a conflict of interest between the woman and the aborted fetus. The decision to donate the fetus occurs after the pregnancy ends and the fetus is aborted. Fetal research supporters conclude, therefore, that at this point the fetus has no rights independent of the aborting woman. Proponents also support their position by citing common law, whereby the courts traditionally gave dispositional authority over a dead body to family members. Federal and state statutes also granted the next of kin the right to choose to donate a dead body for medical research. Notwithstanding the debate surrounding abortion in connection with fetal tissue research, the UAGA grants an aborting woman the right to consent to donate a fetus for medical research purposes. The UAGA grants this right by obtaining the aborting woman's informed consent.

II. THE DOCTRINE OF INFORMED CONSENT AND THE UNIFORM ANATOMICAL GIFT ACT

The doctrine of informed consent acknowledges a person's right to control what happens to his body during his life and upon his death. The UAGA incorporates this doctrine into its provisions, and it requires a physician to obtain consent before researchers use a decedent's organs or tissues for research purposes.

47. See Jonathan Hersey, Comment, Enigma of the Unborn Mother: Legal and Ethical Considerations of Aborted Fetal Ovarian Tissue and Ova Transplantations, 43 UCLA L. REV. 159, 201 (1995) (responding to the argument that a woman's right to consent to the donation of aborted fetal tissue comes into conflict with her right to obtain an abortion). Hersey notes that opponents of fetal tissue research argue that there is a conflict of interest, because the fetus is alive and has rights which can conflict with the aborting mother. Id.

48. Id.
49. Id. at 201-02.
50. Id.
51. Id. The right of the family to provide burial for a corpse has never interfered with the family's right to donate the organs of the corpse prior to burial or cremation. Id.
52. 8A U.L.A. 30.
53. Id.
54. Perley, supra note 42, at 338. The courts have not extended the doctrine of informed consent to require a physician to inform a patient of the proposed use of any of the patient's excised body parts for research purposes. Id. at 337.
55. See 8A U.L.A. 47 (providing that an individual may consent to the donation of his organs or tissues prior to his death); see also id. at 40-41 (providing that the next of kin may consent to the donation of a decedent's organs or tissues); Perley, supra note 42, at 353 (noting that the UAGA recog-
Section A discusses the doctrine of informed consent. Section B examines the use of this doctrine in the UAGA with regard to an individual's right and the next of kin's right to make an anatomical gift. Finally, Section C addresses federal and state laws which supplement the UAGA in connection with the donation of fetuses for research purposes.

A. Doctrine of Informed Consent

Common law recognizes the doctrine of informed consent. As a result of this recognition, federal and state statutes incorporate the doctrine's theories. The doctrine is based on an individual's interest in bodily integrity and his right to self-determination. Through the doctrine of informed consent, medical patients or research subjects assess the risks, benefits, and purposes of a particular medical procedure before submitting to it. Under the doctrine, neither a physician nor a practitioner may take any action until they fully inform the patient and the patient gives consent. Originally, if a physician failed to receive a patient's informed consent, the patient had a cause of action for battery. The majority of courts have subsequently changed their view on the basis for li-
ability, finding that failing to receive a patient's informed consent is actually a breach of a professional duty. The basis for this cause of action, therefore, switched from battery to negligence.

Federal regulations extend the doctrine of informed consent to human experimentation. In recognizing the doctrine of informed consent, courts acknowledge that individuals have an interest in their excised organs and tissues and that some individuals would object to the use of their excised organs or tissues for medical research purposes. The UAGA, by incorporating the doctrine of informed consent, extends the doctrine even further by requiring an individual’s consent to use his organs or tissues upon his death.

B. The Uniform Anatomical Gift Act

The UAGA incorporates the doctrine of informed consent

61. Perley, supra note 42, at 341. For a patient to recover, the courts required him to show: (1) the physician failed to fully inform him of the risks associated with the procedure; (2) his injury was linked to the procedure; and (3) had he been informed of the risks prior to the procedure, he would not have consented. Id. Courts generally apply an objective standard to determine causation. Id. Therefore a patient must show that a reasonable person, while in the same situation as the patient, would not have consented to the questionable procedure. Id. at 342.

