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Abortion after *Roe* and *Doe*: A Proposed Statute

INTRODUCTION

On January 22, 1973, the United States Supreme Court ruled in *Roe v. Wade*¹ that the Texas criminal abortion statute, which proscribed all abortions except "for the purpose of saving the life of the mother,"² violated the constitutional right of privacy. Justice Blackmun, delivering the opinion of the Court, declared that the concepts of personal liberty and restrictions on state action provided by the fourteenth amendment supported a right of privacy "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."³ In a companion case, *Doe v. Bolton*,⁴ the Court noted several impermissible procedural as well as substantive requirements and held unconstitutional substantial portions of the Georgia abortion statute.⁵

Since prior to *Roe* and *Doe* all but four states⁶ had abortion statutes similar to either the Texas or Georgia provisions,⁷ the Supreme Court's decisions effectively invalidated existing abortion statutes throughout the nation. In Tennessee this result was emphasized when a federal district court held that the state's provisions,⁸ similar to the Texas statute, were unconstitutional in light of the *Roe* decision.⁹ In response to the void created by *Roe* and *Doe*, students in the Legislation seminar of the Vanderbilt University School of Law have prepared the accompanying proposed legislation. Although the provisions of the Act are tailored to Tennessee, they are generally adaptable to the statutory scheme of any state.

1. 93 S. Ct. 705 (1973).

2. TEX. PEN. CODE ANN. art. 1196 (1961). The Court's decision invalidated TEX. PEN. CODE ANN. arts. 1191-94, 1196 (1961).

3. *Roe v. Wade*, 93 S. Ct. 705, 727 (1973).

4. 93 S. Ct. 739 (1973).

5. GA. CODE ANN. §§ 26-1201 to -1203 (1972). Among the provisions declared unconstitutional were a requirement that abortions be performed in facilities accredited by the Joint Commission on Accreditation of Hospitals, when other hospitals were satisfactorily equipped and no distinction was made as to the other operations; mandatory approval of each abortion by a hospital committee established expressly for that purpose; the required concurrence by two doctors that the abortion should be performed; and a state residency requirement of ninety days. The substantive provisions of the statute, which were patterned after the ALI MODEL PENAL CODE § 230.3 (1962), were also declared invalid to the extent that they conflicted with the holding in *Roe*.

6. Prior to *Roe*, Alaska, Hawaii, New York, and Washington had enacted statutes which permitted abortion on demand. See ALASKA STAT. § 11.15.060 (1970); HAWAII REV. LAWS § 453-16 (Supp. 1972); N.Y. PENAL LAW § 125.05 (McKinney Supp. 1972); WASH. REV. CODE ANN. §§ 9.02.060 to 9.02.080 (Supp. 1972).

7. *Roe v. Wade*, 93 S. Ct. 705, 709 n.2, 720 n.37 (1973).

8. TENN. CODE ANN. §§ 39-301, -302 (1956).

9. *Tennessee Woman v. Pack*, No. 65-38 (M.D. Tenn., Feb. 1, 1973) (unreported).

During the preparation of this Act, no available model acts or legislative provisions responding to *Roe v. Wade* or *Doe v. Bolton* had yet been drafted. In addition to *Roe* and *Doe*, the drafters considered general case law dealing with abortion and medical procedures,¹⁰ liberal abortion laws enacted prior to *Roe*,¹¹ interviews with physicians and attorneys familiar with the problems associated with abortion,¹² and general opinion concerning the procedure.¹³

Because the legislation is intended primarily to bring state regulation of abortion within the newly established constitutional limits, the sections restricting the performance of abortions closely follow the *Roe* guidelines.¹⁴ Thus, there are no restrictions during the first trimester, other than those which apply to all medical procedures.¹⁵ During the second trimester, abortions are controlled only to the extent that is desirable to promote the health of the mother. In the final trimester, the state's compelling interests in protecting both the mother and the fetus are recognized. To achieve greater clarity and precision, the Act rejects the "three month" or "viability" determinations of trimester in favor of successive twelve-week terms.

