

**2007 DRAFTING REQUEST**

**Bill**

Received: **08/02/2007**

Received By: **phurley**

Wanted: **As time permits**

Identical to LRB:

For: **Scott Fitzgerald (608) 266-5660**

By/Representing:

This file may be shown to any legislator: **NO**

Drafter: **phurley**

May Contact:

Addl. Drafters:

Subject: **Criminal Law - homicide**

Extra Copies:

Submit via email: **YES**

Requester's email: **Sen.Fitzgerald@legis.wisconsin.gov**

Carbon copy (CC:) to:

---

**Pre Topic:**

No specific pre topic given

---

**Topic:**

Partial birth abortion

---

**Instructions:**

repeal current law and redraft according to supreme court decision

---

**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>
/?	phurley 09/26/2007	bkraft 10/02/2007		_____			
/P1	phurley 10/18/2007	bkraft 10/22/2007	nmatzke 10/02/2007	_____	sbasford 10/02/2007		Crime
/1	phurley 12/19/2007	kfollett 12/19/2007	nmatzke 10/22/2007	_____	lparisi 10/22/2007		Crime
/2			rschluet	_____	sbasford	sbasford	

Vers.      Drafted      Reviewed      Typed      Proofed      Submitted      Jacketed      Required

12/19/2007 \_\_\_\_\_ 12/19/2007 01/17/2008

FE Sent For: N/A

<END>

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/P1	phurley 10/18/2007	bkraft 10/22/2007	nmatzke 10/02/2007	_____	sbasford 10/02/2007		Crime
/1	phurley 12/19/2007	kfollett 12/19/2007	nmatzke 10/22/2007	_____	lparisi 10/22/2007		Crime
/2			rschluet	_____	sbasford		

Vers.      Drafted      Reviewed      Typed      Proofed      Submitted      Jacketed      Required

12/19/2007 \_\_\_\_\_ 12/19/2007

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/?	phurley 09/26/2007	bkraft 10/02/2007		_____			
/P1	phurley 10/18/2007	bkraft 10/22/2007	nmatzke 10/02/2007	_____	sbasford 10/02/2007		Crime
/1		1261f 1249	nmatzke 10/22/2007	_____	lparisi 10/22/2007		

Handwritten signature and initials, possibly '1261f' and '1249', are present below the drafting history table.

FE Sent For:

**<END>**

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/?	phurley 09/26/2007	bkraft 10/02/2007					
/P1		1 bjk 10/22	nmatzke 10/02/2007		sbasford 10/02/2007		
			nwn 10/22	nwn/pg 10/22			

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/?	phurley	1/PI bjk	9/28 nwn 10/2	nwn/jf 10/2			

FE Sent For:

<END>



PI  
bk

Insert

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION ✓

SAV ✓  
X-ref ✓

gen. cat.

1

AN ACT ...; relating to: partial-birth abortion and creating a penalty.

*Analysis by the Legislative Reference Bureau*

This is a preliminary draft. An analysis will be provided in a later version. ✓

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

2 SECTION 1. 895.038 (1) (a) of the statutes is amended to read: ✓

3 ✓ 895.038 (1) (a) "Child" "Fetus" has the meaning given in s. 940.16 (1) (a).

History: 1997 a. 219; 2005 a. 277.

4 SECTION 2. 895.038 (2) (a) (intro.) of the statutes is amended to read: ✓

5 ✓ 895.038 (2) (a) (intro.) Except as provided in par. (b), any of the following  
6 persons has a claim for appropriate relief against a person who performs a  
7 partial-birth abortion and thereby kills a fetus: ✓

History: 1997 a. 219; 2005 a. 277.

8 SECTION 3. 895.038 (2) (a) 1. of the statutes is amended to read: ✓

1        ✓ 895.038 (2) (a) 1. If the ~~person~~ mother on whom a partial-birth abortion was  
 2        performed ~~was a minor, the parent of the minor~~ has not attained the age of 18 years  
 3        at the time of the abortion, the maternal grandparents of the fetus.

History: 1997 a. 219; 2005 a. 277.

4        SECTION 4. 895.038 (2) (a) 2. of the statutes is amended to read:

5        ✓ 895.038 (2) (a) 2. The father, if married to the mother at the time she receives  
 6        a partial-birth abortion procedure, of the ~~child~~ fetus aborted by the partial-birth  
 7        abortion.

History: 1997 a. 219; 2005 a. 277.

8        SECTION 5. 940.16 of the statutes is repealed and recreated to read:

9        ✓ 940.16 Partial-birth abortion. (1) In this section:

10        (a) "Fetus" means a human being who has not been completely delivered from  
 11        the body of his or her mother.

