RECENT AND PENDING U.S. SUPREME COURT ACTION ON ABORTION

INFORMATION MEMORANDUM 89-2

Wisconsin Legislative Council Staff

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This Information Memorandum describes the recent U.S. Supreme Court decision on abortion in Webster v. Reproductive Health Services, 1989 U.S. Lexis 3290 (1989), decided July 3, 1989, and related Wisconsin statutes on abortion. [Citations in this Information Memorandum to Webster are to the Lexis version of the decision.] In Webster, the U.S. Supreme Court upheld provisions of a Missouri abortion statute. Webster has no effect on Wisconsin's current abortion statutes.

Also discussed in the Information Memorandum are three abortion cases that the U.S. Supreme Court has agreed to hear in its next term that begins in October 1989.

The remainder of this Information Memorandum is organized as follows:

A. WISCONSIN ABORTION STATUTES

Wisconsin has a number of statutes that deal with the subject of abortion. However, only statutes in three particular areas will be described in this portion of the Information Memorandum, since those statutes relate to topics that were discussed in Webster, are issues in cases pending before the U.S. Supreme Court next term or were discussed in recent months prior to the Webster decision. Wisconsin statutes described in this portion of the Information Memorandum include: (1) criminal statutes on abortion; (2) statutes restricting public funding of abortion; and (3) statutes relating to notification of parents of a minor seeking an abortion. The relevant statutes are included in the Appendices to this Information Memorandum.

The decision of the U.S. Supreme Court in Webster has no effect on current Wisconsin statutes dealing with abortion. Those statutes which were in force prior to Webster remain in force. The one statute--s. 940.04, Stats.--which was not enforceable prior to Webster did not become enforceable due to that decision.

1. Criminal Statutes on Abortion

Wisconsin has two criminal statutes prohibiting abortion--ss. 940.04 and 940.15, Stats. A related statute, s. 940.13, Stats., exempts from prosecution a woman obtaining an abortion. [The provisions of s. 940.04, Stats., are not enforceable under U.S. Supreme Court decisions.]

Section 940.04, Stats., provides as follows:

a. Any person, other than the mother, who intentionally destroys the life of an unborn child may be fined not more than $5,000, imprisoned not more than three years, or both.

b. Any person, other than the mother, who intentionally destroys the life of an unborn quick child (i.e., an unborn child who has moved in the womb) or causes the death of the mother by an act done with intent to destroy the life of an unborn child, may be imprisoned not more than 15 years.

The above prohibitions do not apply to a therapeutic abortion which: (a) is performed by a physician; (b) is necessary, or is advised by two other physicians as necessary, to save the life of the mother; and (c) is performed in a licensed maternity hospital, unless an emergency prevents this.

Section 940.04, Stats., also allows the imposition of penalties on pregnant women who intentionally destroy their unborn child or consent to such destruction, with the penalties varying depending on whether the unborn child is quick. However, these penalties may not be enforced because of s. 940.13, Stats., which states that penalties may not be imposed, and no prosecution may be brought, against a woman who obtains an abortion or otherwise violates any provision of any abortion statute with respect to her unborn child or fetus.

Section 940.15, Stats., was created by 1985 Wisconsin Act 56 (the Abortion Prevention and Family Responsibility Act of 1985). Section 940.15 (1), Stats., defines "viability" as follows:

> 940.15 ABORTION. (1) In this section, "viability" means that stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case before him or her, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support.

Under s. 940.15 (2), Stats., whoever intentionally performs an abortion after the fetus or unborn child reaches viability, as determined by reasonable medical judgment of the woman's attending physician, is guilty of a Class E felony. A Class E felony is punishable by a fine not to exceed $10,000, imprisonment not to exceed two years, or both.

The prohibition does not apply if the abortion is necessary to preserve the life or health of the woman, as determined by reasonable medical judgment of the woman's attending physician. Any such post-viability abortion must be performed in a hospital on an inpatient basis. Also, any physician who performs a lawful post-viability abortion must use that method of abortion which, of those he or she knows to be available, is in his or her medical judgment most likely to preserve the life and health of the fetus or unborn child. However, the physician is not required to employ a method of abortion which, in his or her medical judgment based on the particular facts of the case before him or her, would increase the risk to the woman. Also, the provisions of s. 940.15, Stats., may not be enforced against a pregnant woman who obtains an abortion because of a specific exemption in s. 940.15 (7), Stats., and the general exemption in s. 940.13, Stats.

In summary, s. 940.04, Stats., prohibits all abortions (other than abortions to save the life of the woman and which, other than in emergencies, are performed in a licensed maternity hospital), with higher penalties where the fetus or unborn child is quick. However, s. 940.04, Stats., is not enforceable because of U.S. Supreme Court decisions.

Section 940.15, Stats., prohibits abortions only after viability of the fetus and makes an exception where the abortion is necessary to preserve the life or health of the woman. Section 940.13, Stats., exempts from prosecution a pregnant woman who obtains an abortion.

2. Statutes Restricting Public Funding of Abortion

The primary statute restricting public funding of abortion is s. 20.927, Stats. The statute defines "abortion" as the intentional destruction of the life of an unborn child and defines "unborn child" as a human being from the time of conception until it is born alive. Under s. 20.927, Stats., no funds of this state or of any county, city, village or town or of any subdivision or agency of this state or of any county, city, village or town, and no federal funds passing through the State Treasury, shall be authorized for or paid to a physician or surgeon or a hospital, clinic or other medical facility for the performance of an abortion.

The statute allows exceptions to that restriction: (a) for an abortion which is directly and medically necessary to save the life of the woman; (b) in a case of sexual assault or incest; or (c) if, due to a medical condition existing prior to the abortion, the physician determines that the abortion is directly and medically necessary to prevent grave, long-lasting physical health damage to the woman. Section 20.927, Stats., also does not apply to the authorization or payment of funds "...for or in connection with the prescription of a drug or the insertion of a device to prevent the implantation of the fertilized ovum."

