

## 2007 DRAFTING REQUEST

### Bill

Received: 01/18/2007

Received By: dkennedy

Wanted: As time permits

Identical to LRB:

For: Mark Miller (608) 266-9170

By/Representing: Himself

This file may be shown to any legislator: NO

Drafter: dkennedy

May Contact:

Addl. Drafters:

Subject: Health - abortion

Extra Copies:

Submit via email: YES

Requester's email: Sen.Miller@legis.wisconsin.gov

Carbon copy (CC:) to: robin.ryan@legis.wisconsin.gov

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### Pre Topic:

No specific pre topic given

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### Topic:

Repeal certain abortion prohibitions

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### Instructions:

See Attached

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### Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	dkennedy 02/13/2007	csicilia 02/13/2007		_____			
/1			sherritz 02/13/2007	_____	mbarman 02/13/2007	lparisi 12/20/2007	

FE Sent For:

NO

<END>

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<END>

*jacket for  
Senate per  
DAK  
(Assembly  
comparison  
being drafted  
for  
Sen  
Miller  
also)*

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/?	dkennedy						
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*1 gjs 2/13  
07*

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FE Sent For:

<END>

## **Kennedy, Debora**

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**From:** Sen. Miller  
**Sent:** Wednesday, January 17, 2007 6:22 PM  
**To:** Kennedy, Debora  
**Subject:** Bill Draft

Please draft a senate bill to repeal 940.04 of the statutes relating to banning abortion in Wisconsin.

I would like the relating clause to say:

AN ACT to repeal 940.04; of the statutes: relating to: banning abortions in Wisconsin.

I would like the Legislative Analysis to say:

Under current law, criminal penalties are enforceable, including fines and imprisonment, for any persons who perform abortions and for women who obtain abortions. Current law creates 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, for any person other than the pregnant woman to intentionally terminate a pregnancy before viability. It is also 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, for any person other than the pregnant woman to intentionally terminate a pregnancy after viability (defined as a "quick unborn child") or to cause the woman's death by an act done with the intent to terminate the pregnancy.

Current law also provides a criminal penalty of a fine not to exceed \$200 and imprisonment not to exceed 6 months for any pregnant woman who intentionally terminates her pregnancy before viability or who consents to such termination. There are further penalties and it is a Class I felony, for which the penalty is a fine not to exceed \$10,000 or imprisonment not to exceed 3.5 years or both, for any woman who intentionally terminates a pregnancy after viability.

This section conflicts with WSS 940.13, which states no fine or imprisonment may be imposed or enforced against and no prosecution may be brought against a woman who obtains an abortion or violates any provision of the abortion statute.

Under current law, penalties do not apply if an abortion meets all of the following conditions: 1) it is performed by a physician; 2) it is advised by 2 physicians as necessary to save the woman's life; and 3) it is performed in a hospital unless prevented by an emergency situation.

Wisconsin's abortion statute, 940.04, Stats. 1969, was found unconstitutional as applied in *Babbitz v. McCann*, 310 F. Supp. 293 (1970). The US Supreme Court clearly made Wisconsin's antiabortion statute unenforceable as a violation of the due process clause found in the 14th Amendment of the U.S. Constitution in *Roe v. Wade*, 410 U.S. 113 (1973).

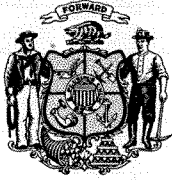
This bill eliminates the current laws creating penalties for abortion that were ruled unconstitutional. This bill does not affect current laws related to fetal homicide. It does not allow public funding of abortion. It does not change consent laws for minors in obtaining an abortion.

### **BILL TEXT**

Section 1. 939.75 (2) (b) 1. of the statutes is amended to read: 939.75 (2) (b) 1. An act committed during an induced abortion. This subdivision does not limit the applicability of ss 940.04, 940.13,

940.15 and 940.16 to an induced abortion.

Section 2. 940.04 of the statutes is repealed.