62. See Salgo v. Stanford Univ., 317 P.2d 170, 181 (Cal. 1957) (holding that the failure to fully inform a patient, and subsequently receive the consent of the patient, constituted a breach of a professional duty to treat a patient with due care); see also McNichols, supra note 60, at 715 (noting that courts began to recognize "inadequate disclosure" as another type of malpractice comparing it to negligent failure to warn cases).

63. Perley, supra note 42, at 342. The system of rules regulating human experimentation utilizes the doctrine of informed consent as a means to prevent injury. Id.

64. But cf. Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 489 (Cal. 1990) (holding that the plaintiff did not retain property interests in his excised cells and that he could only state a claim for breach of informed consent).

65. 8A U.L.A. 47. Under the UAGA, to determine whether an individual is an organ donor, the following procedure must be followed:

On or before admission to a hospital, or as soon as possible thereafter, a person designated by the hospital shall ask each patient who is at least 18 years of age: "Are you an organ donor or tissue donor?" If the answer is in the affirmative the person shall request a copy of the document of gift. If the answer is negative or there is no answer and the attending physician consents, the person designated shall discuss with the patient the option to make or refuse to make an anatomical gift. The answer to the question, an available copy of any document of gift or refusal to make an anatomical gift, and any other relevant information, must be placed in the patient’s medical record.

Id. Under the UAGA, a “document of gift” is defined as “a card, a statement attached to or imprinted on a motor vehicle operator’s or chauffeur’s license, a will, or other writing used to make an anatomical gift.” Id. at 30.

66. Congress promulgated the UAGA in 1968 to provide a set of guidelines
into its provisions. All fifty states and the District of Columbia adopted the UAGA, and, in 1987, several states adopted an amended version of the Act. Both versions of the UAGA similarly govern tissue and organ donation for therapeutic and research purposes from all dead humans including aborted fetuses.

Under the UAGA, an adult may consent to the donation of his organs or tissues upon his death. In accordance with the doctrine of informed consent, the UAGA also provides that the next of kin may make an anatomical gift of the organs of a decedent. The UAGA defines decedent as a “deceased individual and includes a stillborn infant or fetus.”

If an individual, prior to his death, neither consents to nor objects to the donation of his organs, the decisional authority, or the right to consent to the donation of the decedent’s organs or tissues, passes to the next of kin. Common law established such dispositional authority. Under common law, family members of a decedent have “quasi-property” rights to a decedent’s remains.

In order to promote anatomical gifts within the United States. Hersey, supra note 47, at 173.

67. 8A U.L.A. 47. Prior to the formation of the UAGA, very little legislation governed organ donation, and what legislation did exist was ambiguous and contradictory. Hersey, supra note 47, at 173.

68. Id. at 174.

69. Gelfand & Levin, supra note 3, at 671.

70. Under the UAGA, an individual has the right not only to consent to the donation of his organs or tissues, but also to designate to whom they may be donated and for what purposes. 8A U.L.A. 47.

71. See also Perley, supra note 42, at 353 (recognizing a person’s dignitary interest by allowing a person the right to donate his organs and designate the recipient and purpose of the donation).

72. Under the UAGA, an “anatomical gift” is defined as “a donation of all or part of a human body to take effect upon or after death.” 8A U.L.A. 29.

73. 8A U.L.A. 40. See also supra note 55 and accompanying text for a discussion on decisional authority respecting the donation of a decedent’s organs or tissues.

74. As used in the UAGA, “decedent” means “a deceased individual and includes a stillborn infant or fetus.” See 8A U.L.A. 29-30.

75. See 8A U.L.A. 40 (discussing the UAGA’s hierarchical system of consent).

76. Philippe Ducor, The Legal Status of Human Materials, 44 DRAKE L. REV. 195, 229 (1996). Originally, American courts adopted the “no property rule” derived from the British common law with regard to possessory rights in dead bodies. Id. at 228. Claims by decedent’s families instigated the formation of the law concerning biologically dead bodies. Id. at 229.