Statutes which cross-reference the provisions of s. 20.927, Stats., include s. 59.07 (136), Stats., for counties, and s. 66.04 (1) (m), Stats., for cities, villages and towns.

3. Statutes Relating to Parental Notification

Section 146.78 (5), Stats., states that each hospital, clinic or other facility in which a physician performs an abortion shall have a written policy regarding notification of parents or guardians of minor patients who are seeking an abortion. A copy of that policy must be given to each minor patient seeking the abortion. A copy of the policy of each hospital, clinic or other facility must be filed annually with the Department of Health and Social Services.

Under s. 146.78 (5) (c), Stats., the policy "...shall require that the hospital, clinic or other facility personnel strongly encourage the minor patient to consult her parents or guardian regarding the abortion unless the minor has a valid reason for not doing so...." If there is

such a reason, the personnel must encourage the patient to notify another family member, close family friend, school counselor, social worker or other appropriate person.

The policy must also include the following information: (a) the availability of services of a county agency to assist a minor contemplating an abortion who wishes to notify a parent or guardian; and (b) that the hospital, clinic or other facility and persons affiliated with it may not notify the minor's parent or guardian concerning an abortion without the written consent of the minor.

Section 46.24, Stats., states that if a minor contemplating an abortion requests assistance from a county department of social services or a county department of human services in notifying the minor's parent or guardian of the contemplated abortion, the county agency must provide assistance, including, if so requested, accompanying the minor for the notification of the parent or guardian.

B. DESCRIPTION OF WEBSTER V. REPRODUCTIVE HEALTH SERVICES AND ITS EFFECT ON WISCONSIN ABORTION STATUTES

This Section of the Information Memorandum describes the recent U.S. Supreme Court decision in Webster. Because numerous references are made throughout Webster to the 1973 Supreme Court decision in Roe v. Wade, 410 U.S. 113 (1973), a brief summary of Roe is also provided.

1. Roe v. Wade

In Roe, the U.S. Supreme Court discussed the extent to which a state may regulate abortion. The Court held that there is a right of privacy under the U.S. Constitution which "...is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" [Roe, at 153]. The Court stated, however, that the right to privacy is not unqualified and that, at some point in pregnancy, a state's interest in protecting the health of the pregnant woman and in protecting "potential life" becomes sufficiently compelling to sustain regulation.

The Court divided pregnancy into the following three stages (commonly referred to as trimesters, although they are not necessarily of equal duration) and set forth the degree to which a state may regulate abortion during those stages, as follows:

a. During the first trimester of pregnancy, the attending physician, in consultation with the woman, is free to determine "...without

regulation by the State..." that, in the physician's medical judgment, the pregnancy should be terminated [Roe, at 163].

b. After the first trimester of pregnancy, a state "...may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health" [Roe, at 163].

c. After viability of the fetus (i.e., when the fetus "...presumably has the capability of meaningful life outside the mother's womb"), a state may go so far as to proscribe abortion, except where necessary to preserve the life or health of the mother [Roe, at 163-164].

2. Webster v. Reproductive Health Services

Webster is a case in which a challenge was brought to the constitutionality of several provisions of a Missouri law regulating abortion. The suit was brought by five health care professionals employed by the State of Missouri, and two nonprofit corporations that performed abortions, against the State of Missouri and William Webster, the Attorney General of Missouri. After several of the provisions were declared unconstitutional by the U.S. Court of Appeals for the 8th Circuit [see Reproductive Health Service v. Webster, 851 F. 2d 1071 (8th Cir. 1988)], Missouri appealed to the U.S. Supreme Court.

The Supreme Court's decision in Webster consisted of five separate opinions by: (a) Chief Justice Rehnquist (joined by Justices White and Kennedy); (b) Justice O'Connor; (c) Justice Scalia; (d) Justice Blackmun (joined by Justices Brennan and Marshall); and (e) Justice Stevens. With respect to most of the sections of the Missouri abortion statute that were reviewed by the Court, the opinions written by Chief Justice Rehnquist (joined by Justices White and Kennedy) and Justices O'Connor and Scalia were in favor of the constitutionality of the statute, forming the five-person majority. [Because the decision by Chief Justice Rehnquist was joined by two other Justices voting in the majority, the Rehnquist opinion is commonly referred to as the plurality opinion.]

In Webster, the Supreme Court upheld the following four provisions of the Missouri abortion statute:

a. The preamble;

b. The prohibition on the use of public facilities and employes for performance of abortions;

c. The prohibition on public funding for abortion counseling; and

d. The requirement that physicians determine viability of a fetus who is 20 or more weeks of age and conduct appropriate tests to determine viability.

The preamble, the prohibition on the use of public facilities and employes and the viability-testing provisions were upheld by a 5-4 decision. The prohibition on the use of public funding for abortion counseling was upheld by a 9-0 decision because of the manner in which the statute was construed.

The remainder of this portion of the Information Memorandum will describe the Court's action with respect to these four provisions.

a. Preamble

The U.S. Supreme Court, by a 5-4 decision, upheld s. 1.025, Mo. Rev. Stats., which set forth legislative findings that the life of each human being begins at conception, that unborn children have protectable interests in life, health and well-being and that natural parents of unborn children have protectable interests in the life, health and well-being of their unborn child. The preamble provides that the laws of Missouri shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development:

> ...all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.

The preamble defines "unborn child" as a child beginning at the moment of conception until birth. The preamble also states that nothing in the section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly provide care for herself or by failing to follow any particular program of prenatal care.

