

Fall 2013

Humiliation, Degradation, Penetration: What Legislatively Required Pre-Abortion Transvaginal Ultrasounds and Rape Have in Common

Kelsey Anne Green

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#)

Recommended Citation

Kelsey Anne Green, *Humiliation, Degradation, Penetration: What Legislatively Required Pre-Abortion Transvaginal Ultrasounds and Rape Have in Common*, 103 J. CRIM. L. & CRIMINOLOGY 1171 (2013).
<https://scholarlycommons.law.northwestern.edu/jclc/vol103/iss4/5>

This Comment is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

COMMENTS

HUMILIATION, DEGRADATION, PENETRATION: WHAT LEGISLATIVELY REQUIRED PRE-ABORTION TRANSVAGINAL ULTRASOUNDS AND RAPE HAVE IN COMMON

Kelsey Anne Green*

TABLE OF CONTENTS

I. INTRODUCTION	1172
II. MANDATORY ULTRASOUND LEGISLATION	1173
A. What is a Transvaginal Ultrasound?	1174
B. Types of Mandatory Ultrasound Legislation.....	1176
C. Why This Legislation Exists (According to Supporters).....	1179
D. A Final Clarification & Summary of Mandatory Ultrasound Legislation	1182
III. RAPE LAW	1182
A. Types of Rape Statutes.....	1182
1. Combined Legal Structures.....	1183
2. All-Encompassing Sexual Assault Statute.....	1184
3. Broad Rape Statute	1184

* J.D. Candidate, Northwestern University School of Law, 2014; B.A., College of William & Mary, 2008. I would like to thank my dear friend Jane Petersen for inspiring the topic of this Comment, Mallory Huggins for helping me to develop and edit the Comment, and Maya Lentz for editing and sharing her many insights. Special thanks to Emily Thomas and Kelly Hamren for their critical-hour support, and to my family for their constant and indulgent support. I would also like to thank Professors Elizabeth Glazer and Joshua Kleinfeld for their guidance. Many thanks as well to the members of the editorial staff of the *Journal of Criminal Law and Criminology* for all of their hard work and especially to Timothy Fry, whose enthusiasm, patience, and thoughtfulness made this Comment possible.

IV. RAPE THEORY	1185
A. Historic Purposes and Understandings of Rape Law	1185
B. Modern Rape Theory Applied to Mandatory Transvaginal Ultrasounds	1188
1. Person-to-Person Power Exertion	1188
2. Violence	1188
3. Oppression of Women	1189
4. Individual Psychological Attack	1190
5. Denial of Autonomy	1190
V. PRACTICALITIES OF A “RAPE” DESIGNATION.....	1192
A. The Consent Question	1192
1. Consent Theory	1192
2. Consent in Rape Law	1194
B. The Actor Question	1195
C. Implications of Including Required Transvaginal Ultrasound Legislation in the “Rape” Umbrella.....	1196
1. Negative and Positive Impacts of “Rape” Designation.....	1198
VI. CONCLUSION	1199

I. INTRODUCTION

In recent years, legislation has been proposed and enacted to require a woman seeking an abortion to submit to an ultrasound. While performing an ultrasound before an abortion is not an uncommon medical practice, it is also not medically necessary in every circumstance. However, these laws leave no room for medical opinion. Most require an ultrasound in every situation, including cases where the woman was a victim of rape or incest, as well as those cases where abortion is recommended due to fetal abnormalities or a risk to the woman’s health and the woman already submitted to at least one prior ultrasound. Some of this legislation has gone a step further, including standards of imaging that require transvaginal ultrasounds in early pregnancies (which account for more than half of the abortions in the United States). It has been suggested that requiring this medical procedure amounts to rape. This Comment seeks to investigate whether legal and theoretical bases exist for this argument.

Reactions to mandatory ultrasound legislation requiring transvaginal ultrasounds have been strong. A doctor reacted to this kind of legislation by saying, “I do not feel that it is reactionary or even inaccurate to describe an unwanted, non-indicated transvaginal ultrasound as ‘rape.’ If I insert ANY object into ANY orifice without informed consent, it is rape. And

coercion of any kind negates consent, informed or otherwise.”¹ A Virginia state legislator considering such a bill said, “What’s before us is akin to rape.”² A rape victim expressed her thoughts in a recent blog post, *The State of Virginia About to Rape Women, Legally*: “I have been a victim of rape, so I don’t use the word lightly, but there’s no other way to put it.”³ Political commentator Rachel Maddow characterized the 2012 Virginia law as “a physical penetration of the body . . . by state order, without your consent. That would be forced on you as a condition of your being allowed to have an abortion”⁴ An Alabama state senator said: “If you look up the term rape, that’s what it is: the penetration of the vagina without the woman’s consent.”⁵

In order to answer this question, Part II of this Comment discusses the practicalities of a transvaginal ultrasound and analyzes the mandatory ultrasound laws that call for them. It further explores the motivation behind these laws from the perspective of both its proponents and its critics to better understand the expected role of the ultrasound in the abortion procedure. Parts III and IV study a variety of rape and sexual assault statutes as well as theories on the harms of rape that have informed rape statutes in America. This leads to a study of how those theories interact with the state-mandated transvaginal ultrasound, as well as the arguments for and against designating these ultrasounds as rape. Finally, Part V seeks to address the practical roadblocks to the doctrinal issues involved in designating these ultrasounds as rape, such as consent, prosecution, and the effects on victims of violent rape when it is used in that context.

II. MANDATORY ULTRASOUND LEGISLATION

At least fifteen states have proposed mandatory pre-abortion ultrasound legislation in recent years, and eight of them enacted the laws.⁶

¹ John Scalzi, *Guest Post: A Doctor on Transvaginal Ultrasounds*, WHATEVER (Mar. 20, 2012), <http://whatever.scalzi.com/2012/03/20/guest-post-a-doctor-on-transvaginal-ultrasounds>.

² Jillian Rayfield, *Democrats Say Virginia Ultrasound Measure ‘Akin to Rape,’* TALKING POINTS MEMO (Feb. 22, 2012, 6:16 AM), http://tpmmuckraker.talkingpointsmemo.com/2012/02/democrats_say_virginia_ultrasound_measure_akin_to_rape.php.

³ Clytemnestra, *The State of Virginia About to Rape Women, Legally*, DAILY KOS (Feb. 15, 2012, 7:27 AM), <http://www.dailykos.com/story/2012/02/15/1064914/-The-state-of-Virginia-about-to-rape-women-legally>.

⁴ *The Rachel Maddow Show* (MSNBC television broadcast Feb. 14, 2012) (transcript available at http://www.nbcnews.com/id/46398367/ns/msnbc-rachel_maddow_show/t/rachel-maddow-show-tuesday-february/).

⁵ Nicholas D. Kristof, *When States Abuse Women*, N.Y. TIMES, Mar. 4, 2012, at SR11; see *infra* notes 63–65 and accompanying text for a discussion of Alabama’s rape law.

⁶ GUTTMACHER INST., STATE POLICIES IN BRIEF: REQUIREMENTS FOR ULTRASOUND (2013), available at http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf. According to the

This Comment studies the legislation (both enacted and merely proposed) that requires women seeking abortions to submit to transvaginal ultrasounds before the abortions can be performed.⁷ This Part will first explain the procedure involved in a transvaginal ultrasound and its medical uses to clarify the personal impacts of these laws. It then analyzes the legislation that would require a transvaginal ultrasound, splitting legislation into three categories to demonstrate the different ways the requirement is written: (1) those specifically referring to transvaginal ultrasounds; (2) those acknowledging multiple ultrasound techniques; and (3) those simply referring to ultrasounds while including requirements that would, in many cases, necessitate a transvaginal ultrasound. Finally, this Part examines the motivations behind these mandatory ultrasound requirements according to both supporters and opponents.

A. WHAT IS A TRANSVAGINAL ULTRASOUND?

Before beginning the discussion of mandatory ultrasound legislation, it is necessary to develop a general understanding of the purposes, procedures, and practicalities of fetal ultrasounds.

“A fetal ultrasound, or sonogram, is an imaging technique that uses high-frequency sound waves to produce images of a baby in the uterus.”⁸ An ultrasound is used in obstetrics to: determine gestational age; view fetal organs, tissues, and impairments; and, recently, promote prequickenening, or early pregnancy, bonding.⁹ There are two types of obstetric ultrasounds in common medical practice today: transabdominal (“jelly on the belly”) and transvaginal. The transabdominal ultrasound is more familiar to most Americans,¹⁰ but the subject of this Comment is the less familiar

report, as of April 1, 2013, eight states had mandatory ultrasound laws in effect: Alabama, Arizona, Florida, Kansas, Louisiana, Mississippi, Texas, and Virginia. Idaho’s mandatory ultrasound law was slated to take effect in late 2013. Mandatory ultrasound laws were also passed in North Carolina, where the law was then unenforceable pending a court decision, and in Oklahoma, where enforcement of the law was permanently enjoined by court order. *Id.*

⁷ Some of this legislation explicitly indicates that a transvaginal ultrasound may be legally required, while other legislation will effectively require transvaginal ultrasounds due to the specificity of the information the ultrasound must show. These differences are discussed *infra* in Part II.B.

