

On Moral Grounds, Some Judges Are Opting Out of Abortion Cases

By ADAM LIPTAK

MEMPHIS — A pregnant teenager went to the grand and imposing county courthouse here early in the summer, saying she wanted an abortion. The circuit court judge refused to hear the case, and he announced that he would recuse himself from any others like it.

"Taking the life of an innocent human being is contrary to the moral order," the judge, John R. McCarroll, wrote in June. "I could not in good conscience make a finding that would allow the minor to proceed with the abortion."

The teenager was in court because Tennessee, like 18 other states, requires minors to obtain a parent's

Setting off a debate on judicial responsibility and recusals.

permission before they can have an abortion.

But the state also allows another option. The teenagers can ask a judge for permission to decide for themselves.

Judges, however, are starting to opt out. Other judges of the Shelby Circuit Court have recused themselves like Judge McCarroll, and now, according to one judge, only four of the nine judges on the court hear such abortion applications.

Judges in Alabama and Pennsylvania have also said they will not take such cases.

The actions, similar in some ways to pharmacists' refusal to dispense drugs related to contraception or abortion on moral grounds, have set off a debate about the responsibilities of judges and the consequences of such recusals, including political ones when judges are elected rather than appointed.

Judge McCarroll's decision prompted 12 experts on judicial ethics to write to the Tennessee Supreme Court in late August. The ex-

perts called his action lawless and said they feared that his approach could spread around the nation and to subjects like the death penalty, medical marijuana, flag burning and even divorce.

"Unwillingness to follow the law," the letter said, "is not a legitimate ground for recusal."

Helena Silverstein, who teaches government and law at Lafayette College in Easton, Pa., and has studied how parental-consent laws work, said those experts might be right in the abstract. But Professor Silverstein wondered about the consequences of forcing judges to act.

"If you require judges to hear these cases when they are morally and, maybe, religiously opposed to abortion," she said, "they are likely to impose their views on the minor. And that happens."

There are no comprehensive national statistics for abortion applications from minors, and Tennessee, like most states, does not collect them.

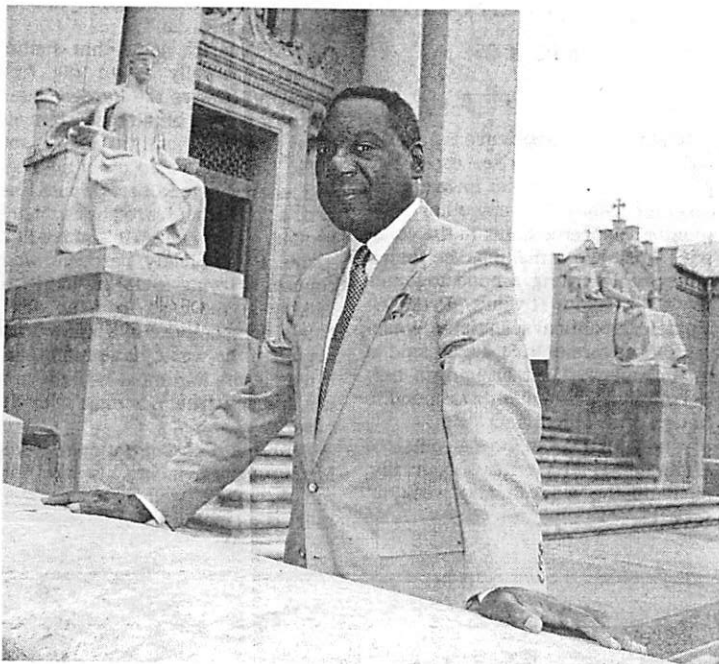
Van Sturdivant, the chief administrative officer of the court here, said its judges had heard 14 applications since January, when the juvenile court judge who ordinarily deals with them began a medical leave. Mr. Sturdivant said he could not say how many applications were granted, citing the secrecy of the proceedings.

In Alabama, according to statistics compiled by Professor Silverstein, women younger than 18 had abortions with parents' permission 16,000 times in the 12 years ending in 1999. In the same years, minors had 200 abortions after judges granted bypass applications. Information on denied applications was not available.

The president of Memphis Regional Planned Parenthood, Barry Chase, said it was too soon to evaluate the effects of the recusals here.

"It's probably more difficult for a young woman" to obtain a judge's permission to make her own decision, Mr. Chase said.

In addition to the states that require a parent's permission, 15 states require that a parent be notified before a minor's abortion, according to the Alan Guttmacher In-



Rollin Riggs for The New York Times

Judge D'Army Bailey of Tennessee hears minors' abortion petitions.

stitute, a research and advocacy group that supports abortion rights. All but one notification state also allow minors to seek a judge's permission not to tell a parent. The exception is Utah.

One issue in recusals in these abortion cases is the workload of the court. Judge D'Army Bailey, another judge on the circuit court here, said in an interview that he had been hearing more than his share of minors' applications since Judge McCarroll and other judges began recusing themselves. Judge Bailey said he had considered "three or four" applications since June and had granted all of them. The proceedings are secret, to protect the minors' privacy.

"I can see good reasons why a teenager would not want to be saddled at that early age with having and raising a child," Judge Bailey said. "It can create a blueprint for disaster for both the mother and child."

He said he put aside his personal

views in hearing the applications.

"I didn't swear to uphold all of the laws of Tennessee except for X, Y and Z," Judge Bailey said. "You're sworn to uphold the law whether you agree with it or not."

He said he worried that the varying approaches of the judges at his court could have political consequences.

"I hope that how I handle these questions of allowing these young women to get abortions does not lead to my defeat in the next election," in 2006, he said. "If it does, so be it. I can't keep a job constantly fearing that I'm going to lose it."

Judge McCarroll was on vacation and did not respond to several requests for an interview through the court, his clerk and an e-mail message. In his statement, he said that recusal was not only appropriate, but also required.

"A judge should recuse himself or herself," he wrote, "if there is any doubt about the judge's ability to preside impartially or if the judge's im-

partiality can reasonably be questioned."

Although only Judge McCarroll has said so publicly, four other judges on the nine-judge court have also declined to hear applications, Judge Bailey said. The other judges declined to comment or did not respond to requests for interviews.

There is reason to think that judges in Alabama and Pennsylvania have also recused themselves from bypass proceedings on moral grounds, Professor Silverstein said.

In counties with a single judge, she added, that meant that teenagers had to travel to another county to find a judge to hear their applications.

Prof. Susan P. Koniak, who teaches legal ethics at Boston University and signed the letter to the Tennessee Supreme Court, said judges were free to express their moral disagreement with a law but were not free to decline to enforce it.

"I expect them to bring their moral sense to a case," Professor Koniak said in an interview. "But the law comes first."

Judge McCarroll's sole lawful options, the law professors' letter said, are to enforce the law or resign from the bench.

A spokeswoman for the Tennessee court system, Sue Allison, said the Tennessee Supreme Court would not act on the letter. Ms. Allison said the professors could file a formal complaint with the Tennessee Court of the Judiciary, which investigates cases involving judicial ethics and can sanction judges.

Professor Koniak said she and her colleagues would consider whether to take that step.

Abortion applications by minors are typically brief, Professor Silverstein said, often taking a half-hour.

Judge Bailey said that teenagers were sometimes accompanied by a brother or grandmother and that they gave him what he said were good reasons for keeping their decisions from their parents.

"One felt it would place too much stress on her mother," the judge said. "One felt it would damage her relationship with her mother so badly that the damage would be irreparable."