12        (b) "Partial-birth abortion" means an abortion in which the person person  
 13        performing the abortion does all of the following:

14        → INSERT A

15        (END) ✓

2. Page 1551, line 11: after that line insert:

“SECTION 3834bm. 940.16 of the statutes is repealed and recreated to read:

**940.16 Partial-birth abortion.** (1) In this section:

(a) “Partial-birth abortion” means an abortion in which the person performing the abortion does all of the following:

1. Deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus.

2. Performs the overt act specified in subd. 1., other than completion of the delivery, that kills the partially delivered living fetus.

(b) “Physician” has the meaning given in s. 448.01 (5).

(2) Except as provided in subs. (3) and (6), any physician or any other person who intentionally performs a partial-birth abortion is guilty of a Class I felony.

(3) Subsection (2) does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

(4) A physician who is charged under sub. (2) may seek a hearing before the medical examining board on whether the physician’s conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

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PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

2007 Bill

SAV  
x-ref ✓

soon  
10-18 ←

regen. cont.

1 AN ACT to amend 895.038 (1) (a), 895.038 (2) (a) (intro.), 895.038 (2) (a) 1. and  
2 895.038 (2) (a) 2.; and to repeal and recreate 940.16 of the statutes; relating  
3 to: partial-birth abortion and creating a penalty.

*Analysis by the Legislative Reference Bureau*

This is a preliminary draft. An analysis will be provided in a later version.

Insert  
analysis  
Fix  
component

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

SECTION 1. 895.038 (1) (a) of the statutes is amended to read:

895.038 (1) (a) "Child" "Fetus" has the meaning given in s. 940.16 (1) (a).

SECTION 2. 895.038 (2) (a) (intro.) of the statutes is amended to read:

895.038 (2) (a) (intro.) Except as provided in par. (b), any of the following persons has a claim for appropriate relief against a person who performs a partial-birth abortion and thereby kills a fetus:

SECTION 3. 895.038 (2) (a) 1. of the statutes is amended to read:

Insert  
A

1 895.038 (2) (a) 1. If the ~~person~~ mother on whom a partial-birth abortion was  
2 performed ~~was a minor, the parent of the minor~~ has not attained the age of 18 years  
3 at the time of the abortion, the maternal grandparents of the fetus.

4 SECTION 4. 895.038 (2) (a) 2. of the statutes is amended to read:

5 895.038 (2) (a) 2. The father, if married to the mother at the time she receives  
6 the partial-birth abortion procedure, of the ~~child~~ fetus aborted by the partial-birth  
7 abortion.

8 SECTION 5. 940.16 of the statutes is repealed and recreated to read:

9 **940.16 Partial-birth abortion.** (1) In this section:

10 (a) "Fetus" means a human being who has not been completely delivered from  
11 the body of his or her mother.

12 (b) "Partial-birth abortion" means an abortion in which the person performing  
13 the abortion does all of the following:

14 1. Deliberately and intentionally vaginally delivers a living fetus until, in the  
15 case of a head-first presentation, the entire fetal head is outside the body of the  
16 mother, or, in the case of breech presentation, any part of the fetal trunk past the  
17 navel is outside the body of the mother, for the purpose of performing an overt act that  
18 the person knows will kill the partially delivered living fetus.

19 2. Performs the overt act specified in subd. 1., other than completion of the  
20 delivery, that kills the partially delivered living fetus.

21 (b) (c) "Physician" has the meaning given in s. 448.01 (5).

22 (2) Except as provided in sub. (3), any physician or any other person who  
23 intentionally performs a partial-birth abortion is guilty of a Class I felony.

24 (3) Subsection (2) does not apply to a partial-birth abortion that is necessary  
25 to save the life of a mother whose life is endangered by a physical disorder, physical

1 illness, or physical injury, including a life-endangering physical condition caused by  
2 or arising from the pregnancy itself.

3 (4) A physician who is charged under sub. (2) may seek a hearing before the  
4 medical examining board on whether the physician's conduct was necessary to save  
5 the life of the mother whose life was endangered by a physical disorder, physical  
6 illness, or physical injury, including a life-endangering physical condition caused by  
7 or arising from the pregnancy itself.

8 (5) Upon a defendant's motion, the trial court shall delay the beginning of the  
9 defendant's trial for not more than 30 days to permit a hearing under sub. (4). The  
10 findings of the medical examining board shall be admissible at trial.

