

# LEGISLATIVE REFERENCE BUREAU

## A Brief History of Abortion Laws in Wisconsin (rev. ed.)

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## Introduction

In light of the recent U.S. Supreme Court ruling in *Dobbs v. Jackson Women's Health Organization*, the Legislative Reference Bureau has fielded various questions relating to the history of Wisconsin's early abortion laws.<sup>1</sup> This issue of *LRB Reports* provides a brief legislative history of general criminal prohibitions against abortion under Wisconsin law.

## Wisconsin's first abortion laws

The first prohibitions on abortion were introduced as part of a bill relating to homicide, 1849 Assembly Bill 116. The three revisors tasked with compiling Wisconsin's laws in 1848 and 1849—Charles Minton Baker, Michael Frank, and Charles S. Jordan—likely drafted this bill.<sup>2</sup> The revisors played a “predominant role in the creation of new substantive law for Wisconsin.”<sup>3</sup> To fill the “large gaps” that existing territorial laws did not address, the revisors borrowed liberally from other states' laws, especially the Massachusetts and New York statutes, which “furnished not only much of the substantive law for Wisconsin, but also the general framework or pattern of organization for the statutes.”<sup>4</sup>

Section 10 of the bill stated the following:

The willful killing of an unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree.

Additionally, section 11 of the bill stated the following:

Every person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree.

Note that these prohibitions pertained to the administration of abortion to “any woman pregnant with a *quick* child” (emphasis added). In the early United States, “quickening” meant “the first perception of fetal movement by the pregnant woman herself,” which typically took place “near the midpoint of gestation.”<sup>5</sup> Accordingly, 1849 Assembly

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1. *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 2022 U.S. LEXIS 3057 (U.S. June 24, 2022).

2. See “The Revised Statutes of 1849” in W. Scott Van Alstyne Jr., “[Land Transfer and Recording in Wisconsin: A Partial History—Part I](#),” *Wisconsin Law Review* 1955, no. 1 (January 1955), 51–56.

3. Van Alstyne, Jr., “Land Transfer and Recording” 54.

4. Van Alstyne Jr., “Land Transfer and Recording,” 54. See also *State v. City of Oak Creek*, 605 N.W.2d 526 (2000) ¶ 31.

5. James Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800–1900* (New York: Oxford University Press, 1978), 26–29. Today, *Merriam-Webster* defines “quickening” as “the first motion of a fetus in the uterus felt by the

Bill 116 generally prohibited abortion after about the midpoint of pregnancy and created first- and second-degree manslaughter penalties. This prohibition reflected American acceptance of British common law, under which the termination of a pregnancy was not recognized as a crime until the fetus had quickened, since at that time, no authoritative proof of pregnancy existed apart from quickening.<sup>6</sup>

In drafting 1849 Assembly Bill 116, the revisors may have modeled the language of sections 10 and 11 after title XXX, chapter 154, sections 32 and 33, of the [1846 Michigan Revised Statutes](#). Sections 10 and 11 were identical to these sections of Michigan law, save the penalties specified.<sup>7</sup> This kind of textual appropriation was hardly unusual, as Michigan laws had formed the foundation of Wisconsin territorial laws.<sup>8</sup> However, the bill did not incorporate the language of a third section of Michigan law that established a broader prohibition against abortion. Specifically, title XXX, chapter 154, section 34, of the 1846 Michigan Revised Statutes generally prohibited assisting “any pregnant woman” with procuring a “miscarriage,” i.e., administering an abortion, regardless of whether quickening had occurred.<sup>9</sup>

Revisors’ drafts were generally passed by the legislature with only minor amendment,<sup>10</sup> as was the case with 1849 Assembly Bill 116. The assembly passed the bill on a vote of 28–26 on March 10, 1849, and the senate concurred on a vote of 9–3 on March 13, 1849. The bill was signed into law by Governor Nelson Dewey on March 31, 1849, and its provisions were codified under chapter 133 (“of offenses against the lives and persons of individuals”), sections 10 and 11, of the [1849 Wisconsin Statutes](#).<sup>11</sup>

