WISCONSIN'S PRE-*ROE v. WADE* ABORTION STATUTE

Current Status and Potential Threats Related to 2011 AJR 77, A Proposed Amendment to the State Constitution

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Current Status and Potential Threats

With growing recognition, even among liberal judges, that the underpinning of *Roe v. Wade* is intellectually bankrupt, the pro-life movement confronts the real prospect that that decision will be reversed within the next seven to ten years. Some states are considering or have enacted legislation aimed directly at challenging the holdings in *Roe.* Most informed observers agree, however, that there are currently not enough votes on the U.S. Supreme Court to overrule *Roe v. Wade.*

In this environment, each state must consider its prospects of protecting unborn children based on the history of abortion law in the state. Wisconsin has had a criminal abortion statute in its statutes since 1849. The current wording of Wisconsin's pre-*Roe* criminal abortion statute, § 940.04, has been in the statutes since a major revision of the criminal code in 1955. Section 940.04 makes it a crime to intentionally destroy the life of an unborn child unless it is necessary to save the life of the mother.

Wisconsin is one of only a handful of states which retains a pre-*Roe* law that prohibits abortion. Along with several other states, Wisconsin enjoys the enviable position of being able to **immediately** protect unborn children once *Roe* is eliminated.

An effort to amend Wisconsin's Constitution is being promoted as a means of protecting unborn children. The proposed state constitutional amendment, introduced as AJR 77, would amend the Wisconsin Constitution as follows:

> **Section 1.** Section 1 of article I of the constitution is amended to read:
>
> [Article I] Section 1. All people are ~~born~~ equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed. As applied to the right to life, the terms "people" and "person" shall apply to every human being at any stage of development.

The purpose of this legal white paper is to examine the legal status of Wisconsin's pre-*Roe* law and the impact of enacting this proposed state constitutional amendment intended to prohibit abortion.

It is the conclusion of the legal white paper that Wisconsin unborn children will best be protected by preserving § 940.04 of the statutes, rather than leaving them to an uncertain future under the proposed state constitutional amendment.

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EXECUTIVE SUMMARY

STATUS OF WISCONSIN'S PRE-*ROE* CRIMINAL ABORTION STATUTE

- Wisconsin's pre-*Roe* criminal abortion statute would **immediately** become enforceable once *Roe v. Wade* is overruled. No legislative or judicial action would be needed to enforce this statute.

IMPACT OF PROPOSED AMENDMENT TO THE WISCONSIN CONSTITUTION

- The proposed amendment would be challenged in federal court where it might be either struck down (if *Roe* is in effect), or held to be irrelevant to abortion. Planned Parenthood and its allies could be awarded substantial attorney fees if they are successful in having the amendment struck down in federal court.

- The language of the proposed amendment would create a material risk of Wisconsin's pre-*Roe* criminal abortion statute being declared unconstitutional under the Wisconsin Constitution.

- The amendment in and of itself would not prohibit abortions. It is very doubtful that the amended language would bring abortions within the scope of Wisconsin's criminal homicide statutes. If § 940.04 were declared unconstitutional and no new law were enacted, there would likely be no law prohibiting abortion throughout pregnancy.

- If the amendment *were* held to make existing intentional homicide statutes applicable to abortion, women who have abortions would be subject to mandatory life sentences.

- At least $4 million would be needed to have a chance to obtain a favorable vote on a statewide ballot.

CONCLUSION

- Wisconsin unborn children will best be protected by preserving § 940.04 of the statutes, rather than leaving them to an uncertain future under the proposed state constitutional amendment.

WISCONSIN'S PRE-*ROE* ABORTION STATUTE
Current Status and Potential Threats

1. What is the current status of § 940.04, Wisconsin's pre-*Roe* criminal abortion statute? If *Roe v. Wade* is overruled, would § 940.04 go back into effect?

Summary Conclusion: Wisconsin's pre-*Roe* criminal abortion statute, § 940.04, is currently unenforceable because of *Roe v. Wade*, 410 U.S. 113 (1973), the U.S. Supreme Court decision that struck down the criminal abortion statutes throughout the United States. Upon *Roe v. Wade* being overruled, with *Roe* as the only impediment to § 940.04, the statute would immediately become fully enforceable because it is not subject to any existing injunction and it has not been repealed expressly or by implication.