Specific provisions are included to protect the civil rights of those individuals involved in the abortion procedure. No physician may be required against his will to perform the operation. The consent of the woman on whom the operation is to be performed is required in every case, unless the woman is adjudged incompetent. Parental permission is required before an abortion may be performed on an unmarried minor.¹⁶ The consent of the husband or father, however, is not made mandatory under any situation. Additionally, a section granting protec-

10. Recent developments, trends, and rules evident in the case law were analyzed. Reference to significant cases is made in the Comments to the Act.

11. See note 6 *supra*.

12. These interviews were helpful primarily in determining local practice.

13. Statistical surveys, historical studies, and informal observations were considered. See, e.g., Yale Legislative Services, Attitudes on Abortion: A Survey of Connecticut Obstetricians and Gynecologists, March 1971 (unpublished); Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971).

14. *Roe v. Wade*, 93 S. Ct. 705, 732 (1973).

15. E.g., TENN. CODE ANN. §§ 63-607, -608 (1956) (unlicensed practice of medicine proscribed).

16. The requirement of parental consent is one example of the effort to make the act attractive to a broad spectrum of legislators. In cases involving a minor, the parents of the minor generally seem to favor an abortion even when the minor herself does not. In light of this, it is not anticipated that any significant chilling effect on the rights of the minor female will result from this provision. Any arbitrary withholding of permission could be overcome by judicial intervention. Parental consent in the case of minors seems to be popularly desirable. See, e.g., Yale Legislative Services, *supra* note 13, at 11.

tion from unauthorized disclosure of abortion records is provided. The Comments following each section indicate the intended policy, purpose, and scope of the provisions of the Act.

After the preparation of this Act, but before the drafters could present it to the Tennessee legislature, the state adopted an alternative statute that satisfies the requirements of *Roe*.¹⁷ The drafters of this proposed legislation believe, nevertheless, that the scope and clarity of this Act recommend its consideration in other jurisdictions.

SECTION 1. SHORT TITLE. This Act shall be known and may be cited as the Tennessee Abortion Act.

SECTION 2. RULES OF CONSTRUCTION; PURPOSES.

(1) This Act shall be construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this Act are:

- (a) to clarify the law regarding criminal abortions in the State of Tennessee;
- (b) to bring regulations of abortions within limitations consistent with a woman's right to privacy under the Constitution of the United States;
- (c) to protect the life and health of the mother and the life of the fetus within the limits of the Constitution of the United States.

Comment:

1. In *Roe v. Wade*, 93 S. Ct. 705 (1973), the United States Supreme Court ruled that a criminal abortion statute similar to the Tennessee statute violated the right to privacy guaranteed by the due process clause of the fourteenth amendment. Following *Roe*, in *Tennessee Woman v. Pack*, No. 65-38 (M.D. Tenn., Feb. 1, 1973), the Tennessee abortion statute was declared null and void. The Act was drafted in response to these judicial actions to provide the state with a reasonable and constitutional criminal abortion statute.

2. The Act, so far as is consistent with its language, should be interpreted in accordance with later developments in constitutional law.

3. A purpose of the Act is to protect the mother and the fetus under certain situations. Reasonable regulations contained in the Act are intended to provide the desired protection without violating individual rights.

17. Pub. Ch. No. 235 (May 14, 1973), replacing TENN. CODE ANN. § 39-301.

SECTION 3. DEFINITIONS. Unless the context otherwise requires, in this Act

(1) "Abortion" means the intentional termination of a human pregnancy unless the intention is to produce a live hirth or to remove a dead fetus.

(2) "Hospital" means each institution, place, huilding, agency or clinic represented and held ont to the general public as ready, willing, and able to furnish care, accommodation, facilities, and equipment, for the use of one or more persons who may he suffering from deformity, injury, or disease, or from any other condition for which nursing, medical, or surgical services would he appropriate for care, diagnosis, or treatment. The department of public health shall have the authority to determine whether or not any institution or agency comes within the scope of this Act and its decisions in that regard shall he subject only to such rights of review as the courts exercise with respect to administrative actions.