⁸ *Fetal Ultrasound Definition*, MAYO CLINIC (Oct. 6, 2012), <http://www.mayoclinic.com/health/fetal-ultrasound/MY00777>.

⁹ Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 365–66 (2008) (citing John C. Fletcher & Mark I. Evans, *Maternal Bonding in Early Fetal Ultrasound Examinations*, 308 NEW ENG. J. MED. 392 (1983)).

¹⁰ LISA M. MITCHELL, *BABY’S FIRST PICTURE: ULTRASOUND AND THE POLITICS OF FETAL SUBJECTS* 3 (2001) (discussing how a trip to the sonographer has become “[o]ne of the most common rituals of pregnancy”). Popular media often portrays such a procedure. For examples of American films in which pregnant characters undergo abdominal ultrasounds,

transvaginal ultrasound. This procedure uses a transducer wand that is five to ten inches long. The wand is inserted into the vagina to create sonar images of the cervix, ovary, and uterus.¹¹ The exam usually takes fifteen to twenty minutes.¹² A patient without health insurance or with insurance that does not cover fetal ultrasounds will pay between \$300 and \$1,000 for each transvaginal ultrasound, which can be more expensive than the transabdominal ultrasound, depending on the state and the type of machine used.¹³

According to the National Abortion Federation, “The use of ultrasound is not a requirement for the provision of first trimester abortion care. However, over the years, especially in higher resource settings, it has become widely used.”¹⁴ Dr. Cassing Hammond, an associate professor of obstetrics and gynecology at Northwestern University’s Feinberg School of Medicine, indicated that the medical purpose for performing a pre-abortion ultrasound is to determine whether the embryo is in the uterus (as opposed to being implanted in the fallopian tubes, which would require different procedures) and how large the embryo is (again, because the size of the fetus will impact the type of procedure and the amount of anesthesia the doctor will use).¹⁵ Transvaginal ultrasounds definitely have a medically indicated and defined role in pre-abortion care, and a large number of patients do need the procedure, particularly if their pregnancies are in the early stages or the patients are obese.¹⁶ According to Dr. Hammond, a transvaginal ultrasound is the most preferable option for a woman in the first trimester because it is much more accurate than an abdominal ultrasound at that point.¹⁷ Dr. Hammond also pointed out that a transvaginal ultrasound would almost always be necessary to satisfy the requirements detailed in the mandatory ultrasound laws.¹⁸ In an abortion setting, a transvaginal ultrasound will almost always display the fetus more

see *KNOCKED UP* (Universal Pictures 2007) and *JUNO* (Fox Searchlight Pictures 2007).

¹¹ For a diagram, see *Transvaginal Ultrasound*, MAYO CLINIC, <http://www.mayoclinic.com/health/medical/IM04391> (last visited Aug. 19, 2013).

¹² Jolie Johnson, *How Long Does a Fetal Ultrasound Take?*, LIVESTRONG (Nov. 6, 2011), <http://www.livestrong.com/article/550838-how-long-does-a-fetal-ultrasound-take/>.

¹³ *Transvaginal Ultrasound Cost and Procedure Information*, NEW CHOICE HEALTH, <http://www.newchoicehealth.com/Directory/Procedure/60/Transvaginal%20Ultrasound> (last visited Aug. 19, 2013).

¹⁴ NAT’L ABORTION FED’N, 2012 CLINICAL POLICY GUIDELINES, LIMITED SONOGRAPHY IN ABORTION CARE 10 (2012).

¹⁵ Interview with Cassing Hammond, Associate Professor, Northwestern University Feinberg School of Medicine, in Chicago, Ill. (Feb. 13, 2013) [hereinafter Dr. Hammond Interview].

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

clearly than would an abdominal ultrasound.¹⁹ However, Dr. Hammond, who is familiar with abortion law policy generally and this kind of legislation in particular, indicated that “none of the regulations are written to make abortion more safe.”²⁰

B. TYPES OF MANDATORY ULTRASOUND LEGISLATION

Among the many mandatory ultrasound bills and laws that require a transvaginal ultrasound, there are four apparent degrees of specificity in the language used. First, and most explicit, a bill in Alabama specifically mentions transvaginal ultrasounds. Second, a 2013 bill in Indiana refers exclusively to medical abortions, like those performed through oral administration of termination medications such as RU-486. This bill would require both a pre-abortion ultrasound and a post-abortion ultrasound.²¹ Third, Idaho’s bill does not use the words “vagina,” “vaginal,” or “transvaginal,” but does acknowledge that multiple ultrasound techniques exist.²² And finally, the legislation from Pennsylvania,²³ Texas,²⁴ Kentucky,²⁵ Virginia,²⁶ and North Carolina²⁷ all refer generally to an ultrasound requirement and would, in practice, often require a transvaginal ultrasound in order to comply with the legislation, because according to the Guttmacher Institute, 88% of abortions occur in the first twelve weeks of pregnancy (the first trimester), and almost 62% occur in the first nine weeks.²⁸ During these weeks of a pregnancy, an abdominal ultrasound would likely be ineffective due to the position and small size of the embryo. Thus, this legislation essentially would require the majority of, if not all, women seeking abortions to submit to transvaginal ultrasounds.²⁹ As a

¹⁹ *Id.*

²⁰ *Id.* Dr. Hammond also said that vilifying vaginal ultrasounds would push patients to seek only abdominal ultrasounds, which is against patients’ and doctors’ interests. Consequently, he does not support associating transvaginal ultrasounds with rape.

²¹ S.B. 371, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013). As discussed below, medical abortions are only possible in the early phases of a pregnancy; as such, this legislation requires exclusively transvaginal ultrasounds.

²² S.B. 1349, 61st Leg., 2d Reg. Sess. (Idaho 2012).

²³ Women’s Right-to-Know Act, H.B. 1077, 2011 Gen. Assemb., Reg. Sess. (Pa. 2011).

²⁴ TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2010 & Supp. 2012–2013).

²⁵ S.B. 5, 2013 Leg., Reg. Sess. (Ky. 2013).

²⁶ H.B. 462, 2012 Gen. Ass., Reg. Sess. (Va. 2012).

²⁷ N.C. GEN. STAT. ANN. § 90-21.85 (West 2008).

²⁸ GUTTMACHER INST., FACTS ON INDUCED ABORTION IN THE UNITED STATES 2 (2013), available at http://www.guttmacher.org/pubs/fb_induced_abortion.pdf. The Guttmacher Institute is an organization that aims to advance reproductive and sexual health through research, policy analysis, and education.

²⁹ Kate Sheppard, *Mandatory Transvaginal Ultrasounds: Coming Soon to a State Near*

result, legislation indicating that whichever type of ultrasound “would display the embryo or fetus more clearly” should be used translates into mandatory transvaginal ultrasounds for almost all patients. The different types of legislation are detailed below; while the language and construction varies from state to state, the effect of requiring a transvaginal ultrasound for women is largely the same.

In Alabama, the law indicates that a physician or ultrasound technician must “[p]erform an obstetric ultrasound on the pregnant woman, using either a vaginal transducer or an abdominal transducer, *whichever would display the embryo or fetus more clearly*.”³⁰ As discussed above, the majority of abortions occur in the first nine weeks of pregnancy when the “clearer” view of an embryo will certainly be through a transvaginal ultrasound.

Similarly, the proposed statute in Idaho recognizes that ultrasounds other than “jelly on the belly” exist, but unlike most other statutes, the bill also leaves some room for patient input:

Prior to a patient giving informed consent to having any part of an abortion performed or induced, and prior to the administration of any anesthesia or medication in preparation for the abortion on the patient, the physician who is to perform the abortion or a qualified technician shall perform an obstetric ultrasound on the pregnant patient, using whichever method the physician and patient agree is best under the circumstances.³¹

Although this language appears to be more patient-friendly, it nonetheless still leaves room for an unwanted vaginal penetration, particularly with young or uneducated patients who feel that they are not in a position to make decisions or disagree with a doctor. Further, the doctors in these scenarios can face penalties for noncompliance.³² It is therefore possible that they will be inclined to push for transvaginal ultrasounds to limit their own liability. Finally, this law concludes by requiring the doctor and patient to sign a statement indicating the gestational age of the fetus.³³

You, MOTHER JONES (Mar. 5, 2012, 3:16 PM), <http://www.motherjones.com/mojo/2012/03/transvaginal-ultrasounds-coming-soon-state-near-you> (“And if the woman has been pregnant for eight weeks or less, conducting an ultrasound generally requires the doctor to insert a probe in a woman’s vagina in order to actually see or hear anything.”).

³⁰ Right to Know and See Act, S.B. 12, 2012 Leg., Reg. Sess. (Ala. 2012) (emphasis added).

³¹ S.B. 1349, 61st Leg., 2d Reg. Sess. (Idaho 2012).

³² *Id.* (“The knowing failure of the attending physician to perform any one (1) or more of the acts required . . . is grounds for discipline . . . and shall subject the physician to assessment of a civil penalty of one hundred dollars (\$100) for each month or portion thereof that each such failure continues, payable to the vital statistics unit of the department of health and welfare, but such failure shall not constitute a criminal act.”).

