

CONSENT

## Pelvic exams performed without patients' permission spur new legislation

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Ashley Weitz didn't expect a pelvic exam when she went to the emergency room for uncontrolled vomiting.

It was 2007, and the doctors in the Utah emergency room couldn't tell what was wrong, despite multiple tests. The attending physician was trying to discharge Weitz when she

vomited again. Instead, he gave her Phenergan, a drug they'd been hoping to avoid because it has a powerful sedative effect. She passed out.

She woke up screaming, with her feet in stirrups and the doctor's hand in her vagina. The doctor was looking for signs of a sexually transmitted infection, but Weitz, who says she was a "really good 23-year-old Mormon girl" at the time, had insisted that it wasn't possible. He did the exam anyway—and he didn't ask for permission.

That's how Weitz ended up testifying before the Utah Senate earlier this year in favor of a bill that forbids medical examination of pelvic areas without the patient's express consent.

"I am a survivor of childhood sexual abuse. And some of the discussion during committee hearings on this in Utah included the question 'Is this assault?' " says Weitz, now in her mid-30s and an advocate for trauma survivors. "I can tell you from experience that it absolutely triggered my past and itself was a violation."

The Utah bill passed—and so did a similar bill in Maryland. Other such bills were introduced this year in Connecticut, Massachusetts, New Hampshire and New York. All of them are aimed at stopping the practice of performing pelvic exams on unconscious women, often by medical students learning the exams. Having students involved in care is routine at teaching hospitals, and patients are typically told students will be involved in their care. Pelvic exams under anesthesia are considered a great training tool, since conscious patients may tense up and make the area harder to feel.

But some institutions don't obtain fully informed consent for the procedures—they don't ask at all, believing it's enough to say students might be involved in the care, or they put it in the form but don't call attention to it. And patients knocked out for surgery may not even know what happened to their bodies. As Weitz notes, that makes the practice seem more like a sexual assault than a form of medical education.

Proponents say the bills are necessary to stop doctors from glossing over the "informed" part of informed consent, the legal standard for medical treatment, and make sure patients have control over what happens to their own bodies. But the Connecticut and New Hampshire bills failed, in part, thanks to opponents who say the concerns are exaggerated and the proposed laws would regulate doctor-patient relationships so closely that they could inadvertently stop doctors from providing necessary care.

"It seems like it should be an easy question to resolve. Women are performing a valuable

service,” says professor Robin Fretwell Wilson of the University of Illinois College of Law, who has followed the issue for many years. “But the question is whether you should have to ask, and I think the answer is ‘yes.’ ”

## **Who’s affected?**

Informed consent is a cornerstone of medical ethics and codified by state laws. Failing to get it can be grounds for a personal injury lawsuit, not to mention professional discipline from state medical regulators. In extreme cases, it can even be the basis of criminal battery charges.

“I would be very surprised to run across a state that didn’t have that sort of a law,” says Robyn Shapiro from the ABA’s Health Law Section and a former director of the Center for Bioethics and Medical Humanities at the Medical College of Wisconsin.

Nonetheless, articles started popping up in 2018 suggesting that informed consent was being skipped for pelvic exams on women about to go into surgery at teaching hospitals. Many articles referenced a 2018 article in the medical journal *Bioethics* by ethicist Phoebe Friesen, arguing that such exams are “immoral and indefensible.”

That may have kicked off the press attention and led to the round of bills in 2019. As of June, the Utah and Maryland laws had brought the total number of such laws to eight, joining laws in California, Hawaii, Illinois, Iowa, Oregon and Virginia. Some of those laws are the results of previous rounds of public concern.

Wilson says the exams are typically performed on women who are heading into obstetric or gynecological surgery, but she’s heard of a few cases where students or doctors practiced pelvic exams on someone awaiting nongynecological surgery. The practice of unconsented exams largely pertains to women, though the Utah and Maryland laws are gender-neutral.

The practice also disproportionately affects the poor and people of color, Wilson says, because they are more likely to use teaching hospitals. That “concentrate[s] the costs of that training on a handful of people,” she adds.

Wilson concedes that doctors genuinely need to do a pelvic exam before obstetric and gynecological surgery in order to understand the patient’s body. But that’s one exam, and part of the debate is about whether it’s acceptable to have one or more medical learners—a catchall term for students and medical residents—do the same exam directly afterward for practice.

By design, patients don't usually recall what happens to them under anesthesia, and the extra pelvic exams don't carry any extra cost that might show up on a bill. This has severely limited lawsuits on the topic.

A further limitation, according to Wilson, is that battery isn't medical malpractice, which means the insurance typically carried by doctors won't cover any payout.

## **Best practices**

Perhaps because of this, medical students have raised some of the loudest objections to this practice. Concerns from a Canadian medical student in 2007 led his sister, Dr. Sara Wainberg, to conduct a survey showing that patients having pelvic floor surgery in Calgary mostly didn't realize the exams might happen. Another then-student, Shawn Barnes, published an essay in the journal *Obstetrics & Gynecology* in 2012 advocating for express consent.

Dr. Laura Baecher-Lind, director of Women's Care of Tufts Medical Center in Boston, says it's significant that medical students have provided most of the data behind the public discussion of this issue. Students who are asked to do the exams on the day of surgery may not have been in the room when the surgeon discussed the procedure with the patient and got consent, she says.

In fact, Baecher-Lind says that in response to the public conversation about consent, students at Tufts led an effort earlier this year to revise the standard informed consent form for her department. The form now includes "exam under anesthesia" preprinted on the line where doctors discuss the specific surgical procedure.

She says this was just formalizing a practice that was already standard at Tufts. Similarly, doctors and medical organizations who testified before state legislatures about pelvic exam bills universally said the laws would be redundant to standard practices in place.

Matthew Houde, vice president for government relations at Dartmouth-Hitchcock Medical Center, also told the New Hampshire legislature that there could be unintended consequences.

"You simply cannot enumerate all the circumstances and situations where a pelvic exam might be necessary," he says. "Therefore, the concern is that unless you capture all those scenarios, you actually are impeding what's best for the patient."

## **Full disclosure**

Baecher-Lind says at Tufts, doctors explain the exams orally in addition to putting them on the consent form. That's also the case at the University of Utah Hospital in Salt Lake City, says Dr. Bob Silver, who chairs that hospital's department of obstetrics and gynecology.

But Wilson isn't sure pelvic exams under anesthesia are as discontinued as teaching hospitals suggest. She's particularly concerned about community hospital systems that serve areas far from the main branch and may not be under strict oversight.

Baecher-Lind worries the mere existence of a law on pelvic exams could scare patients out of coming to doctors in the first place.

But Weitz says her experience in the ER has deterred her from seeking treatment. "I have gone without care when I haven't been able to ensure that I would be safe."

The new Utah bill is aimed at giving patients like Weitz a little more control. Though Silver says it won't change his department's practices, he says it will change the paperwork with a separate consent form with an explicit consent request.

Weitz says she would welcome that kind of change. "[That's] the whole point of my testifying. It's the whole point of my trying to be as loud as I can about this," she says.

*This article first appeared in the September-October 2019 issue of the ABA Journal under the headline "Examined While Unconscious: Informed consent requirements are before state legislatures due to an uproar about pelvic exams performed under anesthesia."*

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