



## Model Legislation: Post-Abortion Organ Harvesting Prohibition

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*The following is presented as model legislation to be used as a guideline for individuals interested in policies that put law in the service of human life. This model legislation should be reviewed by state policy experts to conform to a particular state's law. Bioethics Defense Fund is a public interest legal and educational organization that takes no position in support or opposition to any particular legislation.*

### Section \_\_\_\_\_. Prohibitions regarding post-abortion organ harvesting

#### A. Findings

1. The U.S. Supreme Court decision of *Roe v. Wade* and its progeny establish a constitutionalized right of a woman “to choose to terminate her pregnancy.” *Planned Parenthood v. Casey*, 505 U.S. 833, 870 (1992). The Court has never endorsed a right to harvest the body parts of unborn human beings, whether for profit or donation.
2. The “dead donor rule” is a longstanding ethical norm that protects the integrity of human organ donation by providing (a) that organ donors must be dead before procurement of organs begins, and (b) that organ procurement itself must not cause the death of the donor.<sup>1</sup>
3. The harvesting of organs, tissues and cells from unborn children whose deaths are directly caused by induced abortion violate the dead donor rule in both respects because (a) the unborn children are alive when the fetal repositioning and crushing point decisions are being made by the abortion provider with the goal of procuring intact fetal heart, lungs, livers, brains and other tissues and organs; and (b) the repositioning of the fetus and crushing above and below the thorax to procure intact

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<sup>1</sup> James M. DuBois, *Is Organ Procurement Causing the Death of Patients?*, 18 ISSUES L. & MED. 21 (2002); *see generally*, John A. Robertson, *The Dead Donor Rule*, HASTINGS CENTER REP. 6-13 (Nov./Dec. 1999). *See also* James L. Bernat, M.D., *Life or Death for the Dead Donor Rule?*, N. ENGL. J. MED. 369(14):1289 (Oct. 3, 2013)(“The DDR [dead donor rule] is not a law but an informal, succinct standard highlighting the relationship between the two most relevant laws governing organ donation from deceased donors: the Uniform Anatomical Gift Act and state homicide law. The DDR states that organ donation must not kill the donor; thus, the donor must first be declared dead. It applies only to organ donation from deceased donors, not to living donation, such as that of one kidney or a partial liver.”).

fetal organs, tissues and cells is itself the cause of death of the human being from whom the organs are then harvested.

4. The dead donor rule is further violated because the human being whose fetal organs are procured does not have the capacity to consent to organ donation, and because proxy consent for donation by the unborn child's mother is invalid given that the unborn child is alive at the time the consent forms are signed.
5. The practice of presenting fetal organ donation forms to pregnant women considering their options constitutes unethical undue influence and coercion, and amounts to an incentive to actively participate in the killing of a living human being for the speculative and attenuated benefit of helping researchers.
6. Whether or not prior obtained proxy consent by the mother is ethical and proper for an unborn child whose death is imminent due to natural miscarriage, it is a gross violation of ethical norms to unduly coerce a mother who is considering pregnancy options to directly participate in the decision to cause the death of her living unborn child for the speculative and attenuated benefit that may come from scientific experimentation.
7. States are free to ban the practice of selling or donating the bodies of human beings killed by abortion because federal law does not preempt that area of law. *See, e.g.* 42 U.S.C. 289g-1(e)(1)-(2) allowing the conduct of fetal tissue transplantation "only in accordance with applicable State and local law."

#### B. Prohibition and exceptions

1. Prohibition. Notwithstanding any provision of law to the contrary, it shall be unlawful for any person or entity to buy, sell, donate, accept, distribute, or otherwise transfer or use for any purpose the intact body of a human embryo or fetus whose death was knowingly caused by an induced abortion, or the human organs, tissues or cells obtained from a human embryo or fetus whose death was knowingly caused by an induced abortion.
2. Exceptions. Provided that nothing in this Act shall prohibit final disposition of the bodily remains of the aborted human being in accord with state law, nor shall it prohibit any conduct permitted under state law that is undertaken with the purpose of providing knowledge solely to the mother (such as pathological or diagnostic purposes), or with the purpose of providing knowledge solely to law enforcement officers (such as the case of an autopsy following a fetal homicide). Further, nothing in this Act shall prohibit the donation of bodily remains from a human embryo or fetus whose death was caused by a natural miscarriage or stillbirth, in accord with the guidelines and prohibitions as set forth in applicable state and federal law.

#### C. Definitions. For purposes of this Act only:

1. "Abortion" or "induced abortion" means the act of using or prescribing any instrument, medicine, drug, or any other substance, device, or means with the intent to terminate the clinically diagnosable pregnancy of a woman with the knowledge that the termination by those means will with reasonable likelihood cause the death of the unborn child. Such use, prescription, or means is not an abortion if done with the intent to:

- (a.) Save the life or preserve the health of the unborn child;
  - (b.) Remove an unborn child who died of natural causes; or
  - (c.) Remove an ectopic pregnancy.
2. “Human embryo or fetus” means an *in utero* organism with a human or predominately human genetic constitution throughout the gestational process, without regard to whether the human embryo or fetus came into being by means of fertilization (in vitro or in utero), parthenogenesis, human cloning (somatic cell nuclear transfer), or any other means from one or more human gametes or human diploid cells.
  3. “Miscarriage or stillbirth” means the spontaneous or accidental death of a human embryo or fetus, whether death occurred in the womb or in the process of birth. Death of the human embryo or fetus is indicated by the lack of signs of breathing or any other evidence of life, such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles.

#### D. Criminal Penalties.

*[Insert state-appropriate remedy, for example]* Any person who violates the provisions of this Act shall be fined \$50,000, or imprisoned for not more than 10 years, or both.

#### E. Civil and Administrative Penalties.

*[Insert state-appropriate remedy, for example]* In addition to any other remedies available under the law of this State, failure to comply with the requirements of this Section shall:

- 1) Provide a basis for recovery of the parent(s) of the unborn embryo or fetus. Such relief shall include money damages for all psychological injuries caused by the violation of this Section.
- 2) Provide a basis for professional disciplinary action under *[insert appropriate reference to state statutes or administrative rules concerning the State Medical Board or other appropriate state regulatory or licensing authority]* for the suspension or revocation of any license for physicians, licensed vocational and registered nurses, or other licensed or regulated healthcare providers.

#### F. Construction.

- 1) Nothing in this Act shall be construed to alter generally accepted medical standards, affect existing federal or state law regarding the practice of abortion, or to create or recognize a right to abortion.
- 2) Any provision of this Act held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to give it the maximum effect permitted by law, unless such holding shall be one of

utter invalidity or unenforceability, in which event such provision shall be deemed severable herefrom and shall not affect the remainder hereof or the application of such provision to other persons not similarly situated or to other dissimilar circumstances.



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