³³ *Id.* According to this legislation, the physician must state:

I performed an ultrasound test including fetal heartbeat on (insert name of patient) on (insert date

Compliance with this requirement could also necessitate the use of a transvaginal ultrasound.

Unlike the Alabama and Idaho legislation, the proposed Virginia statute was subtle. The initial proposed bill indicated that an ultrasound technician:

shall perform fetal ultrasound imaging and auscultation of fetal heart tone services on the patient undergoing the abortion for the purpose of determining gestational age. . . . The ultrasound image shall be made pursuant to standard medical practice in the community, contain the dimensions of the fetus, and accurately portray the presence of external members and internal organs of the fetus, if present or viewable. Determination of gestational age shall be based upon measurement of the fetus in a manner consistent with standard medical practice in the community in determining gestational age. . . . A print of the ultrasound image shall be made to document the measurements that have been taken to determine the gestational age of the fetus.³⁴

On first read, this statute does not seem to mandate an invasive procedure. But in practice, in order to create an image with sufficient detail to comply with these requirements, a transvaginal ultrasound would most often be the only option.³⁵ In response to media and voter outrage over the transvaginal ultrasound requirement,³⁶ the final bill was scaled back to remove the language that would have required a transvaginal ultrasound.

Kentucky's bills and North Carolina's enacted ultrasound law would similarly require specific results and information from the ultrasound.³⁷ As with the originally proposed Virginia bill, compliance with these statutes would likely require most women seeking abortions to submit to transvaginal ultrasounds as a result of the specificity these statutes require and the greater clarity the transvaginal ultrasounds afford.

The North Carolina statute, however, makes an interesting distinction by requiring that the quality of the ultrasound be consistent with the

and time) at (insert name of facility where ultrasound test was performed). At that time, the gestational age was determined to be (insert #) weeks and the heart rate was (not present or {insert #} beats per minute {mark one}).

The patient must then initial each point of information, and sign and date the statement. *Id.*

³⁴ H.B. 462, 2012 Gen. Ass., Reg. Sess. (Va. 2012) ("Any physician who fails to comply with the provisions of this section shall be subject to a \$2,500 civil penalty.").

³⁵ See Dr. Hammond Interview, *supra* note 15.

³⁶ See *supra* notes 1–4.

³⁷ See N.C. GEN. STAT. ANN. § 90-21.85(a) (West 2008) (emphasis added); S.B. 5, 2013 Leg., Reg. Sess. (Ky. 2013) ("(a) Any physician who violates Section 1 of this Act shall be fined not more than one hundred thousand dollars (\$100,000) for a first offense and not more than two hundred fifty thousand dollars (\$250,000) for each subsequent offense. (b) In addition to the fine, the court shall report the violation, in writing, to the Kentucky Board of Medical Licensure for such action and discipline as the board deems appropriate."). This bill was proposed (and failed) in Kentucky in multiple sessions.

standard medical practice in the community.³⁸ This requirement is also present in the ultrasound bill in Pennsylvania that was proposed—but never voted on—in early 2012.³⁹ As discussed above, the standard practice of physicians performing ultrasounds during most of the first trimester is to perform transvaginal ultrasounds. Similarly, the level of detail required is consistent with information available only through transvaginal ultrasound during the early pregnancy. As a result, North Carolina essentially requires that a transvaginal ultrasound accompany every abortion.

Finally, the Texas ultrasound statute requires a woman seeking an abortion to go through the most explicit explanation of the pregnancy and the ultrasound. The doctor or ultrasound technician must “display[] the sonogram images in a quality consistent with current medical practice in a manner that the pregnant woman may view them” and “provide[], in a manner understandable to a layperson, a verbal explanation of the results of the sonogram images, including a medical description of the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs.”⁴⁰ These onerous requirements, like those discussed above, will certainly require a transvaginal ultrasound in many, if not most, cases.

The critically important pieces of these statutes, those pieces that may seem innocuous to a layperson but are heavy with scientific implications, are in the details. These statutes, proposed and enacted, show a variety of examples of state-mandated vaginal penetration without regard for the consent of the women subjected to these procedures. Because most of these bills and laws do not explicitly indicate the invasive nature of the procedure that they require, they largely did not receive much press or pushback from women’s rights activists, even after uproar over the Virginia legislation in 2012.⁴¹ In fact, despite clear transvaginal ultrasound requirements in Indiana and Michigan bills introduced in early 2013, the national press has reported little about them.

C. WHY THIS LEGISLATION EXISTS (ACCORDING TO SUPPORTERS)

State legislators around the country have been writing, promoting, and voting for these mandatory ultrasound laws for years.⁴² Understanding the

³⁸ See N.C. GEN. STAT. § 90-21.85(a)(2) (“The image and auscultation of fetal heart tone shall be of a quality consistent with the standard medical practice in the community.”).

³⁹ Women’s Right-to-Know Act, H.B. 1077, § 4(c), 2011 Leg., Reg. Sess. (Pa. 2011).

⁴⁰ TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2010 & Supp. 2012–2013).

⁴¹ See generally *supra* notes 2–4.

⁴² The bills cited in this Comment date back to 2010 (if not earlier in their initial introductions).

motivation behind such laws may shed light on their purposes and expected effects. These laws are generally couched in the language of “informed consent,” indicating that ultrasounds are not meant to improve doctors’ understanding or performance but to impact the patients whose consent is required for the procedures. Legislators have stated two main goals of the ultrasounds: simply offering additional information to a pregnant woman before she consents to the procedure, and, more politically charged, dissuading women from going through with abortions.

Pennsylvania State Representative Kathy Rapp has expressed both goals in official statements regarding the ultrasound bill that she sponsored. In one statement, she said that the mandatory ultrasound “would allow every woman to have the option of viewing a live ultrasound and be given a printed image of what they’ve just seen. . . . [T]he final decision rests with her, and she’ll live with that choice for the rest of her life. She deserves the truth—all of it.”⁴³ This statement could give the impression that Representative Rapp meant this legislation to benignly offer information that she thought patients did not have previously. However, during her Women’s Right-to-Know Act press conference, Representative Rapp revealed the underlying motivation behind her sponsorship of the bill: “[W]e hope through this legislation, once women see all the material that is available to them, the image of their child, the heartbeat, and hearing that heart beat, seeing those little fingers and toes, that they will make the informed decision to save that child, and to deliver that child and raise that child.”⁴⁴ She went on to say that legislators “have a duty to care for our most vulnerable citizens, those who have no voice.”⁴⁵ Finally, in the very same press conference, a doctor supporting the bill explicitly said that the ultrasound does not, in fact, provide any information that a patient did not already have: “No one enters into an abortion glibly. . . . It’s always a struggle, seeking an abortion. . . . I don’t think anybody enters into an abortion not knowing what is going on. You’re not withholding any information or giving any information that they otherwise don’t have.”⁴⁶ Further, in response to reporters’ questions regarding Pennsylvania’s proposed legislation, Governor Tom Corbett demonstrated his own ignorance of the proposal’s actual implications by indicating of the procedure: “it’s on exterior not interior.”⁴⁷ During the same event, he

⁴³ Kathy Rapp, *Women’s Right-to-Know Law Would Protect Women in PA*, YOUTUBE 1:05–1:30 (Jan. 20, 2012), <http://www.youtube.com/watch?v=-rPQW4ZQG0Q>.

⁴⁴ Kathy Rapp, *Women’s Right to Know Press Conference*, YOUTUBE 2:20–2:46 (Jan. 23, 2012), <http://www.youtube.com/watch?v=ggrW1WXoW34>.

⁴⁵ *Id.* at 3:43–3:55.

⁴⁶ *Id.* at 11:30–13:15 (statement of Dr. Joseph Castelli, Jr.).

⁴⁷ *Proposed Bill Requiring Ultrasounds Before Abortions Causes Contention*, WGAL NEWS 8

dismissively suggested that women who do not want to watch the ultrasound would “just have to close [their] eyes.”⁴⁸ While this bill was entitled the Women’s Right-to-Know Act and had the stated purpose of informing a woman about her pregnancy before she committed to an abortion, if the woman was not required to watch the ultrasound as Governor Corbett indicated, then the invasive, time consuming, expensive, and medically unnecessary procedure would also lose any purported informative value.

Similarly, North Carolina State Representatives Ruth Samuelson and Pat McElraft, sponsors of that state’s mandatory ultrasound bill, gave similar dual-purpose statements. Representative Samuelson said that the bill would “afford women the respect of giving them all the available information about this tough decision and trust that after that, they will be better able to make the best decision for themselves in the long term,” and then added that studies had shown that the bill would prevent about 2,900 abortions per year.⁴⁹ Her cosponsor shared a similar sentiment, arguing that “‘pain and regret’ were reasons for pushing this legislation through.”⁵⁰

In a more staunchly positioned statement, Texas ultrasound bill sponsor State Senator Dan Patrick estimated the law would save 15,000 lives annually in Texas “if it stops one out in five abortions.”⁵¹ Patrick was quoted as saying, “There’s no other piece of legislation anywhere else in the country that has that kind of impact. . . . I don’t take credit for it. It’s God’s hands.”⁵² This is an explicitly political and religious stance, notably omitting any mention of medical procedure or informed consent law.

