

"LIFE" IN WISCONSIN: UNSETTLED LAW AND AN UNSETTLED COURT

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The Wisconsin Supreme Court ("Court") finds itself in interesting times. For the past few years, the Court has been at the center of a controversy within the state about the proper role of the judiciary and the nature of constitutional interpretation.²

Delivering the Tenth Annual Hallows lecture at Marquette Law School, former Justice Diane Sykes—now a judge on the Seventh Circuit Court of Appeals—discerned "a dramatic shift in the court's jurisprudence" during its 2004-05 term. She claimed the Court had

departed from some familiar and long-accepted principles that normally operate as constraints on the Court's use of its power: the presumption that statutes are constitutional, judicial deference to legislative policy choices, respect for precedent and authoritative sources of legal interpretation, and the prudential institutional caution that counsels against imposing broad-brush judicial solutions to difficult social problems.³

While this may accurately summarize a trend, the Court remains sharply divided. As Susan Steingass, a professor at the University of Wisconsin Law School, observed, "[i]t's an interesting court to watch now. Nothing's for sure."⁴ It is within the framework of this very uncertain time in the history of the Court that constitutional provisions, statutes, and judicial decisions bearing on life issues must be assessed.

I. LIFE ISSUES

While there are relatively few Wisconsin decisions bearing directly on life issues, the state has enacted a variety of statutory protections of life that are yet to be definitively

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² See generally, RICK ESENBERG, *A Court Unbound? The Recent Jurisprudence of the Wisconsin Supreme Court* (2007), available at http://www.fed-soc.org/publications/pubID.5/pub_detail.asp (last visited Oct. 12, 2007).

³ DIANE S. SYKES, *Reflections On The Wisconsin Supreme Court*, 89 MARQ. L. REV. 723, 725 (2006).

⁴ BILL LUEDERS, *Under Fire*, MILWAUKEE MAGAZINE, Dec. 1, 2005, available at http://www.milwaukee.com/currentIssue/full_feature_story.asp?NewMessageID=13177&type=502 (last visited Oct. 12, 2007).

construed or measured against potentially applicable constitutional provisions. Wisconsin is, moreover, a major player in embryo-destructive stem cell research and its current Governor has promoted such research as a vehicle for economic development.

In addition, should federal constitutional restrictions on the prohibition of abortion be either removed or liberalized, the state's pre-*Roe* criminal statute is still on the books, and, at least as things stand now, it will be reviewed by a sharply divided Court trending in what many view as a liberal or activist direction. Interesting times may continue.

Abortion

Wisconsin is one of a handful of states in which a statute restricting abortion enacted prior to *Roe v. Wade*⁵ remains on the books. Sec. 940.04 makes it a Class H felony⁶ for any person, other than the mother, to intentionally destroy the life of an unborn child,⁷ and a Class E felony to intentionally destroy the life of an unborn quick child.⁸ These prohibitions do not apply to a "therapeutic abortion" that is 1) performed by a physician, 2) is necessary, or is advised by two other physicians as necessary, to save the life of the mother, and 3) unless an emergency prevents, is performed in a licensed maternity hospital.⁹ An "unborn child" is defined as a human being from the time of conception until born alive.¹⁰

There is no pending injunction against § 940.04. Certain aspects of the statute were subject to federal constitutional challenge prior to *Roe*, and, although an injunction against application of the statute was ultimately issued,¹¹ that injunction was eventually

⁵ 410 U.S. 113 (1973).

⁶ Wisconsin groups felonies into categories ranging from Class A to Class I. WIS. STAT. § 939.50 (2006).

⁷ § 940.04(a).

⁸ § 940.04(2)(a). Sec. 940.04 also contains a provision stating that "any pregnant woman who intentionally destroys the life of her unborn child or consents to such destruction by another may be fined not more than \$200 or imprisoned not more than six months or both." § 940.04(3). As explained more fully below, this provision was repealed by the enactment of § 940.13.

⁹ § 940.04(5).

¹⁰ § 940.04(6).

¹¹ *Babbitz v. McCann*, 320 F.Supp. 219 (E.D. Wis. 1970).

vacated by the Court.¹² After the decision in *Roe*, the case was dismissed as moot. No subsequent case has enjoined the enforcement of any aspect of § 940.04 or further considered the constitutionality of its prohibition of abortion on state or federal constitutional grounds.¹³

Abortion proponents will undoubtedly argue that, as applied to abortions, the law has been implicitly repealed by post-*Roe* legislation inconsistent with its broad prohibition of abortion. However, it is unlikely this argument will succeed, or—if there is an implied repeal—that it applies to § 940.04 in its entirety.

Before addressing the particulars, it should be noted that implied repeal is disfavored,¹⁴ and there is a presumption against finding that a later statute has repealed an earlier one.¹⁵ To the extent there is a fatal inconsistency between a later and earlier statute, courts are to give effect to as much of the earlier statute as is not inconsistent with the latter.¹⁶

The only decision to address § 940.04 in the past thirty-three years is *State v. Black*.¹⁷ In *Black*, the Court upheld the prosecution of a defendant who violently assaulted a pregnant woman five days before her expected delivery date. The baby was delivered dead via caesarian section, and the cause of death was determined to be blunt force trauma to the mother's abdomen.

Making clear that the case was not about abortion, a majority of the Court held that the defendant could be prosecuted under § 940.02(2)(a) (causing the death of an unborn quick child). Significantly, the Court rejected the notion that § 940.04 had been

¹² *McCann v. Babbitz*, 402 U.S. 903 (1971). The Court vacated and remanded in light of its decision in *Younger v. Harris*, 401 U.S. 37 (1971), prohibiting injunctions against state criminal prosecutions where the prosecution is brought lawfully and in good faith.

¹³ To the contrary, in *Larkin v. McCann*, 368 F.Supp. 1352 (E.D. Wis. 1974), the Court declined to enjoin the enforcement of § 940.04, dismissing a physician's claim seeking such relief as moot.