Chief Justice Rehnquist stated that the preamble does not regulate abortion. He stated that the Supreme Court has emphasized that Roe implies no limitation on the authority of a state to make a value judgment favoring childbirth over abortion and that the preamble can be read simply to express that sort of value judgment. Chief Justice Rehnquist added that the extent to which the preamble's language might be used to interpret other state statutes or regulations is something that only the courts of Missouri can definitively decide. Chief Justice Rehnquist

stated that the federal courts may address the meaning of the preamble should it be applied to restrict the activities of Reproductive Health Services. He, therefore, stated that the Court need not pass on the constitutionality of the preamble.

Justice O'Connor agreed, stating that nothing in the record or the lower court decisions indicates that the preamble will affect a woman's decision to have an abortion.

Justice Scalia concurred in the opinion of Chief Justice Rehnquist. However, Justice Scalia's separate opinion did not focus on the preamble, but rather primarily set forth a discussion of why Roe should be overturned by the Court.

Justice Blackmun stated that he did not see how the preamble could realistically be construed as being abortion-neutral. He stated that, in his view, a state may not expand indefinitely the scope of its abortion laws by creating interests in fetal life that are limited solely by reference to Supreme Court decisions. He stated that such a statutory scheme will have the unconstitutional effect of chilling the exercise of a woman's right to terminate a pregnancy and of burdening the freedom of health professionals to provide abortion services.

Justice Blackmun's opinion, and the opinion of Justice Stevens, also stated that the preamble will unconstitutionally burden the use of contraceptive devices, such as the intrauterine device (IUD) and the "morning after" pill, which may operate to prevent pregnancy only after conception, as "conception" is defined in the Missouri statute. In that statute, "conception" occurs at the time the ovum is fertilized by a sperm cell.

Justice Stevens also stated that the absence of any secular purpose for the legislative declarations, that life begins at conception and conception occurs at fertilization, makes the relevant portion of the preamble invalid under the clause prohibiting establishment of a religion of the First Amendment to the U.S. Constitution.

b. Public Facilities and Employes

The U.S. Supreme Court, by a 5-4 decision, upheld s. 188.210, Mo. Rev. Stats., which states that it is unlawful for any public employe within the scope of his or her employment to perform or assist in an abortion, not necessary to save the life of the mother. The decision also upheld s. 188.215, Mo. Rev. Stats., which makes it unlawful for any public facility to be used for the purpose of performing or assisting in an abortion not necessary to save the life of the mother.

The Missouri statutes define: (1) "public employe" to mean any person employed by Missouri or any agency or political subdivision of Missouri; and (2) "public facility" to mean "...any public institution, public facility, public equipment, or any physical asset owned, leased, or controlled by this state or any agency or political subdivisions thereof."

Chief Justice Rehnquist discussed earlier opinions of the Supreme Court in which the Court upheld restrictions on the use of public funds for most abortions. He stated that, as in those cases, Missouri's decision to use public facilities and staff to encourage childbirth over abortion places no governmental obstacle in the path of the woman who chooses to terminate her pregnancy. Chief Justice Rehnquist stated that having held that a state's refusal to fund abortions does not violate Roe, "...it strains logic to reach a contrary result for the use of public facilities and employees" [Webster, at 14]. He went on to state that nothing in the Constitution requires states to enter or remain in the business of performing abortions nor do private physicians and their patients have a constitutional right of access to public facilities for the performance of abortions.

Justice O'Connor upheld the public facility and public employe provisions of the Missouri law as being constitutional, but stated that there may be conceivable applications of the ban on the use of public facilities that would be unconstitutional, given Missouri's definition of "public facility." However, she stated that a person challenging a statute must establish that no set of circumstances exists under which the statute would be valid. She added that the fact that the statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.

Justice Scalia concurred in the opinion of Chief Justice Rehnquist.

Justice Blackmun stated that the Court's earlier decisions on public funding do not control this case, "...where the State not only has withdrawn from the business of abortion, but has taken affirmative steps to assure that abortions are not performed by private physicians in private institutions" [Webster, at 31].

Justice Blackmun stated that, under the Missouri definition of "public facility," no abortion may be performed at Truman Medical Center in Kansas City, where, in 1985, 97% of all Missouri hospital abortions at 16 weeks or later were performed. He stated that Truman Medical Center is a private hospital, staffed primarily by private doctors, and administered by a private corporation, but is located on ground leased from a political subdivision of Missouri. He added that even if a state may decline to subsidize or participate in the exercise of a woman's right to terminate a pregnancy, it may not affirmatively constrict the availability of

abortions by defining as "public" that which in all meaningful respects is private.

c. Public Funding for Abortion Counseling

The U.S. Supreme Court, by a 9-0 decision, upheld s. 188.205, Mo. Rev. Stats., which states that no public funds may be used to encourage or counsel a woman to have an abortion not necessary to save her life. Chief Justice Rehnquist stated that the Court accepts, for purposes of this decision, Missouri's claim that the provision "...is not directed at the conduct of any physician or health care provider, private, or public," but "is directed solely at those persons responsible for expending public funds" [Webster, at 15]. The plaintiffs in Webster stated that they were not adversely affected under Missouri's interpretation of the provision. Chief Justice Rehnquist held that the controversy over that provision was moot.

All other Justices concurred in the Rehnquist opinion on this issue. However, Justice O'Connor stated that the interpretation placed on the provision by Missouri in this case is not binding on the Supreme Court of Missouri. She stated that if the Missouri Supreme Court interprets the provision to prohibit publicly employed health professionals from giving specific medical advice to pregnant women, this may clear the path for future relitigation of the issues.

Justice Blackmun stated that, although the challenge to this provision is moot, the constitutionality of the provision might become the subject of relitigation should the Missouri Supreme Court adopt an interpretation of the provision that differs from the one accepted by the Supreme Court in this case.

d. Determination of Viability

The U.S. Supreme Court, by a 5-4 decision, upheld s. 188.029, Mo. Rev. Stats., which states as follows:

> Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical

> examination and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother.

