

# Michigan Democrats for Life

## Pro-Life for the Whole Life

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## Information on the Citizen Petition to Ban Live-Dismemberment Abortions in Michigan

The board of *Michigan Democrats for Life* supports the citizen petition drive to ban live-dismemberment abortions in Michigan. However, there is a considerable amount of misunderstanding with regard to the proposed law among both its supporters and its opponents. The information below is intended to address this misunderstanding and explain our reasons for supporting this proposed law.

### What would the proposed law accomplish?

First, it is important to understand what the proposed law would NOT do:

- It would NOT ban D&E ('dilation and evacuation') abortions.
- It would NOT reduce the total number of abortions in Michigan.
- It would NOT reduce access to abortions.

What it *would* do is ban procedures to 'dismember a live fetus.'<sup>1</sup> In other words, an abortionist would have to kill a late-term fetus in another way—presumably a less painful way, such as cutting the umbilical cord—before performing a D&E procedure. Thus, the proposed law would reduce fetal pain. The board of *Michigan Democrats for Life* believes that this is an important objective, even though it is only a small part of what is needed to address the laws and practices surrounding abortion.

The limited impact of the proposed law may be a disappointment to many people who signed the petition. However, it does make it much more likely for the law to withstand judicial scrutiny.

### What is the most appropriate way to describe the proposed law?

The petition itself describes the proposed law as banning 'dismemberment abortions.' That is not a very precise description, since the petition language goes on to define 'dismemberment abortion' as a procedure to 'dismember a living fetus.' Abortions involving dismemberment could still take place as long as the fetus is no longer alive during that phase of the procedure.

Some opponents of the law claim that it should be described as 'a ban of D&E procedures,' since that is the 'technical' term applied to late-term abortions that involve fetal

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<sup>1</sup> The full text of the proposed legislation can be found at [https://ballotpedia.org/Michigan\\_%22Dismemberment\\_Abortion\\_Ban\\_Act%22\\_Initiative\\_\(2020\)](https://ballotpedia.org/Michigan_%22Dismemberment_Abortion_Ban_Act%22_Initiative_(2020))

dismemberment. However, that description would be inaccurate and misleading. The proposed law would not ban dilation and it would not ban evacuation. In fact, it would not even ban the dismemberment that takes place in between the dilation and the evacuation. Instead, it would make it necessary to add the extra step of killing a fetus prior to dismembering it. Late-term abortions involving dilation, fetal dismemberment, and evacuation could still take place.

Therefore, this document describes the proposed law as banning ‘live-dismemberment abortions.’ It could also be accurately described as making it necessary to have an extra step in D&E procedures that minimizes pain for the fetus through killing it by other means before it is dismembered.

### **At what stage of development can a human fetus experience pain?**

As is the case with many other scientific issues with political implications, there is no consensus regarding the answer to this question. The British Parliament’s *Commission of Inquiry into Fetal Sentience* declared that fetuses may feel pain from six weeks of gestation (middle of first trimester),<sup>2</sup> whereas the *Royal College of Obstetrics and Gynaecology* countered that fetuses cannot be sentient before 26 weeks of gestation (end of second trimester).<sup>3</sup> Experts who argue that second-trimester fetuses are unable to experience pain point to the fact that sensory nerves do not reach the cortex of the brain until the third trimester. However, other milestones that are arguably sufficient for the experience of pain are reached much earlier. By about 10 weeks of gestational age, unpleasant stimuli result in hyperexcitability and a generalized movement of the limbs.<sup>4</sup> By the eleventh week of gestational age, sensory nerves extend from the thalamus-- a portion of the brain that recognizes pain and directs responses to pain—through the spinal cord and all the way to the surface of the limbs.<sup>5</sup> By the middle of the second trimester, painful stimuli cause fetuses to release the same stress hormones that are associated with pain in adults.<sup>6</sup>

Thus, while a developing child may be incapable of intellectual reflection on the experience of pain until sensory nerves reach the cortex, there is good reason to suppose that non-intellectual aspects of pain are experienced much earlier. This is confirmed by the ability of

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<sup>2</sup> Rawlinson P, Commission of Inquiry into Fetal Sentience, London, Her Majesty’s Stationery Office, 1996; cited in K. J. S. Anand, Cynthia Rovnaghi, Marlene Walden, and John Churchill, “Consciousness, Behavior, and Clinical Impact of the Definition of Pain,” *Pain Forum*, Volume 8, Issue 2, Summer 1999, Pages 64-73.