77. Id. Courts confine the extent of these “quasi-property” rights to a certain bundle of rights including the right to possess and guard the decedent’s remains. Id. Other rights included within the scope of these “quasi-property” rights were:

the right to have the corpse remain in its final resting place, the right to have it buried where the closest relative wants, the right to refuse an autopsy, the right to prevent the removal of body parts, and the right to recover damages for any outrage, indignity, or injury to the body of the
Traditionally, courts have given these rights to the next of kin for two purposes. First, the public health requires the speedy burial of a corpse. Moreover, the relatives usually have an emotional interest in the decedent and guarantee an expedited burial. Second, the relatives of a decedent generally receive some benefit from the decedent's estate. Therefore, for distributional reasons, the law logically confers the responsibility of burial to the next of kin.

The UAGA adds to the bundle of "quasi-property" rights in a dead body by giving the decedent's relatives the right to dispose of the dead body through means other than burial. The UAGA, in effect, gives the relatives the right to act as the decedent's "proxy" in making an anatomical gift when the decedent leaves no directive concerning his remains. The UAGA provides a hierarchical system of consent which divides the next of kin into classes. Un-
under this system, the donation of a fetus will be effected by the consent of “either parent.”

According to a provision of the UAGA, if both parents are available, one parent is allowed to object to the donation by withholding their consent. The UAGA, however, does not distinguish between the donation of fetuses resulting from spontaneous abortions and ectopic pregnancies, and the donation of fetuses resulting from elective abortions. Because of the sensitive nature of the abortion issue and its connection to fetal tissue research, federal and state legislatures have enacted laws which supplement the UAGA, thus providing additional regulation of fetal tissue research.

C. Federal and State Law

In addition to the UAGA, federal and state legislatures have also embraced the doctrine of informed consent. The legislatures adopted laws which include consent provisions and regulate the donation of and research on fetal tissue. In 1973, the National Institute of Health (the “NIH”) proposed guidelines for fetal tissue research. These guidelines assisted in the formation of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research (the “Commission”). In 1975, Congress passed laws created by the Commission to regulate fed-

87. Gelfand & Levin, supra note 3, at 672. Because a fetus is not married nor has children, “either parent” will effectuate the donation. Id. at 672 n.146. The consent of one parent and the non-objecting or non-notification of the other is also needed to effectuate the donation. Id. at 672. However, the father cannot be expected to object to the donation if he is not notified. Id. There does not currently appear to be a notification requirement in the UAGA. Id.

88. See 8A U.L.A. 41 (stating that an anatomical gift may not be made if the person in the class proposing to make the anatomical gift knows of an objection to the making of the gift by another member of the same or prior class).

89. See 8A U.L.A. 29-30 (including stillborn infants or fetuses within the definition of “decedent”).

90. See generally Hersey, supra note 47, at 169-81. (noting that currently federal regulations do not prohibit the use of aborted fetuses for fetal research). To some extent federal law and some state laws require consent of the aborting woman to the donation of fetal tissue. Id. Federal laws extend only to research funded by the federal government. Cory Zion, The Legal and Ethical Issues of Fetal Tissue Research and Transplantation, 75 OR. L. REV. 1281, 1289-91. However, the stated adopted UAGA regulates fetal tissue research at the state level and applies to any research regardless of whether it is federally funded. Id.

91. Hersey, supra note 47, at 170. Concerns that fetal research would increase the number of abortions prompted the federal regulation covering this research. Id.

92. Id. The Commission discussed the advantages and disadvantages of federally funded fetal tissue research. Id. at 171. It also reviewed the testimony and philosophical opinions about the ethics involved. Id.
erally funded research on fetal tissue. The Commission determined, inter alia, that in order for fetal tissue research to qualify for federal funding, the researchers must first obtain the informed consent of the mother along with the non-objection of the father. However, for fetal tissue research which is not federally funded, federal laws defer to state and local laws.

All fifty states have adopted a version of the UAGA. Approximately half of the states, however, have chosen to supplement the UAGA with laws that specifically address issues revolving around the use of fetal tissue for research. Of these states which have chosen to further regulate the use of fetal tissue research, roughly half have laws requiring the consent of the aborting woman prior to the donation and subsequent use of the fetus. Although these supplementary laws exist, the controlling law with respect to the donation of fetal tissue for research purposes is still the state-adopted UAGA.