Sentiments like this are shared across the country; sponsors and supporters of these laws intend them to be roadblocks to abortion, using a medical procedure to make a final impression on a woman before she goes through with her decision to abort a pregnancy.

(Mar. 14, 2012, 9:39 AM), <http://www.wgal.com/Proposed-Bill-Requiring-Ultrasounds-Before-Abortions-Causes-Contention/-/9361174/10230622/-/item/0/-/flus42z/-/index.html>.

⁴⁸ *Id.*

⁴⁹ Chinmayi Sharma, *NC Bill Could Add Steps to Obtaining Abortions*, DUKE CHRON., June 2, 2011, at 1.

⁵⁰ Eren Tataragasi, *Law Spawns Praise, Criticism*, CARTERET COUNTY NEWS-TIMES, July 31, 2011, at 1A.

⁵¹ Gary Scharrer, *Texas Sonogram Law Goes into Effect Today*, HOUS. CHRON., Feb. 6, 2012, available at <http://www.chron.com/news/houston-texas/article/Texas-sonogram-law-goes-into-effect-today-3085314.php>.

⁵² *Id.*

D. A FINAL CLARIFICATION & SUMMARY OF MANDATORY ULTRASOUND LEGISLATION

Before continuing on to the analysis of rape law and theory, it is important to clarify, based on the above discussion, that these laws are *not* being enacted for medical reasons. They are not entitled “Safety in Abortion,” “Improving Procedural Care in Abortion,” or “Pre-Abortion Health Protection.” They share variations on the title, “A Woman’s Right-to-Know Act,” which is explicitly not a medically related designation. Further, the statements of bill sponsors and their political supporters indicate that the purpose of these laws is politically and emotionally charged, intended to dissuade women from going through with abortions rather than to advance a medical objective. These ultrasounds will not always produce medically necessary information, and performing an ultrasound within two or twenty-four hours of every abortion is certainly not a standard medical practice.⁵³

III. RAPE LAW

Because ultrasound statutes mandate the use of vaginal transducers and may require unwanted vaginal penetration, many have responded to this legislation with accusations of state-mandated rape.⁵⁴ While such rhetoric has been politically useful,⁵⁵ and while the layman’s understanding of rape as vaginal penetration without consent supports this characterization, the focus of this Part is an analysis of whether pre-abortion transvaginal ultrasound penetration could legally constitute rape. In order to answer this question, I present a variety of rape statutes and apply them to the situation of state-mandated penetration. Because the issue of consent is particularly nuanced in this analysis, it will be examined separately.

A. TYPES OF RAPE STATUTES

A state’s definition of rape has a large impact on whether transvaginal ultrasounds can be classified as rape. States have different ways of structuring their sexual assault laws. Some states adopt a combined structure, which involves a narrow rape law and a broad sexual assault (or similar) law. Others use a universal sexual assault law to cover all types of assaults, thereby eliminating the need for a separate rape-specific law.⁵⁶ Finally, some states have a very broad rape statute that covers many acts of

⁵³ See Dr. Hammond Interview, *supra* note 15.

⁵⁴ See, e.g., Scalzi, *supra* note 1.

⁵⁵ See *infra* note 116.

⁵⁶ For the reasoning behind all-encompassing laws like this, see ROSEMARIE TONG, *WOMEN, SEX, AND THE LAW* 94 (1984).

penetration, obviating the need for separate sexual assault statutes. This Part looks at examples of each of these to understand where mandatory transvaginal ultrasounds might fall on the spectrum of criminalized penetration.

1. Combined Legal Structures

Under combined structures, which define rape narrowly, transvaginal ultrasounds are least likely to meet the legal definition of rape. The most stringent definition of rape is from the Model Penal Code, which suggests one of the most outdated and incomprehensive statutes.⁵⁷ According to the MPC:

A male who has sexual intercourse with a female not his wife is guilty of rape if: (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone . . .⁵⁸

Under this construction, there is certainly no way to consider mandatory transvaginal ultrasound as rape.

Further, in Idaho, rape is defined as “the penetration, however slight, of the oral, anal or vaginal opening *with the perpetrator’s penis* accomplished with a female.”⁵⁹ Idaho also has a separate law to address forcible sexual penetration by use of a foreign object. This law, unlike the rape statute, requires that the actor cause penetration by foreign object “for the purpose of sexual arousal, gratification or abuse.”⁶⁰ Idaho’s foreign object penetration law may not allow for transvaginal ultrasounds to fall in this category because these ultrasounds are not mandated for the purpose of sexual arousal or gratification. However, one could view abuse as the purpose of these ultrasounds. Although abuse is not defined in this statute, Idaho has defined it in other sexual abuse statutes as “the intentional or negligent infliction of physical pain, injury or mental injury.”⁶¹ As will be discussed in depth below, these laws have been seen as intentionally causing mental injury to the women who must submit to the ultrasounds.⁶² As such, it is possible that a mandatory transvaginal ultrasound would constitute a criminal violation in Idaho.

⁵⁷ See, e.g., Deborah W. Denno, *Why the Model Penal Code’s Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207, 207 (2003) (“What started as a leading authority for the legal enhancement of women and homosexuals is now a relic that detracts from the credit and foresight that its creators deserve.”).

⁵⁸ MODEL PENAL CODE § 213.1 (1985).

⁵⁹ IDAHO CODE ANN. § 18-6101 (West 2012) (emphasis added).

⁶⁰ *Id.* § 18-6608.

⁶¹ *Id.* § 18-1505(4)(a).

⁶² See *infra* Part IV.B.

Finally, rape under Alabama law requires sexual intercourse, which is defined in the statute as having “its ordinary meaning” and occurring “upon any penetration, however slight.”⁶³ However, the statute criminalizing “sexual torture,” defines penetration “with an inanimate object by forcible compulsion with the intent to sexually torture or to sexually abuse.”⁶⁴ While there is no mens rea element in the rape statute, the sexual torture statute is circular in requiring an intent to sexually torture, given that there is no other definition of sexual torture other than the clause immediately preceding the mens rea requirement.⁶⁵ Because Alabama law does not provide for rape by physical object, the sexual torture statute is likely the only criminal statute that could most nearly cover state-mandated transvaginal ultrasounds. It does appear to fit the definition (again leaving the consent debate for later).

2. *All-Encompassing Sexual Assault Statute*

In contrast with each of these laws, Texas has removed the crime of rape from its penal code and replaced it with an all-encompassing sexual assault statute. A person commits sexual assault in Texas “if the person: (1) intentionally or knowingly: (A) causes the penetration of the anus or sexual organ of another person *by any means*, without that person’s consent.”⁶⁶ Under such a broad law, mandatory transvaginal ultrasound would likely fit into the definition of sexual assault.

3. *Broad Rape Statute*

Kentucky, on the other hand, defines “sexual intercourse” in a way that allows for an even broader application of rape law. Where rape is defined as engagement “in *sexual intercourse* with another person by forcible compulsion,”⁶⁷ and sexual intercourse includes in its definition “penetration of the sex organs of one person by a foreign object manipulated by another person,”⁶⁸ it seems clear that mandatory transvaginal ultrasounds would be considered rape. However, the Kentucky statute continues: “‘Sexual intercourse’ does not include penetration of the sex organ by a foreign object in the course of the performance of generally recognized health-care practices.”⁶⁹

⁶³ ALA. CODE §§ 13A-6-60 to -61 (1988).

⁶⁴ *Id.* § 13A-6-65.1.

⁶⁵ *Id.*

⁶⁶ TEX. PENAL CODE ANN. § 22.011 (West 2009) (emphasis added).

⁶⁷ KY. REV. STAT. ANN. § 510.040 (West 2012) (emphasis added).

⁶⁸ *Id.* § 510.010.

⁶⁹ *Id.* (emphasis added).

This rape statute indicates that penetration by a foreign object in the course of the performance of generally recognized healthcare practices would not constitute rape. North Carolina's sexual offense law has a similar provision, which states "it shall be an affirmative defense that the penetration was for accepted medical purposes."⁷⁰ While such language, on its face, seems to foreclose the possibility that transvaginal ultrasound performance will equal rape, it actually invites an analysis of the merits of performing this procedure. While the practice of performing transvaginal ultrasounds can be considered a "generally recognized health-care practice," the fact that there is no medical mandate for a transvaginal ultrasound immediately before an abortion may remove that barrier to protection under this law.⁷¹ With its broad definition of sexual intercourse, bolstered by the analysis in Part II discussing mandatory transvaginal ultrasounds as nonrecognized healthcare practices, it is possible that the procedures might be cognizable as rape under Kentucky's statute.

IV. RAPE THEORY

Since women are much more likely than men to be victims of sexual assaults of any kind, violent or not, the obvious question to ask is whether the criminal law is treating women's autonomy rights equally to men's by excluding from criminal protection so much nonconsensual sexual activity?

—Joan McGregor⁷²

In addition to determining whether mandatory transvaginal ultrasounds fit within any statutory constructions of rape, a discussion of whether they ought to be considered rape under the law is also in order. Such discussion should include a variety of steps: a normative analysis of rape laws and their purposes; a consideration of the motivation behind ultrasound legislation; and an inquiry into the implications of including these ultrasounds under the "rape" umbrella.