¹⁴ *State v. Zawistowski*, 95 Wis.2d 250, 264, 290 N.W.2d 303 (1980).

¹⁵ 95 Wis.2d at 263-64.

¹⁶ *Jicha v. Karns*, 39 Wis.2d 676, 680, 159 N.W.2d 691, 693 (1968).

¹⁷ 188 Wis.2d 639, 526 N.W.2d 132 (1994).

repealed by the post-*Roe* passage of a more limited regulation of abortion in 1986.¹⁸ The Court concluded that, notwithstanding the statute's title ("abortion"), its plain language—prohibiting the intentional destruction of an unborn quick child—applied and upheld the conviction.¹⁹

The defendant's argument for implied repeal in *Black* was based upon § 940.15, which was enacted after *Roe* and, seeking to comply with its restrictions, outlaws abortions after viability unless necessary to preserve the life or health of the mother. The defendant argued that this narrow prohibition replaced the broader proscription of § 940.04.

In rejecting that argument, the Court relied upon the following notion:

A later and an older statute will, if it is possible and reasonable to do so, be always construed together, so as to give effect not only to the distinct parts or provisions of the latter, not inconsistent with the new law, but to give effect to the older law as a whole, subject only to restrictions or modifications of its meaning, where such seems to have been the legislative purpose.²⁰

The Court went on to state that the earlier and later have distinct roles. Sec. 940.15, according to the Court, "places restrictions (consistent with *Roe v. Wade*) on consensual abortions" and, notwithstanding its caption and the fact that it was undoubtedly enacted to forbid it, "[s]ection 940.04(2)(a) . . . is not an abortion statute."²¹

Abortion proponents may argue *Black* is consistent with the notion of an implied repeal of § 940.04 as an abortion law and that, following established law, it merely gave

¹⁸ 188 Wis.2d at 645-646. The Court also rejected an argument that the law could not be applied because it was held to be facially unconstitutional in *Babbitz*, reasoning that only §§ 940.04(1) and (5) had been held unconstitutional in *Babbitz* and that, in any event, it is not bound by a district court's interpretation of federal law.

¹⁹ It was necessary to charge *Black* under the abortion statutes because, at the time, the pertinent criminal statutes were limited to the killing of "human beings" who are defined, for purposes of the homicide statutes, as "persons who are born alive." § 939.22(16)

²⁰ *Black*, 188 Wis.2d at 645-46, quoting *Jicha v. Karns*, 39 Wis.2d 676, 680, 159 N.W.2d 691 (1968), quoting *McLoughlin v. Malnar*, 237 Wis. 492, 496-97, 297 N.W. 370 (1941).

²¹ *Id.* at 646.

effect to that application of § 940.04(2)(a) that is not inconsistent with § 940.15, *i.e.*, application to something other than abortion.

It seems more likely, however, that § 940.15 was simply an effort to take what *Roe* would give and says nothing about legislative intent to eliminate or limit the older and broader law. This view of the latter statute is, in fact, embedded in *Black's* description of the legislative purpose in enacting § 940.15, *i.e.*, to place restrictions on abortion "consistent with *Roe v. Wade*."²²

In addition, the same bill that enacted § 940.15 also enacted a separate section exempting the mother from sanctions imposed for abortion.²³ Proceeding by the enactment of a separate statutory provision—as opposed to simply writing that exemption into § 940.15 itself—suggests a legislative awareness that some prohibition of abortion other than § 940.15 remains in effect. At the time, this could only have been § 940.04.²⁴

More significantly, the notion that the Legislature intended repeal is further undermined by repeated legislative recognition that § 940.04 is still extant. For example, in 1998, the Legislature enacted a series of amendments to the state's major homicide and bodily injury statutes, making them applicable to unborn children. The same bill created a series of exceptions to these new prohibitions of feticide and fetal injury. Pertinent to our concerns here, § 939.75(2)(b)(1) provides that the newly enacted statutes do not apply to acts committed during an "induced abortion." In doing so, however, the

²² 188 Wis.2d at 646.

²³ § 940.13.

²⁴ Because § 940.13 was enacted in the same bill that created § 940.15, this view of legislative intent would bolster the conclusion that the latter was not intended to repeal § 940.04. The legislative choice to repeal sanctions against mothers by enacting a separate statute rather than amending § 940.04(3) may also support an argument against implied repeal in an entirely different way. The Wisconsin Constitution places an extraordinary veto power in the hands of the state's Governor. At the time the 1985 Act was passed, the Governor could wield what was often called the "Vanna White" veto, permitting the veto of individual letters and numbers in an appropriations bill to completely rewrite passed legislation. Organizations such as Wisconsin Right to Life have argued that the Legislature chose to enact its repeal in a separate statute because, had it repealed § 940.04(3), Democratic Governor Tony Earl could arguably have struck "(3)" and caused the repeal of § 940.04 in its entirety. Wisconsin Constitution, Art. V., § 10(1)(b). *See, e.g., Wisconsin Senate v. Thompson*, 144 Wis.2d 429, 424 N.W.2d 385 (1988) (upholding such a veto). The State constitution was amended in 1980 to prohibit the Governor from creating a new word by rejecting "individual letters" in an appropriations bill. WIS. CONST. art. V, § 10(1)(c).

Legislature also made clear that "[t]his subdivision does not limit the applicability of §§ 940.04, 940.13, 940.15 and 940.16 to an induced abortion."²⁵ In other words, it expressly acknowledged the continued applicability of § 904.04 to abortion.

Other post-*Roe* regulations of abortion offer no significant support for implied repeal. Sec. 253.10, known as Wisconsin Woman's Right To Know law, also enacts a series of regulations of abortion.²⁶ While it could be used to argue for implied repeal—it recognizes that abortions outside the scope of § 940.04 will occur—it, too, is an attempt to comply with *Roe* and, in any event, contains an explicit savings clause, providing that "[n]othing in this section may be construed as creating or recognizing a right to abortion or as making lawful an abortion that is otherwise unlawful."²⁷

There have been several bills introduced to repeal sec. 940.04, most recently in the 2005-06 legislative session.²⁸ In preparing analyses of these proposals, the nonpartisan Legislative Reference Bureau expressed the view that § 940.04 is current law.