Because lawmakers created the UAGA prior to the legalization of abortion and the revolution of fetal tissue research, the UAGA does not take into consideration the donation of fetuses from elective abortions. The UAGA assumes that both parents

93. Id.
94. Id. at 171. The Commission also determined that for fetal tissue to qualify for federal funding the research must have the approval of local institutional review boards. Id.
95. Id.
96. See 45 C.F.R. § 46.210 (1996) (providing that “[a]ctivities involving the dead fetus, macerated fetal material, or cells, tissue, or organs excised from a dead fetus shall be conducted only in accordance with any applicable state or local laws regarding such activities”).
97. See supra note 8 for a breakdown of the number of states which adopted the UAGA in its original and amended forms.
98. Helen M. Maroney, Bioethical Catch-22: The Moratorium on Federal Funding of Fetal Tissue Transplantation Research and the NIH Revitalization Amendments, 9 J. CONTEMP. HEALTH L. & POL’Y 485, 490 (1993). These laws regulate experimentation, disposition, sale and transportation of fetal tissue used in medical research. Id. Generally, these laws are restrictive in nature and pertain to the use of fetal tissue obtained from elective abortions. See Zion, supra note 90, at 1289-91; see also Hersey, supra note 47, at 179 (discussing various state laws which restrict experimentation on fetal remains). See, e.g., ARIZ. REV. STAT. ANN. § 36-2302 A (West 1993) (prohibiting the use of “[a]ny” human fetus or embryo resulting from an induced abortion . . . for any medical experimentation . . . except as is strictly necessary to diagnose a disease or condition in the mother of the fetus . . . and only if the abortion was performed because of such disease or condition”).
100. Maroney, supra note 98, at 489. Maroney also states that it appears that hospitals and clinics performing abortions are failing to effectuate the donation of fetal tissue in accordance with the UAGA. Id. at 489-90.
101. Gelfand & Levin, supra note 3, at 671. The authors state that the application of the UAGA to organ donation of electively aborted fetuses gives
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will be known and available to give their consent. In practice, however, this provision does not effect fetuses from voluntary abortions. If the father is not available to give his consent prior to the donation of an aborted fetus, the hospital or clinic simply considers him unavailable. For all practical purposes, they deem the consent of the aborting mother to be sufficient. Here lies the problem with regard to the application of the UAGA to electively aborted fetuses.

III. THE EFFECT OF THE APPLICATION OF THE UAGA TO ABORTED FETAL TISSUE

The UAGA does not take into consideration the effect of elective abortions or the fetal tissue resulting therefrom. Hence, lawmakers interpreted the UAGA to imply that doctors should afford an aborting woman the decisional authority with regard to the disposition of fetal remains. The UAGA provides that either parent of the decedent may consent to the donation of the decedent’s organs or tissues with the non-objection of the other parent. However for practical reasons, the doctor will give an aborting woman alone this decisional authority in accordance with the provisions of the UAGA and applicable state laws. To some, however, simply affording such a right because it is the only “practical” solution seems inappropriate and to some extent disturbing. Before lawmakers automatically grant this right to the aborting woman, however, it is necessary to discern whether the UAGA applies to the donation of aborted fetal tissue. Section A discusses whether the common law purposes for granting the next of kin dispositional authority under the UAGA extend to the donation of electively aborted fetuses. Section B analyzes the UAGA’s language and concludes that the UAGA does not include an aborting woman as a potential donor of fetal remains.

102. Id. at 672. The UAGA states that “either parent” of the decedent may make an anatomical gift. 8A U.L.A. 40.
103. Id. The consent of one parent and the non-objection or non-notification of the other is needed to effectuate donation of an electively aborted fetus. Id. The father cannot be expected, however, to object to the donation if he is not notified. Id. There does not appear to be a notification requirement in the UAGA. Id.
104. Id.
105. Id. at 669.
106. Id.
107. See 8A U.L.A. 41 (explaining why one parent cannot donate a decedent’s organs if the other parent objects).
108. Gelfand & Levin, supra note 3, at 672.
109. See supra notes 38-44 and accompanying text for a discussion on arguments against the use of electively aborted fetal tissue for research purposes.
A. Purposes for the UAGA Granting the Family the Right to Consent to Donation

The UAGA incorporates into its provisions the common law reasoning for granting the right of dispositional authority over a dead body to the next of kin. The common law view protected the public health and the financial interests of the family and the decedent. These bases for granting the next of kin dispositional authority, however, are now unnecessary and inapplicable with respect to electively aborted fetuses.