A. No injunction is in place against § 940.04

A lawsuit challenging § 940.04 was pending in the federal trial court for the Eastern District of Wisconsin at the time *Roe v. Wade* was decided. Although a preliminary injunction against enforcement of the measure had been entered, that injunction had been vacated and the case had been remanded to the district court, where proceedings were still pending when *Roe v. Wade* came down.

In *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970), decided March 5, 1970 (prior to *Roe*), a federal district court held that § 940.04 (1) and (5) were unconstitutional. No injunction was issued. In *Babbitz v. McCann*, 320 F. Supp. 219 (E.D. Wis. 1970), decided November 18, 1970, the court issued the injunction previously denied. However, in *McCann v. Babbitz*, 402 U.S. 903 (1971), decided April 19, 1971, the U.S. Supreme Court vacated the injunction and remanded the case for reconsideration on a procedural issue. According to the civil docket for this case, on July 30, 1971 the district court did not re-instate the injunction. The case was ultimately dismissed as moot as of March 5, 1973.

On January 31, 1973, Wisconsin Attorney General Robert Warren sent a letter to "All Wisconsin District Attorneys" regarding the "Constitutionality of Wisconsin Abortion Statute (§ 940.04, Wis. Stats.)" stating, "It is my opinion that [the January 22, 1973 *Roe v. Wade* and *Doe v. Bolton*] decisions have effectively rendered unconstitutional and unenforceable the Wisconsin abortion statute, § 940.04, Stats, in its entirety." Although the Attorney General opinion correctly stated the effect of *Roe* and *Doe* on § 940.04, the opinion is advisory only.

After *Roe v. Wade* further action took place in the Wisconsin courts. In *Larkin v. McCann*, 368 F. Supp. 1352 (E.D. Wis. 1974), decided January 3, 1974, the district court denied an abortion doctor's request for an injunction based on the position taken by the Wisconsin attorney general, District Attorney E. Michael McCann, and other defendants that the U.S. Supreme Court's rulings in *Roe v. Wade* and *Doe v. Bolton* had mooted the question of the enforceability of § 940.04, and the defendants' recognition that this statute was unenforceable. The court stated, "We recognize that there will be no direct official deterrent to prosecution of the plaintiff by the defendants as a result of our action today." The action was dismissed.

There are no Wisconsin Supreme Court cases addressing the constitutionality of § 940.04. State courts, including the Wisconsin Supreme Court, are bound only by U.S. Supreme Court decisions interpreting the U.S. Constitution. They are not bound by the decisions of federal district courts, such as the *Babbitz v. McCann* decisions noted above.

B. Section 940.04 has not been expressly repealed by the legislature

In 1985, the Wisconsin legislature passed a bill commonly referred to as the Pregnancy Options Bill which covered a wide range of issues including pregnancy prevention, sex education programs, informed consent for abortion, and abortion prohibitions. This law created § 940.15 which prohibits abortion after viability unless it is "necessary to preserve the life or health of the woman". During the negotiations on this legislation, a provision was added to repeal § 940.04 and replace it with a ban on post-viability abortions. Wisconsin Right to Life was successful in having this attempt to repeal § 940.04 removed from this legislation before it even reached the floor for a vote.

Between 1989 and 1992, there were several attempts to repeal § 940.04, either directly; as a provision in the bi-annual state budget; or as an amendment to other legislation. None of these attempts to repeal § 940.04 was successful. In 1989, Assembly Bill 500 was introduced for the sole purpose of repealing § 940.04. This attempt to repeal § 940.04 was soundly defeated by the state legislature. In 1992, when the State Senate was voting on the parental consent for abortion legislation, there was an amendment to repeal § 940.04. This senate amendment was soundly defeated.

In 2006, bills to repeal § 940.04 were introduced late in the legislative session. No action was taken on these bills.

C. Section 940.04 has not been repealed by implication by the legislature

Abortion advocates can be expected to claim that § 940.04 has been impliedly repealed by the enactment of several abortion regulation laws in Wisconsin such as § 940.15 which prohibits and regulates post-viability abortions; § 253.10, which requires informed consent for an abortion; or § 48.375, which requires parental or judicial consent for an abortion on a minor unless certain exemptions or exceptions apply.

