March 1, 2020

BY EMAIL

Public Health Committee Public Hearing for SB-243

Re: 2020 Session SB-243 Testimony - An Act Prohibiting An Unauthorized Pelvic Examination on a Female Patient Who is Under Deep Sedation or Anesthesia or Unconscious

Dear Members of the Public Health Committee:

We are students at the University of Illinois in Urbana-Champaign (UIUC). One of us, Ashley Chong, is a law student and a Public Interest Ambassador for the Epstein Health Law and Policy Program[1] at the University of Illinois College of Law. One of us, Roxana Madani, an undergraduate at UIUC, serves as a Public Interest Liaison for the Epstein Health Law and Policy Program.

We write to urge the members of the Connecticut State Senate to support Senate Bill 243, which prohibits licensed physicians and medical students from performing intimate pelvic examinations[2] on sedated, anesthetized, or unconscious patients save for three exceptions: (1) informed consent has been expressly received; (2) the examination is within the scope of the surgical procedure; or (3) the examination is required for diagnostic purposes on the unconscious patient.[3]

The passage of Senate Bill 243 will foster norms of autonomy and respect for all persons so that patients are not treated as a means to an end. As we show below, requiring explicit consent for pelvic examinations will secure female patients' dignity without endangering the quality of medical education in Connecticut. Patients are at their most vulnerable when unconscious and receiving care—they deserve our respect.

Part A of this testimony applauds this legislation, explaining that its passage would place Connecticut within the current growing movement of states granting patients the respect and autonomy to decide whether they want medical students to perform intimate exams for the students' learning. Part B rebuts the claim that legislators should not act because such unconsented exams do not occur with evidence of the extent of the practice. Part C describes legislative and professional medical organizations' responses; there is a consensus that such intimate exams should not occur without consent. Parts E, F, and G refute common justifications for performing pelvic exams without consent.

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[1] The Epstein Health Law and Policy Program promotes engagement on critical issues in health care delivery and health status, including questions of informed consent and respect for patients. The Epstein Program is co-directed by Professor Robin Fretwell Wilson, who has written extensively about consent to medical teaching. For more details about the Epstein Health Law and Policy Program, see https://www.epsteinprogram.com/home.

[1] [2] *See generally* MAYO CLINIC, Pelvic Exam, https://www.mayoclinic.org/tests-procedures/pelvic-exam/about/pac-20385135 (last visited Feb. 26, 2020).

[3] S.B. 234, 2020 Leg., Sess. (Conn. 2020).

A. Senate Bill 243 Will Provide Crucial Protections

Passage of Senate Bill 243 would place Connecticut within a growing number of states to require healthcare providers and students to ask women for their permission before using them as teaching tools. California, Hawaii, Illinois, Iowa, Oregon, Virginia, Maryland, Utah, Delaware, and most recently New York in October 2019 all require explicit informed consent for pelvic examination performed unconscious patients.[4]

Similarly to the laws of those states, Senate Bill 243 prohibits "[a] physician licensed pursuant to chapter 370 of the general statutes, student in a medical school participating in a course of instruction or person participating in a residency program or clinical training program" from performing a pelvic examination on a sedated, anesthetized, or unconscious female patient with three exceptions.[5]

In the American Bar Association Journal, the former director of the Center for Bioethics and Medical Humanities at the Medical College of Wisconsin, Robyn Shapiro, commented, "I would be very surprised to run across a state that didn't have that sort of a law."[6] Connecticut has tried to pass a bill previously and still does not have this law that ensures crucial protections.

B. Extent of Unauthorized Use of Patients for Teaching

Some reflexively assume that unconsented exams could never occur. Medical educations and hospital administrators contend that laws expressly requiring informed consent are unnecessary. True, it is difficult to prove the frequency at which unconsented pelvic exams occur nationwide. By its very nature, intimate exams are difficult for patients to police when they are unconscious or anesthetized. Moreover, asking medical students to act as whistleblowers is unfair because teaching faculty possess significant control over their futures. In spite of these obstacles, a growing body of evidence and testimony demonstrates that this belief is simply false.