The first reason the common law afforded the next of kin this dispositional authority was to safeguard the public health. However, this safeguard is not needed with respect to aborted fetuses, because clinics properly dispose of fetal remains in accordance with state laws. Several of these laws provide that the fetus be disposed of in a sanitary and appropriate manner. The states enacted these laws to automatically safeguard the public health. Because state laws provide for the disposal of fetal remains, it is not necessary to grant an aborting woman the common law dispositional authority, traditionally granted to the next of kin, over the fetal remains.

The second reason for affording the next of kin dispositional authority under the common law was because the next of kin were likely to take responsibility for the financial affairs of the dece-

110. See Ducor, supra note 76, at 229 (stating that the common law affords dispositional authority to the next of kin because of claims to the dead bodies by the decedent’s family).
111. Id. at 231 (discussing the donative authority of the next of kin under the UAGA).
112. Id. Aside from allowing the next of kin to make a donation of the decedent’s organs or tissues only when the decedent has not previously made his wishes known, the UAGA grants quasi-property rights to the next of kin in order to bury the deceased. Id.
113. Gelfand & Levin, supra note 3, at 676. Following an elective abortion, the woman leaves the aborted fetus with the hospital or clinic in which the abortion was performed and it is disposed of therefrom. Id.
114. Terry, supra note 2, at 427. Terry notes that various disposal statutes may be found unconstitutional if such statutes are found to unduly burden or “otherwise chill” a woman’s right to have an abortion. Id. at 428.
115. Id. Courts recognize the inherent interest in state’s need to dispose fetal remains; see, e.g., City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 451 & n.45 (1983) (finding that, although the state had a legitimate interest in enacting the disposal statute, the statute was impermissibly vague).
116. Terry, supra note 2, at 428. A federal court suggested that statutes which require that the hospital or clinic notify an aborting woman of the means of disposal, or requiring her to designate the means of disposal, may be constitutionally defective if they impose a direct burden on her abortion decision. Id. at 429; see also Margaret S. v. Edwards, 488 F. Supp. 181, 222 (E.D. La. 1980) (holding that the state’s disposal statute imposed psychological burdens on the pregnant woman’s decision to have an abortion).
dent's estate and would be included as beneficiaries to the estate. Therefore, they would assure that the last wishes of the decedent were granted.\textsuperscript{117} It is easy to assess that this rationale is without effect with respect to aborted fetuses. A aborted fetus does not have any last wishes. A aborted fetus has not acquired any property and therefore does not have an estate or beneficiaries to look after that estate. Unlike the next of kin of a decedent, the aborting woman will not receive any economic benefit from the death of the fetus.\textsuperscript{118}

By allowing relatives to consent to the donation of a decedent's remains,\textsuperscript{119} the UAGA incorporates the common law purposes for affording dispositional authority to the next of kin. Because the common law reasons for affording this authority are now without effect, with respect to aborted fetuses, those interpreting the UAGA should not extend such rights to aborting women. It can also be argued that, as the UAGA currently reads, a woman who electively aborts a fetus is not a potential donor.

\textbf{B. Language of the UAGA}

States have recently interpreted the UAGA to afford aborting women the right to consent to the donation of electively aborted fetuses.\textsuperscript{120} The UAGA does not, however, by its very own language, necessarily afford her this right.\textsuperscript{121} Before extending the UAGA to include a woman's donation of an electively aborted fetus, it is necessary to find such language in the UAGA which conclusively permits such a donation. An argument can be made that the language of the UAGA does not include a woman who electively aborts a fetus as not a potential donor.