A. HISTORIC PURPOSES AND UNDERSTANDINGS OF RAPE LAW

In order to determine whether "rape" is the correct term for mandatory transvaginal ultrasounds, we should look beyond current statutory constructions to historic and recent societal understandings of the harm caused by rape. Many scholars have theorized the harms of rape. One lens through which to judge these laws is by measuring their effects on women

⁷⁰ N.C. GEN. STAT. ANN. § 90-21.85 (West 2008).

⁷¹ See *supra* Part II.A for a discussion of the medical considerations surrounding pre-abortion ultrasounds.

⁷² JOAN MCGREGOR, IS IT RAPE?: ON ACQUAINTANCE RAPE AND TAKING WOMEN'S CONSENT SERIOUSLY 17 (2005).

in comparison to the theorized effects of rape. If the harms match, then designating such legislation as “rape” is appropriate.

To begin, the historic understanding of rape and its evolution informs this study. The current understanding of the purpose of rape statutes is almost diametrically opposed to their original purpose. Blackstone initially defined rape as “carnal knowledge of a woman forcibly and against her will.”⁷³ However, despite the this definition’s focus on a woman’s will, the crime of rape is rooted in ancient male concepts of property, in which rape

was thought to be an offense against the woman’s father or husband as opposed to an injury to her. Women didn’t have an interest in their own bodily integrity, but fathers had an interest in their daughters’ chastity for their marketability as brides; and husbands had interests in ensuring that any progeny of their wives were biological[ly] theirs.⁷⁴

Rape was “viewed as an offense one male commits upon another—a matter of abusing ‘his woman.’”⁷⁵ According to Rosemary Tong, a traditional definition of rape includes:

‘carnal knowledge,’ that is, vaginal penetration, however slight, by a penis. According to standard feminist analysis, the law’s customary preoccupation with penetration is a reflection of man’s persistent desire to maintain exclusive control over woman’s vagina so that his need to be ‘sole physical instrument governing impregnation, progeny and inheritance rights,’ is met.⁷⁶

Today, however, rape is viewed differently; as a result of the American feminism movement in the 1960s and 1970s, the present goal of rape law is to protect victims from harm beyond the obvious need to protect people from the physical injury caused by violent attack.⁷⁷ First, the requirement of “carnal knowledge” has loosened:

Increasingly, people are linking sex with pleasure rather than with procreation. But if society is no longer focusing on sex-for-procreation but instead on sex-for-pleasure, there is, according to feminist antirapists, no need for it to think of sex as something that happens when a man’s penis penetrates a woman’s vagina. . . . [R]ape can be oral or anal as well as vaginal, and that penetration need not be by a penis, but can be accomplished by tongue, fingers, toes, or artificial instruments.⁷⁸

⁷³ 4 WILLIAM BLACKSTONE, COMMENTARIES *210.

⁷⁴ See MCGREGOR, *supra* note 72, at 3.

⁷⁵ KATE MILLET, SEXUAL POLITICS 44 (2000).

⁷⁶ See TONG, *supra* note 56, at 92 (citation omitted).

⁷⁷ JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 862 (6th ed. 2008); *see also* DEBRA L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 244–45 (1989) (“Historically, rape has been perceived as a threat to male as well as female interests; it has devalued wives and daughters and jeopardized patrilineal systems of inheritance. But too stringent constraints on male sexuality have been equally threatening to male policymakers. The threat of criminal charges based on female fabrications has dominated the history of rape law.”).

⁷⁸ See TONG, *supra* note 56, at 94.

Additionally, rape is now framed with an eye toward its effects on victims, on women generally, or on society as a whole. Some currently accepted theories on the roots and effects of rape include: an exertion of power;⁷⁹ an act of violence alone;⁸⁰ systematic oppression of women in a patriarchal society;⁸¹ a psychological attack against an individual's dignity and self-perception;⁸² and a denial of a person's bodily and sexual autonomy.⁸³ Each of these will be discussed in greater detail in the following Part to answer the question of whether mandatory pre-abortion transvaginal ultrasounds should be considered rape within any of these theoretical constructs. Many of them share commonalities, but I will attempt to

⁷⁹ See Catharine A. MacKinnon, *A Sex Equality Approach to Sexual Assault*, in *SEXUALLY COERCIVE BEHAVIOR: UNDERSTANDING AND MANAGEMENT* 265, 266 (Robert A. Prentky et al. eds., 2003) (noting that sexual violence is seen as “an act not of [biological] difference but of dominance”).

⁸⁰ See JOSHUA DRESSLER ET AL., *UNDERSTANDING CRIMINAL LAW* 577 (3d ed. 2001) (mentioning that under the common law rule, forcible rape would be found only if the perpetrator used violence to overcome a victim's will); see also Pamela Lakes Wood, *The Victim in a Forcible Rape Case: A Feminist View*, in *RAPE: THE FIRST SOURCEBOOK FOR WOMEN* 143, 158 (Noreen Connell & Cassandra Wilson eds., 1974) (“The act is one of murderous aggression, spawned in self-loathing and enacted upon the hated other.”) [hereinafter *RAPE: THE FIRST SOURCEBOOK*].

⁸¹ See ERIC S. JANUS, *FAILURE TO PROTECT: AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE* 6 (2006) (“Sexual violence flourishes with social support, enforcing and expressing the socially imposed inferiority of women.”) (internal quotation omitted); *id.* at 79 (“[S]exual violence is not a pathologically isolated cancer but a systemic dysfunction, spread broadly throughout the normal relationships of society.”); see also SUSAN BROWNSMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 15 (1993) (“[Rape] is nothing more or less than a conscious process of intimidation by which *all men* keep *all women* in a state of fear.”); Sylvana Tomaselli, *Introduction*, in *RAPE* 1, 12 (Sylvana Tomaselli & Roy Porter eds., 1986) (“There is a powerful case being made for the view that what is wrong about rape is not simply its specific, individual occurrence, but its wider social implication in terms of the fear it instills in all women at all times.”).

⁸² See Samuel H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 *LOY. L.A. L. REV.* 845, 879 (2002) (“I argue that we should characterize rape generally as a crime against the soul, for this phrase expresses in emotive terms the way that the rapist attacks the victim's inner person through sexual invasion.”). Pillsbury's study involved the collection of stories from rape victims. One woman explained the effect of her experience: “My *rapist* stole me from me. He ripped my personality out of me— who I was—the same as if he had ripped out my heart.” *Id.* at 893.

⁸³ See DRESSLER, *supra* note 80, at 582 (“[T]he law of rape primarily guards the integrity of a woman's will and the privacy of her sexuality from an act of intercourse undertaken without her consent.” (quoting *People v. Cicero*, 204 Cal Rptr. 582, 590 (Cal. Ct. App. 1984))); see also KAPLAN ET AL., *supra* note 77, at 864 (“What is at stake is nothing less than women's bodily security and every person's right to control the boundaries of his or her own sexual experience.”); *R. v. Park*, [1995] 2 S.C.R. 836 (Can.) (“The primary concern animating and underlying the present offence of sexual assault is the belief that women have an inherent right to exercise full control over their own bodies, and to engage only in sexual activity that they wish to engage in.”).

address each separately. In this analysis, I will not address the issue of consent⁸⁴ but will rather focus on the theories of rape and their implications relating to the ultrasound legislation.

B. MODERN RAPE THEORY APPLIED TO MANDATORY TRANSVAGINAL ULTRASOUNDS

1. *Person-to-Person Power Exertion*

When rape is framed as an exertion of power by one person over another, the designation likely does not apply to a mandatory transvaginal ultrasound. While the patient may feel violated, one could imagine circumstances that might help to remove any person-to-person power imbalance. For example, a nurse or doctor could carefully explain that the legal mandate for the procedure arises from an intent to make the woman feel informed. However, it is not difficult to imagine that a patient, particularly a young or uneducated woman, could easily see this penetration as an exertion of power by an older professional in a position of responsibility. Even generously assuming that the care providers at medical offices and clinics who perform abortions are gentle and careful, it seems likely that a transvaginal ultrasound would not cause a patient to feel subject to an exertion of power by one person (or by her entire state government) over her.

2. *Violence*

Similarly, if rape is viewed exclusively as an act of violence, akin to any other type of battery that leaves marks, scars, or bruises, mandatory transvaginal ultrasound seems to fall outside the realm of rape as violence. It has been asserted that “rape is an assault like any other assault. . . . [T]he rapist’s choice of the vagina or anus as the target of his aggression is no more significant than the barroom brawler’s choice of a man’s arm or leg as the target of his aggression.”⁸⁵ It is worth noting that these arguments equating rape with any other assault were initially made during rape reform discussions in the 1970s and 1980s when the goal of the feminists leading rape reform efforts was to *elevate* the level of rape to that of assault.⁸⁶ Due

⁸⁴ See *infra* Part V for examination of the consent issue.

⁸⁵ See TONG, *supra* note 56, at 117–18.