(3) "Licensed physician" means a gradnate of an accredited medical school authorized to confer upon gradnates the degree of Doctor of Medicine, who is dnly authorized by the Tennessee State Board of Medical Examiners to practice in this state.

(4) "Person" means any human heing including both physicians and nonphysicians.

(5) "Trimester" means a period of time used to designate progressive stages of a pregnancy:

(a) "First trimester" means a period of twelve weeks heginning on the day of conception, to he determined by reasonable medical judgment based on information available before the performance of an ahortion;

(b) "Second trimester" means a period of twelve weeks heginning on the first day of the thirteenth week after conception, to he determined by reasonable medical judgment based on information available before the performance of an ahortion;

(c) "Third trimester" means a period of time heginning on the first day of the twenty-fourth week after conception, to he determined by reasonable medical judgment based on information available before the performance of an ahortion, and ending with the termination of the pregnancy.

Comment:

Similar Provisions:

ALASKA STAT. § 11.15.060(a) (1970)

ABA UNIFORM ABORTION ACT (1972)

HAWAII REV. LAWS § 453-16(b) (Supp. 1972)

N.Y. PENAL LAW § 125.05(2) (McKinney 1967)

1. "Abortion." The definition is intended to encompass the traditional concept of abortion and to avoid any implication that accidental miscarriages come within the scope of the Act. Any method of performing the act will suffice to establish the crime if the necessary intent to terminate the pregnancy is present.

2. "Hospital." This conforms substantially with the definition of "hospital" in TENN. CODE ANN. § 53-1301 (1966), although it has been expanded to include clinics. In *Doe v. Bolton*, 93 S. Ct. 739, 749 (1973), the court took judicial notice of the fact that certain clinics and places other than hospitals are adequately equipped to perform abortions. The state department of public health may prescribe minimum standards to insure that any authorized clinic has the staffing and services necessary to perform an abortion safely. Facilities adequate to handle serious complications or emergencies may be required.

3. "Licensed physician." This conforms with the definition of "physician" in TENN. CODE ANN. § 53-1301 (1966) and is intended to include persons granted reciprocity by the state and persons permitted to practice medicine in federal institutions.

4. "Person." This term is defined to emphasize that both physicians and nonphysicians are subject to the provisions in which the term "person" is used. For example, although special penalties are specified for "physicians," they are not exempt from penalties applying to "persons."

5. "Trimester." This definition complies with traditional medical opinion and the view accepted by the Court in *Roe v. Wade*, 93 S. Ct. 705 (1973). The twelve-week delineation is more definite than the more common three-month characterization. In determining the length of pregnancy, the physician is required to make a reasonable judgment based on the data available to him prior to the operation. If this determination is found to be inaccurate after the fact, the burden will be on the state to show that the physician's opinion was not medically sound in light of the information available to him before the operation.

Cross references: Point 2: TENN. CODE ANN. § 53-1301 (1966). Point 3: TENN. CODE ANN. § 53-1301 (1966). Point 4: Act § 5.

SECTION 4. ABORTIONS PERMITTED AND PROHIBITED AT CERTAIN TIMES. (1) The abortion decision and the performance of the abortion during the first trimester of pregnancy must be left to the judgment of the mother.

(2) An abortion during the second trimester of pregnancy must be performed by a licensed physician in a hospital licensed by the Tennessee Department of Public Health or a hospital operated by the federal government or an agency thereof.

(3) No abortion may be performed during the third trimester of pregnancy unless:

- (a) the abortion is performed by a licensed physician; and
- (b) the abortion is performed in a hospital licensed by the Tennessee Department of Public Health or operated by the federal government or an agency thereof; and
- (c) the physician reasonably believes that continuance of the pregnancy would endanger the life of the mother or would impair the physical or mental health of the mother. The physician in making this determination may take into consideration the physical and mental condition of the fetus.

