



WISCONSIN  
RIGHTTOLIFE

## LEGISLATIVE ANALYSIS

2009-2010 LEGISLATIVE SESSION

# PRESERVING WISCONSIN'S LAW THAT PROTECTS UNBORN CHILDREN

## WISCONSIN ABORTION BAN IS SOLID

Section 940.04, the Wisconsin ban on abortion, prohibits abortion at any stage of pregnancy, with more severe penalties when the life of a “quick” unborn child is destroyed, unless the abortion is necessary to save the life of the mother. Only the person performing the abortion can be penalized under Wisconsin law. Although s. 940.04 contains provisions providing penalties for a woman who obtains an abortion, these provisions were superseded by a later law, s. 940.13, which was enacted in 1985. **Section 940.13 clearly states that a woman cannot be prosecuted, fined or imprisoned for obtaining an abortion.**

Wisconsin is one of only four states that still has its pre-*Roe* abortion ban on the books. The 1973 *Roe v. Wade* decision of the US Supreme Court is the only thing that prevents s. 940.04 from being enforced. If *Roe v. Wade* is reversed, then s. 940.04, as modified by s. 940.13, would immediately be enforceable because there is no court injunction preventing the enforcement of s. 940.04. The few court cases dealing directly with the issue of judicial revival of a statute are unanimous in holding that a law, once declared unconstitutional and later held to be constitutional, does not require re-enactment by the legislature in order to restore its operative force.

Section 940.04 has not been repealed. Statutes can be repealed expressly or by implication. Although there have been several efforts over the years to *expressly repeal* s. 940.04, these prior efforts have been soundly defeated. In the 1994 Wisconsin Supreme Court decision in *State v. Black*, the court held that s. 940.04 has not been repealed by implication with the 1985 enactment of s. 940.15, a post-*Roe* statute that prohibits abortions after viability unless it is necessary to preserve the life or health of the woman.

It is also clear that the state legislature recognizes that s. 940.04, as modified by s. 940.13, is still on the books in Wisconsin. In 1998, Wisconsin enacted a comprehensive “fetal homicide” law applicable to unborn children who are harmed or killed by the violent act of a third party in a *non-abortion* context. Abortions were expressly excluded from the coverage of the fetal homicide law in order to distinguish this law from Wisconsin’s criminal abortion statutes (see s. 939.75 (2) (b) 1.). This abortion exclusion provision also states that it “does not limit the applicability of [sections] 940.04, 940.13, 940.15 and 940.16 to an induced abortion” in order to clarify that these abortion statutes would still be operative when *Roe v. Wade* is overruled.

## WISCONSIN BAN ON ABORTION SHOULD NOT BE REPEALED OR AMENDED

Abortion advocates are fully aware that s. 940.04 would become enforceable if *Roe* is overruled. Rep. Terese Berceau has already announced that she will once again introduce legislation to expressly repeal s. 940.04. It is critical that any effort to repeal or amend s. 940.04 be defeated. If s. 940.04 is repealed, abortion would continue to be legal in Wisconsin even if *Roe v. Wade* is reversed, unless or until a new ban on abortion would be enacted by the legislature. If s. 940.04 is amended, unborn children will be destroyed.

**Please contact your state legislators and urge them to oppose any proposal to repeal or amend s. 940.04, as modified by s. 940.13.**