²⁵ As noted earlier, § 940.13 exempts women who have abortions from criminal liability (but only if the abortion is performed by a physician) and § 940.15 prohibits post-viability abortions unless necessary to preserve the life or health of the mother. § 940.16 prohibits partial birth abortion. The latter statute was held unconstitutional in *Hope Clinic v. Ryan*, 249 F.3d 603 (7th Cir. 2001).

²⁶ Sec. 253.10(3) requires informed and voluntary consent to an abortion and mandates the provision of certain information including the availability of fetal ultrasound imaging and auscultation, the probable anatomical and physiological characteristics of the unborn child at his or her gestational age, the medical risks of abortion, the availability of medical assistance, paternal support and placement of the child for adoption or in a foster home. The statute also mandates the provision of certain printed materials and requires a 24 hour waiting period. The constitutionality of its various provisions was considered in *Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1997). The Seventh Circuit held that the requirement to inform a woman that services exist to view the image or hear the heartbeat of an unborn child is unconstitutional in that an unborn child does not develop a discernable heartbeat until six to eight weeks gestation. It struck that portion of the law requiring physicians to pay for mandated informational materials and placed a limiting construction on the obligation to distribute county lists of agencies and services providing birth control information. It also held that the law was constitutional only if it is read as not requiring physicians to provide information about the father's responsibility for support when the woman is pregnant as a result of sexual assault or incest or the fetus has been diagnosed with a lethal anomaly.

²⁷ § 253.10(8). In addition, another post-*Roe* statute, § 48.375, requires parental or judicial consent for an abortion on a minor and does not have a similar savings clause. However, § 48.375 is easily reconciled with the continued existence of § 940.04. It could be construed to apply to those abortions permitted under § 940.04(5) as necessary to save the life of the mother, requiring parental consent for abortion in the case of a minor's life threatening pregnancy.

²⁸ See, e.g., 2005 WI S.B. 721, 2005 WI A.B. 1144.

Although a finding of an implied repeal of § 940.04 in its entirety is unlikely, it is less clear that the statute will not be found to have been modified by subsequent regulation. The problem is the continued existence of § 940.15. There is no authority (and has been little or no opportunity) for treating a statute enacted to comport with federal constitutional limitations as a complete dead letter once those limitations are abandoned and the idea of two different – and inconsistent – prohibitions of abortion coexisting is, at best, inelegant.

But, as the Court recognized in *Black*, a subsequent statute should be read to repeal *only so much* of an earlier statute that is inconsistent with it. The reconciliation of §§ 940.04 and 940.15 might proceed as follows: Sec. 940.04(2) made it a Class E felony to abort an unborn quick child, with one exception—strictly defined, only to save the life of the mother. Sec. 940.15 makes it a lesser felony (Class I) to abort a child after viability unless necessary to preserve the life *and* health of the mother. Perhaps § 940.15 implicitly repeals § 940.04(2), making post-viability abortions Class I rather than Class E felonies and creating a life *and* health exception. Sec. 940.04(1), which criminalizes pre-viability abortions, is not inconsistent with that, although the harsher punishment (Class H rather than Class I) and absence of a health exception might be.

While not logically inconsistent, it may be thought anomalous to punish early abortions more harshly than later ones and to provide a narrower exception ("life threatening") for the former than the latter. Thus, a court might also construe §§ 940.04 and 940.15 to make all abortions Class I felonies, unless necessary to preserve the life or health of the mother.²⁹

It seems likely, then, that if *Roe* is overturned, § 940.04 will become enforceable in some way, at least where an abortion is not necessary to preserve the life and health of the mother.

²⁹ A Class I felony is punishable by a fine not to exceed \$10,000 and imprisonment not to exceed three years and six months, § 939.50(3)(i), as opposed to six years for a Class H felony. The state's bifurcated sentencing law would limit confinement in prison to one year and six months and extended supervision to two years. § 973.02(2)(b) and (d).

Protection of the Unborn from Criminal Violence

Until relatively recently, Wisconsin's general statutes on homicide and bodily injury applied only to actions against "human beings" who are defined, for those purposes, as persons "born alive."³⁰

As noted earlier, this was changed by a series of amendments making these statutes generally applicable to actions causing the destruction of the life of, or bodily injury to, an unborn child.³¹ For these purposes,³² an "unborn child" is defined as "any individual of the human species from fertilization until birth that is gestating inside a woman."³³ There have been no significant Court decisions interpreting or considering the validity of these provisions.³⁴

Exceptions to the "feticide amendments" are set forth in § 939.75(2)(a), the most significant of which are induced abortions and "[a]n act by a woman who is pregnant with an unborn child that results in the death of or great bodily harm, substantial bodily harm or bodily harm to that child."³⁵ As noted above, the Court upheld the application of § 940.04 to feticide outside the context of an abortion,³⁶ but that statute is, however, no longer applicable in any way to the actions of an unborn child's mother.³⁷ It is, therefore,

³⁰ § 939.22(16). As noted above, it is unclear whether those statutes could be applied to fetal injuries resulting in death after birth. *See* nn. 11 and 12.

³¹ 1997 Wis. Act 295.

³² Although not for § 940.04 in which an "unborn child" is defined as a "human being from the time of conception until it is born alive." This may be significant in the area of embryo-destructive research.

³³ § 939.75(1).

³⁴ As noted earlier, *see* nn. 12, *supra*, the court of appeals, after the dismissal of certification by an equally divided Supreme Court, held that homicide injury statutes could not be applied to a woman whose binge drinking caused fetal injuries resulting in post-natal death, relying, in part, on the exception set forth in § 939.75(2)(a). *State v. Deborah J.Z., supra*. Thus, these amendments may make it more difficult to apply – or actually preclude the application of – the general homicide and bodily injury statutes to death or injury resulting from pre-natal acts.