Under the UAGA, a person can make an anatomical gift of a fetus.\textsuperscript{122} The UAGA provides that "either parent" may consent to the making of an anatomical gift.\textsuperscript{123} In reading the language of this section and applying it to electively aborted fetuses, the first as-

\begin{itemize}
\item \textsuperscript{117} See Ducor, \textit{supra} note 76, at 229 (stating that courts have defined "quasi-property rights" in a dead body as the bundle of rights associated with possessing and guarding the decedent's remains).
\item \textsuperscript{118} Bell, \textit{supra} note 1, at 282; \textit{see also} 8A U.L.A. 58 (prohibiting an aborting woman from receiving compensation for the fetal tissue by providing that "a person may not knowingly, for valuable consideration, purchase or sell a part for transplantation or therapy, if removal of the part is intended to occur after the death of the decedent").
\item \textsuperscript{119} See \textit{supra} note 86 and accompanying text for a discussion on the dispositional authority of the next of kin under the UAGA.
\item \textsuperscript{120} Gelfand & Levin, \textit{supra} note 3, at 671-72.
\item \textsuperscript{121} \textit{See generally} id. (discussing the effect of the application of the UAGA to elective abortions).
\item \textsuperscript{122} \textit{See} 8A U.L.A. 40.
\item \textsuperscript{123} \textit{See} id. (discussing which "class" under the UAGA will effectuate the donation of a fetus).
\end{itemize}
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assumption requires that the aborting woman is in fact a "parent" of the aborted fetus. Section 3(b)(2) of the UAGA also provides that "either parent" may not make an anatomical gift if "the [parent] proposing to make an anatomical gift knows of a refusal or contrary indications by the decedent." This language makes a second assumption that, because the fetus is incapable of consenting to or refusing to make such a gift, the aborting woman will act in its best interest in consenting to the donation.

Because the UAGA fails to define "parent," the first assumption needed to apply the UAGA to electively aborted fetuses is that the aborting woman is indeed a "parent." For the first assumption, the "parent," who carries the fetus, would have to be the "mother." The legal definition of "mother" is a woman who has borne a child, a female parent, and includes maternity during the pre-birth period. In applying this definition, one can easily deduce that a woman who chooses to abort a fetus is not, in the traditional meaning of the word, a mother. She did not intend to carry the fetus to term nor has she borne a child. Although the definition of mother also includes the pre-birth period, there cannot be a "pre-birth" if there is never going to be a "birth." However, it can be argued that before the pregnant woman makes the decision to abort, there is a pre-birth period and that the woman is therefore, for the purposes of the UAGA, a parent. This argument, however, is flawed because the decision to donate the fetus is made subsequent to the decision to abort. At this point in time, when the definitions under the UAGA become applicable, the intent of the woman to not carry the fetus to term is apparent.

For purposes of the argument, if it is assumed that the aborting woman is the parent of the aborted fetus, a second assumption must still be made for the UAGA to apply to electively aborted fetuses. In applying the UAGA to electively aborted fetuses, the aborting woman must not know of any objections on the part of the fetus to the anatomical gift. This assumption seems

124. See id. at §§ 40-41 (providing that the next of kin may not make an anatomical gift of the decedent's remains if they know of any indications of the decedent to the contrary).
125. Maroney, supra note 98, at 515.
126. Bell, supra note 1, at 283.
127. 8A U.L.A. 40.
129. Bell, supra note 1, at 283. In aborting the fetus the mother has chosen not to become a parent. Id. Since she made an affirmative decision to terminate the pregnancy, she may very well resent being referred to as a mother or parent. Id.
130. Maroney, supra note 98, at 500.
131. Gelfand & Levin, supra note 3, at 671. The UAGA is inapplicable to donations from live persons. Id.
132. Bell, supra note 1, at 283.
absurd because the fetus is incapable of either objecting or consenting.\textsuperscript{133} The language of the UAGA also provides, however, that "either parent" of the decedent is prohibited from making the anatomical gift if they know of contrary indications of the decedent.\textsuperscript{134}