The portions of the Court's opinion discussing this provision often set forth reasons why Roe should or should not be overturned.

Chief Justice Rehnquist noted that the parties disagreed over the meaning of this provision and added that the Court of Appeals read the provision as requiring that, after 20 weeks, doctors must perform tests to find gestational age, fetal weight and lung maturity. Chief Justice Rehnquist stated that the Court of Appeals interpretation of the statute is contrary to the established principle that statutes should be interpreted to avoid constitutional difficulties.

Chief Justice Rehnquist stated that the viability-testing provision makes sense only if the second sentence is read to require only those tests that are useful to making subsidiary findings as to viability. He stated that if the second sentence were construed to require a physician to perform tests that were irrelevant to determining viability or even dangerous to the mother and the fetus, the second sentence would conflict with the first sentence's requirement that a physician apply reasonable professional skill and judgment. He also stated that it would be incongruous to read the second sentence, especially the word "necessary," to require the performance of tests that are irrelevant to the express statutory purpose of determining viability.

Chief Justice Rehnquist went on to state that the provision creates what is essentially a presumption of viability at 20 weeks, which the physician must rebut with tests indicating that the fetus is not viable prior to performing an abortion. He stated that to the extent that the provision regulates the method for determining viability, it undoubtedly superimposes state regulation on the medical determination of whether a particular fetus is viable. He also stated that to the extent that the viability tests increase the cost of a second trimester abortion, their validity may also be questioned under a previous Supreme Court decision. However, he stated that the doubt cast upon the Missouri statute by these cases is not so much a flaw in the statute as it is a problem with the trimester approach enunciated in Roe.

Chief Justice Rehnquist spent much of the remainder of his opinion questioning the validity of the trimester approach used in Roe. He stated that the Roe trimester approach falls into the category of cases that may be reconsidered because prior construction of the Constitution has proved

unsound in principle and unworkable in practice. In criticizing Roe, Chief Justice Rehnquist stated as follows:

> The key elements of the Roe framework--trimesters and viability--are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle. Since the bounds of the inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine [Webster, at 19].

Chief Justice Rehnquist also stated that he did not see why the state's interest in protecting potential human life should come into existence only at the point of viability.

Chief Justice Rehnquist went on to state that the requirement of tests permissibly furthers the state's interest in protecting potential human life and that the Missouri provision is constitutional. He added that, although urged by the defendants and the U.S. government to overturn Roe, the facts of Webster differ from those in Roe. Missouri had determined that viability is the point at which its interest in potential human life must be safeguarded. In Roe, the Texas statutes criminalized the performance of all abortions, except where the mother's life was at stake. Chief Justice Rehnquist went on to state:

> This case therefore affords us no occasion to revisit the holding of Roe, which was that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause, id., at 164, and we leave it undisturbed. To the extent indicated in our opinion, we would modify and narrow Roe and succeeding cases [Webster, at 21].

Justice O'Connor stated that she agreed with Chief Justice Rehnquist that it was an error for the Court of Appeals to interpret the second sentence of the provision as meaning that doctors must perform tests to find gestational age, fetal weight and lung maturity. She stated that, when read together with the first sentence of the provision, it would be "contradictory nonsense" to read the second sentence as requiring a physician to perform viability tests in situations where it would be careless and imprudent to do so. However, she stated that, unlike Chief Justice Rehnquist, she did not find the viability-testing requirements to conflict with any of the Court's past decisions concerning state regulation of abortion. She stated:

> Therefore, there is no necessity to accept the State's invitation to reexamine the constitutional validity of Roe v. Wade... [Webster, at 23].

Justice O'Connor went on to state:

> When the constitutional invalidity of a State's abortion statutes actually turns on the constitutional validity of Roe v. Wade, there will be time enough to reexamine Roe. And to do so carefully [Webster, at 23].

Justice O'Connor stated that, as Chief Justice Rehnquist properly interpreted the second sentence of the viability provision, it does nothing more than delineate means by which the unchallenged 20-week presumption of viability may be overcome if those means are useful in doing so and can be prudently employed. She, therefore, stated that the challenged provision was constitutional.

Justice Scalia stated that Roe should be overturned explicitly. He stated that what the Court was doing in Webster was "...to prolong this Court's self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridicial..." [Webster, at 26-27]. Justice Scalia went on to state that it was an arguable question whether the provision of the Missouri law contravened Roe, and he would have examined Roe rather than examining the contravention. He went on to state:

> It thus appears that the mansion of constitutionalized abortion-law, constructed overnight in Roe v. Wade, must be disassembled door-jamb by door-jamb, and never entirely brought down, no matter how wrong it may be [Webster, at 29].

Justice Blackmun stated that the opinions by Chief Justice Rehnquist and Justice Scalia would overrule Roe and "...would return to the States virtually unfettered authority to control the quintessentially intimate, personal, and life-directing decision whether to carry a fetus to term" [Webster, at 30]. He goes on to criticize Chief Justice Rehnquist's opinion as follows:

> The plurality opinion is filled with winks, and nods, and knowing glances to those who would do away with Roe explicitly, but turns a stone face to anyone in search of what the plurality conceives as the scope of a woman's right under the Due Process

> Clause to terminate a pregnancy free from the coercive and brooding influence of the State. The simple truth is that Roe would not survive the plurality's analysis, and that the plurality provides no substitute for Roe's protective umbrella [Webster, at 30].

Justice Blackmun criticized Chief Justice Rehnquist's reading of the viability-testing statute, stating that the statute requires physicians to undertake procedures that "...have no medical justification, impose significant additional health risks on both the pregnant woman and the fetus, and bear no rational relation to the State's interest in protecting fetal life" [Webster, at 33-34]. He states that if, as Chief Justice Rehnquist's opinion appears to hold, the testing provision simply requires a physician to use appropriate and medically sound tests to determine viability when the estimated gestational age is greater than 20 weeks, he sees little or no conflict with Roe, since nothing in Roe holds that a state may not effectuate its compelling interest in the potential life of a viable fetus.