³⁵ Again, these exceptions do not apply to the abortion statutes although, as noted earlier, § 940.13 prohibits prosecution of a woman upon whom an abortion is performed. In addition, § 939.75 also excepts application of the feticide amendments to acts "committed in accordance with the usual and customary standards of medical practice during diagnostic or therapeutic treatment" performed by, or under the supervision of, a physician, § 939.75(2)(b)(2h) and the lawful use of birth control. § 939.75(2)(b)(3).

³⁶ *State v. Black, supra*.

³⁷ *See* n. 2.

unclear whether a fetus is afforded any criminal law protection in *utero* from the acts of the mother.

There is some support for the idea that the state's criminal laws regarding homicide and personal injury can be applied only to those who cause injury in utero resulting in death or bodily harm *after birth*. In *State v. Cornelius*,³⁸ the court of appeals permitted such an application, holding that homicide statutes could be applied to a defendant whose intoxicated use of a vehicle caused fetal injury to a child carried by his female passenger resulting in death of the child after birth.

But it is less clear whether the reasoning in *Cornelius* could be used to prosecute a woman who wrongfully caused injury to her fetus resulting in death after birth. In *State v. Deborah J.Z.*³⁹ the court of appeals held that a woman whose binge drinking shortly before delivery caused the death of her infant could not be prosecuted under the homicide statutes, because only acts resulting in injury to "human beings," *i.e.*, those already born alive, are covered by these statutes.

However, state law does afford some measure of civil protection in utero from the actions of the mother. In *State ex rel. Angela M.W. v. Kruzicki*,⁴⁰ the Court considered the applicability of Wisconsin's scheme for child protective custody to an unborn child endangered by his or her mother's pre-natal behavior. In *Angela M.W.*, a pregnant woman was repeatedly using cocaine, and the authorities filed a petition to take the child (and, necessarily, the woman) into protective custody. The Court, in a 4-3 decision, rejected that effort but did so on statutory grounds, holding that the term "child" in Wisconsin's Children's Code referred only to children who have been born.⁴¹ Thus, it avoided addressing her constitutional claims.⁴²

³⁸ 152 Wis.2d 272, 448 N.W.2d 434 (Wis. Ct. App. 1989),

³⁹ 228 Wis.2d 468, 596 N.W.2d 490 (Wis. Ct. App. 1999). The decision in *Deborah J.Z.* was issued after certification of the question resulted in an equally divided Supreme Court. *State v. Deborah J.Z.* 225 Wis.2d 33, 590 N.W.2d 711 (1999).

⁴⁰ 209 Wis.2d 112, 561 N.W.2d 729 (1997).

⁴¹ The Children's Code defined "child" as a person who has not yet attained the age of 18. The majority's analysis echoed portions of Justice Blackmun's explication of the term "person" in *Roe*, see, *e.g.*, 410 U.S. at 156-157. Just as he observed that (not surprisingly) constitutional references to a "person" involve

The Legislature responded by enacting § 48.193,⁴³ which permits taking an adult expectant mother into custody under specified circumstances, including a substantial risk to the physical health of the child caused by the mother's use of alcohol or controlled substances. There have been no cases interpreting this law or passing upon its validity.

Assisted Suicide

Wisconsin law prohibits assisted suicide.⁴⁴ No case has considered the constitutionality of that prohibition. There is an extensive statutory framework for the termination of life support. Sec. 154.03 permits a person of sound mind to authorize the withholding or withdrawal of life-sustaining procedures or feeding tubes when he or she is in a terminal condition or persistent vegetative state.⁴⁵

However, withholding or withdrawal of life support is not permitted if it will cause pain or discomfort that cannot be alleviated through pain relief measures,⁴⁶ and one cannot authorize the withholding or withdrawal of nutrition and hydration that is administered or received by means other than a feeding tube unless the attending physician says that the administration is "medically contraindicated."⁴⁷

No case has addressed whether or not the limitations in this framework are constitutional, and the statute says that its provisions do not impair or supercede a person's right to authorize the withdrawal of life support,⁴⁸ suggesting that the statute may not exhaust the circumstances under which this can be done. In *Guardianship of L.W.*,⁴⁹ the Court has recognized that there is, under certain circumstances, a

activities or statuses that normally occur after birth, the Angela M.W. Court noted that most of the uses of the term "child" in the Children's Code occur in a context suggesting that the child has been born.

⁴² The dissent reached and rejected the constitutional claim, holding that the state had a compelling interest in the protection of human life.

⁴³ WIS. STAT. § 48.193 (2006).

⁴⁴ § 940.12.

⁴⁵ These terms are defined in §§ 154.01(8) and 154.01(5m), respectively. There is also an extensive statutory framework governing the execution of a health care power of attorney, including one specifying the circumstances under which life support can be withdrawn. *See* § 155.01, et seq.

⁴⁶ § 154.03(1).

⁴⁷ *Id.*

⁴⁸ § 154.11(4).

⁴⁹ 167 Wis.2d 53, 482 N.W.2d 60 (1992).

constitutional right under both the federal and state constitutions to refuse medical treatment.

To date, however, the cases simply address the circumstances under which this right may be exercised on behalf of those who are unable to express their wishes or who have not done so through the exercise of a health care power of attorney. In *L.W.*, the Court held that an incompetent individual in a persistent vegetative state has a constitutionally protected right to refuse "unwanted" nutrition or hydration and a guardian may consent to on his or her ward's behalf.⁵⁰ It held that a guardian may so consent when the ward's attending physician together with two independent neurologists or physicians determine with reasonable medical certainty that the ward is in a permanent vegetative state and has no reasonable chance of recovery to a cognitive and sentient life.⁵¹

The Court refused, however, to take the next step in *In re Guardianship of Edna M.F.*⁵² A unanimous Court held that, if the ward is not in a permanent vegetative state and, in the absence of a clear statement of intent established by a clear preponderance of the evidence, it is not in his or her interest to withdraw life sustaining treatment (including a feeding tube) as a matter of law. Several concurring Justices did emphasize, however, that a different outcome would be warranted should the ward's diagnosis change. Although the Court has not signaled a willingness to depart from the *Edna M.F.* framework, there was recently an attempt to set up a test case to challenge *Edna M.F.'s* requirement that, where a ward has left no advance instruction, food and water may be

⁵⁰ The Court made clear that, at least under circumstances in which the divination of a ward's intent is impossible such as those in which the ward was never able to form such an intent, a "best interest" rather "substituted intent" standard is applicable.