<sup>3</sup> Royal College of Obstetrics and Gynaecology, Report of working party in fetal awareness, London, Oct. 1997; referenced in Anand, *op.cit.*

<sup>4</sup> Yigiter AB, Kavak ZN, “Normal standards of fetal behavior assessed by four-dimensional sonography,” *Journal of Maternal, Fetal, and Neonatal Medicine*, 2006;19:707–721; cited in Carlo Valerio Bellieni and Giuseppe Buonocore, “Is fetal pain a real evidence?,” *Journal of Maternal, Fetal and Neonatal Medicine*, 2012; Early Online: 1–6, 2012

<sup>5</sup> Okado N, “Onset of synapse formation in the human spinal cord,” *Journal of Comparative Neurology*, 1981:201,211–219; Larsen WJ, Sherman LS, Potter SS, Scott WJ, ed. *Human Embryology*, 3rd ed., Churchill Livingstone, Philadelphia PA, 2001; referenced in Bellieni, *op.cit.*

<sup>6</sup> Giannakoulopoulos X, Sepulveda W, Kourtis P, Glover V, Fisk NM, “Fetal plasma cortisol and beta-endorphin response to intrauterine needling” [see comments], *Lancet* 344:77-81, 1994; Giannakoulopoulos X, Teixeira J, Fisk N, Glover V, “Human fetal and maternal noradrenaline responses to invasive procedures,” *Pediatric Research*, 1999; referenced in Anand, *op.cit.*

infants and children with hydraencephaly to experience and respond to pain and other stimuli in highly-developed ways despite their absence of a cortex.<sup>7</sup> It is also consistent with the ability of children born prematurely to show distress in response to pain even in cases where they are born before the age of viability.<sup>8</sup> It is clear that fetuses can ‘feel’ and respond to things that doctors do to them in the second trimester or earlier, irrespective of whether those feelings meet a particular author’s definition of ‘pain.’

### **Does killing a fetus before dismembering it involve additional risks for the mother?**

Like other pro-life organizations, *Michigan Democrats for Life* believes that any abortions that are performed should avoid unnecessary risk for the mother and unnecessary pain for the child being aborted. That does not in any way negate the fact that we oppose unnecessary abortions, regardless of the means employed.

Perhaps the most straightforward way to kill a late-term fetus before dismemberment is cutting (‘transection’) of the umbilical cord, which does not contain sensory nerves. This results in the fetus bleeding to death as its heart pumps its blood out of the severed cord. A study of 407 cases found that this takes an average of about three-and-a-half minutes and that cessation of fetal heartbeat was confirmed before dismemberment in all 407 cases. This approach was also found to be safe for the mother.<sup>9</sup> In fact, it should be noted that the umbilical cord is always cut at some point in the process of dismembering a fetus. Cutting the cord in a deliberate manner should never be more dangerous for the mother than cutting it in the course of dismembering a fetus that is alive and moving. Thus, when a late-term abortion cannot be avoided, transection of the umbilical cord at the beginning of the procedure may well reduce risk for the mother as well as reducing the pain that would otherwise be experienced by the fetus.

### **Should abortion laws prescribe jail time for people who perform abortions?**

Under the proposed law, live-dismemberment abortion would be a felony punishable by imprisonment for not more than two years or a fine of not more than \$50,000.00, or both.

The board of *Michigan Democrats for Life* believes that non-criminal consequences are often more appropriate and more effective than declaring activities to be felonies punishable by imprisonment. For example, doctors would have good reason to object to a different sort of law that called for imprisonment of doctors who performed abortions that were not medically necessary. Doctors disagree with insurance companies about questions of medical necessity on

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<sup>7</sup> Shewmon DA, Holmes GL, Byrne PA, “Consciousness in congenitally decorticate children: developmental vegetative state as self-fulfilling prophecy,” *Developmental Medicine and Child Neurology*, 41:364–374, 1999; referenced in Bellieni, *op.cit.*