## 1858 changes to abortion laws

The next substantial changes to Wisconsin’s abortion laws came in 1858. First, legislators removed the word “quick” directly before “child” in chapter 133, sections 10 and 11, of the 1849 Wisconsin Statutes, ostensibly prohibiting abortion at any stage of gestation. As in 1849, this abortion law change occurred in the course of statute revisions; however, this time, the change was met with disagreement. On April 30, 1858, the senate resolved itself into a committee of the whole to consider the compilation and revision of the statutes.<sup>12</sup>

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mother usually somewhat before the middle of the period of gestation.” *Merriam-Webster*, medical dictionary, s.v. “quickening,” accessed May 10, 2022, <https://www.merriam-webster.com>.

6. Mohr, *Abortion*, 3.

7. 1849 AB 116 provided for first- and second-degree manslaughter penalties, whereas Michigan laws simply provided for manslaughter penalties.

8. See, for example, [Ch. 39, Laws of 1836](#).

9. This section established a penalty of imprisonment for not more than one year, a fine of not more than \$500, or both.

10. Van Alstyne Jr., “Land Transfer and Recording,” 54.

11. Although the signed copy of this legislation is available at the Wisconsin Historical Society (WHS) Archives, the enacted legislation was not published as part of the 1849 Session Laws. [Enrolled revised statutes](#), vols. 3–4, WHS Archives, 1989/018 MAD 2M/51/B1-2.

12. Wis. Senate Journal (1858 v. 2) [1273](#). Resolving into a committee of the whole enabled the senate to operate more like

The senate ultimately reported out (i.e., recommended for passage) several chapters of the revisors' compilation, including a bill relating to crimes and the punishment thereof. As introduced, the bill did not modify existing abortion provisions. However, the version of this bill reported out included an amendment proposing to “strike out the word ‘quick’” under chapter 133, sections 10 and 11, of the 1849 Wisconsin Statutes.<sup>13</sup> This amendment may have reproduced the provisions of a bill introduced earlier in the legislative session by Senator Alden Bennett, a physician and farmer representing parts of Rock County.<sup>14</sup>

On May 3, 1858, the assembly declined to concur in the amendment in a 29–30 vote.<sup>15</sup> After the senate refused to proceed without the amendment, a committee of conference was appointed.<sup>16</sup> On May 10, four days after the committee was created, three committee members—Representative Samuel H. Bassinger and Senators Alden Bennett and Martin L. Kimball—recommended adoption of the senate amendment, while Representatives Perry H. Smith and Jonathan C. Hall recommended against adoption.<sup>17</sup> Legislative records do not indicate the basis of the representatives' opposition to the amendment. The assembly and the senate ultimately concurred in the recommendation of the majority.<sup>18</sup>

The enacted bill amended and renumbered provisions relating to abortion under chapter 164 (“of offenses against the lives and persons of individuals”), sections 10 and 11, of the [1858 Wisconsin Statutes](#). As amended, these sections generally prohibited administering abortions, whether they occurred before or after quickening. As in the 1849 Wisconsin Statutes, a violation of section 10 was deemed manslaughter in the first degree, which was punishable by at least seven years in state prison, while a violation of section 11 was considered manslaughter in the second degree, which was punishable by between four and seven years in state prison.<sup>19</sup>

The next abortion law change made by the 1858 legislature was to create lesser penalties for any person who intentionally attempted to assist a pregnant woman to “procure

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a committee, with each member permitted to speak more than twice on the same subject, among other things. See L. H. D. Crane, *A Manual of Customs, Precedents, and Forms, in Use in the Assembly of the State of Wisconsin: Together with the Rules, the Apportionment, and Other Lists and Tables for Reference, with Indices* (Madison, WI: James Ross, 1859), 81–87.

13. A note on a slip of paper attached to the relevant section of the statutes reads: “Strike out the word ‘quick’ as it occurs in sections 10 and 11 of Chap 161 of compiled statutes.” The reverse side of this slip of paper contains the amendment's legislative history, as recorded by the assembly and senate chief clerks. The slip of paper is titled “Senate Amendment 17 to Chapter 161 of the revisor's compilation.” It is possible the slip of paper is the actual amendment itself. [Revision bills for revised statutes, 1858](#), WHS Archives, 161 MAD 3/6/G4, Box 4, Title 27. See also Wis. Senate Journal (1858 v. 2) [1274](#) (showing the senate reporting out Chapter 161 with Senate Amendment 17).