11

(END)

↑ Insert B ✓

2007-2008 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-3034/P1ins  
PJH:bk:nwn

6x

INSERT ANALYSIS:

\*  
\*  
Current law prohibits the performance of a partial-birth abortion and defines a partial-birth abortion as one during which a person partially delivers a living fetus, causes the death of the living fetus with the intent to kill the fetus, and then completes delivery of the fetus. A person who performs a partial-birth abortion is guilty of a Class A felony, and is subject to life imprisonment. Current law allows an exception if the partial-birth abortion is performed in order to save the life of the pregnant woman and no other option is available, and current law does not permit the prosecution of the woman upon whom a partial-birth abortion is performed. Current law also grants a civil cause of action to the father or, if the pregnant woman who received the partial-birth abortion was a minor, the grandparent, of a fetus aborted by a partial-birth abortion if the father or grandparent did not consent to the partial-birth abortion procedure. maternal

\*  
\*  
After the United States Supreme Court invalidated a Nebraska statute that prohibited "partial-birth abortion," in *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Seventh Circuit Court of Appeals held that the current Wisconsin law prohibiting partial-birth abortion had the same Constitutional flaws as the Nebraska statute and enjoined its enforcement. *Planned Parenthood of Wisconsin et al. v. Doyle, et al.*, 249 F.3d 603 (7th Cir. 2001).

In 2007, the United States Supreme Court upheld a federal ban on partial-birth abortion, finding that the federal ban did not unduly burden a woman's right to an abortion and that the federal statute set forth specific "landmarks" that clearly delineate when a partial-birth abortion is being performed. *Gonzales v. Carhart*, \_\_\_ U.S. \_\_\_ (2007).

This bill changes the current prohibition on the performance of a partial-birth abortion to define "partial-birth abortion" as an abortion during which a person vaginally delivers a living fetus until a certain proportion of the fetal body is outside of his or her mother's body and then kills the partially delivered fetus. This definition is the same as that under the federal ban, as upheld by *Gonzales*.

The bill grants a physician who is prosecuted for performing a partial-birth abortion the right to a hearing before the medical examining board to determine if the partial-birth abortion was necessary to save the life of the mother.

The bill also specifies that a civil cause of action is granted to the father of a fetus aborted by a partial-birth abortion is limited to cases in which the father was married to the mother at the time the abortion was performed.

CRIME →

INSERT A: X

SECTION 1. 895.038 (1) (intro.) and (b) of the statutes are consolidated,

\*  
renumbered 895.038(1) and amended to read:



895.038 (1) (intro.) In this section: ←

*move*  
History: 1997 a. 219; 2005 a. 277.

~~NOA~~ (b), "Partial-birth abortion" has the meaning given in s. 940.16 (1) (a). ✓

History: 1997 a. 219; 2005 a. 277.

~~X~~  
**SECTION 2.** 895.038 (1) (a) of the statutes is repealed. ✓

*end of insert A*

1 **SECTION 3834bp.** 940.16 (2) of the statutes is amended to read:

2 940.16 (2) Except as provided in sub. ~~(3)~~ whenever subs. (3) and (5), any  
3 physician or any other person who intentionally performs a partial-birth abortion  
4 and thereby kills a fetus is guilty of a Class A I felony.

5 **SECTION 3834bt.** 940.16 (3) of the statutes is amended to read:

6 940.16 (3) Subsection (2) does not apply if the to a partial-birth abortion that  
7 is necessary to save the life of a woman ~~mother~~ whose life is endangered by a physical  
8 disorder, physical illness, or physical injury, including a life-endangering physical  
9 ~~disorder, physical illness or physical injury~~ condition caused by or arising from the  
10 pregnancy itself, ~~and if no other medical procedure would suffice for that purpose.~~

11 **SECTION 3834bw.** 940.16 (4) of the statutes is created to read:

12 940.16 (4) A physician who is charged under sub. (2) may seek a hearing before  
13 the medical examining board on whether the physician's conduct was necessary to  
14 save the life of the mother whose life was endangered by a physical disorder, physical  
15 illness, or physical injury, including a life-endangering physical condition caused by  
16 or arising from the pregnancy itself. The findings of the medical examining board  
17 on that issue shall be admissible on that issue at the defendant's trial. Upon the  
18 defendant's motion, the trial court shall delay the beginning of the defendant's trial  
19 for not more than 30 days to permit the hearing to take place. *De*

20 (END) of insert B

*Insert B*

**Hurley, Peggy**

**From:** Gilkes, Keith  
**Sent:** Monday, December 17, 2007 4:59 PM  
**To:** Hurley, Peggy  
**Subject:** FW: Partial-birth abortion - need for LRB-3034/2, LRB-3285/2 to correct an omission

Peggy-

Another correction to the partial-birth abortion draft to look at correcting? Please make the correction if needed.

