2007 SENATE BILL 398

January 17, 2008 – Introduced by Senators Miller, Risser and Erpenbach, cosponsored by Representatives Berceau, Kreuser, Sinicki, Kessler, Black, Pocan, Pope-Roberts, Seidel, Boyle, Zepnick, Young, Richards, Toles, Sheridan, Parisi, Grigsby, Benedict, Shilling and Turner. Referred to Committee on Health, Human Services, Insurance, and Job Creation.

- AN ACT *to repeal* 940.04; and *to amend* 939.75 (2) (b) 1. of the statutes; **relating**
- 2 **to:** eliminating certain abortion prohibitions.

Analysis by the Legislative Reference Bureau

Currently, there are two laws in this state, ss. 940.04 and 940.15, stats., that directly penalize the performance of certain abortions. These laws are, in turn, affected by a third law, s. 940.13, stats.

Section 940.04, stats.

Under this law, any person, other than the mother, who intentionally destroys the life of an unborn child is guilty of a Class H felony, for which the penalty is a fine not to exceed \$10,000 or imprisonment not to exceed six years or both. "Unborn child" is defined as a human being from the time of conception until born alive. Any person, other than the mother, who intentionally destroys the life of an unborn quick child or causes the mother's death by an act done with intent to destroy the life of an unborn child is guilty of a Class E felony, for which the penalty is a fine not to exceed \$50,000 or imprisonment not to exceed 15 years or both. "Unborn quick child" is not defined. Any pregnant woman who intentionally destroys the life of her unborn child or who consents to the destruction by another may be fined not more than \$200 or imprisoned not more than six months or both, but for the same action with respect to her unborn quick child the penalty is a fine not to exceed \$10,000 or imprisonment not to exceed three years and six months or both. None of these penalties apply to a therapeutic abortion that is performed by a physician; is necessary, or advised by two other physicians as necessary, to save the life of the mother; and, unless a emergency prevents, is performed in a licensed maternity hospital. This statute was

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cited, in *Roe v. Wade*, 410 U. S. 113 (1973), as similar to a Texas statute that was held to violate the due process clause of the 14th Amendment of the United States Constitution, which protects the right to privacy, including a woman's qualified right to terminate her pregnancy. Because of the *Roe v. Wade* decision, a subsequent decision by a federal district court, *Larkin v. McCann*, 368 F. Supp. 1352 (E.D. Wis., 1974), held the statute unenforceable.

Section 940.15, stats.

This law prohibits intentional performance of an abortion after a fetus or unborn child reaches viability, unless the abortion is necessary to preserve the life or health of the woman. "Viability" is defined as that stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case before him or her, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support. Intentional performance of such an abortion is a Class I felony, for which the penalty is a fine not to exceed \$10,000 or imprisonment not to exceed three years and six months or both. This penalty does not apply to a woman who obtains an abortion in violation of the statute.

Section 940.13, stats.

This law prohibits prosecution of and imposing or enforcing a fine or imprisonment against a woman who obtains an abortion or otherwise violates any abortion law with respect to her unborn child or fetus. Further, crimes of being a party to a crime, solicitation, and conspiracy are inapplicable to a woman who obtains an abortion or otherwise violates an abortion law with respect to her unborn child or fetus.

Effect of this bill

This bill eliminates s. 940.04, stats.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

- **SECTION 1.** 939.75 (2) (b) 1. of the statutes is amended to read:
- 2 939.75 (2) (b) 1. An act committed during an induced abortion. This
- 3 subdivision does not limit the applicability of ss. 940.04, 940.13, 940.15 and 940.16
- 4 to an induced abortion.
- **SECTION 2.** 940.04 of the statutes is repealed.
- 6 (END)