DOCTRINE OF IMPLIED REPEAL. Implied legislative repeal is a question of statutory construction. Implied repeal of state legislation is a state law question. The Wisconsin Supreme Court is the ultimate decision maker as to whether a Wisconsin statute has been impliedly repealed. *The issue of implied repeal is essentially a question of legislative intent.* The issue arises when there is an apparent conflict between an earlier and a later statute. As a general proposition, the later enactment, as the latest expression of legislative intent, governs. However, implied repeal is highly disfavored and there is a presumption against a finding that the prior law has been impliedly repealed. The presumption against implied repeal is particularly strong in regard to important public policy statutes of long standing. If an apparent conflict between the two enactments can be resolved, and both enactments can be given some area of operation and effect, no implied repeal will be found. Subsequent abortion regulations can be reconciled with prior abortion prohibitions so long as some class of legal abortions are permitted for which the regulations can be given some field of operation. The post-*Roe* enactments should generally be viewed as measures intended to fill a gap created by *Roe*, rather than as impliedly repealing pre-*Roe* legislation. (*See* David M. Smolin, *The Status of Existing Abortion Prohibitions in a Legal World Without* Roe: *Applying the Doctrine of Implied Repeal to Abortion,* St. Louis University Public Law Review 385, 394 (1992).)

Fortunately, in *State v. Black*, 188 Wis. 2d 639 (1994), the Wisconsin Supreme Court ruled that when the legislature enacted § 940.15, the post-viability ban on abortion, it did **not** impliedly repeal § 940.04 (2) (b), the portion of Wisconsin's pre-*Roe* law that prohibits" intentionally destroying the life of an unborn quick child." The court made it clear the implied repeal of statutes by later enactments is not favored in statutory construction.

The enactment of § 253.10, Wisconsin's Woman's Right to Know law which requires informed consent for an abortion contains a "savings clause" which is designed to prevent a ruling of implied repeal based on the enactment of this law. This provision is in § 253.10 (8) and reads as follows: "CONSTRUCTION. Nothing in this section may be construed as creating or recognizing a right to abortion or as making lawful an abortion that is otherwise unlawful."

The absence of an explicit savings clause in § 48.375, which requires parental or judicial consent for an abortion on a minor, is of no consequence. The mere absence of a savings clause does not overcome the presumption against implied repeal. The presumption against implied repeal means that in the absence of an explicit savings or repealing clause, the court should presume that the legislature intended to save existing legislation. Furthermore, a parental consent statute does not apply to adults, so it cannot impliedly repeal abortion prohibitions as applied to abortions performed upon adults. Wisconsin's parental consent statute specifically states that it is intended to further Wisconsin's interests "in fostering the family structure" and "protecting the rights of parents to rear minors who are members of their households." These interests do not cease during life-threatening pregnancies and a parent's interest in providing emotional support after an abortion does not cease merely because the pregnancy threatened the minor daughter's life. (*See id* at 413, 415-16.)

The legislative intent of these regulatory laws, therefore, was not to statutorily legalize abortion, but rather to clearly enact the maximum abortion regulations permissible under current U.S. Supreme Court law.

D. There is judicial recognition that § 940.04 is still in effect.

In *State v. Black*, 188 Wis. 2d 639 (1994), the Wisconsin Supreme Court ruled that Glenndale Black could be properly charged under § 940.04 (2) (a) with the crime of *intentionally destroying the life of an unborn quick child*. Black had violently assaulted his wife and caused the death of his unborn son who was due to be born in five days. In its opinion, the court held that the words of § 940.04 (2) (a) "… could hardly be clearer. The statute plainly proscribes feticide, the action alleged of Black." The court underscored that the case was about "feticide" and that it was not an abortion case. It noted that § 940.04 (2) (a) cannot be used to charge for a consensual abortion because that would be unconstitutional under *Roe v. Wade.*

State v. Black did not address § 940.04 as a whole. In footnote 2 the court stated, "We address only sec. 940.04 (2) (a) and make no attempt to construe any other sections of sec. 940.04. Additionally, we do not agree that sec. 940.04 (2) (a) was to apply only to consensual abortions. The plain language of the statute evinces an intent otherwise."

E. There is ample evidence of legislative intent that § 940.04 should remain on the statute books as a criminal abortion statute.

From 1992 to 1998 Wisconsin Right to Life worked continuously with Tracy Black (Glenndale Black's former wife, who is now known as Tracy Seavers) to pass comprehensive fetal homicide and bodily injury laws recognizing unborn children as separate victims of crimes. These laws, which were enacted in 1998, created parallel statutes under all the major homicide and bodily injury laws that apply specifically to unborn children, with the same penalties as the provisions applying to born human beings. It was the intent of the legislature to have these statutes used as "feticide" statutes.