⁵¹ Significantly, the Court held that an unqualified state interest in preserving life transforms human beings into unwilling prisoners of medical technology. According to the Court, permitting the termination of life support protects the integrity of the medical profession because physicians may be discouraged from attempting life sustaining procedures if they can never be removed. This is a somewhat different take on the state's interest than that described by the U.S. Supreme Court in upholding Washington's prohibition of physician assisted suicide. *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997) (prohibition of assisted suicide serves state's interest in protecting the integrity and ethics of the medical profession).

⁵² 210 Wis.2d 557, 563 N.W.2d 485 (1997).

withdrawn only if he or she is in a persistent vegetative state. The matter was dismissed by the guardian at the trial court level.⁵³

Healthcare Rights of Conscience

There are several statutes in Wisconsin that afford some measure of conscience protection on life issues. For example, physicians, hospitals, and their employees may not be required to participate in a sterilization procedure or the removal of a human embryo or fetus.⁵⁴

The law also exempts hospitals and hospital employees from civil damages resulting from a refusal to perform sterilization or abortion procedures if the refusal is based on religious or moral precepts⁵⁵ and prohibits discrimination in employment or education on the basis of a person's refusal to recommend aid or perform abortion or sterilization procedures based on religious or moral precepts.⁵⁶ Sec. 253.09(4) prohibits requiring any recipient of a grant, contract, or loan guarantee to provide abortion or sterilization procedures that are objected to by the recipient on moral or religious grounds.

Sec. 441.06(6) exempts registered nurses from liability for civil damages resulting from his or her refusal to perform sterilization procedures or to remove or aid in the removal of a human embryo or fetus from a person on religious or moral grounds. Physicians and physician assistants enjoy the same immunity.⁵⁷ There is also conscience protection for those who refuse to be involved in the withdrawal of life preserving nutrition and hydration.⁵⁸

These statutes do *not* protect pharmacists or apply to the provision of contraceptives or abortifacients that do not remove an embryo or fetus from a body.⁵⁹

⁵³ Terry Rindfleisch *Case Draws Right to Life Action*, LA CROSSE TRIBUNE, Aug. 15, 2007,

⁵⁴ § 253.09(1)

⁵⁵ § 253.09(2).

⁵⁶ § 253.09(3)

⁵⁷ § 448.03(5).

⁵⁸ §§ 157.07(1)(a)(3); 115.50(1)(b).

⁵⁹ Wisconsin's recently-defeated Attorney General did opine that the exclusion of contraceptives from an employer or university benefits plan providing prescription drug coverage would violate state anti-

Nor do all of the statutes apply to all health care professionals, students, schools, or medical facilities. They do *not* protect persons who do not wish to participate in an employer's embryo-destructive research or other research involving the destruction of life prior to birth. A bill that would have extended much of this protection was passed by the Legislature during the last term but vetoed by the governor.⁶⁰

There have been no cases interpreting these provisions or assessing whether there is a constitutional right to follow one's conscience where there is no statutory right. Wisconsin's Constitution provides "the right to worship Almighty God according to the dictates of conscience shall never be infringed" and that no "control of, or interference with, the rights of conscience be permitted . . ."⁶¹ The state supreme court does not interpret this provision in the same way that the United States Supreme Court ("USSC") interprets the First Amendment's Free Exercise Clause.⁶²

In *State v. Miller*,⁶³ the Court held that requiring Old Order Amish to display a state-mandated slow moving vehicle emblem on their horse-drawn buggies, notwithstanding the Amish belief that the display of such a "worldly symbol" was contrary to their faith, violated the state constitutional right to freedom of conscience. In so doing, it made clear that burdens on free exercise would be subject to a "compelling state interest" test:

Succinctly stated, under this analysis, the challenger carries the burden to prove: (1) that he or she has a sincerely held religious belief, (2) that is burdened by application of the state law at issue. Upon such proof, the burden shifts to the

discrimination law. 2004 WL 078999 (Wis. A.G.) She did not consider – or even acknowledge – a potential constitutional concern.

⁶⁰ AB 207 would have protected health care, professionals, students, medical facilities and medical schools from being forced to participate in certain activities that deliberately destroy human life including abortion, assisted suicide, euthanasia, destruction of human embryos for research and use of aborted fetuses for research or any other purpose. Given that the Democrats have taken control of the state Senate, it seems unlikely that such a bill will be passed during the next term.

⁶¹ WIS. CONST. art. I, § 18.

⁶² In *Employment Div. v. Smith*, 494 U.S. 872 (1990), the U.S. Supreme Court held that neutral, generally applicable state laws which are not aimed at regulation of religious belief and which do not implicate other constitutional provisions do not run afoul of the Free Exercise Clause.

⁶³ 202 Wis.2d 56, 549 N.W.2d 235 (1996).

State to prove: (3) that the law is based on a compelling state interest, (4) which cannot be served by a less restrictive alternative.⁶⁴

This suggests at least the potential for constitutionally-required conscience protection, but there have been few cases applying *Miller* and no further guidance on how it might impact life issues.

Cloning.

There are no statutes or case law regarding cloning. Last term, the Legislature passed a bill which would have forbidden cloning but it was vetoed by the Governor.⁶⁵

Destructive Embryo Research.