Justice Blackmun went on at length to criticize the plurality opinion for its lack of discussion of the right to privacy under the Constitution and also went on to justify the trimester approach used in Roe. He added:

> For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows [Webster, at 43-44].

Justice Stevens criticized the plurality's construction of the viability-testing provision. He added that he agreed with Justice Blackmun's opinion and stated that the viability-testing provision is manifestly unconstitutional.

3. Effect of Webster on Wisconsin Abortion Statutes

The decision of the U.S. Supreme Court in Webster has no effect on current Wisconsin statutes dealing with abortion. Those statutes which were in force prior to Webster remain in force. The one statute--s. 940.04, Stats.--which was not enforceable prior to Webster did not become enforceable due to that decision. The U.S. Supreme Court, in Webster, retained the trimester approach used in Roe in determining the extent to which a state may regulate abortion, and s. 940.04, Stats., is inconsistent with the trimester approach. Although Webster allowed states

greater latitude than previous decisions in specifying how viability determinations must be made, Wisconsin statutes would have to be modified if Wisconsin were to choose to exercise this latitude. Webster gives states, such as Wisconsin, the authority to enact statutes that are the same as the Missouri statute. However, Webster does not require states to do so.

C. PENDING U.S. SUPREME COURT CASES

In its next term, which begins in October 1989, the U.S. Supreme Court will be reviewing decisions of three U.S. Courts of Appeals with respect to abortion statutes. Those three decisions, which are described in the remainder of this Information Memorandum, are as follows:

1. Ragsdale v. Turnock, 841 F. 2d 1358 (7th Cir. 1988), which dealt with Illinois statutes and regulations regulating clinics in which abortions are performed.

2. Hodgson v. Minnesota, 850 F. 2d 1452 (8th Cir. 1988), which dealt with a Minnesota parental notification statute.

3. Ohio v. Akron Center for Reproductive Health [Court of Appeals case name was Akron Center for Reproductive Health v. Slaby], 854 F. 2d 852 (6th Cir. 1988), which dealt with an Ohio parental notification statute.

1. Ragsdale v. Turnock

a. Background

In Ragsdale v. Turnock, 841 F. 2d 1358 (7th Cir. 1988), the U.S. Court of Appeals for the 7th Circuit, by a 2-1 decision, struck down Illinois statutes and regulations regulating clinics in which abortions are performed. The State of Illinois appealed and the U.S. Supreme Court agreed to hear the case.

b. Description of Statutes and Regulations

The Illinois statutes involved in the case were part of the Medical Practice Act, part of the Health Facilities Planning Act and the Ambulatory Surgical Treatment Center (ASTC) Act. The portion of the Medical Practice Act under review allowed the state to revoke, suspend, place on probationary status or take other disciplinary action against a person performing an elective abortion other than in an ASTC, a hospital or a state, federal or university facility.

The portion of the Health Facilities Planning Act reviewed by the Court required anyone seeking to open an ASTC to obtain a certificate of need from the state after a public hearing and a 120-day review period.

The bulk of the challenge was against the ASTC Act and regulations promulgated under it. The ASTC Act generally governed ASTC's and allowed the state to impose regulations on those centers and had certain specific provisions directed at ASTC's in which abortions are performed. For example, ASTC's devoted primarily to providing facilities for abortions must have on their boards of directors a physician who is licensed to practice medicine in all of its branches. Licensing fees are required. In addition, the ASTC Act prohibited the performance of second trimester abortions in ASTC's.

General regulations promulgated under the ASTC Act specified physical plant requirements, information to be provided in an application for licensure, policies and procedures, personnel requirements, equipment requirements and other general requirements. In addition, the regulations had an abortion-specific subpart which required:

(1) At least one registered professional nurse with post-graduate education or experience in obstetrical or gynecological nursing;

(2) Testing and reporting of the results to the patient of blood Rh factor and diagnosis of pregnancy; and

(3) Counseling by someone specifically trained to give it and who has no financial interest in the patient's decision; the counseling must include a discussion of alternatives, a description of the procedures to be performed and an explanation of risks and possible complications.

c. Court of Appeals Decision

The Court of Appeals began by stating that the challenge to the ASTC Act provision that prohibits the performance of second trimester abortions in ASTC's is moot because the State of Illinois conceded that the requirement was unconstitutional and was not enforcing the requirement.

The Court noted that Roe and cases since Roe have held that, for first trimester abortions, restrictions must be insignificant in terms of the woman's exercise of her right and that the restriction must be justified by important state health objectives. The Court stated that the ASTC Act was enacted primarily with abortion clinics in mind and only applied to outpatient surgical clinics generally in an effort to save the statute from unconstitutionality. The Court also stated that the state cannot, merely by applying the label of "surgery" to a medical procedure,

apply requirements which would be necessary to major surgical procedures if the requirements would be wholly inappropriate in the abortion context.

The Court went on to state that Illinois had not shown that the performance of first trimester abortions in physicians' offices, rather than heavily regulated ASTC's, in any way undermines the safety of the operation. Therefore, the Court struck down the licensing requirement and held that the remainder of the requirements, which were conditions of licensure, must also be unconstitutional. However, the Court went on to discuss the constitutionality of some of the specific requirements in the laws and regulations. The Court stated that many of the requirements in the regulations seemed clearly contrary to either prior Supreme Court precedents or precedents of the Court of Appeals for the 7th Circuit.