⁸⁶ See, e.g., Jennifer Temkin, *Women, Rape and Law Reform*, in RAPE: THE FIRST SOURCEBOOK, *supra* note 80, at 16, 31 (quoting LAW REFORM COMM’N CAN., SEXUAL OFFENCES 16 (Working Paper No. 22) (1978)) (“[R]ape is actually a form of assault and should therefore perhaps be treated as such under the law The concept of sexual assault more appropriately characterizes the actual nature of the offence of rape because the primary focus is on the assault or the violation of the integrity of the person rather than the sexual intercourse.”).

to the work of rape law reformers thirty years ago, however, framing rape as assault in 2013 is almost offensively simplistic and demeaning. When theory removes the gendered and sexual nature of forcible, nonconsensual vaginal penetration from the concept of rape, it ignores the difference between a blow to a limb and the internal penetration of a culturally sacred and otherwise physically unavailable part of the body. Nonetheless, mandatory transvaginal ultrasounds would likely not reach the threshold of rape considered to be an act of violence alone.

3. *Oppression of Women*

By contrast, in adopting the lens of understanding rape as the systematic oppression of women in a patriarchal society, it is hard not to see mandatory transvaginal ultrasounds fitting perfectly within the conception of rape. “Within this conception of rape, the act of rape is but the visible and most awesome aspect of an unspoken system which keeps women in their place.”⁸⁷ Here, we are discussing a male-dominated legislative body imposing mandatory vaginal penetration on a group of women—women asserting their right to control their own bodies by undergoing abortions.⁸⁸ Any feminist could easily make the argument that these laws are a way of putting women back in their place, a reminder that women won the battle of abortion rights but are still losing the war of equality and independence. Angela Y. Davis argues that rape “bears a direct relationship to all of the existing power structures in a given society. The relationship is not a simple, mechanical one, but rather involves complex structures reflecting the interconnectedness of the race, gender, and class oppression that characterize the society.”⁸⁹ Along the same lines, feminist philosopher Susan Griffin argues “the existence of rape in any form is beneficial to the ruling class of white males.”⁹⁰

The obvious metaphor of the vindictive reassertion of male dominance over women through unwanted vaginal penetration is only part of the patriarchal imposition in the context of mandatory ultrasounds; also inherent in requiring ultrasounds before abortions is the paternalistic view that women undergoing abortions simply do not realize what they are doing

⁸⁷ Tomaselli, *supra* note 81, at 12.

⁸⁸ See, e.g., NAT’L CONFERENCE OF STATE LEGISLATURES, LEGISLATOR DEMOGRAPHICS, <http://www.ncsl.org/legislatures-elections/legisdata/legislator-demographic-map.aspx> (last visited Aug. 19, 2013) (showing that 76% of all state legislators in 2013 were men, while in Pennsylvania and Virginia the figure was 82%).

⁸⁹ ANGELA Y. DAVIS, *WOMEN, CULTURE & POLITICS* 47 (1989).

⁹⁰ Susan Griffin, *Rape: The All-American Crime*, *RAMPARTS MAG.*, Sept. 1971, reprinted in *APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN’S LIVES: SEX, VIOLENCE, WORK, AND REPRODUCTION* 422, 429 (D. Kelly Weisberg ed., 1996).

or understand the implications of their choices. Legislative insistence on further “informing” women about their unwanted or dangerous pregnancies again asserts the inferiority of women by assuming that they cannot make thoughtfully considered and responsible decisions without governmental interference. If the harm of rape is the continued systematic oppression of women in a patriarchal society, then mandatory transvaginal ultrasounds seem to fit the bill and cause precisely the same harm.

4. *Individual Psychological Attack*

Similarly, assessing these laws vis-à-vis rape as a psychological attack against an individual’s dignity and self-perception may lead to the conclusion that mandatory transvaginal ultrasounds are consistent with rape. Rape has been described as an act that unifies “sex and violence to subdue, humiliate, degrade, and terrorize” a victim.⁹¹ “Humiliate” and “shame” are two words most commonly used by critics of these laws to describe their goals and practical effects.⁹² It is generally accepted that the abortion process is already emotionally trying;⁹³ adding the condescension and intrusion of state-mandated transvaginal ultrasounds will likely result in the patient’s humiliation and degradation. Further, just as rape serves to “subdue” a victim, these ultrasounds are similarly meant to subdue the women seeking abortions by convincing them not to exercise their constitutionally protected right to choose. Viewed in this light, mandatory transvaginal ultrasound legislation, in attacking the self-worth of the women subjected to the procedure, is the same as rape.

5. *Denial of Autonomy*

The final and most widely accepted theory regarding rape and its impact on women and society is the denial of a person’s bodily and sexual

⁹¹ DEBRAN ROWLAND, *THE BOUNDARIES OF HER BODY: THE TROUBLING HISTORY OF WOMEN’S RIGHTS IN AMERICA* 655 (2004); see also Pillsbury, *supra* note 82, at 879 (“[T]he central injury of forced sex is a harm to the spirit.”); *id.* at 893 (“Forced sex involves a betrayal of a personal human bond.”).

⁹² See generally Kristof, *supra* note 5; Dahlia Lithwick, *Virginia’s Proposed Ultrasound Law is an Abomination*, SLATE (Feb. 16, 2012, 6:57 PM), http://www.slate.com/articles/double_x/doublex/2012/02/virginia_ultrasound_law_women_who_want_an_abortion_will_be_forcibly_penetrated_for_no_medical_reason.html.

⁹³ See generally *Choosing an Abortion is a Difficult Decision*, PREGNANCY RESOURCE CTRS., <http://www.pregnancyresource.org/abortion.htm> (last visited Sept. 21, 2013). See also Carolyn Jones, *‘We Have No Choice’: One Woman’s Ordeal with Texas’ New Sonogram Law*, TEX. OBSERVER (Mar. 15, 2012, 8:03 AM), <http://www.texasobserver.org/we-have-no-choice-one-womans-ordeal-with-texas-new-sonogram-law/> (“What good is a law that adds only pain and difficulty to perhaps the most painful and difficult decision a woman can make?”).

autonomy. Sexual autonomy has been explained to contain three distinct dimensions. According to John Kaplan, “[t]he first two are mental—an internal capacity to make reasonably mature and rational choices and an external freedom from impermissible pressures and constraints. The third dimension is . . . the bodily integrity of the individual.”⁹⁴ I will analyze mandatory transvaginal ultrasounds through each of these three dimensions.

First, when considering a woman’s ability to make personal decisions, ultrasound legislation parallels rape’s denial of autonomous decisionmaking in two ways: by taking away the woman’s decision regarding whether to have the vaginal transducer placed inside her body and by paternalistically implying that she was not capable of making the decision of whether to carry the pregnancy to term without legislative interference. Through their insistence that a woman undergo a medically unnecessary, invasive ultrasound, legislators ignore her personal maturity and rationality. In this way, legislative intrusion in the abortion process through required transvaginal ultrasounds is disturbingly similar to rape.

Similarly, these laws place impermissible pressures and constraints on women seeking abortions, thereby denying them their freedom. By requiring the performance of a medical procedure, legislatures are shackling both doctors and patients to a practice that has no proven benefits. A Texas doctor responded to the passage of Texas’s mandatory transvaginal ultrasound law by calling it “state-sanctioned abuse” and indicating his discomfort with the requirement by saying that “[a] woman is coerced to do this, just as I’m coerced.”⁹⁵ By conditioning abortion on a transvaginal ultrasound, the state is constraining the actions and choices of women (and their doctors) in a manner that results in unwilling vaginal penetration. This bears an eerie resemblance to cases in which doctors, lawyers, teachers, and other people in positions of power conditioned their services or aid on submission to sex.⁹⁶ External pressures to submit to unwanted penetration amount to rape; in this way, mandatory transvaginal ultrasounds are comparable with rape.

Finally, rape violates the bodily integrity of a victim by denying her control over her body.⁹⁷ The penetration of a woman’s vagina is an invasion of her body, whether it is penetration by a penis for sexual satisfaction or penetration by an object for political reasons.

⁹⁴ See KAPLAN ET AL., *supra* note 77, at 864.

⁹⁵ See Kristof, *supra* note 5 (quoting Dr. Curtis Boyd, a Texas physician who performs abortions).

⁹⁶ See *infra* note 98.

⁹⁷ See *generally supra* note 83 and accompanying text.

When applied to mandatory transvaginal ultrasounds, almost all of these accepted rape theories (with violence and person-to-person power exertion as the only exceptions) indicate that legislation requiring vaginal penetration in order to access a women-specific medical procedure has the same roots, goals, and effects as rape, because the purpose, practice, and harm of imposing the procedure on women seeking abortions carries the gravity and social significance of rape.

V. PRACTICALITIES OF A “RAPE” DESIGNATION

A. THE CONSENT QUESTION

1. *Consent Theory*

Stephen J. Schulhofer, in his treatise *Unwanted Sex*, indicates that coerced consent should not be considered true consent, although many criminal rape statutes and courts indicate otherwise. Schulhofer mentions a variety of situations in which coerced consent was enough for courts to find that rape had not occurred: teachers, job supervisors, therapists, doctors, lawyers, family members, and professors who used “flagrantly coercive” tactics without physical violence would “often face no significant sanctions.”⁹⁸ He continues: “intimidation can take forms that existing law largely ignores.”⁹⁹ He goes on to say, however, that “[i]ntercourse without consent should always be considered a serious offense. Valid consent is obviously lacking when a woman submits to sex because she is coerced by threats to . . . withhold medical treatment she desperately needs.”¹⁰⁰ If following Schulhofer’s analysis, a state’s threat—or rather, the requirement—to withhold the medical procedure of an abortion in the absence of consented vaginal penetration should be seen as flagrantly coercive, thereby invalidating the patient’s consent.