For one, McGill University Bioethics Professor Phoebe Friesen explains in companion testimony that medical students report being instructed to perform pelvic examinations without the patients' knowledge and specific consent.

For another, experience shows that unauthorized exams continue across the United States. The New York Times recently featured an article including testimonies of medical students, patients, and people who have been working to halt the disturbing practice.[7] Sarah Wright of Wisconsin concluded that someone had entered her most intimate area with their hands or an instrument while she was vulnerable and unconscious on an operating table—she was given a diagnosis of extreme vulvar sensitivity after an abdominal operation that should not have affected her sexual organs.[8] In testimony to the Utah

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[4] *See infra* Part C. *See also* EPSTEIN HEALTH LAW AND POLICY PROGRAM, *Unauthorized Pelvic Exams: Public Engagement Initiative*, https://www.epsteinprogram.com/pelvic-exams (last visited Feb. 26, 2020).

[5] Senate Bill 243. *Compare* CAL. BUS. & PROF. CODE § 2281 (2010) ("A physician and surgeon or a student undertaking a course of professional instruction or a clinical training program, may not perform a pelvic examination on an anesthetized or unconscious female patient unless the patient gave informed consent to the pelvic examination, or the performance of a pelvic examination is within the scope of care for the surgical procedure or diagnostic examination to be performed on the patient or, in the case of an unconscious patient, the pelvic examination is required for diagnostic purposes").

[6] Lorelei Laird, *Pelvic exams performed without patients' permission spur new legislation,* AMER. BAR. ASSN. J. (Sept. 1, 2019, 1:50 AM), http://www.abajournal.com/magazine/article/examined-while-unconscious.

[7] Emma Goldberg, *She Didn't Want a Pelvic Exam. She Received One Anyway.* NYT (Feb. 17, 2020), https://www.nytimes.com/2020/02/17/health/pelvic-medical-exam-unconscious.html.

[8] *Id.*

Senate Health and Human Services Committee, Ashley Weitz, testified that she had been subjected to an unauthorized pelvic exam while sedated in the emergency room.[9] Medical students from Duke and other institutions say that they have been asked to do exams without consent.[10] Patients and medical students are coming forward to share that patients' bodies had been used without their consent.

Empirical studies show that the practice is not uncommon. For example, a 2005 regional survey held at the University of Oklahoma found that the vast majority of junior and senior medical students had performed pelvic examinations on anesthetized gynecologic surgery patients; nearly 75% of the students believed that the patients had not consented to the teaching procedure.[11] In 2003, 90% of five Philadelphia medical school students had performed pelvic examinations on anesthetized patients during their obstetrics/gynecology rotation.[12] As early as 1992, 37.3% of American and Canadian medical schools reported to using anesthetized patients to teach students how to perform pelvic examinations.[13]

Given the fast-paced nature of medical education and teaching on the floor, hospital administrators may simply be unaware if teaching faculty or specific students do not ask for informed consent. Furthermore, the rise of community teaching hospitals outside the purview of the medical school and principal teaching hospitals makes it difficult to ensure consent through norms and internal practices. Thus, Senate Bill 243 is necessary to ensure that the practice of specific informed consent for intimate pelvic examinations is observed everywhere.

Significantly, some Connecticut healthcare facilities have shown leadership in adopting informed consent policies. [14] Senate Bill 243 would build on this leadership, ensuring specific consent uniform across Connecticut.

C. The Legislative and Professional Response

Ten states have enacted legislation requiring explicit informed consent for pelvic examinations unconscious or anesthetized patients. [15] In 2019, eighteen states introduced bills responding to the widespread use of patients; four were signed into law.[16] In 2020, fifteen states have introduced similar bills.[17]

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[9] Laird, *supra* note 6.

[10] ASSOCIATED PRESS, *Bills seek special consent for pelvic exams under anesthesia* (May 12, 2019, 10:24 AM), https://www.savannahnow.com/zz/news/20190512/bills-seek-special-consent-for-pelvic-exams-under-anesthesia/1.