In addition to striking down the ASTC Act requirements and regulations, the Court also stated that the certificate of need requirement under the Health Facilities Planning Act is unconstitutional. The Court stated that, where the exercise of constitutional rights is concerned, the government may play no role in determining whether outlets for their exercise are needed. The Court also stated that Illinois had failed to prevent the process from becoming essentially a public veto of ASTC's that wish to perform abortions.

The Court stated that there may be facets of the statute and regulations which would individually pass constitutional muster, but affirmed the District Court's injunction of the entire statutory and regulatory scheme (with the exception of the moot issue of the provision requiring that second trimester abortions be performed in hospitals), stating that parts of it were not severable from other parts.

The dissent in Ragsdale noted that states have the power and authority, if not the duty, to apply the same licensing standards to abortion facilities as those applied to facilities performing similar surgical procedures. The dissent noted that the provision of the Medical Practice Act that prohibited abortions other than at specified facilities should be enjoined, as should a companion clause in the ASTC Act. However, the dissent added that states, including Illinois, are free to regulate ASTC's, including those performing abortions, as long as abortions are not singled out from other, similar surgical procedures. The dissent would, therefore, uphold all of the remaining statutory sections and regulations which "...neither burden the abortion decision nor its effectuation, and are justified with important health objectives in mind" [Ragsdale, at 1378]. The dissent also disputed the majority's opinion that the ASTC Act was enacted primarily to regulate abortions and discussed the history of the Act.

The dissent went on to state that all of the abortion-specific regulations should be upheld under Roe, with one exception. The requirement that the person counseling the woman having an abortion have no financial interest in the patient's decision "...appears to interfere with the physician-patient relationship and should be severed and enjoined" [Ragsdale, at 1398].

2. Hodgson v. Minnesota

a. Background

The U.S. Supreme Court has agreed, in its next term, to hear appeals of two federal court cases involving state statutes which require that one or both parents of a minor seeking an abortion be notified of the impending abortion. The first case is an appeal of the 8th Circuit Court of Appeals decision in Hodgson v. Minnesota, 850 F. 2d 1452 (8th Cir. 1988), where the Court upheld the constitutionality of most of the Minnesota parental notification statute. Both sides in the Hodgson case have appealed. Hodgson, a doctor, and the other parties who have joined her have appealed the part of the Court's decision which held that the version of the parental notification statute which includes a procedure allowing the minor to go to court to obtain a waiver of the notification requirement is constitutional. The State of Minnesota has appealed the part of the decision which held that the version of the statute which requires parental notification but does not include this court procedure is unconstitutional.

b. Description of Statute

The Minnesota statute requires actual or constructive delivery of a written notice of a minor's planned abortion to both of the minor's parents 48 hours prior to the abortion. The two-parent notice requirement also applies in cases where the minor's parents are separated or divorced. Minors who notify only one parent, or minors who decide not to notify either parent, must go to court to obtain a waiver of the two-parent notice requirement. This is commonly referred to as a "judicial bypass" proceeding. The requirement that this type of proceeding be made available to minors where a state elects to require parental involvement in a minor's abortion decision was first established by the U.S. Supreme Court in Bellotti v. Baird, 443 U.S. 622 (1979).

The statute sets out procedures for the minor to follow to obtain a court determination of her ability to make the abortion decision without parental notification. The procedures provide for court-appointed counsel, a waiver of filing fees, confidentiality of the proceeding and expedited proceedings both at the trial and appellate court levels.

The statute was enacted with the notification requirement separate from the judicial bypass proceeding, so that the notification requirement would be effective independent of the judicial bypass proceeding. The judicial bypass proceeding was to become operative in the event that the parental notification requirement (without the judicial bypass proceeding) was temporarily or permanently enjoined by a court order. Such a court order was sought by opponents of the statutes and was granted by a court and went into effect the day before the effective date of the statute (August 1, 1981). Thereafter, the statute operated with the judicial bypass proceeding in effect.

c. Court of Appeals Decision

The Court of Appeals for the 8th Circuit:

(1) Determined that the parental notification requirement, without the judicial bypass proceeding, was unconstitutional, affirming the District Court's decision on this issue.

(2) Upheld the constitutionality of the parental notification statute as a whole. The Court noted that a lengthy trial before the Federal District Court in Minnesota on the issue of the actual burden of the statutory requirements on minors seeking abortions raised, in the Court's view, "considerable questions about the wisdom of this statute." Nonetheless, the Court determined that the statute conformed with U.S. Supreme Court guidelines for these types of statutes, because "parental notice or consent requirements do not unconstitutionally burden a minor's abortion right when an appropriate judicial bypass is in place" [Hodgson, at 1459].

(3) Upheld, after considering it in isolation, the statute's two-parent notice requirement. The Court noted that the two-parent notice requirement did place additional burdens on the minor, but added that parental and family interests (as distinguished from the interests of the minor alone) justified the two-parent notice requirement. The Court reevaluated the diverse interests furthered by the requirement and, in balancing them with the burdens the requirement placed on minors, determined that the two-parent notice requirement was constitutional. The Court noted that, in cases where the two-parent notice requirement might result in a significant burden on a particular minor, the judicial bypass procedure was available to that minor.

(4) Upheld, after considering it in isolation, the 48-hour delay requirement. In response to the assertion that this requirement, when combined with weather, scheduling, travel and other factors could operate to significantly delay the abortion, the Court pointed out other factors to examine in evaluating the burden of this requirement, such as: (a) the

waiting period could run concurrently with the scheduling of the abortion appointment; and (b) persons scheduling abortions typically had to wait two or three days after initial contact with the clinic for the abortion to be performed. The Court, after considering these factors, reevaluated the burden of the 48-hour waiting period and determined that it was not an unconstitutional burden on the minor.