Several exceptions to these fetal homicide and bodily injury laws were created in § 939.75. The fetal homicide laws would have been subject to a court challenge as being in conflict with *Roe v. Wade* unless a provision was added to make it clear that they did not apply to an abortion. Consequently, § 939.75 (2)(b)1 was included to provide that the fetal homicide laws do not apply to "An act committed during an induced abortion." This same provision also provided that, "This subdivision does not limit the applicability of §§ 940.04, 940.13, 940.15 and 940.16 to an induced abortion." The legislative intent of this savings provision is to clarify that these specific statutes are Wisconsin's abortion statutes.

The major abortion advocates in Wisconsin recognize that § 940.04 is not dead. As discussed above, there have been and continue to be unsuccessful attempts by these abortion advocates to expressly repeal § 940.04. They also concede that § 940.04 could be effective again if *Roe* is overruled. In its Winter 2006 newsletter, Planned Parenthood Advocates of Wisconsin stated, "The moment *Roe* is overturned, authorities could enforce our existing state statute, Wis. Stat. § 940.04 banning abortion." On February 22, 2006, NARAL Pro-Choice Wisconsin issued a press release stating, "If *Roe* were overturned or rolled back, the [Wisconsin pre-*Roe* abortion ban] could immediately go back into effect …" These abortion advocates have never claimed that § 940.04 has been repealed by implication.

The creation of § 940.13 in 1985 is another example of legislative intent to keep § 940.04 on the books. Both Wisconsin Right to Life and the abortion advocates agreed that there should be no fine or imprisonment imposed upon a woman who obtains an abortion. As currently worded, § 940.04 (3) and (4) have language that appears to impose penalties on a woman who intentionally destroys the life of her unborn child or consents to such destruction by another. Pro-life legislators did not want to risk a line item veto by Governor Tony Earl, an abortion advocate, by directly repealing § 940.04 (3) and (4). He could have lined out ~~(3)~~ and ~~(4)~~ of the repealing provision and modified it to read "repeal § 940.04". Instead, the legislators cleverly created § 940.13 which provides 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 any abortion statute …" Thus, women cannot be penalized for obtaining abortions and § 940.04 remains on the statute books.

In addition, the Wisconsin state legislature has a long history of protecting unborn children in a non-abortion context such as (1) the fetal homicide and bodily injury statutes, (2) the "Cocaine Mom" law that permits child protective services to take an unborn child and his or her mother into custody to protect the unborn child from the mother's "habitual lack of self-control" in the use of alcohol or a controlled substance, and (3) the definition of "live birth" which requires statutes and rules to be construed so that whoever undergoes a live birth as the result of an abortion has the same legal status and legal rights as a child who is born as the result of natural or induced labor or a cesarean section.

2. If *Roe v. Wade* is overruled, what steps would need to be taken, if any, to make § 940.04 enforceable again?

Summary Conclusion: The only impediment to the enforcement of § 940.04 of the Wisconsin statutes is the *Roe v. Wade* decision. Consequently, there would be no need for legislative or judicial action.

In *Jawish v. Morlet,* 86 A.2d 96 (D.C. 1952), the court stated, "There are comparatively few cases dealing squarely with the question before us, but they 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. They proceed on the principle that a statute declared unconstitutional is void in the sense that it is inoperative or unenforceable, but not void in the sense that it is repealed or abolished; that so long as the decision stands the statute is dormant but not dead; and that if the decision is reversed the statute is valid from its first effective date [cases from five states were cited]." (Emphasis added.)

Roe v. Wade, in footnote 2, listed Wis. Stat. § 940.04 as an abortion statute similar to the Texas statute it struck down as unconstitutional in that decision. If *Roe* is overruled, Wisconsin's pre-*Roe* law will again be valid and enforceable.

In the federal cases outlined above, there is no current injunction on enforcement of § 940.04 (1) and (5) and there have never been any injunctions on any part of § 940.04 by any other court.

In the publications discussed above, Planned Parenthood Advocates of Wisconsin and NARAL Pro-Choice Wisconsin each declared that if *Roe* is overturned, § 940.04 could immediately go back into effect.

Consequently, the only thing standing in the way of enforcing § 940.04 is the *Roe v. Wade* decision.

3. If adopted, can the proposed state constitutional amendment be challenged in a federal court?

The proposed amendment says two things: (1) unborn children are "people" and "persons"; and (2) this prescription is operative with respect to "the right to life". By striking the word "born" from the existing version of Article I, § 1 of the Wisconsin Constitution, the proposal makes it clear that its intent, at least in part, is to bring unborn children within the scope of the constitutional assertion of an inherent right to life belonging to all human beings.