By allowing either parent to consent to the anatomical gift of a fetus, the UAGA assumes that the parent of the decedent will act in the best interest of the decedent.\textsuperscript{135} It seems natural to assume that a mother, or a pregnant woman with every intention of carrying a fetus to term and delivering a child, would necessarily act in the best interests of her child or fetus.\textsuperscript{136} However, allowing a woman who aborted a fetus to subsequently act as agent for the fetus, and making the assumption that the woman is capable of acting in the best interests\textsuperscript{137} of the fetus, does not seem so natural.\textsuperscript{138} The response to this statement is that just because a woman chooses to abort a fetus does not mean she necessarily shows a disregard for the fetus, nor does she extinguish any rights she may possess.\textsuperscript{139} Therefore, the law should allow her to subsequently act as agent for the fetus for the purposes of the UAGA.\textsuperscript{140} The laws fetal tissue research potentially implicates are currently unclear and contradictory with regard to what dispositional rights, if any, a woman may have over the aborted fetal remains.\textsuperscript{141} However, until the law establishes such rights, a reasonable alternative to the aborting woman as the vicarious decision-maker in the donation process is necessary to promote the advancement of fetal tissue research.

\begin{itemize}
\item \textsuperscript{133} \textit{Id.} Evidence of a fetus' consent or objection to the donation of its tissue does not exist. \textit{Id.}
\item \textsuperscript{134} Gelfand & Levin, \textit{supra} note 3, at 672. Either parent will effectuate the donation of an anatomical gift. \textit{Id.} The consent of one parent and the non-objection or non-notification of the other is also needed to effectuate the donation. \textit{Id.; see also} 8A U.L.A. 41 (stating that an anatomical gift may not be made if the person in the class proposing to make the anatomical gift knows of an objection to the making of the gift by another member of the same or prior class).
\item \textsuperscript{135} Maroney, \textit{supra} note 98, at 515.
\item \textsuperscript{136} Gelfand & Levin, \textit{supra} note 3, at 676.
\item \textsuperscript{137} \textit{See generally} Bell, \textit{supra} note 1, at 284-85 (discussing the traditional models of proxy decision in connection with the UAGA).
\item \textsuperscript{138} \textit{Id.} at 283. It is debatable whether an aborting woman indicates that she has no further interests in a fetus, let alone an interest in acting as agent for a fetus whose life she chose to terminate. \textit{Id.}
\item \textsuperscript{139} \textit{Id.}
\item \textsuperscript{140} \textit{See} Perley, \textit{supra} note 42, at 354 (stating that the right to consent to the donation of fetal tissue should vest with the aborting woman because the fetus has a moral status similar to a child and the fetus is human tissue and part of the woman's body).
\item \textsuperscript{141} Terry, \textit{supra} note 2, at 432. The law is unclear as to any possessory rights to the aborted fetus in the event of non-disposal. \textit{Id.}
\end{itemize}
IV. REASONABLE ALTERNATIVE TO AN ABORTING WOMAN'S CONSENT TO DONATION OF FETAL TISSUE

State legislatures should regulate the use of fetal tissue in medical research by enacting legislation separate and distinct from the UAGA. Currently, the states provide statutes which regulate the disposal of aborted fetuses.142 States have the authority to incorporate into such statutes a provision which would allow the state the option of using the fetal tissue, without the consent of the aborting woman, for the purpose of maintaining and improving the public health.143 If this authority is used, the states could then permit researchers to use fetal tissue in research for the sole purpose of advancing medical technology to promote the health of the general public.

The government could police the endeavor by requiring researchers, hospitals and clinics involved in the research to be licensed by the state. The licensing requirement would allow the state to monitor the transfer of aborted fetal tissue. This proposed provision could also prohibit hospitals and clinics from receiving any compensation for the transfer of fetal tissue to ensure the integrity of the research. A state should also require that researchers petition the state for a research license. The researchers would submit proposals to a state-created review board indicating the methods, purposes, and overall benefits of such research. If these proposals meet the state's standards, a petitioner would become licensed and could then proceed with the proposed research.

States will be promoting the growth of valuable research144 and a legitimate state interest145 by including the proposed provision in their disposal statutes. The proposal would necessarily do away with the requirement that an aborting woman consent to the donation of fetal tissue prior to researchers using such tissue.146

142. Id. at 427. Following Roe v. Wade, states enacted laws addressing the disposal of fetuses from elective abortions. Id. at 427-29; see, e.g., FLA. STAT. ANN. § 390.001(7) (West 1993) (providing that "fetal remains shall be disposed of in a sanitary and appropriate manner in accordance with standard health practices, as provided by rule of the Department of Health and Rehabilitative Services").