Comment:

Similar Provisions:

ALASKA STAT. § 11.15.060(a) (1970)

HAWAII REV. LAWS § 453-16(b) (Supp. 1972)

N.Y. PENAL LAW § 125.05(3) (McKinney Supp. 1972)

1. Subsection (1) corresponds to the decision reached in *Roe v. Wade*, 93 S. Ct. 705, 732 (1973), that the state may exercise no control over the mother's decision to have an abortion in the first trimester. During the first trimester the only illegal abortion would be one performed by a person who is not a "licensed physician." See Section 5(1) and TENN. CODE ANN. § 63-608 (1956).
2. Subsection (2) allows the state to protect the health of the mother during the second trimester of pregnancy. During this time the state has a compelling interest only in the area of maternal health. *Roe v. Wade*, 93 S. Ct. 705, 732 (1973). An abortion performed in the second trimester is sufficiently hazardous to the mother's health that only a qualified licensed physician, operating in an adequately equipped facility, may execute the surgical procedure.
3. Subsection (3) reflects the state's two-fold interest in the abortion decision during the third trimester of pregnancy. Since the operation's risks are accentuated, the state continues its interest in the health and safety of the mother. In addition, the state has a legitimate interest in the potential life of the viable child. Although the Court refused to recognize a viable child as a "person" under the fourteenth amendment,

it said that “[w]ith respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability.” *Roe v. Wade*, 93 S. Ct. 705, 732 (1973). Since viability may occur any time between the twenty-fourth and twenty-eighth week, the Act takes a conservative position by equating viability with the beginning of the third trimester. The Court expressly allowed states to protect viable fetal life by proscribing abortion, except when it is necessary to preserve the life or health of the mother. *Roe v. Wade*, 93 S. Ct. 705, 732 (1973). In *Roe* and in *United States v. Vuitch*, 402 U.S. 62 (1971), the Supreme Court has held that the term “health” includes both the physical and mental condition of the mother. This concept is expressly included in the Act.

4. Since there will usually be sufficient opportunity to obtain an abortion during the first six months of pregnancy, requests for abortions during the last trimester should be few. When the offspring will be physically or mentally deficient, however, an abortion may be justified during the third trimester, even if neither the mother’s life nor her physical health is endangered. In some situations neither the mother nor her attending physician is aware of defects until the seventh or eighth month. When, for example, the woman contracts german measles or syphilis during pregnancy, serious fetal abnormalities can result and remain undetected until the later stages of pregnancy. Additionally, in many pregnancies, tests for abnormalities simply will not be made during the early stages or will be inconclusive at that time.

The prospective birth of a defective child would usually constitute a threat to the mental health of the mother. The Act, by specifically allowing the physician to consider the mental and physical condition of the fetus in determining whether the mother’s mental health is endangered, removes any doubt as to the validity of this factor in the physician’s ultimate decision. Straightforward treatment of this issue should preclude unnecessary litigation.

5. *Roe* and *Vuitch* held that the question whether the mother’s life or health is endangered and the question whether the mother has entered the third trimester are professional judgments. A doctor is routinely called upon to decide whether an operation is necessary in a particular case, and his judgment should be upheld when reasonable.

6. Self-abortion is not expressly dealt with in the Act. Subjecting the mother to criminal penalties for this act during the first trimester would be inappropriate. Because the act is performed upon one’s self, it does not come within the provisions for the practice of medicine in *TENN. CODE ANN. § 63-608* (1956). The mother could violate subsections (2) or (3) of section 4, however, by performing a self-abortion during the

second or third trimester. The Act intends to reach self-abortion in those cases, although the former Tennessee statute may not have. Tennessee and the vast majority of states do not treat the consenting woman as an accomplice to criminal abortion, Annot., 34 A.L.R.3d 858 (1970), and possibly would choose not to prosecute her as a principal. *See Smartt v. State*, 112 Tenn. 539, 553, 80 S.W. 586, 589 (1904). Self-abortion may properly be prohibited under the *Roe* decision since the Court expressly approved a requirement that all abortions be performed by physicians. *Roe v. Wade*, 93 S. Ct. 705, 732-33 (1973). Restriction on self-abortion is justified by legitimate state interests in the health of the mother as well as interest in the life of the fetus during the later stages of pregnancy.

Cross Refences: Act § 5. Point 1: TENN. CODE ANN. §§ 63-607, 63-608 (1956). Point 2: Act § 3(2).