14. “Bills Introduced,” *Daily State Journal* (Madison), April 20, 1858; “Bills Passed,” *Daily State Journal* (Madison), April 24, 1858. See also Crane, *A Manual of Customs, Precedents, and Forms*, 16; and Annie S. McLenegan, *Centennial History of the Town of Turtle, Rock County Wisconsin, 1836–1936* (n.p.: 1936), 128.

15. Wis. Assembly Journal (1858 v. 2) [1619–20](#).

16. Wis. Senate Journal (1858 v. 2) [1362](#) (showing the senate refusing to recede); Wis. Assembly Journal (1858 v. 2) [1677](#) (showing the assembly requesting a committee of conference at the request of Perry H. Smith). Representatives Smith, Jonathan C. Hall, and Samuel H. Bassinger and Senators Alden I. Bennett and Martin L. Kimball were appointed to the committee of conference. Wis. Assembly Journal (1858 v. 2) [1677](#); Wis. Senate Journal (1858 v. 2) [1380](#).

17. Wis. Assembly Journal (1858 v. 2) [1759–60](#).

18. Wis. Assembly Journal (1858 v. 2) [1760](#); Wis. Senate Journal (1858 v. 2) [1447](#).

19. 1858 Wis. Stat. ch. 164, § 22.

a miscarriage,” i.e., obtain an abortion, by various means and for any woman who intentionally attempted to procure her own miscarriage. It appears that these provisions may have been proposed by the revisors, but this is difficult to confirm on the basis of the legislative record.<sup>20</sup> Nevertheless, it appears that these provisions were considered concurrently with the aforementioned amendment removing the word “quick,” but with far less contention. The provisions went on to be codified under chapter 169 (“of offenses against public policy”), sections 58 and 59, of the [1858 Wisconsin Statutes](#).

Section 58 stated the following:

Every person who shall administer to any pregnant woman, or prescribe for any such woman, or advise or procure any such woman to take, any medicine, drug, or substance or thing whatever, or shall use or employ any instrument or other means whatever, or advise or procure the same to be used, with intent thereby to procure the miscarriage of any such woman, shall upon conviction be punished by imprisonment in a county jail, not more than one year nor less than three months, or by fine, not exceeding five hundred dollars, or by both fine and imprisonment, at the discretion of the court.

Section 59 stated the following:

Every woman who shall take any medicine, drug, substance, or thing whatever, or who shall use or employ any instrument, or shall submit to any operation or other means whatever, with intent to procure a miscarriage, shall upon conviction be punished by imprisonment in a county jail, not more than six months nor less than one month, or by a fine, not exceeding three hundred dollars, or by both fine and imprisonment, at the discretion of the court.

Historians attribute the 1858 abortion law changes to the influence of Dr. William Henry Brisbane, a Wisconsin doctor committed to discouraging women from seeking abortions and penalizing doctors who performed them.<sup>21</sup> In 1857, Brisbane wrote to fellow doctor Horatio Robinson Storer that he intended “to get a law passed by our Legislature to meet the case, much too common, of administering drugs and injections either to prevent conception or destroy the embryo.”<sup>22</sup> Weeks later, the American Medical Association (AMA) appointed Brisbane to a committee of eight members “to report upon

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20. The reverse side of this section of the drafted version of the revised statutes seems to suggest that the changes were part of revisor’s amendment 23 to Chapter 166, which may have been further amended by Senate Amendments 18, 19, and 20. [Revision bills for revised statutes, 1858](#), WHS Archives, 161 MAD 3/6/G4, Box 4, Title 27. See also Wis. Senate Journal (1858 v. 2) [1274](#) (showing the senate reporting out “Chap. 166, revisor’s amendment No. 23 amended by Senate amendment Nos. 18 and 19, and by striking out section 48 S.A. No. 20”).

21. See, generally, James Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800–1900* (New York: Oxford University Press, 1978); Cynthia Kickham Rock, “The History of Abortion in Nineteenth-Century Wisconsin” (PhD diss., University of Wisconsin–Madison, 1992).