Thanks.

*Keith A. Gilkes*  
*Office of Senator Scott Fitzgerald*  
*Phone: (608) 266-5660*

---

**From:** Mary Klaver [mailto:mklaver@wrtl.org]  
**Sent:** Monday, December 17, 2007 4:24 PM  
**To:** Sen.Fitzgerald; Rep.Ott; Rep.Staskunas  
**Cc:** Gilkes, Keith; Mueller, Virginia; Ramirez, Adrienne; Burri, Lance; Hurley, Peggy; Sue Armacost  
**Subject:** RE: Partial-birth abortion - need for LRB-3034/2, LRB-3285/2 to correct an omission

As long as the draft is being modified, I think another correction is needed. On page 2, line 3, shouldn't "Partial-birth abortion" be "partial-birth abortion" – in other words, be lower case because it is in the middle of the sentence?

---

**From:** Mary Klaver [mailto:mklaver@wrtl.org]  
**Sent:** Monday, December 17, 2007 4:12 PM  
**To:** 'Sen. Scott Fitzgerald'; 'Rep. Jim Ott'; 'Rep. Tony Staskunas'  
**Cc:** 'Keith Gilkes'; 'Ginger Mueller'; 'Adrienne Ramirez'; 'Lance Burri'; 'Peggy Hurley'; Sue Armacost  
**Subject:** Partial-birth abortion - need for LRB-3034/2, LRB-3285/2 to correct an omission

Hello,

I was going over the drafts of the Wisconsin partial-birth abortion ban and discovered an inadvertent omission.

The drafting instruction was to mirror the federal law which uses the term "fetus." Wisconsin's current statutes use the term "child." So, "child" was replaced throughout the bill with "fetus." However, we missed one in s. 895.038 (4). The correction would be as follows:

On page 3, after line 7, insert:

Section 6. 895.038 (4) of the statutes is amended to read:

895.038 (4) Subsection (2) applies even if the mother of the ~~child~~ fetus aborted by the partial-birth abortion consented to the performance of the partial-birth abortion.

12/19/2007

Also, please renumber "Section 6" on page 3, line 8, to "Section 7." (So that it is not obvious that there was an omission.)

I discussed the child->fetus error with Peggy Hurley, the LRB drafter. She agreed that the change was necessary. She needs an instruction from Sen. Fitzgerald and Rep. Jim Ott to make the change to each draft. You can simply forward this email to her with an instruction to make this change.

When LRB-3034/2 (senate version) and LRB-3285/2 (assembly version) are done, would you please send a copy to me? Thanks.

Mary Klaver  
Legislative Legal Counsel  
Wisconsin Right to Life  
414-778-5780  
[mklaver@wrtl.org](mailto:mklaver@wrtl.org)

2  
✓  
Kx

2007 BILL

today

Resen

1 AN ACT *to repeal* 895.038 (1) (a); *to consolidate, renumber and amend*  
 2 895.038 (1) (intro.) and (b); *to amend* 895.038 (2) (a) (intro.), 895.038 (2) (a) 1.  
 3 and 895.038 (2) (a) 2.; and *to repeal and recreate* 940.16 of the statutes;  
 4 **relating to:** partial-birth abortion and creating a penalty.

***Analysis by the Legislative Reference Bureau***

Current law prohibits the performance of a partial-birth abortion and defines a partial-birth abortion as one during which a person partially delivers a living fetus, causes the death of the living fetus with the intent to kill the fetus, and then completes delivery of the fetus. A person who performs a partial-birth abortion is guilty of a Class A felony, and is subject to life imprisonment. Current law allows an exception if the partial-birth abortion is performed in order to save the life of the pregnant woman and no other option is available, and current law does not permit the prosecution of the woman upon whom a partial-birth abortion is performed. Current law also grants a civil cause of action to the father or, if the pregnant woman who received the partial-birth abortion was a minor, the maternal grandparent, of a fetus aborted by a partial-birth abortion if the father or grandparent did not consent to the partial-birth abortion procedure.

After the United States Supreme Court invalidated a Nebraska statute that prohibited "partial-birth abortion," in *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Seventh Circuit Court of Appeals held that the current Wisconsin law prohibiting partial-birth abortion had the same constitutional flaws as the Nebraska statute

**BILL**

and enjoined its enforcement. *Planned Parenthood of Wisconsin et al. v. Doyle, et al.*, 249 F.3d 603 (7th Cir. 2001).

In 2007, the United States Supreme Court upheld a federal ban on partial-birth abortion, finding that the federal ban did not unduly burden a woman's right to an abortion and that the federal statute set forth specific "landmarks" that clearly delineate when a partial-birth abortion is being performed. *Gonzales v. Carhart*, \_\_\_ U.S. \_\_\_ (2007).