[11] Schniederjan S & Donovan GK, *Ethics Versus Education: Pelvic Exams on Anesthetized Women*, 98 J. OKLA. STATE MED. ASS'N, 386, 386–88 (2005).

[12] Peter A. Ubel et al., *Don't Ask, Don't Tell: A Change in Medical Student Attitudes After Obstetrics/Gynecology Clerkships Toward Seeking Consent for Pelvic Examinations on an Anesthetized Patient*, 635635 AM. J. OBSTETRICS & GYNECOLOGY 575, 579 (2003).

[13] Charles R. B. Beckmann et al., *Gynaecological Teaching Associates in the 1990s*, 26 MED. EDUC. 105, 106 (1992).

[14] *See e.g.*, UCONN HEALTH, *Policy: Informed Consent, Clinical – Obtaining and Documenting*, Policy Number 2015-03 (May 9, 2017), https://health.uconn.edu/policies/wp-content/uploads/sites/28/2017/06/2015-03-Informed-Consent-Clinical-Obtaining-Documenting.pdf ("Informed consent is an interaction between a patient or legal representative and a provider in which the nature of the illness and purpose of the procedure is discussed and an opportunity for questions is allowed.").

[15] *See* Va. Code Ann. § 54.1-2959 (2010); 410 ILCS 50/7 (2010); Cal Bus & Prof Code § 2281 (2010); Oregon Rev. Stat. § 676.360; Haw. Rev. Stat. § 453-18.

[16] *See* EPSTEIN HEALTH LAW AND POLICY PROGRAM, *supra* note 1.

[17] *Id.*

This legislation reflects the consensus of American professional medical organizations that intimate pelvic examinations should not be performed as teaching tools without explicit consent.[18] The American Association of Medical Colleges, which represents 125 accredited U.S. medical schools and 400 teaching hospitals, described "pelvic examinations on women under anesthesia, without their knowledge and approval ... [as] unethical and unacceptable."[19]

Likewise, the American College of Obstetricians and Gynecologists ruled that patients should retain autonomy and decide whether they choose to interact with medical students.[20] More specifically, the Committee on Ethics declared that "Pelvic examinations on an anesthetized woman that offer her no personal benefit and should be performed only with her specific informed consent before surgery."[21]

As the next Parts of this letter demonstrate, however, some teaching faculty offer a number of justifications for not asking patients for permission—justifications that simply do not withstand scrutiny.

D. Patients Have Not Implicitly Consented to Intimate Educational Exams

The first justification advanced for not obtaining specific consent for educational pelvic examinations is that patients have implicitly consented to accept care at teaching facilities.

Empirical evidence suggests that many patients do not know that they are in a teaching facility. For example, one study discovered that 60% of patients at a teaching hospital in Great Britain did not know that they were at a teaching hospital until they met medical students during treatment.[22] Indeed, in the United States, facilities give varying degrees of their teaching status. Some hospitals, like Yale New Haven Hospital,[23] indicate their medical affiliation in their name. However, the majority of the 400

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[18] *See* American College of Obstetricians and Gynecologists Committee on Ethics, Professional Responsibilities in Obstetric-Gynecologic Medical Education and Training, Ruling No. 500 (August 2011), http://www.acog.org/~/media/Committee%20Opinions/Committee%20on%20Ethics/co500.ashx?dmc=1&ts=20120112T1021153539; Joint Statement of The Association of Academic Professionals in Obstetrics and Gynaecology of Canada and Society of Obstetricians and Gynaecologists of Canada, No. 246 (Sept. 2010) ("[P]atient autonomy should be respected in all clinical and educational interactions. When a medical student is involved in patient care, patients should be told what the student's roles will be, and patients must provide consent. Patient participation in any aspect of medical education should be voluntary and non-discriminatory.").

See also Eli Y. Adashi, *Teaching Pelvic Examination Under Anesthesia Without Patient Consent*, JAMA FORUM (Jan. 16, 2019), https://newsatjama.jama.com/2019/01/16/jama-forum-teaching-pelvic-examination-under-anesthesia-without-patient-consent/ ("Viewed in hindsight, it is difficult to see how the conduct of unapproved pelvic examinations by medical students could have been rationalized, let alone condoned.").