<sup>8</sup> Bartocci M, Bergqvist LL, Lagercrantz H, Anand KJ, “Pain activates cortical areas in the preterm newborn brain,” *Pain* 122:109–117, 2006; Slater R, Worley A, Fabrizi L, Roberts S, Meek J, Boyd S, et al., “Evoked potentials generated by noxious stimulation in the human infant brain,” *European Journal of Pain*, 14:321–326, 2010; referenced in Bellieni, *op.cit.*

<sup>9</sup> K. Tocce, Kara K. Leach, Jeanelle Sheeder, Kandice Nielson, Stephanie B. Teal, Umbilical cord transection to induce fetal demise prior to second-trimester D&E abortion, *Contraception*, Volume 88(6), pp 712-716, August 2013.

a regular basis, so the imposition of criminal penalties for disagreeing with a board or judge or jury on an issue of medical judgement would be unacceptable to physicians as well as often being inappropriate. Better options are available.

Criminal penalties are somewhat less problematic with respect to a law prohibiting live dismemberment, since 'dismemberment of a live fetus' is an unambiguous concept and there would be no gray area with respect to whether or not the law was violated. Nevertheless, the law would have been better if it prescribed a hierarchy of non-criminal consequences instead of calling for felony convictions.

One problem with criminal penalties is that they rely upon choices made by prosecutors. Some prosecutors may seek to make a name for themselves by declining to seek conviction of abortionists. Others may quietly decline to seek felony convictions because they think the penalties are too severe or because they wish to avoid being sucked into a political maelstrom. If doctors come to be imprisoned for performing a service requested by women facing heart-rending circumstances—particularly if a substantial percentage of the population considers that service to be appropriate—those doctors will be seen as martyrs. Thus, criminal penalties may prompt a backlash that would set the pro-life movement back and reinforce barriers to the necessary work of changing minds and hearts.

Those who develop future pro-life laws would do well to consider whether a hierarchy of non-criminal consequences might be more appropriate and more effective than seeking convictions on felony charges. Some options to consider include denial of payment, requiring refund of payment, civil fines that escalate for repeat offenses, license limitations to curtail a physician's ability to perform abortions, court injunctions, and penalties for violating court injunctions.

### **Will the petition drive result in the proposed law coming before voters in a future election?**

At the present time, that is thought to be unlikely. Backers of the petition drive expect the pro-life majority in the Michigan House and Senate to pass legislation identical to the provisions of the petition. That legislation would take effect without being subject to veto by the Governor and the issue would not come before voters. However, the legislature may decline to act if the Republican legislative leadership considers it more advantageous to have the issue appear on the ballot.

### **Why did the Michigan legislature fail to act on dismemberment abortion before now?**

Banning dismemberment abortion has been a priority of *Michigan Right to Life* from the time of its successful referendum banning partial-birth abortion. Bills were introduced in subsequent legislative sessions, but the Republican legislative leadership never allowed them to come out of committee despite having a Republican governor for eight years and having decisive majorities in both the House and the Senate. (Republicans held as many as 27 of 38 Senate seats and 64 of 110 House seats during the Snyder administration.<sup>10</sup>) One explanation for

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<sup>10</sup> [https://en.wikipedia.org/wiki/Political\\_party\\_strength\\_in\\_Michigan](https://en.wikipedia.org/wiki/Political_party_strength_in_Michigan)

failure to advance the bills was that Governor Snyder did not want to be forced into publicly deciding whether or not to sign them. Another possible explanation is that the Republican Party did not have anything to gain politically from taking significant action on abortion. It already controlled the governorship and both houses of the legislature, so there would be no further political benefit in resolving an issue that might be valuable in future elections. Of course, the reluctance of a Republican governor and legislature could have been circumvented through a citizen referendum like the one that was undertaken in 2019, but a referendum was not pursued during the eight years of the Snyder administration.

If it had been possible for Governor Snyder to win a third term, there would probably still be no action on this issue by the legislature or by pro-life organizations. Ironically, it was the election of a pro-choice Democratic governor that opened the door for banning live-dismemberment abortions. Losing control of the governorship has finally left Michigan's Republicans with something to gain from addressing the abortion issue, as well as making it possible for pro-life organizations to mount a petition drive without paying a political price for circumventing their allies.