Stephen R. Miller  
Chief

# State of Wisconsin

## LEGISLATIVE REFERENCE BUREAU

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Madison, WI 53701-2037  
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Reference Fax: (608) 266-5648

February 13, 2007

## MEMORANDUM

**To:** Senator Mark Miller

**From:** Debora Kennedy, Managing Attorney

**Subject:** Draft to repeal 940.04, stats.

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Today you will receive a draft that, to the extent that the LRB can do so, responds to the concerns you expressed regarding 2005 AB 1144. As I indicated to you by telephone on February 2, I am not able to provide you with a bill to repeal s. 940.04, stats., that duplicates the proposed language you have provided me for the analysis and the relating clause, because the language is, in part, misleading and inaccurate. The *Wisconsin Bill Drafting Manual 2006-2007* (Manual) guides our drafting. The Manual states numerous precepts for drafting, including "The purpose of an analysis is to describe clearly and objectively, in understandable language, the substance and effect of a legislative proposal ... so that the legislature is adequately advised as to the legal effect of the proposal." The purpose of the relating clause, according to the Manual is "to describe the proposal's subject matter." The following are several examples of the problems posed by the proposed language:

1. The proposed relating clause ("banning abortions in Wisconsin") is incorrect; the bill does not ban abortions, as a reader of the relating clause would be led to believe. To the contrary, the bill repeals a statute that *does* ban abortions.

2. The proposed analysis states "... criminal penalties are enforceable, including fines and imprisonment, ... for women who obtain abortions." This statement fails to acknowledge (although later language in the proposed analysis does) the existence of s. 940.13, stats., which states that no fine or imprisonment may be imposed or enforced against and no prosecution may be brought against a woman who obtains an abortion or otherwise violates any provision of the abortion statute with respect to her unborn child or fetus. It would be necessary for a court to decide, given the conflict between the two statutes, whether the penalties under s. 940.04, stats., are enforceable against a pregnant woman violator. Usually in the case of direct conflicts courts interpret the legislature's later enactment to prevail. Section 940.13, stats., was enacted under 1985 Wisconsin Act 56, long after s. 940.04, stats.

3. The proposed analysis states, "The US Supreme Court clearly made Wisconsin's antiabortion statute unenforceable as a violation of the due process clause found in the 14th Amendment of the U. S. Constitution in *Roe v. Wade*, 410 U.S. 113 (1973)." This statement is a restatement of the holding in *Larkin v. McCann*, 368 F. Supp 1352 (E.D. Wis., 1974) and is a

conclusion of the court in that case. For purpose of an analysis, however, it is incorrect. The U. S. Supreme Court, in *Roe v. Wade*, found that a Texas abortion prohibition violated the due process clause of the 14th Amendment of the U. S. Constitution. The *Roe v. Wade* decision cited s. 940.04, stats., as similar to the Texas statute, but the holding in the decision was confined to the Texas statute.

4. The proposed analysis states, "It is also a Class E felony . . . for any person other than the pregnant woman to intentionally terminate a pregnancy after viability (defined as a "quick unborn child") . . ." and states ". . . it is a Class I felony . . . for any woman who intentionally terminates a pregnancy after viability." These statements are incorrect; viability is not mentioned, let alone defined, in s. 940.04, stats. The term used in the statute, "unborn quick child," is not defined, so it is unclear from the statute what the term means.

5. The proposed analysis states "Wisconsin's abortion statute, 940.04, Stats. 1969, was found unconstitutional as applied in *Babbitz v. McCann*, 310 F. Supp. 293 (1970)." This statement is overinclusive. I believe that the statement was derived from the Revisor's Note that follows s. 940.04, stats. That Revisor's Note states, in full, "Wisconsin's abortion statute, 940.04, Stats. 1969 is unconstitutional as applied to the abortion of an embryo that has not quickened. *Babbitz v. McCann*, 310 F. Supp. 293 (1970)." Citing the *Babbitz* case misses the current point of unconstitutionality of s. 940.04, stats. Under *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), which reaffirmed *Roe v. Wade*, an abortion may be lawfully performed before viability; viability is a stage later in a pregnancy than quickening. The *Babbitz* case is irrelevant to this issue.

6. The proposed analysis makes no mention of s. 940.15, stats., which prohibits abortions performed after viability unless necessary to preserve the life or health of the woman. Thus, the reader of the proposed analysis and proposed relating clause has no idea that the bill, although it repeals prohibitions that have been found unconstitutional, does not affect other current penalties for abortions performed after viability, for which no court ruling of unconstitutionality has been made.