[19] AM. ASS'N OF MED. COLLS., *AAMC Statement on Patient Rights and Medical Training* (June 12, 2003).

[20] American College of Obstetricians and Gynecologists Committee on Ethics, Professional Responsibilities in Obstetric-Gynecologic Medical Education and Training, Ruling No. 500 (August 2011), http://www.acog.org/~/media/Committee%20Opinions/Committee%20on%20Ethics/co500.ashx?dmc=1&ts=20120 112T1021153539 ("Respect for patient autonomy requires patients be allowed to choose to not be cared for or treated by [medical student] learners when this is feasible.").

[21] *Id.*

[22] D. King et al., *Attitudes of Elderly Patients to Medical Students*, 26 MED. EDUC. 360 (1992) (reporting on results of survey, prior to discharge, of patients whose average age was 80 years old).

[23] YALE SCHOOL OF MEDICINE, *Training Hospitals*, https://medicine.yale.edu/surgery/education/program/hospitals/ (last visited Feb. 25, 2020).

members of the Council of Teaching Hospitals and Health Systems – more than 75% – do not contain the word "college" or "university" in their name.[24]

Even still, Yale School of Medicine's other training hospitals, including Bridgeport Hospital and the Veterans Administration Connecticut Health Care System, do not immediately suggest any affiliation to tip patients off of their status as a teaching hospital.[25]

While a hospital's name or website may not immediately relay its teaching mission to patients, physical proximity may give patients construct notice of a hospital's teaching status. For example, a patient may know that New-York Presbyterian is a teaching hospital affiliated with the Columbia Medical University College of Physicians & Surgeons because the facilities are located sixty feet apart.[26] However, patients at the 50 facilities associated with Columbia's medical school throughout New York, Connecticut, and New Jersey cannot possibly be on constructive notice.[27]

The same holds true for patients and teaching facilities in Connecticut. Consider the Frank H. Netter MD School of Medicine which boasts partnerships with hospitals health care centers in New England and Florida.[28] This medical school offers training at locations such as Jewish Senior Services (Fairfield, CT), ProHealth Physicians (Farmington, CT), Sacred Heart Healthy System (Pensacola, FL), and Northern Maine Medical Center (Fort Kent, ME).[29]

E. Patients Have Not Explicitly Consented to Intimate Educational Exams

Additionally, teaching faculty justify current practices because the patient consented upon admission to a teaching facility.[30] This claim takes two forms. In one, the pelvic exam is an ordinary part of the consented surgery. In the second, the pelvic exam is encompassed in consent for additional, related procedures.[31]

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[24] AAMC HOSPITAL/HEALTH SYSTEM MEMBERS, *Council of Teaching Hospitals and Health Systems, https*://members.aamc.org/eweb/DynamicPage.aspx?site=AAMC&webcode=AAMCOrgSearchResult&orgtype=Hospital/Health%20System (last visited Feb. 25, 2020).

[25] YALE SCHOOL OF MEDICINE, *supra* note 24.

[26] New York-Presbyterian, The University Hospital of Columbia and Cornell is the primary teaching hospital of Columbia University College of Physicians & Surgeons and the Weill Medical College of Cornell University. *See* New York-Presbyterian, The University Hospital of Columbia and Cornell website at http://www.nyp.org https://members.aamc.org/eweb/DynamicPage.aspx?site=AAMC&webcode=AAMCOrgSearchResult&orgtype=Hospital/Health%20System. This full title appears on the exterior building and on all hospital publications. Personal communication with Cathy Thompson, Office of Public Affairs & Media, Columbia-Presbyterian Medical Center. (Oct. 29, 2003) (on file with Robin Fretwell Wilson).

[27] NEW YORK PRESBYTERIAN HEALTH SYS., *About Us*, https://www.nyp.org/about-us. (noting that "In collaboration with two renowned medical schools, Weill Cornell Medicine and Columbia University College of Physicians and Surgeons, New York-Presbyterian is consistently recognized as a leader in medical education, groundbreaking research, and innovative, patient-centered clinical care.").

