940.04 Abortion. (1) Any person, other than the mother, who intentionally destroys the life of an unborn child is guilty of a Class H felony.

(2) Any person, other than the mother, who does either of the following is guilty of a Class E felony:

(a) Intentionally destroys the life of an unborn quick child; or

(b) Causes the death of the mother by an act done with intent to destroy the life of an unborn child. It is unnecessary to prove that the fetus was alive when the act so causing the mother's death was committed.

(5) This section does not apply to a therapeutic abortion which:

(a) Is performed by a physician; and

(b) Is necessary, or is advised by 2 other physicians as necessary, to save the life of the mother; and

(c) Unless an emergency prevents, is performed in a licensed maternity hospital.

(6) In this section "unborn child" means a human being from the time of conception until it is born alive.

History: 2001 a. 109; 2011 a. 217.

Aborting a child against a father's wishes does not constitute intentional infliction of emotional distress. Przybyla v. Przybyla, 87 Wis. 2d 441, 275 N.W.2d 112 (Ct. App. 1978).

Sub. (2) (a) proscribes feticide. It does not apply to consensual abortions. It was not impliedly repealed by the adoption of s. 940.15 in response to *Roe v. Wade*. State v. Black, 188 Wis. 2d 639, 526 N.W.2d 132 (1994).

The common law "year–and–a–day rule" that no homicide is committed unless the victim dies within a year and a day after the injury is inflicted is abrogated, with prospective application only. State v. Picotte, 2003 WI 42, 261 Wis. 2d 249, 661 N.W.2d 381, 01–3063.

This section is cited as similar to a Texas statute that was held to violate the due process clause of the 14th amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Roe v. Wade, 410 U.S. 113 (1973).

The state may prohibit first trimester abortions by nonphysicians. Connecticut v. Menillo, 423 U.S. 9 (1975).

The viability of an unborn child is discussed. Colautti v. Franklin, 439 U.S. 379 (1979).

Poverty is not a constitutionally suspect classification. Encouraging childbirth except in the most urgent circumstances is rationally related to the legitimate governmental objective of protecting potential life. Harris v. McRae, 448 U.S. 297 (1980).

Abortion issues are discussed. Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Planned Parenthood Assn. v. Ashcroft, 462 U.S. 476 (1983); Simopoulas v. Virginia, 462 U.S. 506 (1983).

The essential holding of *Roe v. Wade* allowing abortion is upheld, but various state restrictions on abortion are permissible. Planned Parenthood v. Casey, 505 U.S. 833, 120 L. Ed. 2d 674 (1992).

Wisconsin's abortion statute, s. 940.04, Stats. 1969, is unconstitutional as applied to the abortion of an embryo that has not quickened. Babbitz v. McCann, 310 F. Supp. 293 (1970).

When U.S. supreme court decisions clearly made Wisconsin's antiabortion statute unenforceable, the issue in a physician's action for injunctive relief against enforcement became mooted, and it no longer presented a case or controversy over which the court could have jurisdiction. Larkin v. McCann, 368 F. Supp. 1352 (1974).

(b) The state concedes that it is unable to prove beyond a reasonable doubt that the mitigating circumstances specified in s. 940.01 (2) did not exist. By charging under this section, the state so concedes.

(2h) In prosecutions under sub. (2g), it is sufficient to allege and prove that the defendant caused the death of an unborn child with intent to kill that unborn child, kill the woman who is pregnant with that unborn child or kill another.

(3) The mitigating circumstances specified in s. 940.01 (2) are not defenses to prosecution for this offense.

History: 1987 a. 399; 1997 a. 295.

Judicial Council Note, 1988: Second–degree intentional homicide is analogous to the prior offense of manslaughter. The penalty is increased and the elements clarified in order to encourage charging under this section in appropriate cases.

Adequate provocation, unnecessary defensive force, prevention of felony, coercion and necessity, which are affirmative defenses to first–degree intentional homicide but not this offense, mitigate that offense to this. When this offense is charged, the state's inability to disprove their existence is conceded. Their existence need not, however, be pleaded or proved by the state in order to sustain a finding of guilty.

When first–degree intentional homicide is charged, this lesser offense must be submitted upon request if the evidence, reasonably viewed, could support the jury's finding that the state has not borne its burden of persuasion under s. 940.01 (3). State v. Felton, 110 Wis. 2d 465, 508 (1983). [Bill 191–S]

The prosecution is required to prove only that the defendant's acts were a substantial factor in the victim's death; not the sole cause. State v. Block, 170 Wis. 2d 676, 489 N.W.2d 715 (Ct. App. 1992).

The common law "year–and–a–day rule" that no homicide is committed unless the victim dies within a year and a day after the injury is inflicted is abrogated, with prospective application only. State v. Picotte, 2003 WI 42, 261 Wis. 2d 249, 661 N.W.2d 381, 01–3063.

Importance of clarity in law of homicide: The Wisconsin revision. Dickey, Schultz & Fullin. 1989 WLR 1323 (1989).

940.06 Second–degree reckless homicide. (1) Whoever recklessly causes the death of another human being is guilty of a Class D felony.

(2) Whoever recklessly causes the death of an unborn child is guilty of a Class D felony.

History: 1987 a. 399; 1997 a. 295; 2001 a. 109.

Judicial Council Note, 1988: Second–degree reckless homicide is analogous to the prior offense of homicide by reckless conduct. The revised statute clearly requires proof of a subjective mental state, i.e., criminal recklessness. See s. 939.24 and the NOTE thereto. [Bill 191–S]

Second–degree reckless homicide is not a lesser included offense of homicide by intoxicated use of a motor vehicle. State v. Lechner, 217 Wis. 2d 392, 576 N.W.2d 912 (1998), 96–2830.

The common law "year–and–a–day rule" that no homicide is committed unless the victim dies within a year and a day after the injury is inflicted is abrogated, with prospective application only. State v. Picotte, 2003 WI 42, 261 Wis. 2d 249, 661 N.W.2d 381, 01–3063.

The second–degree reckless homicide statute requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk. The circuit court's refusal to instruct the jury about the effect of a parent's sincere belief in prayer treatment for their child on the subjective awareness element of second–degree reckless homicide, did not undermine the parents' ability to defend themselves. The second–degree reckless homicide statute does not require that the actor be subjectively aware that his or her conduct is a cause of the death of his or her child. The statute and the jury instructions require only that the actor be subjectively aware that his or her conduct created the