143. See Terry, supra note 2, at 428 (noting that at common law, a state's interest in maintaining the public health included the disposal of dead bodies); see, e.g., Wyeth v. Thomas, 86 N.E. 925, 927 (1909) (holding that there is no question that the state has the power to exercise control over the disposal of the dead).

144. See supra notes 17-23 and accompanying text for a discussion on the benefits of fetal tissue research.

145. See Terry, supra note 2, at 428 (stating that when the state regulates the disposal of dead bodies, it maintains the public health).

146. See Bell, supra note 1, at 283. The states ultimately have a legitimate interest in the effect of the transfer of aborted fetal tissue on the public in general and ensuring that fetal tissue research does not become commercialized. Jacquelyn F. Sedlak, Fetal Tissue Transplantation: Regulating the
By eliminating the consent requirement, states will eliminate the possibility of any incentive for a woman to abort for monetary gain, any incentive of a health practitioner encouraging abortion for the purposes of advancing their own research, and any incentive of a woman to abort in an effort to donate the tissue to a specified person or research endeavor. By not requiring her consent, a provision such as the one proposed, will not violate her fundamental right to privacy, which includes a woman’s right to terminate a pregnancy.

Currently, courts hold that any law which creates an undue burden on a woman’s decision to have an abortion is unconstitutional. Courts also find that certain statutes which require a woman to determine the method of the aborted fetus’ disposal continue to impose an undue burden on her. As with the majority of current fetal disposal statutes, the proposal will not require any decision on the part of the aborting woman with respect to the means of disposal. Therefore, the proposal does not impose an undue burden on her decision to abort. The proposed provision is neutral as to the issue of abortion, and lawmakers will not promulgate the provision to dissuade pregnant women from seeking an abortion. Since the current UAGA ineffectively regulates the

147. Id. at 73.
148. Zion, supra note 90, at 1286.
149. Sedlak, supra note 146, at 77.
150. See June Coleman, Playing God or Playing Scientist: A Constitutional Analysis of State Laws Banning Embryological Procedures, 27 PAC. L.J. 1331, 1363 (1996) (stating that “[f]undamental rights should include liberty interests which society has traditionally protected, according to the plurality opinion”); see also Michael H. v. Gerald D., 491 U.S. 110, 122-24 (1989) (recognizing the right to privacy in several areas, including reproductive choice, marital relationships, family relationships, child rearing and education).
151. See Roe v. Wade, 410 U.S. 113, 153-54 (1973) (holding that the state’s interest in a fetus prior to viability does not outweigh a woman’s interest such that an abortion may be prohibited).
154. See Margaret S. v. Edwards, 488 F. Supp. 181, 222 (E.D. La. 1980) (holding that the state’s disposal statute imposed psychological burdens on the pregnant woman’s decision to have an abortion). See also Terry, supra note 2, at 429 (discussing the holding in Margaret S. v. Edwards).
155. See Pacer, supra note 152, at 307 (noting that the Court in Roe v. Wade acknowledged that a state could interfere with a fundamental right for the purposes of pursuing a value-neutral health objective).
donation of aborted fetal tissue for medical research, a provision such as the one proposed can effectively regulate the research with a consent requirement for the sole purpose of promoting the public health through the use of new medical technology.

CONCLUSION

Traditionally, the common law vested in the next of kin the right to dispose of a dead body. The UAGA fails in its attempt to extend this right to aborting women for the purposes of donating fetal remains for research. Due to the UAGA's language and its intended purposes, the UAGA affords an aborting woman the right to consent. Lawmakers have only applied the UAGA to the donation of aborted fetal tissue in an effort to facilitate fetal tissue research. The states currently have statutes which regulate the disposal of aborted fetal remains. States can effectively regulate aborted fetal tissue research by incorporating into such statutes a provision whereby the states can regulate aborted fetal tissue without a woman's consent. The provision would provide a state with the power to determine if the tissue will be used in research for the benefit of the public's health and will not impose an undue burden on a woman's decision to obtain an abortion.

156. See generally Gelfand & Levin, supra note 3, at 671-72 (discussing the ineffective application of the UAGA to aborted fetal tissue).