Wisconsin may become a battleground over embryonic stem cell research because of two patents held by the Wisconsin Alumni Research Foundation ("WARF") and the University of Wisconsin's Dr. James Thomson⁶⁶ that WARF claims governs all isolation of human embryonic stem cells and whose licensing policies have been accused of inhibiting research.⁶⁷ The National Institutes of Health (NIH) has awarded \$16.1 million to fund a National Stem Cell Bank to the WiCell Research Institute, a University of Wisconsin-affiliated organization of which Dr. Thomson is the scientific director. The University of Wisconsin has announced plans for building a new Wisconsin Institute for Discovery that will focus on, among other things, embryonic stem cell research. Governor Jim Doyle, who was reelected this past November, emphasized embryonic stem cell research and stressed the state's competitive advantage in the field and its benefits for the state's economy.

⁶⁴ 202 Wis.2d at 66; 549 N.W.2d at 239-40.

⁶⁵ The bill would have prohibited a person from knowingly: (1) performing or attempting to perform human cloning or (2) transferring or acquiring a human embryo produced by human cloning or any embryo, cell, tissue or product derived from a human embryo produced by human cloning.

⁶⁶ In 1998 Dr. Thompson became the first scientist to isolate human embryonic stem cells.

⁶⁷ However, the patent office recently granted re-examination and issued a preliminary rejection of the pertinent claims.

There are no statutes or case law addressing embryo-destructive research⁶⁸, although an argument may be made that it is prohibited by the old abortion statute, § 940.04. That section, as noted earlier, provides that anyone who intentionally destroys the life of an unborn child is guilty of a Class H felony.⁶⁹ An "unborn child" is defined as "a human being from the time of conception until it is born."⁷⁰

Although the feticide statutes apply only to embryos or fetuses gestating inside a woman, there is no such limitation here. While there are no Wisconsin cases that define "conception," the most common understanding of the term is the point of fertilization, that is, the formation of a zygote. This would seem to suggest that a human embryo—a developmental stage that certainly occurs after conception—is a human being for purposes of the abortion statute. It is clear that § 904.04, enacted in 1955, was adopted without thought of destruction of a human embryo sitting in a petri dish. Nevertheless, arguments that fix the beginning of human life at some point after conception, *e.g.*, gastrulation (the point at which monozygotic twinning or fusion is no longer possible) (14 days) or implantation (day six), would be difficult to square with this language.

While it is unlikely anyone will be prosecuted for embryo-destructive research or the destruction of embryos created for purposes of *in vitro* fertilization, the argument that § 904.04 literally applies to such activity is not implausible.

On a variety of life issues, including the termination of life support or the withdrawal of food and water, the legal status of abortion in a post-*Roe* world and the scope of conscience protection, much will turn on the future pronouncements of the Court. It is to the Court's jurisprudential philosophy and composition that we now turn.

⁶⁸ Nor does the state have any law governing the status of embryos created for in vitro fertilization. *See, e.g.*, Laura M. Katers, Note, *Arguing the "Obvious" In Wisconsin: Why State Regulation of Assisted Reproductive Technology Has Not Come to Pass and How It Should*, 2000 WIS. L. REV. 441; Debbie K. Lerner, Note, *New Reproductive Technology and Wisconsin Law*, 75 MARQ. L. REV. 206 (1991).

⁶⁹ § 940.04(1)

⁷⁰ § 940.04(6)

II. JUDICIAL RESTRAINT

In assessing the general dispositions of the Wisconsin Supreme Court, one must begin with the 2004-05 term, the first following the resignation of Justice Diane Sykes (appointed to the Seventh Circuit Court of Appeals by President Bush) and her replacement by Justice Louis Butler, a trial court judge in Milwaukee and former public defender, appointed by Democratic Governor Jim Doyle.

In that term, the Court's docket resulted in a series of 4-3 decisions characterized by a remarkable lack of judicial circumspection. We have already noted Judge Sykes' comments on the Court's recent jurisprudence, but she was not alone. Joseph Kearney, Dean of Marquette University Law School, observed that "[b]y any measure, this was an extraordinary year at the Wisconsin Supreme Court." According to Kearney, "[f]rom tort law to criminal law, the court was willing to depart from what had seemed to be settled approaches."

What emerged during the 2004-2005 term was a fairly solid "liberal" bloc consisting of Justices Abrahamson, Bradley, and Butler that achieved some success in attracting Justice Patrick Crooks, who had generally been regarded as a conservative, as a fourth vote. With Justice Butler's appointment to the Court, Chief Justice Shirley Abrahamson, arguably the Court's most liberal member, was not the most frequent dissenter, for only the second time in recent years. Justice Crooks was most frequently in the majority and, in nineteen cases decided by a 4-3 vote, was in the majority in all but three.

In each of those nineteen cases, Justices Abrahamson, Bradley, and Butler voted together and were in the majority in twelve. Justices Wilcox and Roggensack dissented in each of the twelve cases in which Chief Justice Abrahamson and Justices Bradley and Butler provided three of a four-vote majority and were in the majority in each of the cases

in which the three liberal justices constituted the dissent. The other swing vote was Justice David Prosser.⁷¹

None of the cases decided in the 2004-05 term involved life issues, but the Court's decision in *Ferdon v. Wisconsin Patients Compensation Fund*⁷² is one of the most extraordinary in the Court's history; if it does not prove to be an aberration, it has profound implications for a variety of constitutional questions. It may not be a wholesale rejection of the idea of judicial restraint, but it is certainly a strong first step in that direction. It is significant because it represents the Court's recent willingness to aggressively assert its authority.

Ferdon involved an equal protection challenge to legislation capping noneconomic damages in medical malpractice at \$450,000. Just one year earlier, in *Maurin v. Hall*,⁷³ the Court had upheld the cap on noneconomic damages in medical malpractice wrongful death cases. Understandably, then, *Ferdon* began with a discussion of *stare decisis* and found it not particularly constricting. Existing law, the Court observed, should not be abandoned lightly, but "[w]e have stated that *stare decisis* is not mechanical in application, nor is it a rule to be inexorably followed."⁷⁴

The Court did anything but "inexorably follow" *Maurin*, dismissing it with a single sentence by observing (without explanation) that a desire to curb jury passion—while a constitutionally permissible concern in wrongful death cases—may not support a damages cap in injury cases.