22. Letter from William Henry Brisbane to Horatio R. Storer, April 6, 1857, “Correspondence to Horatio Robinson Storer from various physicians relating to criminal abortion,” Harvard Countway Library, B MS b47. Quoted from the original in Mohr, *Abortion*, 57.

criminal abortion, with a view to its general suppression.”<sup>23</sup> The resulting report decried “the belief . . . that the foetus is not alive till after the period of quickening” and urged the AMA to lobby state legislatures to revise their statutes accordingly.<sup>24</sup> By 1859, Brisbane reported to Storer that he had “succeeded in having enacted by our Legislature the following statute,” and enclosed the text of newly revised abortion laws.<sup>25</sup> It is difficult to substantiate Brisbane’s self-professed role in enacting legislation to establish broader prohibitions against abortion. As senate chief clerk during the 1857 legislative session, Brisbane would have been acquainted with most state senators.<sup>26</sup> And as a founding member of the Wisconsin Medical Society, Brisbane likely worked alongside fellow co-founder Samuel H. Bassinger, a state representative and member of the conference committee that recommended adoption of the amendment striking the word “quick” from statutes relating to abortion.<sup>27</sup> Although Brisbane’s diaries do not expressly mention this legislation (or the issue of abortion), they do note various trips to Madison to meet with lawmakers.<sup>28</sup>

All told, the 1858 legislature had effectively established two different offenses for those who administered abortions. Under chapter 169, section 58, assisting a pregnant woman with procuring a “miscarriage” was punishable by between three months and one year in county jail or a fine of up to \$500, or both. Yet, under chapter 133, section 11, with the removal of the word “quick” from the phrase “pregnant with a quick child,” administering an abortion at any time during gestation was also considered manslaughter in the second degree, punishable by between four and seven years in state prison. The Wisconsin Supreme Court distinguished these two offenses in *Foster v. State* (1923), after an individual was charged with second-degree manslaughter for performing an operation to abort a “two months’ embryo.” The court stated that it was “evident that the legislature did not intend to define the same offense in the two sections.”<sup>29</sup> The court ultimately held that, in order for the graver manslaughter provision to apply, the unborn child must be quickened, stating that a “two months’ embryo is not a human being in the eye of the law.”<sup>30</sup>

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23. Horatio R. Storer, *On Criminal Abortion in America* (Philadelphia: J.B. Lippincott & Co., 1860), 107.

24. “Report on Criminal Abortion” in *The Transactions of the American Medical Association* (Philadelphia: Collins, 1959), 75–78.

25. Letter from William Henry Brisbane to Horatio R. Storer, May 19, 1859, “Correspondence to Horatio Robinson Storer from various physicians relating to criminal abortion,” Harvard Countway Library, B MS b47. Quoted from the original in Mohr, *Abortion*, 57. It is unclear whether Brisbane enclosed the text of 1858 Wis. Stat. ch. 164, §§ 10 and 11, or that of 1858 Wis. Stat. ch. 169, §§ 58 and 59. However, Storer seems to have credited Brisbane with the removal of “quick” in 1858 Wis. Stat. ch. 164, §§ 10 and 11, in referring to him as having effectuated a modification of Wisconsin laws in acknowledgement of the fetus as a living being prior to quickening. Storer, *On Criminal Abortion*, 74. See also R.H. Tatum, “A Few Observations in the Attributes of the Impregnated Germ” in James B. McCaw and George A. Otis, eds., *Virginia Medical Journal*, vol. 6 (Richmond, VA: Ritchie and Dunnivant, 1856), 455–59.

26. A. J. Turner, *The Legislative Manual of the State of Wisconsin; Comprising Jefferson’s Manual, Rules, Forms and Laws for the Regulation of Business; also, Lists and Tables for Reference* (Madison, WI: Atwood & Culver, 1872), 213.

27. *Wisconsin Medical Society records*, 1855–2012, WHS Archives, M2001-034. See also, generally, Ronald Numbers, “Public Protection and Self-Interest: Medical Societies in Wisconsin,” in *Wisconsin Medicine: Historical Perspectives*, eds. Ronald Numbers & Judith Leavitt (Madison, WI: University of Wisconsin Press, 1981), 82–83.