3. Ohio v. Akron Center for Reproductive Health

a. Background

The second case relating to the constitutionality of a state parental notification statute which the U.S. Supreme Court has agreed to hear in its next term is Ohio v. Akron Center for Reproductive Health. This is an appeal by the State of Ohio of the decision of the 6th Circuit Court of Appeals in Akron Center for Reproductive Health v. Slaby, 854 F. 2d 852 (6th Cir. 1988), in which the State of Ohio had intervened as a party. In Akron, the 6th Circuit Court of Appeals declared the Ohio parental notification statute unconstitutional.

b. Description of Statute

The Ohio statute provides that an unemancipated minor may not obtain an abortion unless one of the following occurs: (1) the person performing the abortion provides at least 24 hours actual notice to the parent or guardian of a minor; (2) one of the minor's parents or her guardian consents in writing to the abortion; (3) a juvenile court issues an order authorizing the minor to proceed with the abortion without parental notification; or (4) a juvenile court "constructively authorizes" the minor to consent to the abortion through its inaction.

The statute provides that if the person required to be notified cannot be notified of the impending abortion after reasonable effort, the person intending to perform the abortion must give at least 48 hours constructive notice by both regular and certified mail to that person. If the person cannot be reached within the 48-hour period, the abortion may proceed without notification. In addition, if the parent or guardian notified of the abortion expresses that he or she does not wish to consult with the minor prior to the abortion, the statute provides that the abortion may proceed without further delay.

The statute also provides criminal penalties for performing an abortion on an unemancipated minor without complying with the statutory requirements.

The statute establishes a procedure for a judicial bypass of the parental notification requirement. Under the judicial bypass procedure in the Ohio statute, the minor is required to file one of the following three complaint forms: (1) a complaint alleging that the minor is mature enough to decide whether to have an abortion without notifying her parents; (2) a complaint alleging that one or both of her parents, guardian or custodian has abused her or that notification of her parents, guardian or custodian regarding the abortion would otherwise not be in her best interests; or (3) a complaint asserting both of these allegations.

The minor is required to prove the allegation or allegations set out in her complaint by clear and convincing evidence. The statute requires that counsel be appointed to represent the minor at the hearing and at any subsequent appeal.

The Ohio statute provides for an expedited procedure to be followed in the bypass proceeding, from filing the complaint through the appeal process. If each level of court review took the maximum time allotted under the statute, the entire proceeding could take up to 22 days to complete.

The statute provides that if the initial court hearing on the minor's complaint is not held by the fifth business day after the complaint is filed, the failure to hold the hearing is considered "constructive authorization" for the minor to get the abortion without parental notification.

Finally, the statute provides that the hearing be conducted in a manner which preserves the confidentiality of the minor.

c. Court of Appeals Decision

The Court of Appeals for the 6th Circuit:

(1) Struck down the requirement that the physician intending to perform the abortion must be the one to notify the minor's parents of the abortion. The Court commented that the state's interest in ensuring that an immature, unemancipated minor whose best interest requires parental notification is not advanced by requiring the attending physician, as opposed to another qualified, responsible person, to effectuate the notification.

(2) Struck down the requirement that the minor determine which of the three complaint forms, described above, should be filed. The Court said that this requirement furthered no legitimate state interest and placed an undue burden on the minor, because by requiring her to choose one of the three complaint forms, she could be foreclosed from pursuing all valid arguments against the parental notification requirement at the hearing.

all valid arguments against the parental notification requirement at the hearing.

(3) Struck down the requirement that the minor prove the allegations in her complaint by clear and convincing evidence as a violation of due process. The Court stated that requiring this level of proof has the effect of placing the primary allocation of the risk of error in the proceedings upon the minor, the "precise individual whose fundamental liberty interest is at stake." The Court stated that the state's interest in obtaining a reliable result in the proceeding could be furthered by a lower standard of proof.

(4) Struck down the requirement that the minor sign her real name to the complaint to initiate the bypass proceeding and provide an address where the court can contact her throughout the bypass proceeding unless she is represented by an attorney. The Court stated that this part of the statute failed to ensure the required degree of anonymity to the minor, even though she is entitled to proceed under a pseudonym in the proceeding.

(5) Struck down the time limits set forth in the bypass procedure, which could result in a possible 22-day delay from the time the proceeding is commenced to when the appeal process is completed. The Court stated that this delay unduly burdens the minor's right to obtain an abortion.

(6) Struck down the statute's "pocket authorization" provision that allows the minor to proceed with the abortion without parental notification in the event that the juvenile court fails to hold a hearing on the petition within five business days after it is filed. The Court reasoned that, given the severe penalties imposed on physicians who perform an abortion without adequate authorization, the result of this "pocket authorization" of the abortion without parental notification would be that physicians will be unwilling to perform abortions in such situations.

(7) Upheld the 24-hour post-notification waiting period and rejected an argument that the statute is constitutionally deficient because it fails to provide for the appointment of counsel on appeal. The Court took these actions on procedural grounds, stating that the parties challenging these statutory provisions had failed to perfect a cross-appeal.

RNS:LR:all:las;kja

APPENDIX A

WISCONSIN CRIMINAL STATUTES ON ABORTION
[Sections 940.04, 940.13 and 940.15, Stats.]

940.04 ABORTION. (1) Any person, other than the mother, who intentionally destroys the life of an unborn child may be fined not more than $5,000 or imprisoned not more than 3 years or both.

(2) Any person, other than the mother, who does either of the following may be imprisoned not more than 15 years:

(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.

(3) Any pregnant woman who intentionally destroys the life of her unborn child or who consents to such destruction by another may be fined not more than $200 or imprisoned not more than 6 months or both.

(4) Any pregnant woman who intentionally destroys the life of her unborn quick child or who consents to such destruction by another may be imprisoned not more than 2 years.

(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.

940.13 ABORTION EXCEPTION. 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 with respect to her unborn child or fetus, and s. 939.05, 939.30 or 939.31 does not apply to a woman who obtains an abortion or otherwise violates any provision of any abortion statute with respect to her unborn child or fetus.