This bill changes the current prohibition on the performance of a partial-birth abortion to define "partial-birth abortion" as an abortion during which a person vaginally delivers a living fetus until a certain proportion of the fetal body is outside of his or her mother's body and then kills the partially delivered fetus. This definition is the same as that under the federal ban, as upheld by *Gonzales*.

The bill grants a physician who is prosecuted for performing a partial-birth abortion the right to a hearing before the medical examining board to determine if the partial-birth abortion was necessary to save the life of the mother.

The bill also specifies that a civil cause of action is granted to the father of a fetus aborted by a partial-birth abortion is limited to cases in which the father was married to the mother at the time the abortion was performed.

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a report concerning the proposed penalty and the costs or savings that are likely to result if the bill is enacted.

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

1           **SECTION 1.** 895.038 (1) (intro.) and (b) of the statutes are consolidated,  
2           renumbered 895.038 (1) and amended to read:

3           895.038 (1) (intro.) In this section: (b) ~~Partial-birth~~ "partial-birth" has the  
4           meaning given in s. 940.16 (1) (a).

5           **SECTION 2.** 895.038 (1) (a) of the statutes is repealed.

6           **SECTION 3.** 895.038 (2) (a) (intro.) of the statutes is amended to read:

7           895.038 (2) (a) (intro.) Except as provided in par. (b), any of the following  
8           persons has a claim for appropriate relief against a person who performs a  
9           partial-birth abortion and thereby kills a fetus:

10          **SECTION 4.** 895.038 (2) (a) 1. of the statutes is amended to read:

**BILL**

1           895.038 (2) (a) 1. If the ~~person~~ mother on whom a partial-birth abortion was  
2 performed ~~was a minor, the parent of the minor~~ has not attained the age of 18 years  
3 at the time of the abortion, the maternal grandparents of the fetus.

4           **SECTION 5.** 895.038 (2) (a) 2. of the statutes is amended to read:

5           895.038 (2) (a) 2. The father, if married to the mother at the time she receives  
6 the partial-birth abortion procedure, of the ~~child~~ fetus aborted by the partial-birth  
7 abortion.

8           **SECTION 6.** 940.16 of the statutes is repealed and recreated to read:

9           **940.16 Partial-birth abortion.** (1) In this section:

10          (a) "Partial-birth abortion" means an abortion in which the person performing  
11 the abortion does all of the following:

12           1. Deliberately and intentionally vaginally delivers a living fetus until, in the  
13 case of a head-first presentation, the entire fetal head is outside the body of the  
14 mother, or, in the case of breech presentation, any part of the fetal trunk past the  
15 navel is outside the body of the mother, for the purpose of performing an overt act that  
16 the person knows will kill the partially delivered living fetus.

17           2. Performs the overt act specified in subd. 1., other than completion of the  
18 delivery, that kills the partially delivered living fetus.

19          (b) "Physician" has the meaning given in s. 448.01 (5).

20          (2) Except as provided in sub. (3), any physician or any other person who  
21 intentionally performs a partial-birth abortion is guilty of a Class I felony.

22          (3) Subsection (2) does not apply to a partial-birth abortion that is necessary  
23 to save the life of a mother whose life is endangered by a physical disorder, physical  
24 illness, or physical injury, including a life-endangering physical condition caused by  
25 or arising from the pregnancy itself.





**2007-2008 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-3034/lins  
PJH:bx:nwn

INSERT A:

**SECTION 1.** 895.038 (4) of the statutes is amended to read:

895.038 (4) Subsection (2) applies even if the mother of the ~~child~~ fetus aborted by the partial-birth abortion consented to the performance of the partial-birth abortion.

**History:** 1997 a. 219; 2005 a. 277.

**Basford, Sarah**

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**From:** Hurley, Peggy  
**Sent:** Thursday, January 17, 2008 2:05 PM  
**To:** Basford, Sarah  
**Cc:** Gilkes, Keith  
**Subject:** FW: Can you please...

Sarah, can you do this?

---

**From:** Gilkes, Keith  
**Sent:** Thursday, January 17, 2008 2:04 PM  
**To:** Hurley, Peggy  
**Subject:** Can you please...

Peggy-

Can you please jacket the Partial Birth Abortion Ban Legislation - LRB-3034/2?

Go ahead and send it over to out office - 202 South

Thanks.

*Keith A. Gilkes  
Office of Senator Scott Fitzgerald  
13th State Senate District  
Phone: (608) 266-5660  
Keith.Gilkes@legis.wisconsin.gov*