Joan McGregor similarly addressed consent by considering the purpose of criminal law as protecting individuals from serious and wrongful harms. “A harm must be 1) a wrongful act that 2) sets back or invades the interest of another person.”¹⁰¹ She goes on to indicate that:

⁹⁸ STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF THE LAW* 5 (1998) (“Men who abuse their status or professional authority to coerce sexual compliance often face no significant sanctions.”). Schulhofer argues that the law, rather than “requir[ing] the presence of genuine consent,” is focused only on “assur[ing] the absence of force.” *Id.*

⁹⁹ *Id.* at 7.

¹⁰⁰ *Id.* at 254.

¹⁰¹ See MCGREGOR, *supra* note 72, at 15 (discussing JOEL FEINBERG, *HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW* (1984)).

[m]any things can be harmful, for example, actions to which we consent can literally harm us. However, . . . [the theory is that] ‘To one who consents, no harm is done.’ . . . Consent plays an important role in determining whether a harm is wrongful. Consent is the vehicle through which we express our autonomous wishes, so by getting consent, one does not wrong that person.¹⁰²

Consent in the arena of sexuality is particularly contentious because it has been construed in a variety of ways over the years; it has become muddled with submission, to the detriment of the rape victim subject to intimidation. According to McGregor:

The issue of consent being identified with submission, no matter how long or what it takes to get that submission, is patently absurd but has endured until the present. What role is consent supposed to be playing when it can be inferred from someone beaten or threatened to comply? In *no* other arena would we accept such a notion of consent.¹⁰³

Again, the history of rape law works against the argument that mandatory transvaginal ultrasounds are rape despite “consent,” because “consent” in historic rape law can be completely coerced.

McGregor adopts the view that, while “there is [nothing] morally wrong with sexual intercourse *per se*, . . . the wrongness of rape rests with the matter of the woman’s *consent*.”¹⁰⁴ This same statement should be made regarding transvaginal ultrasounds. The medical practice of performing an ultrasound is not morally reprehensible or anywhere near criminal when performed for legitimate medical needs.¹⁰⁵ However, consent for any procedure or activity relating to a woman’s vagina is particularly important. According to McGregor:

What explains the seriousness of the injury of rape is what the consent *ranges* over. Sex, sexuality, our bodies and control over them are central to who we are. . . . [I]t is generally accepted that people must be capable of identifying their own interests, making choices which fit into larger life plans based on their interests, and must have the ability to communicate those interests and choices to others.¹⁰⁶

These arguments lend support for the conclusion that the consent coerced from a patient in need of an abortion cannot be considered meaningful consent, thereby fulfilling yet another requirement of laws against rape.

¹⁰² *Id.* at 15–16.

¹⁰³ *Id.* at 32.

¹⁰⁴ *Id.* at 221 (quoting Carolyn M. Shafer and Marilyn Frye, *Rape and Respect*, in *FEMINISM AND PHILOSOPHY* 333, 334 (Mary Vetterling Bragg et al. eds., 1977)).

¹⁰⁵ See Cienna Madrid, *Why Transvaginal Ultrasounds Aren’t Physician-Assisted Rape (According to One OB-in-Training)*, *THE STRANGER* (Mar. 22, 2012, 1:45 PM), <http://slog.thestranger.com/slog/archives/2012/03/22/why-transvaginal-ultrasounds-arent-physician-assisted-rape>.

¹⁰⁶ See MCGREGOR, *supra* note 72, at 221–22.

2. Consent in Rape Law

While rape theory may support the idea that the consent in mandatory transvaginal ultrasound procedures is not sufficient for the procedures to avoid a rape designation, the rape laws discussed in Part III tell a somewhat different story.

In most states, the nonconsent requirement must be fulfilled by demonstrating that the accused rapist used “forcible compulsion” or “physical force.” For example, Alabama’s rape statute requires a showing of “physical force that overcomes earnest resistance or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person”¹⁰⁷ in order to demonstrate an absence of consent. Mandatory transvaginal ultrasounds, however, will likely not be administered at gunpoint or with a doctor holding a baseball bat, so a traditional conception of fear of imminent harm will not likely be fulfilled. Still, it is possible that women who have endured childbirth would say that being pregnant should put a woman in fear of serious physical injury. Maternal mortality rates are not high in the United States,¹⁰⁸ but it is possible that a woman who is pregnant and needs an abortion does fear for her life. The question remains whether the difficulty of pregnancy, the extreme pain of childbirth, and the possibility of pregnancy or birth-related death be ignored as coercive threats against an unhappily pregnant woman.

On another note, an alleged rape victim in Idaho must prove that she submitted to the alleged rapist:

under the belief, instilled by the actor, that if she [did] not submit, the actor [would] cause physical harm to some person in the future; or cause damage to property; or engage in other conduct constituting a crime; or accuse any person of a crime or cause criminal charges to be instituted against her; or expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt or ridicule.¹⁰⁹

This requirement gives much more meaning to consent and acknowledges a variety of forms of coercion that will vitiate consent in a rape setting. While these forms of coercion are not all applicable to mandatory transvaginal ultrasounds, one could imagine situations in which at least the last scenario applies. If a woman seeks an abortion to avoid the pregnancy-incited wrath of a parent or husband, the state’s threat of forcing her to

¹⁰⁷ ALA. CODE § 13A-6-60 (1988).

¹⁰⁸ See Cent. Intelligence Agency, *The World Factbook: Country Comparison:: Maternity Mortality Rate*, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2223rank.html> (last visited Aug. 19, 2013) (indicating that the United States maternal mortality rate in 2010 was 21 deaths per 100,000 live births).

¹⁰⁹ IDAHO CODE ANN. § 18-6101 (West 2002).

sustain the pregnancy could constitute publicizing an asserted fact tending to subject the woman to hatred or contempt.

Finally, in Texas, a sexual assault is deemed to occur without consent if “the actor is a public servant who coerces the other person to submit or participate.”¹¹⁰ While a doctor is not a public servant in most cases, legislators who pass these laws are public servants.¹¹¹ If a law of the state coerces a woman to submit to unwanted penetration of her vagina, it could be argued that those legislators who passed the law coerced her consent. This concept raises the issue of which actor might be responsible in a criminal case. The following Part addresses this question.

B. THE ACTOR QUESTION

This discussion has been largely theoretical or hybrid theoretical-legal thus far, but here, the analysis will focus on the practical issue of prosecution. The crime of rape is addressed by the state court system. Crimes create public rights of action to be brought against individuals, and they are prosecuted by states or local governments on behalf of citizens. Usually, if a man rapes a woman, the government prosecutes that man and, if successful, puts him in jail. In the case of viewing mandatory transvaginal ultrasound as rape, who should be prosecuted? Who should go to jail? There appear to be two general possibilities to answer this question: medical professionals who actually engage in the penetration and lawmakers who created and enacted the legislation.

Doctors and ultrasound technicians who perform these mandatory transvaginal ultrasounds do so, not for their own sexual arousal, but because the law requires it. In fact, the penalties for noncompliance exclusively fall to the physicians performing the abortions, and the penalties are generally felony convictions.¹¹² Under the current statutory regimes, no liability rests with the patients. As such, doctors are not freely choosing to perform these procedures. They themselves are obligated to perform them at the risk of losing their licenses or their livelihoods, potentially even facing prison time

¹¹⁰ TEX. PENAL CODE ANN. § 22.011(b)(8) (West 2009).

¹¹¹ See TEX. CIV. PRAC. & REM. CODE ANN. § 22.021 (West 2009) (“‘Public servant’ means a person elected, selected, appointed, employed, or otherwise designated as one of the following . . . : (A) an officer, employee, or agent of government; (B) a juror; (C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy; (D) an attorney or notary public when participating in the performance of a governmental function; or (E) a person who is performing a governmental function under a claim of right, although the person is not legally qualified to do so.”).

¹¹² See, e.g., Right to Know and See Act, S.B. 12, 2012 Leg., Reg. Sess. (Ala. 2012) (“Any person who knowingly or recklessly performs or attempts to perform an abortion in violation of this act shall be guilty of a Class C felony. No penalty may be assessed against the female upon whom the abortion is performed or attempted to be performed.”).

in some states. Under duress theory, this could mean that the crime transfers to the coercer, in this case, the State. However, in many states, duress is only a viable affirmative defense if the actor was in immediate danger of death or grave serious injury;¹¹³ this would not apply to doctors in these cases, so it is possible that the crime would not transfer.

Under either the theory of coercion or the theory that the rape is perpetrated directly by the State, obvious issues arise relating to the practicality of such a charge. First, some of the rape statutes specify that rape need be perpetrated by a man.¹¹⁴ In the case of the State as the actor, the State itself cannot be considered a man. It might be possible to charge a man under such a scheme if legislators were specifically subject to liability, but of course with (a few) women in state legislatures, this would not always perfectly align. Further, if the actor were specified as the bill sponsor, for example, then that would also present problems in places like Pennsylvania, where the sponsor was a woman. In addition, charging state actors also brings up constitutional and theoretical issues of whether a legislator may be held criminally responsible for a law she enacted; no evidence suggests that this is a possibility. Beyond the “man” requirement, there is also a logistical question of charging such a crime. Because the state or county decides whom to prosecute, it is unlikely that it will choose to prosecute itself or its legislators.