940.15 ABORTION. (1) In this section, "viability" means that stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case before him or her, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support.

(2) Whoever intentionally performs an abortion after the fetus or unborn child reaches viability, as determined by reasonable medical judgment of the woman's attending physician, is guilty of a Class E felony.

(3) Subsection (2) does not apply if the abortion is necessary to preserve the life or health of the woman, as determined by reasonable medical judgment of the woman's attending physician.

(4) Any abortion performed under sub. (3) after viability of the fetus or unborn child, as determined by reasonable medical judgment of the woman's attending physician, shall be performed in a hospital on an inpatient basis.

(5) Whoever intentionally performs an abortion and who is not a physician is guilty of a Class E felony.

(6) Any physician who intentionally performs an abortion under sub. (3) shall use that method of abortion which, of those he or she knows to be available, is in his or her medical judgment most likely to preserve the life and health of the fetus or unborn child. Nothing in this subsection requires a physician performing an abortion to employ a method of abortion which, in his or her medical judgment based on the particular facts of the case before him or her, would increase the risk to the woman. Any physician violating this subsection is guilty of a Class E felony.

(7) Subsections (2) to (6) and s. 939.05, 939.30 or 939.31 do not apply to a woman who obtains an abortion that is in violation of this section or otherwise violates this section with respect to her unborn child or fetus.

APPENDIX B

WISCONSIN STATUTES RESTRICTING PUBLIC FUNDING OF ABORTION
[Sections 20.927, 59.07 (136) and 66.04 (1) (m), Stats.]

20.927 SUBSIDY OF ABORTIONS PROHIBITED. (1) Except as provided under subs. (2) and (3), no funds of this state or of any county, city, village or town or of any subdivision or agency of this state or of any county, city, village or town and no federal funds passing through the state treasury shall be authorized for or paid to a physician or surgeon or a hospital, clinic or other medical facility for the performance of an abortion.

(2) (a) This section does not apply to the performance by a physician of an abortion which is directly and medically necessary to save the life of the woman or in a case of sexual assault or incest, provided that prior thereto the physician signs a certification which so states, and provided that, in the case of sexual assault or incest the crime has been reported to the law enforcement authorities. The certification shall be affixed to the claim form or invoice when submitted to any agency or fiscal intermediary of the state for payment, and shall specify and attest to the direct medical necessity of such abortion upon the best clinical judgment of the physician or attest to his or her belief that sexual assault or incest has occurred.

(b) This section does not apply to the performance by a physician of an abortion if, due to a medical condition existing prior to the abortion, the physician determines that the abortion is directly and medically necessary to prevent grave, long-lasting physical health damage to the woman, provided that prior thereto the physician signs a certification which so states. The certification shall be affixed to the claim form or invoice when submitted to any agency or fiscal intermediary of the state for payment, and shall specify and attest to the direct medical necessity of such abortion upon the best clinical judgment of the physician.

(3) This section does not apply to the authorization or payment of funds to a physician or surgeon or a hospital, clinic or medical facility for or in connection with the prescription of a drug or the insertion of a device to prevent the implantation of the fertilized ovum.

(4) In this section, "abortion" means the intentional destruction of the life of an unborn child, and "unborn child" means a human being from the time of conception until it is born alive.

59.07 (136) SUBSIDY OF ABORTIONS RESTRICTED. No county or agency or subdivision of the county may authorize funds for or pay to a physician or surgeon or a hospital, clinic or other medical facility for the

performance of an abortion except those permitted under and which are performed in accordance with s. 20.927.

66.04 (1) (m) Subsidy of abortions restricted. No city, village or town or agency or subdivision of a city, village or town may authorize funds for or pay to a physician or surgeon or a hospital, clinic or other medical facility for the performance of an abortion except those permitted under and which are performed in accordance with s. 20.927.

APPENDIX C

WISCONSIN STATUTES RELATING TO PARENTAL NOTIFICATION
[Sections 46.24 and 146.78 (5), Stats.]

46.24 ASSISTANCE TO MINORS CONCERNING ABORTION NOTIFICATION. If a minor who is contemplating an abortion requests assistance from a county department under s. 46.215, 46.22 or 46.23 in notifying the minor's parent or guardian of the contemplated abortion, the county shall provide assistance, including, if so requested, accompanying the minor for the notification of the minor's parent or guardian.

146.78 (5) PARENTAL NOTIFICATION FOR ABORTION FOR A MINOR. (a) Each hospital, clinic or other facility in which a physician performs an abortion shall have a written policy regarding notification of parents or guardians of minor patients who are seeking an abortion.

(b) A copy of the policy under par. (a) shall be given to each minor patient seeking an abortion.

(c) The policy shall require that the hospital, clinic or other facility personnel strongly encourage the minor patient to consult her parents or guardian regarding the abortion unless the minor has a valid reason for not doing so or, if the personnel determine that there is a valid reason for the minor patient not to notify the parents or guardian, that the personnel encourage the patient to notify another family member, close family friend, school counselor, social worker or other appropriate person. The policy shall also include the following information:

1. The availability of services under s. 46.24 to assist a minor contemplating an abortion who wishes to notify a parent or guardian of the contemplated abortion.

2. That the hospital, clinic or other facility and persons affiliated with the facility may not notify the minor's parent or guardian concerning an abortion performed or to be performed, without the written consent of the minor, as specified in par. (d).

(d) No hospital, clinic or other facility in which abortions are performed and no person affiliated with the hospital, clinic or facility may notify the parent or guardian of a minor concerning an abortion performed or to be performed on a minor without the written consent of the minor.

(e) Each hospital, clinic or other facility in which a physician performs an abortion shall file a copy of the policy under par. (a) annually with the department of health and social services.