[28] QUINNIPIAC, *Clinical Partners*, https://www.qu.edu/schools/medicine/clinical-partners.html (last visited Feb. 26, 2020).

[29] *Id.*

[30] AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS (ACOG), COMM. OPINION 181: ETHICAL ISSUES IN OBSTETRIC-GYNECOLOGICAL EDUCATION 2 (1997).

[31] *See e.g.*, Michael Ardagh, *May We Practise Endotracheal Intubation on the Newly Dead?*, 23 J. MED. ETHICS 289, 292 (1997) (making this observation with respect to practicing resuscitation procedures on the recently deceased); A.D. Goldblatt, *Don't Ask, Don't Tell: Practicing Minimally Invasive Resuscitation Techniques on the Newly Dead*, 25 ANNALS EMERGENCY MED. 86, 87 (1995) (analogizing to "construed consent," which authorizes related tests or diagnostic procedures).

Simple contract interpretation strikes down both arguments. In the typical consent form, patients will:

> [A]gree and give consent to [teaching hospital], its employees, agents, the treating physician ... medical residents and Housestaff to diagnose and treat the patient named on this consent to any and all treatment which includes, but might not be limited to ... examinations and other procedures related to the routine diagnosis and treatment of the patient.[32]

The typical admission form authorizes care for the patient's benefit. It does not expressly authorize care for educational purposes. Thus, the consent form only encompasses the treatment a patiently reasonably expects to receive that will directly benefit herself.

F. Exaggerated Fears of Widespread Refusal

Some members of the medical community contend that women will refuse to consent to educational intimate exams. This fear is misplaced, defeated by studies that show the opposite. "Hypothetical" studies – studies in which patients are asked how they would respond in a given situation – and studies of actual women during real exams show that women will consent to pelvic examinations for educational purposes so long as they are asked.

A 2010 Canadian survey found that 62% of respondents would consent to medical students performing pelvic examinations; only 14% would outright refuse.[33] A parallel study in the United Kingdom found that 46% of respondents in an outpatient would not object, and only 5% would refuse in the private practice setting.[34] A 2000 American study reported that 61% of outpatients would either definitely allow or probably allow educational pelvic examinations.[35]

Even more women consent to examinations before surgery. In one study in the United Kingdom, 85% of patients awaiting surgery consented to educational exams by students while the patient was under anesthesia.[36] These studies involved *actual patients* giving *actual consent* to *real exams* by *real students*. Responding to hypothetical questions, more than half of the patients surveyed in another study (53%) would consent or were unsure if they would consent to pelvic exams, if asked prior to surgery.[37]

G. Conclusion

Protecting women's autonomy even in medical teaching facilities is crucial. Otherwise, many will be reduced to being "medical practice dummies" without their permission or knowledge. Such treatment should not occur. Instead, patients will gladly consent if asked.

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[32] Palmetto Health Richland, *About Prisma Health*, https://www.palmettohealth.org/patients-guests/about-prisma-health (last visited Feb. 25, 2020).

[33] S. Wainberg et al., *Teaching pelvic examinations under anaesthesia: what do women think?*, 32 J. OBSTET. GYNAECOL. CAN. 49 (2010).

[34] Lawton et al., *Patient Consent for Gynaecological Examination*, 44 BRIT. J. HOSP. MED. 326, 326, 329 (1990) (discussing J. Bibby et al., *Consent for Vaginal Examination by Students on Anaesthetised Patients*, 2 LANCET 1150, 1150 (1988)).

[35] Peter A. Ubel & Ari Silver-Isenstadt, *Are Patients Willing to Participate in Medical Education?,* 11 J. CLINICAL ETHICS 230, 232–33 (2000).

[36] Lawton, *supra* note 35, at 329.

[37] Ubel & Silver-Isentadt, *supra* note 36, at 234.

Senate Bill 243 will bring Connecticut to the forefront of the movement in states to give women dignity and autonomy. Not only will it affirm their dignity; it will also build trust in the healthcare system.

Respectfully Yours, [38]

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[38] We write in our individual capacities and our university takes no position on this or any other bill.