28. See diary entries dated January 12, 1858, to May 16, 1858. *William Henry Brisbane papers*, 1829–1975. WHS Archives. Mss VD MAD 3/34/G3-4.

29. *Foster v. State*, 182 Wis. 298, 196 N. W. 233 (1923) ¶ 3.

30. *Foster v. State*, 182 Wis. 298, 196 N. W. 233 (1923) ¶ 7.



## Subsequent legislative changes

Between 1858 and the early 1950s, the only significant changes made to abortion provisions were to modify related penalties. Under chapter 186, section 4584, of the [1878 Wisconsin Statutes](#), the monetary penalty associated with any woman seeking to “procure a miscarriage” had decreased, with the maximum fine falling from \$300 to \$100, and the option of *both* a fine and a jail term had been removed. Conversely, the minimum jail time for those assisting a woman with procuring a miscarriage had increased from three months to six months, and a minimum monetary penalty of \$250 was added, whereas there had previously been no minimum.<sup>31</sup>

Several decades later, a pair of laws increased fines and terms of imprisonment associated with administering abortions. Specifically, [Ch. 446, Laws of 1947](#), provided that assisting with the procurement of a miscarriage was punishable by a fine between \$1,000 and \$5,000 or imprisonment between one and three years, or both.<sup>32</sup> [Ch. 447, Laws of 1947](#), increased the penalty for administering an abortion from second-degree manslaughter to third-degree murder. Additionally, Ch. 447 added language providing that if the pregnant woman died as a result of the abortion, it was “unnecessary to prove that the fetus was alive” to charge under this more severe, third-degree murder provision. This underscores the understanding held in *Foster* that the more severe abortion penalty was to apply only after quickening, unlike the procurement of a miscarriage provision, which could apply at any time.<sup>33</sup>

In the 1950s, the Wisconsin Legislature adopted a new criminal code that incorporated all of the aforementioned abortion provisions under Wis. Stat. § [940.04](#) (1955).<sup>34</sup> The Legislative Council, which had developed the new criminal code, along with the State Bar Association, described this new statute as a “substantial restatement of the present law.”<sup>35</sup> The newly created Wis. Stat. § 940.04 (1), which prohibited any person, “other than the mother,” from intentionally destroying the life of an “unborn child,” was described to be “substantially the same” as the existing “miscarriage” provision except that (1) the new subsection would require that the “miscarriage actually be produced”; and (2) the existing exception for therapeutic abortions would also apply to these abortions prior

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31. Wis. Stat. ch. 186, § 4583.

32. Note that prior to 1983, Wisconsin referred to enacted legislation as “chapters” instead of “acts.”

33. See “Legal Aspects of Abortions and Miscarriages,” *The Wisconsin Medical Journal* 47, no. 1 (January 1948): 64–65. This article discusses the difference between the “abortion statutes” and the “miscarriage statutes” under current law, explaining that in *Foster*, the court held that the abortion statute required the existence of a living child, “by which is ordinarily meant a fetus at least three months old.”

34. [Ch. 696, Laws of 1953](#).

35. The explanatory notes can be found in 1953 Wis. AB 100, which went on to be enacted as [Ch. 623, Laws of 1953](#). Section 281 of that act established a criminal code advisory committee that was to study the enacted criminal code and offer any changes before the law was to be added to the statutes during the 1955 legislative session. Ch. 696, Laws of 1955, incorporated the provisions of Ch. 623, Laws of 1953, albeit with various changes. The abortion provisions were nearly identical in both of these laws. Thus, the explanatory notes for 1953 Wis. AB 100 are instructive.



to quickening. The Legislative Council note described it as an “unintentional conflict” under current law that the therapeutic abortion exception applied only after quickening. The language under the newly created Wis. Stat. § 940.04 (2) (a), which prohibited any person, other than the mother, from intentionally destroying the life of an “unborn quick child,” was described by the Legislative Council to be largely the same as the existing “administering an abortion” provision. The new criminal code also added language specifying that “‘unborn child’ means a human being from the time of conception until it is born alive.”<sup>36</sup>