The Court went on to consider the presumption of a statute's constitutionality. It characterized the damages cap as drawing a distinction between the more and less severely injured because the former would presumably recover a lower percentage of the noneconomic damages than they have "actually suffered." It rejected the idea that this

⁷¹The statistics are drawn from an analysis done by David Ziemer in the August 24, 2005 issue of the WIS. L.J. The Justices were similarly divided in 2005-06, although Chief Justice Abrahamson was once again the most frequent dissenter. David Ziemer, *Crooks is still court's key swing vote*, WIS. L.J., August 16, 2006.

⁷² 2005 WI 125, 284 Wis.2d 573, 702 N.W.2d 440.

⁷³ 2004 WI 100, 274 Wis.2d 28, 682 N.W.2d 866.

⁷⁴ 2005 WI 125, at ¶ 30, 284 Wis.2d at 597, 701 N.W.2d at 453.

distinction should be subjected to some form of heightened scrutiny. The distinction, it insisted, is subject to only rational basis scrutiny.

But "rational basis scrutiny," the Court concluded, need not be all that deferential. Although it rehearsed some standard propositions about rational basis review, it made clear that it intends to apply a rational basis test "with teeth" and "with bite" that is "not a toothless one,"⁷⁵ It rejected the Legislature's empirical judgment regarding that connection. Judge Sykes noted the Court devoted 79 paragraphs to its argument that the damages cap was not rationally related to legislative ends, observing that "you'd think if a law were truly irrational, it would be simpler to explain why"⁷⁶

The Court justified its inquiry, in part, by claiming that a statute that is rational when enacted may be made irrational by events and presuming that policing this "devolving rationality" is a judicial responsibility.⁷⁷ The dissent argued that the majority's use of statistics was selective; for our purposes, the salient point is that the decision entailed a thorough reassessment of legislative choices.

How significant *Ferdon* will prove to be is uncertain. Only two weeks before it was decided, the Court employed garden-variety equal protection analysis in rejecting an equal protection challenge to a statute of repose protecting only those whose liability is predicated upon an improvement to real property.⁷⁸ Justice Butler, joined by Chief Justice Abrahamson, dissented but without reference to any nontraditional standard of review. In several cases arising the following term, the Court appeared to revert to a more traditional (and deferential) form of review.⁷⁹

The other four cases discussed by Judge Sykes were decided by the same four justice majority (Abrahamson, Bradley, Butler, and Crooks) that prevailed in *Ferdon*.

⁷⁵ 2005 WI 125 at ¶ 78.

⁷⁶ Sykes, *supra* n. 2, 89 MARQ. L. REV. at 728.

⁷⁷ 2005 WI 125 at ¶ 114, 284 Wis.2d at 629.

⁷⁸ Kohn v. Darlington Community Schools, 2005 WI 99, 283 Wis.2d 1, 698 N.W.2d 794.

⁷⁹ See, e.g., Northwest Airlines v. Department of Revenue, 2006 WI 88, 293 Wis.2d 202, 717 N.W.2d 280 (exemption from ad valorem tax for airlines operating a hub facility in the state satisfies rational basis test).

None of the cases involved life issues, but each arguably constituted significant departures from notions of judicial restraint.

Most significant here are those adopting a "New Federalist" approach to interpretation of provisions in the Wisconsin Constitution paralleling the Fourth and Fifth Amendments. These cases make clear that the Court is willing to adopt constitutional analysis that departs from that of the USSC.

In *State v. Dubose*,⁸⁰ the Court departed from longstanding adherence to the framework for judging due process challenges to eyewitness identifications and adopted a stricter rule of admissibility under the Wisconsin Constitution. In *State v. Knapp*,⁸¹ the Court departed from the USSC's rule regarding the exclusion of physical evidence obtained as a result of a Miranda violation.⁸²

Justice Wilcox, one of the more "conservative" members of the Court, has announced that he will retire upon the expiration of his term in August 2007 and did not seek re-election. On April 5, 2007, Wisconsin voters elected Annette Ziegler, a trial judge from exurban Milwaukee, to replace him. She is generally regarded as a conservative and was endorsed by Wisconsin Right to Life.

The race between Justice Ziegler and her opponent, a Madison lawyer generally regarded as a more liberal candidate, was both nasty and expensive, attracting large independent contributions from groups in and outside of Wisconsin. Although Justice Ziegler's replacement of Justice Wilcox may not have affected the "balance" of the Court, the same may not be true of the election in the spring of 2009. Incumbent Justice Louis Butler is expected to face a challenge from a well financed conservative challenger.

⁸⁰ 2005 WI 126, 285 Wis.2d 143, 699 N.W.2d 794.

⁸¹ 2005 WI 127, 285 Wis.2d 86, 700 N.W.2d 899.

⁸² See, e.g., *State v. Jerrell C.J.*, 2005 WI 105, 283 Wis.2d 145, 699 N.W.2d 110 (use of superintending power over courts to require recording of juvenile confessions by law enforcement agencies).

It is not implausible that the Court might find a state constitutional right to an abortion. As noted earlier, the Court is not reluctant to adopt an interpretation of a parallel state constitutional provision that is at odds with that afforded by the comparable federal provision.

The Court has held that the Wisconsin Constitution includes a right to privacy, defined as the guarantee of liberty in some "preferred" or "fundamental" aspects of personal life.⁸³ That right is apparently grounded in Article I, section I of the state's constitution, which provides:

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.⁸⁴

In a recent case, the Court said the Due Process Clauses of Article 1, § 1, of the Wisconsin Constitution and the Fourteenth Amendment to the United States Constitution are "substantially equivalent," but that it "will not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin . . . require[s] that greater protection of citizens' liberties ought to be afforded."⁸⁵

Wisconsin courts also recognize a more general right of substantive due process "protecting against governmental actions that are arbitrary and wrong 'regardless of the fairness of procedures used to implement them.'" *Monroe County Dept. of Human Services v. Kelli B.*⁸⁶ However, this right seems not to result in strict scrutiny unless a

⁸³ *Matter of Guardianship of L.W.*, 167 Wis.2d 53, 482 N.W.2d 60, 69 (1992) (right to choose whether or not to choose medical treatment).