As I indicated, I am by separate cover sending you a draft of a bill to repeal s. 940.04, stats. I have changed the analysis and the relating clause in that bill from the analysis and relating clause that were contained in 2005 Assembly Bill 1144. It is my hope that the revised analysis and relating clause both are more clear than previously. They are accurate.

I would be glad to discuss this matter further with you if you wish.

cc. Steve Miller



TODAY  
State of Wisconsin  
2007 - 2008 LEGISLATURE

LRB-1564/31

DAK:/:....

ys

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

Gen cat

1 AN ACT ...; relating to: eliminating certain abortion prohibitions.

\$10,000

**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 an unborn quick child the penalty is a fine not to exceed \$20,000 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 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

her

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**Kennedy, Debora**

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**From:** Kuhn, Jamie  
**Sent:** Thursday, December 20, 2007 1:14 PM  
**To:** Kennedy, Debora  
**Subject:** Changes....LRB-1564/1

**Attachments:** Proposed LRB analysis 11.29.07.doc

Last request on this bill draft..... Can we make these changes today? Sorry for the immediate request. Other things came up that we need to work this out as soon as possible.



Proposed LRB  
analysis 11.29.07...

Thanks. Jamie

**Jamie S. Kuhn**

Office of Senator Mark Miller  
State Capitol  
Room 409 South  
PO Box 7882  
Madison, WI 53707  
Phone 608-266-9170  
Fax 608-266-5087

12/20/07 DAK called Jamie +  
said would be unable to  
make the changes (are either  
inaccurate, repetitive, or use  
terms other than as used in  
the statutes)

Preamble:

An ACT to repeal 940.04; and to amend 939.72 (2)(b) 1. of the statutes; relating to eliminating the criminalization statute for most abortions.

Analysis by the Legislative Reference Bureau

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

Section 940.15

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. 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.

This section is unaffected by this bill.

Section 940.04, stats.

This statute bans most abortions and imposes criminal penalties on pregnant women obtaining abortions and individuals performing, or assisting in the performance of, abortions, among others. 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.

This section of the statute contradicts Section 940.13, stats, which prohibits prosecution or 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 fetus or embryo. Further, Sec. 940.13 provides that crimes of being a party to a crime, solicitation and conspiracy are inapplicable to a

**Deleted:** repealing the criminalization of abortion of the statutes, relating to criminalizing abortion in Wisconsin.

**Deleted:** for

*this is no more precise than Analysis language; "outlaw" is loaded word*

*This is able to be deduced from the "Effect of this bill" part of Analysis*

*This is repetitive to what Analysis says*

*This mixes the order*

**Deleted:** emtn

**Deleted:** with respect to her unborn child or fetus

**Formatted:** Strikethrough

*This term is not used in the statute*

*no; other*

*statutes are "criminalization" statutes (i.e., have felonies for unlawful performance)*

ok

woman who obtains an abortion or otherwise violates an abortion law with respect to her fetus or embryo.

Deleted: fetus. PROHIBITS PROSECUTION OR AND IMPO

None of these penalties in Wis. Stat. 940.04 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 an emergency prevents, is performed in a licensed maternity hospital. This statute was 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 14<sup>th</sup> Amendment of the United States Constitution, which protects the right to privacy, including a woman's qualified right to terminated 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. Since that time, this statute has not be enforced.

This bill eliminates s. 940.04, stats.

This follows, it's unenforceable - also - it goes beyond my knowledge, except that State v. Black was prosecuted under 940.04

**Kennedy, Debora**

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**To:** Kuhn, Jamie  
**Subject:** RE: please prepare draft for introduction....

Thank you, Jamie. I will have the program assistants jacket -1564 for the Senate, and I will draft a companion for you and have it jacketed for the Assembly.  
Debora

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**From:** Kuhn, Jamie  
**Sent:** Thursday, December 20, 2007 4:00 PM  
**To:** Kennedy, Debora  
**Subject:** please prepare draft for introduction....

Senate and assembly companion bills.....1564

**Jamie S. Kuhn**

*Office of Senator Mark Miller  
State Capitol  
Room 409 South  
PO Box 7882  
Madison, WI 53707  
Phone 608-266-9170  
Fax 608-266-5087*