Ultimately, it appears that a doctor or ultrasound technician who performs the ultrasound would be the most feasible defendant, should a state decide to prosecute fulfillment of mandatory transvaginal ultrasound legislation requirements. Of course, it is hard to imagine a situation in which a state would prosecute an actor for following the law. As such, the actor question is the clearest barrier to any argument that a mandatory transvaginal ultrasound could be successfully prosecuted as rape.

C. IMPLICATIONS OF INCLUDING REQUIRED TRANSVAGINAL ULTRASOUND LEGISLATION IN THE “RAPE” UMBRELLA

As the previous Parts have demonstrated, there is strong theoretical support for designating these ultrasounds as rape, considering the roots, goals, and effects of rape and their parallels with mandatory transvaginal ultrasound legislation. However, it is also important to consider the implications of calling this mandatory medical procedure “rape.”

¹¹³ See, e.g., MODEL PENAL CODE § 2.09 (1985) (“It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.”).

¹¹⁴ See, e.g., *id.* § 213.1.

By using such a loaded word, activists are able to garner the kind of attention necessary to hold legislators accountable by speaking out against a clear government overreach into the extremely personal space of a woman's vagina. For example, in the case of Virginia, the media maelstrom that erupted once the proposed law was likened to rape was enough to provoke the bill's authors to specify that a transvaginal ultrasound would never be required for compliance with the mandatory ultrasound requirement.¹¹⁵ It was not until the blunt terms "state-mandated rape," "vaginal probe," and "vaginal penetration" entered public discourse that the details of the proposed legislation came to light.¹¹⁶ Even Governor Bob McDonnell indicated that he had not actually understood the legislation that his party was about to pass until media scrutiny brought its requirements national attention.¹¹⁷ It was not until "the opponents of the bill learned how to oppose it" using explicit language that even the legislators supporting the bill came to understand its full effects.¹¹⁸ Once the power of the media was harnessed, Governor McDonnell made a statement that "[m]andating an invasive procedure in order to give informed consent is not a proper role for the state. No person should be directed to undergo an invasive procedure by the state, without their consent, as a precondition to another medical procedure."¹¹⁹ The importance of using attention-garnering language like

¹¹⁵ See VA. CODE ANN. § 18.2-76 (West 2012) ("At least 24 hours before the performance of an abortion, a qualified medical professional trained in sonography and working under the supervision of a physician licensed in the Commonwealth shall perform fetal transabdominal ultrasound imaging on the patient undergoing the abortion for the purpose of determining gestational age. . . . *If gestational age cannot be determined by a transabdominal ultrasound, then the patient undergoing the abortion shall be verbally offered other ultrasound imaging to determine gestational age, which she may refuse. . . .* The provisions of this subsection shall not apply if the woman seeking an abortion is the victim of rape or incest, if the incident was reported to law-enforcement authorities. Nothing herein shall preclude the physician from using any ultrasound imaging that he considers to be medically appropriate pursuant to the standard medical practice in the community.") (emphasis added); see also *Va. House Passes Amended Transvaginal Ultrasound Bill*, WTOP 103.5 FM (Feb. 22, 2012, 5:50 PM), <http://www.wtop.com/?nid=41&sid=2758082>.

¹¹⁶ Laura Vozzella & Anita Kumar, *Va. Ultrasound Bill in Doubt; Invasive Test Would Be Optional*, WASH. POST, Feb. 23, 2012, at A1 ("On Jan. 31, when the measure came up for a vote in the Senate, [Senators George L. Barker and Ralph S. Northam] raised the issue during the floor debate—but very delicately. 'We tried to be a little sensitive with the language, particularly when you have the [Senate] pages sitting behind you,' Barker said.")

¹¹⁷ See Laura Bassett, *Bob McDonnell, Virginia Governor, Didn't Realize Ultrasound Bill Mandated Invasive Procedure*, HUFFINGTON POST (Feb. 24, 2012, 10:34 PM), http://www.huffingtonpost.com/2012/02/24/va-governor-bob-mcdonnell_n_1299348.html.

¹¹⁸ See Vozzella & Kumar, *supra* note 116 (quoting Bob Holsworth, commentator and former Virginia Commonwealth University political science professor).

¹¹⁹ Press Release, Governor Bob McDonnell, Statement of Governor Bob McDonnell on SB 484 (Feb. 22, 2012), *available at* <http://www.governor.virginia.gov/news/viewrelease.cfm?id=1148>.

this is all the more clear when analyzing passage of similar laws in other states; opponents raised little or no protest to laws with substantially similar requirements. Virginia's transvaginal ultrasound legislation was the first to cause a national groundswell of opposition, which successfully encouraged state lawmakers to amend the bill.

1. *Negative and Positive Impacts of "Rape" Designation*

Despite pro-choice advocates' success in publicizing this legislation by using the term "rape," it is possible that such rhetoric could have a detrimental effect, both on individuals and on the cause against rape in general. By likening an uncomfortable but nonviolent penetration performed by a trusted healthcare professional in a sterile environment to any of the myriad scenarios in which rapes occur, it is possible that rape survivors will feel the significance of their horrible experiences diminish. Along those same lines, if the image that society attaches to rape becomes one of sterile doctors' offices and nonviolent penetration, it is possible that messaging and agendas against rape will not carry as much weight or allow for the powerful advocacy that those campaigns need. It could be argued that the experience of rape will be minimized in the public eye if this medical procedure becomes the image associated with rape.

At the same time, though, it is important to think about those individual women who undergo transvaginal ultrasound procedures against their will. The government intrudes into a woman's decisionmaking process when any sonogram, waiting period, counseling, or other politically motivated obstruction tactic is foisted upon her as she seeks an abortion. As discussed above, this is already a paternalistic imposition that denies women responsibility and autonomy. One Texas woman who endured the effects of a mandatory ultrasound law had this to say about the tactic: "Abortion. Abortion. Abortion. That ugly word, to pepper that ugly statement, to embody the futility of all we'd just endured. Futile because we'd already made our heartbreaking decision about our child, and no incursion into our private world could change it."¹²⁰ This woman's reaction speaks to the experience of being subjected to medically unnecessary but legally required procedures. Beyond the emotional difficulties that come with added time, costs, and procedures (on top of the emotional difficulty inherent in the abortion itself), the physical experience of the transvaginal ultrasound will likely exacerbate a woman's emotional and physical pain.

One reporter voluntarily underwent a transvaginal ultrasound to understand the experience; she was neither pregnant nor a rape victim, but this was her response: "It was uncomfortable to the point of being painful,

¹²⁰ Jones, *supra* note 93.

emotionally triggering (and undoubtedly is moreso for victims of rape or incest or any woman in the midst of an already-emotional experience) and something that no government should force its citizens to undergo to make a political point.”¹²¹ As advocates, however, attorneys and legislators should examine this procedure from the perspective of women who *are* victims of rape: first these women were subjected to at least one instance of unwanted penetration, then they likely also had similarly invasive rape-kit tests performed, and finally they would be required to go through a viscerally similar procedure yet again. While rape may not be the best term to use, it is important that the insidious, invasive procedure that has no medical relevance be given a label that is not as benign as “ultrasound.”

VI. CONCLUSION

While this argument cannot carry mandatory transvaginal ultrasound procedures all the way through criminal prosecution, such a shortcoming does not render incorrect the theoretical discussions asserting that mandatory transvaginal ultrasounds are a form of rape. “Much of our personal identity is tied to our gender and sexual expression and hence to our sexual self-determination.”¹²² Because of the importance of sexual self-determination, it is critical that legislators not seize control over sexual organs in order to make political statements. While mandatory transvaginal ultrasounds do not fit neatly into many states’ rape statutes, it appears that the purpose, practice, and harm that come from imposing the procedure on women seeking abortions carry the gravity and social significance of rape. Even if the rhetoric of rape is too harsh, too violent, or too sacred to be applied to state-mandated transvaginal ultrasounds, it is critical that the public acknowledges the oppression and denial of self-determination and personal physical integrity that these statutes create in our country.

Rape is a crime, and its meaning is deeply connected to criminal law, but the evolution of rape theory and the importance of rape rhetoric in debates about mandatory transvaginal ultrasounds demonstrates that rape is also a societal construction and a tool for drawing reproach. In these contexts, if not the criminal law, mandatory transvaginal ultrasounds are rape.

¹²¹ Megan Carpentier, *I Had a Transvaginal Ultrasound: My Perspective on the Mandate That Touched Off 2012’s War on Women*, RAW STORY (Apr. 17, 2012, 3:37 PM), <http://www.rawstory.com/rs/2012/04/17/i-had-a-transvaginal-ultrasound-my-perspective-on-the-mandate-that-touched-off-2012s-war-on-women> (stating also that despite her negative experience, the author would not liken her voluntary transvaginal ultrasound to rape).

¹²² See MCGREGOR, *supra* note 72, at 224.