SECTION 5. PENALTIES FOR ILLEGAL PERFORMANCE OF AN ABORTION, ATTEMPT. (1) There is no penalty for performance of an abortion during the first trimester except as provided in state laws prohibiting the practice of medicine without a license.

(2) Any person who performs an abortion in violation of Section 4(2) is guilty of a misdemeanor punishable by a fine of one hundred dollars (\$100) to one thousand dollars (\$1000).

(3) Any person who performs an abortion in violation of Section 4(3) is guilty of a felony punishable by a fine of one hundred dollars (\$100) to five thousand dollars (\$5000), or by imprisonment of one (1) to five (5) years, or in the case of a physician by an order directing the suspension or revocation of his license, or any combination of these penalties.

(4) Any person who attempts to commit any offense prohibited by Section 4(2) is punishable by a fine of one hundred dollars (\$100) to one thousand dollars (\$1000); and any person who attempts to commit any offense prohibited by Section 4(3) is punishable by a fine of one hundred dollars (\$100) to five thousand dollars (\$5000), or imprisonment of one (1) to three (3) years, or in the case of a physician by an order directing the suspension or revocation of his license, or any combination of these penalties.

(5) These penalties are in addition to any penalties provided for violation of other sections of the state law.

Comment:

Similar Provisions:

ALASKA STAT. § 11.15.060(b) (1970)

ABA UNIFORM ABORTION ACT (1972)

HAWAII REV. LAWS § 453-16(c) (Supp. 1972)

1. During the first trimester of pregnancy the Act imposes no penalty for the performance of an abortion. If, however, the person performing the abortion is not a licensed physician, he will be subject to penalties for practicing medicine without a license. TENN. CODE ANN. § 63-607 (1956).

2. Subsection (2) makes a violation of the Act during the second trimester a misdemeanor. A violation of the primarily administrative regulations on abortions during this stage of pregnancy is not sufficiently serious to warrant felony status. The potentially high fine is a realistic deterrent and provides judicial latitude. Although only a fine is provided for violation of this subsection, nonphysicians would still be subject to a jail sentence under TENN. CODE ANN. § 63-607 (1956).

3. An abortion performed during the third trimester in violation of Section 4(3) is a felony. The five-year maximum sentence is the standard under most current and model abortion statutes. In Tennessee, a one-year minimum allows for lesser sentences. *Miller v. State*, 189 Tenn. 281, 286, 225 S.W.2d 62, 64 (1949); TENN. CODE ANN. § 40-2703 (1956).

The maximum fine is intended to be sufficiently large to make criminal abortions unprofitable. The addition of a court ordered suspension or revocation of a physician's license, bypassing existing license revocation procedures, TENN. CODE ANN. §§ 63-618 to -620 (1956), should provide a significant penalty for doctors convicted of violating the Act.

4. Subsection (4) deals with attempts to commit a criminal abortion. The trimester distinction is retained with fines at the same level as for the actual commission of the offense. Little difference in moral turpitude is perceivable between the attempt and the actual abortion. The one- to three-year sentence is retained from the former Tennessee attempt provision; a difference in sentences may be useful in the practical application of prosecutorial discretion.

5. Subsection (5) emphasizes that these penalties are in addition to sanctions for other offenses. Practice without a license and felony-murder are two of the offenses outside this Act that might be committed in conjunction with a criminal abortion. Subsection (4) does, however, operate to preempt the general felony-attempt provisions of TENN. CODE ANN. § 39-603 (1956).

Cross references: Point 1: Act § 4; TENN. CODE ANN. § 63-607 (1956).

Point 2: TENN. CODE ANN. § 63-607 (1956). Point 3: TENN. CODE

ANN. §§ 40-2703, 63-618 to -620 (1956). Point 5: TENN. CODE ANN. § 39-603 (1956).

SECTION 6. REFUSAL TO PERFORM ABORTION; DISCRIMINATION. (1) Nothing in this Act requires any person to perform or assist in performing an abortion so long as the refusal to act is not inconsistent with good medical practice in an emergency situation.