*Roe v. Wade* (1973) rendered Wis. Stat. § 940.04 generally unenforceable.<sup>37</sup> Nevertheless, Wis. Stat. § 940.04 was amended twice after *Roe*. [2001 Wis. Act 109](#) amended penalties relating to abortion to align with a new felony classification scheme adopted under the bill. Additionally, [2011 Wis. Act 217](#) repealed prohibitions against and penalties for any woman seeking an abortion. (Note that by that time, such penalties were unenforceable, as [1985 Wis. Act 56](#) created Wis. Stat. § 940.13, which prohibited the imposition or enforcement of penalties for a woman intentionally undergoing an abortion.)

After *Roe*, Wisconsin lawmakers created criminal prohibitions against abortion under other statutes. Namely, [1985 Wis. Act 56](#) created Wis. Stat. § 940.15, which prohibits the performance of an abortion by any person “after the fetus or unborn child reaches viability, as determined by the reasonable medical judgment of the woman’s attending physician,” except if necessary to preserve the life or health of the woman. Additionally, [1997 Wis. Act 219](#) created Wis. Stat. § 940.16, which prohibits partial-birth abortions, defined to mean an abortion in which a person partially vaginally delivers a living child, causes the death of the delivered child with the intent to kill the child, and then completes the delivery of the child. Most recently, [2015 Wis. Act 56](#) created Wis. Stat. § 253.107 (3) (a), which prohibits the performance of an abortion by any person “if the probable post-fertilization age of the unborn child is 20 or more weeks.” Prior to the *Dobbs* ruling, the most restrictive and enforceable statute generally prohibited abortion 20 or more weeks postfertilization, per Wis. Stat. § 253.107.<sup>38</sup> That provision includes an exception for cases involving a medical emergency wherein termination of the pregnancy “in a manner that . . . provides the best opportunity for the unborn child to survive” poses a risk of the pregnant woman’s death or irreversible physical impairment of a major bodily function.

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36. Such language currently exists under Wis. Stat. § 940.04 (6).

37. *Roe v. Wade*, 410 U.S. 113, 118, 164–65 (1973); *Larkin v. McCann*, 368 F. Supp. 1352, 1353 (E.D. Wis. 1974). Note that one provision of Wis. Stat. § 940.04 remained enforceable in the wake of *Roe*. Under *State v. Black*, Wis. Stat. § 940.04 (2) (a) was considered enforceable as a prohibition against feticide. The Wisconsin Supreme Court ruled this prohibition inapplicable to consensual abortions performed by doctors, since those are covered under Wis. Stat. § 940.15. *State v. Black*, 188 Wis. 2d 639, 645 (1994).

38. This statute has not been held by a court of competent jurisdiction to be unconstitutional and is therefore enforceable. Note that similar statutes from other jurisdictions have been held unconstitutional insofar as they prohibit an abortion between 20 weeks of pregnancy and fetal viability. *Isaacson v. Horne*, 716 F.3d 1213, 1229 (9th Cir. 2013) (analyzing Ariz. Rev. Stat. § 36-2159).

Current law does not prohibit a woman from seeking an abortion or establish criminal penalties for doing so.

## Conclusion

The Wisconsin Statutes first addressed abortion in 1849, when lawmakers enacted a general prohibition on abortion after quickening, providing an exception for an abortion necessary to preserve the life of the mother. In 1858, new, lesser penalties were created for the “procurement of a miscarriage,” both for the pregnant woman and for anyone who assisted her. Also during the 1858 session, the more severe 1849 prohibition was expanded, ostensibly to prohibit abortion at any stage of gestation. However, in 1923 the Wisconsin Supreme Court ruled in *Foster* that the latter provision was to apply only after quickening. Although related penalties changed over time, most of these broad prohibitions on abortion have remained under statute to the present and currently exist under Wis. Stat. § [940.04](#). From 1973 until the *Dobbs* ruling, this statute was unenforceable due to *Roe* and subsequent court rulings. The U.S. Supreme Court’s holding in *Dobbs*, as well as subsequent post-*Dobbs* legal challenges, may affect the enforceability of this statute and others. ■