⁸⁴ WIS. CONST. art. I, § 1.

⁸⁵ *In re the Paternity of John R.B.*, 2005 WI 6, ¶ 18, n.12, 277 Wis.2d 378, 391, n.12, 690 N.W.2d 849, 856, n.12. (citations omitted.)

⁸⁶ 2004 WI 48, ¶ 19, 271 Wis.2d 51, 678 N.W.2d 831.

fundamental right is at stake,⁸⁷ so, for our purposes, it probably adds little to the privacy right itself or analysis under the Equal Protection Clause. *State v. Jorgenson*.⁸⁸

However, no case has explored the boundaries of an independent privacy right under state constitutional law in a way that sheds much light on the question or considered whether that right might extend to abortion. Although Wisconsin has, as we have seen, enacted a series of restrictions upon or regulations of abortion, any challenges to these laws have been made in federal court,⁸⁹ where challenges to state statutes on state constitutional grounds are generally unavailable.⁹⁰

In summary, although the Court is divided, it has shown a willingness to adopt an expansive view of its role and to depart from the U.S. Supreme Court's treatment of similar issues and parallel constitutional provisions. In short, with the current Court, much is possible while little is certain.

III. THE COURT

The Wisconsin Supreme Court consists of seven justices elected to ten-year terms. Mid-term vacancies are filled by the governor, and the appointed justice serves the entire unexpired terms. Elections are nonpartisan.

The current members of the Wisconsin Supreme Court are as follows:

Justice	Appointed by / Year	Term Expires	Miscellaneous
Chief Justice Shirley Abrahamson	Governor P. Lucy / 1976 Elected / 1979 Re-elected / 1989	2009	-Biographical information: B.A., New York University, 1953; J.D., Indiana University, 1956; Doctorate of law in American Legal History, University of

⁸⁷ See, e.g., *State v. Beecraft*, No. 2006 AP 982-CR, ¶ 9 (Wis. Ct. App., Dec. 28, 2006) (describing substantive due process jurisprudence in the course of rejecting privacy interest in possession of marijuana at home) (not recommended for publication).

⁸⁸ 2003 WI 105, ¶ 32, 264 Wis.2d 157, 667 N.W.2d 318 (where there is no suspect class, the analysis under the substantive component of the due process clause is equivalent to the equal protection analysis).

⁸⁹ See, e.g., *Hope Clinic v. Ryan*, 249 F.3d 603 (7th Cir. 2001), *Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1999)

⁹⁰ See, e.g., *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).

	Re-elected / 1999 (Chief Justice since 1996)		Wisconsin, 1962. -Professional/social affiliations: Practiced law in Madison for 14 years; Taught at the University of Wisconsin law school; Chief Justice since 1996; Regarded as a member of the Court's liberal bloc.
Ann Walsh Bradley	Elected / 1995 Re-elected / 2005	2015	-Biographical information: B.A., Webster College, 1972; J.D., University of Wisconsin, 1976. -Professional/social affiliations: Served as circuit judge in Wausau prior to her appointment to the Court; Regarded as a member of the Court's liberal bloc.
Louis Butler	Governor J. Doyle / 2004	2008	-Biographical information: B.A., Lawrence, 1973; J.D. University of Wisconsin, 1977. -Professional/social affiliations: Served as circuit court judge, municipal judge and public defender in Milwaukee prior to joining the Court; Considered a member of the Court's liberal bloc.
John Wilcox	Governor T. Thompson / 1992 Re-elected / 1997	2007 when he will retire	-Biographical information: B.A., Ripon College, 1958; J.D., University of Wisconsin, 1965. -Professional/social affiliations: Served as circuit court justice in rural Waushara County for 13 years prior to appointment; Was in private practice; Served in the Wisconsin Legislature.
Annette Ziegler	Elected / 2007	2017	-Biographical information: B.A., Hope College, 1986; J.D., Marquette, 1989. -Professional/social affiliations: Served as a circuit Judge, 1997-present; Former Assistant U.S. Attorney.
Patrick Crooks	Elected / 1996 Re-elected / 2007	2016	-Biographical information: B.A., St. Norbert's College, 1960; J.D., Notre Dame, 1963. -Professional/social affiliations: Served as circuit court judge in Green Bay for 17 years; Largely regarded as conservative, but provided swing vote in five fairly significant decisions that can be

			characterized as extraordinary “liberal” or “activist” during 2004-05 term.
David Prosser	Governor T. Thompson / 1998 Elected / 2001	2011	-Biographical information: B.A., DePauw, 1965; J.D., University of Wisconsin, 1968. -Professional/social affiliations: Republican legislator, serving as minority leader and speaker of the Assembly; Generally thought to be conservative.
Patience Drake Roggensack	Elected / 2003	2013	-Biographical information: B.A. in biology, Drake, 1962; J.D. from University of Wisconsin, 1980. -Professional/social affiliations: Lost bid for the Court in 1999; Was in private practice, 1980-1996, when she was elected to the Court of Appeals; Regarded as a conservative justice.

CONCLUSION

In assessing the Wisconsin Supreme Court's potential treatment of life issues, we live in interesting and unsettled times. The Court's willingness to adopt a generous view of its own role and to depart from approaches taken by the Supreme Court of the United States, suggests that, in a post-*Roe* world (or even in this one with respect to matters unresolved by *Roe*), the Court might well adopt a jurisprudence rooted in the Wisconsin Constitution. While one might expect that such a development is more likely to come from the "left" wing of the court, nothing is certain. Given the divided nature of the Court and the absence of clear guidance on many of these issues, its life jurisprudence is a book that is yet to be written – with not only its composition but its authors yet to be determined.