To what extent, if at all, would this language conflict with *Roe*? It challenges a key premise of the majority's reasoning in that decision, *i.e.* that when life begins is a legally insoluble philosophical conundrum that must be left to individual judgment and is therefore constitutionally insulated from legislative intrusion. In and of itself, that would not necessarily make it constitutionally vulnerable. The federal courts do not exist to resolve abstract disagreements about propositions of fact, policy, or value. Supporters of the proposed amendment are correct in pointing out that, in *Webster v. Reproductive Health Services*, 492 U.S. 490, 504-505, the Supreme Court rejected the conclusion that a legislative assertion of fetal personhood, as long as it was not used to justify anti-abortion regulation, was inconsistent with *Roe*.

The preamble at issue in *Webster* was found by the Court to be "abortion neutral". A constitutional challenge to the personhood amendment could be based on the contention that the expanded language inserted into the Constitution by that amendment would have a real-world impact on the exercise of the right to abortion. One avenue for such a challenge would be a contention by an abortion provider, or by a

woman claiming to want an abortion, that the provision raised the specter of criminal prosecution of abortions under Wisconsin statutes prohibiting intentional homicide (or, perhaps, lesser degrees of unlawfully taking life). The challenger would presumably concede that, on their face, those statutes apply only to victims who have been born alive. S/he would argue, however, that a plausible interpretation of the amendment's language – particularly its reference to equality – is that limitation of statutory protection of the right to life to those who have already been born is now unconstitutional, and that the relevant statutes must therefore be read as if that limitation had been extirpated.

Presumably, proponents of the amendment will have taken pains to establish legislative history expressly disclaiming any intent to achieve that effect through the amendment. That would not necessarily be enough, however, to defeat the challenger's argument. A basic principle of statutory construction is that aids to interpretation, such as legislative history, come into play only if the statutory language itself is ambiguous. If that language is unambiguous within the four corners of the provision under consideration, then the courts may not resort to legislative intent (however thoroughly documented) or any other extrinsic aid to construction.

Confronted with a challenge that turns on the impact of a state constitutional provision on pre-existing state statutes, a federal court might take one of several courses: (1) abstain from exercising jurisdiction until the state courts had had a chance to provide a definitive interpretation of the provision (*e.g.*, in an actual criminal prosecution, or an action in state court to enjoin prosecution); (2) reject the challenge on the ground that the provision is ambiguous and ambiguous statutory provisions should be construed, if possible, in such a way as to avoid constitutional issues, leading the court to interpret the provision as not removing the "born alive" limitation from Wisconsin homicide statutes; (3) dismiss the challenge on the ground that there was no case or controversy, and therefore no federal jurisdiction, because the Wisconsin Attorney General would (presumably) disclaim the prosecutorial authority that the challengers would contend the personhood amendment unconstitutionally conferred on him (or her); or (4) find that the statute is unambiguous and then either uphold the challenge or reject it, based on whether the court accepts the interpretation placed on the statute by the challenger. (It seems quite unlikely that the court would find the provision ambiguous and then resolve the ambiguity in favor of the challenger's contention, but that outcome could not be ruled out.)

If any of these outcomes were appealed to the United States Court of Appeals for the Seventh Circuit, it is possible (though far from certain) that that court would certify the question of the personhood amendment's effect on criminal statutes to the Wisconsin Supreme Court for definitive resolution. That court would then be confronted with options (2) and (4).

This assumes for purposes of this discussion that, if any court reaches the merits of the hypothetical challenge, it is likely to determine that the personhood amendment does not have the effect of criminalizing abortion by removing the "born alive" element from Wisconsin criminal statutes. That outcome, however, is not certain. The challenge hypothesized would face an uphill fight, but it would be neither frivolous nor hopeless.

Hence, we should recognize a material risk that it would be brought, and would lead to an outcome that either nullified the personhood amendment or formally limited its effect. If the former result obtained, a six-figure award of attorney's fees to the pro-abortion challengers should be expected.

4. If adopted, what impact would the proposed state constitutional amendment have on § 940.04?

The Personhood Amendment does not present the same obstacles to renewed enforcement as the 2006 proposal. In the context of the proposed amendment as a whole, however, the reference to all people (including children prior to birth) being "equally" free raises troublesome difficulties in this regard.