(2) (a) No hospital, person, firm, corporation, or governmental entity may discriminate as to employment or privileges accompanying employment against a person on the grounds of his refusing to act within the protection of subsection (1).

(h) No hospital, person, firm, corporation, or governmental entity may discriminate as to employment or privileges accompanying employment against a person on the grounds of his performing or assisting in performing a legal abortion.

(c) A violation of the provisions of this subsection is a misdemeanor punishable by a fine of one hundred dollars (\$100) to one thousand dollars (\$1000). In addition, a person may bring a civil action to recover actual damages resulting from a violation of this subsection and may recover exemplary damages.

(3) No civil action for negligence or malpractice may be maintained against a person on the grounds of a refusal to perform an act within the protection of subsection (1).

Comment:

Similar provisions:

ALASKA STAT. § 11.15.060(a) (1970)

American Medical Ass'n, Proceedings of AMA House of Delegates 221 (June 1970)

HAWAII REV. LAWS § 453-16(d) (Supp. 1972)

N.Y. CIV. RIGHTS LAW § 79-i (McKinney Supp. 1972)

WASH. REV. CODE ANN. § 9.02.080 (Supp. 1972)

1. Subsection (1) guarantees an affirmative right to refuse to participate in the performance of abortions. Refusal on moral or religious grounds is probably within the scope of the first amendment. The provision for emergency situations is not likely to interfere with any reasonable moral beliefs.

2. Physicians, nurses, and others refusing to participate in abortion operations are protected by subsection (2). The provision removes any fear that the *Roe* decision will force individuals to participate in abor-

tions. To increase the availability of the operations, the subsection also provides protection for those who do perform abortions.

3. The types of discrimination guarded against in subsection (2) are specified to avoid vagueness or overinclusiveness. "Discrimination as to employment or privileges accompanying employment" is broad enough to protect the critical areas of potential harm. When rationally based, differentiated treatment of abortions, such as requiring them to be performed in one area of a hospital, is not proscribed by this provision.

4. Granting medical personnel a civil right of action for damages and shielding them from liability, in subsections (2) and (3), guarantees their freedom of choice. The protection extends to private hospitals and individuals not subject to provisions of the first and fourteenth amendments to the Constitution of the United States. Although a physician is generally under no duty to perform services to all who request them, *Hammonds v. Aetna Cas. & Sur. Co.*, 237 F. Supp. 96, 98 (N.D. Ohio 1965), subsection (3) assures protection from suits for negligence or malpractice in such cases.

5. This section grants no right to hospitals to establish an official policy of refusing to perform abortions. In several instances, actions of ostensibly private hospitals that receive some public funds and serve important public functions have been held to constitute "state action" for fourteenth amendment due process purposes. *Meredith v. Allen County War Memorial Hosp. Comm'n*, 397 F.2d 33, 35 (6th Cir. 1968). It is unlikely that a hospital so described could constitutionally prohibit the performance of abortions in its facilities. The scope of state action must be left to judicial determination. In *Doe v. Bolton*, 93 S. Ct. 739, 750 (1973), the Court considered a statute providing that a hospital is not required to admit a patient for an abortion. GA. CODE ANN. § 26-1202(e) (1972). The Court, however, expressed no view on the issue of a hospital policy prohibiting abortions.

SECTION 7. COMPELLED ABORTION AND FEMALE'S CONSENT. (1) State and local governmental entities have no power to compel any female to submit to an abortion for any reason.

(2) An abortion may be performed upon a woman only after she has given her consent. If the female is an unmarried minor, or incompetent as adjudicated by any court of competent jurisdiction, then permission must additionally be given by the parents, or guardian, or person standing *in loco parentis* to the unmarried minor, or incompetent. However, a court of competent jurisdiction may grant such permission upon application on behalf of the minor or incompetent and upon a finding that permission has been arbitrarily or capriciously withheld.