The proposed amendment says that the inherent rights of all people include the right to life. Is the right to life part of the freedom that unborn children share equally with everyone else? If so, does the fact that it is shared "equally" mean that the legal protection of that right provided by the criminal law must be the same for unborn children as it is for everyone else? If the answers to these questions are "Yes," then prescribing a lesser penalty for intentionally and deliberately killing a child three months before birth than for intentionally and deliberately killing a child sixty minutes after birth – which is one of the effects of § 904.04 – would conflict with that prescription.[1]

A defendant seeking to assert this position in a criminal prosecution under § 940.04 would face serious standing issues. An abortionist or abortion-seeker pursuing injunctive relief, however, would not face that obstacle. Such a challenger could contend that the dramatic difference in treatment between intentionally killing people before and after birth simply cannot be squared with the amendment's prescription of equality.

To be sure, that argument would confront a formidable substantive objection. The law routinely treats homicides differently depending on the circumstances under which they are committed. Murder for hire, to take an obvious example, is punished more harshly than murder committed impulsively at the climax of a heated argument. Judges would ask the challengers why the differentiation implicit in § 940.04 is not simply one more example of this commonplace approach.

The challengers' answer, presumably, would be that the differentiation here is not based on circumstance but on the status of the victim; or to put it another way, on the precise "circumstance" that the amended constitutional language would make expressly ineligible for consideration. That rejoinder might fail – but it might succeed. Its prospects for success are certainly not trivial. And if it did succeed, the results would be literally fatal for thousands of unborn children in Wisconsin.

[1] This argument has been raised repeatedly over the past forty years and, in our judgment, it would be imprudent not to take it seriously. *See, e.g.,* Chemerinsky, "Rationalizing the Abortion Debate: legal Rhetoric and the Abortion Controversy," 31 Buff. L. Rev. 107, 112-14 & nn. 27, 38 (1982); *see also Roe v. Wade*, 410 U.S. 113, 157 n.54 (1973).

5. If adopted, what would be the impact of the proposed state constitutional amendment on Wisconsin's laws regulating abortion?

Unlike the 2006 measure considered, the Personhood Amendment should not interfere with enforcement of these regulations. The regulations accord to the lives of unborn children as much legal protection as is constitutionally possible under the *Roe* regime, and increase the level of that protection relative to what it would be in the absence of the regulations. It would be clearly pretextual for a court to invoke the Personhood Amendment as a basis for striking down those measures.

6. If *Roe* is overruled and the proposed state constitutional amendment goes into effect, would the amendment in and of itself prohibit abortion?

Supporters of the proposal insist that it is not intended to have this effect. The only way it could have that effect would be if it were interpreted as implicitly amending existing unlawful homicide statutes to bring abortion within their scope by defining "person" and "people" to include unborn children. It is extremely unlikely that the Wisconsin Supreme Court would countenance such an interpretation.

It bears mention that pro-abortionists would argue strenuously that the amendment would indeed have this effect, both when they were opposing adoption of the Personhood Amendment, and when they were attacking it in court after it was adopted. If those attacks failed, however, they would then join (almost) everyone else in recognizing that the Personhood Amendment was not intended to have that effect and did not in fact have it. Hence, it is very hard to imagine any circumstances under which a criminal prosecution under the Personhood Amendment would even be attempted, much less successful.

7. If the proposed state constitutional amendment is adopted, could district attorneys use Wisconsin's intentional homicide laws to prosecute for abortion?

For the reasons set out in response to Question No. 6, the answer is no.

8. Assume that the proposed state constitutional amendment is adopted, *Roe* is overruled, and § 940.04 has been declared unconstitutional under the amendment. Would the proposed state constitutional amendment sufficiently protect the unborn?

Once again, for the reasons set out in response to Question No. 6, the answer is no. A measure that had been successfully defended against constitutional attack before *Roe v. Wade* was overturned on the ground that it did not criminalize abortion either directly or by implication could not credibly be used to prosecute abortionists under criminal statutes that had never before been understood as applying to abortions.

9. Are there other problems with the actual language of the proposed state constitutional amendment?

Legally, the answer is no. Politically, pro-abortionists would run television ads showing women in orange jump suits being put in irons and thrown into prison, and would claim that adoption of this amendment would mean that the penalty for having an abortion was life without parole. That would be a lie, but the impact of that lie would be a reality that the pro-life movement would have to deal with.

10. What would be the monetary cost of enacting the proposed state constitutional amendment?

It is estimated that the cost to secure a “YES” vote, the pro-life vote, in Wisconsin would be at least $4 million to have a chance to approve this proposed state constitutional amendment on the ballot.