Comment:

Similar provisions:

ALASKA STAT. § 11.15.060(a) (1970)

N.C. GEN. STAT. § 14-45.1 (Supp. 1971)

1. Subsection (1) sets forth in absolute terms the right of procreation within the right of privacy. This right has been guaranteed by the decision in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), as interpreted by the Court in *Roe v. Wade*, 93 S. Ct. 705, 726 (1973).
2. The Court in *Roe* specifically refused to rule on the constitutionality of the requirement of parental consent for minors. *Roe v. Wade*, 93 S. Ct. 705, 733 n.67 (1973). The interests of the parents of the unmarried minor or incompetent, including responsibilities for care, and the practice followed for other operations sufficiently justify the Act's grant of power to parents in the decision-making process. In Tennessee, a minor is any person under the age of eighteen. TENN. CODE ANN. § 1-305(30) (Supp. 1972).
3. The consent provision for incompetents allows for abortions, where there is reason, when the female herself is incapable of giving consent or refusal.
4. For purposes of subsection (2) permission is arbitrarily or capriciously withheld when, for example, the mother's life or health is in danger and parental consent is refused on the basis of religious beliefs not shared by the mother.
5. Although there is very little authority on the subject, the idea that the father/husband has a right to stop an abortion from being performed seems to have been rejected. *Cf. Herko v. Uviller*, 203 Misc. 108, 109, 114 N.Y.S.2d 618, 619 (1952). That case held that the father/husband's right of procreation is not violated when the mother has an exclusive right to make the abortion decision. The mother's decision is not state or governmental action, and the father/husband is free to find another partner if he desires. The Supreme Court has specifically declined to address the issue of the father's or husband's consent. *Roe v. Wade*, 93 S. Ct. 705, 733 n.67 (1973). Cross Reference: Point 2: TENN. CODE ANN. § 1-305(30) (Supp. 1972).

SECTION 8. DISCLOSURE OF ABORTION INFORMATION. (1) It is unlawful for any hospital, person, firm, corporation, or governmental entity to disclose a report of a referral or request for abortifacient services, or to disclose a report of the performance of an abortion, unless the disclosure is authorized in writing by the subject of

such report, or unless the disclosure is ordered by a court of competent jurisdiction; provided, that this section shall not bar the report of statistical information as required under Tennessee Code Annotated, Section 53-430 (1966).

(2) A violation of the provisions of this section is a misdemeanor punishable by a fine of one hundred dollars (\$100) to one thousand dollars (\$1000). In addition, a person may bring a civil action to recover actual damages resulting from a violation of this section, and may recover exemplary damages if the violation was wilful.

Comment:

Similar provisions:

N.Y. GEN. BUS. LAW § 394-e (McKinney Supp. 1972)

TENN. CODE ANN. § 53-425 (1966)

1. This section protects subjects of abortions from unwanted public disclosure of abortion records because of the sensitivity of the abortion issue. It avoids the result in *Quarles v. Sutherland*, 215 Tenn. 651, 389 S.W.2d 249 (1965), that no statutory or common law cause of action exists for the disclosure of medical records by a physician. The abortion subject will now have a private right of action for damages if her records are disclosed without authorization.

2. Statistical reporting under TENN. CODE ANN. § 53-430 (1966) should not require the disclosure of subjects' names.

3. By prohibiting disclosure from any source and giving a damages remedy, this section goes beyond the provisions now in effect. Tenn. Code Ann. § 53-425 (1966) only makes unlawful disclosure of medical records by state officials.

Cross references: Point 2: TENN. CODE ANN. § 53-430 (1966). Point 3: TENN. CODE ANN. § 53-425 (1966).

SECTION 9. SEVERABILITY. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

Comment:

Similar provisions:

ABA UNIFORM ABORTION ACT (1972)

SECTION 10. REPEAL OF FORMER ABORTION SECTIONS. Tennessee Code Annotated, Sections 39-301 and 39-302, being all of Chapter 3 of Title 39, are repealed.

Comment:

This section repeals all current Tennessee criminal abortion provisions so that a totally new statutory scheme, consistent with the right to privacy recognized in *Roe v. Wade*, 93 S. Ct. 705 (1973), and the procedural limitations of *Doe v. Bolton*, 93 S. Ct. 739 (1973), may be instituted.

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