March 11, 2019

BY EMAIL

Assembly Health and Senate Health Committees
New York State Legislature
Albany, New York

Re: Senate Bill 1092/Assembly Bill 6325, Relates to requiring consent to perform a pelvic examination on an anesthetized or unconscious person

Dear Committee Member:

We write to urge you to support Senate Bill 1092/Assembly Bill 6325, which prohibits intimate pelvic examinations[1] on female patients, for medical teaching purposes, *without the patient's consent*. The passage of Senate Bill 1092/Assembly Bill 6325 will ensure that norms of autonomy and respect for all persons are honored. The passage of this bill will ensure that those who are capable of consenting are not treated as a means to an end. As we explain below, requiring explicit consent for intimate exams guarantees the dignity and respect that female patients deserve *without* jeopardizing the quality of medical education in New York.

Part A of this letter applauds this important legislation, the passage of which would place New York at the forefront of an emerging trend among states to disclose forthrightly the educational nature of practice procedures and require those performing such procedures to ask for permission. Part B details the extent of intimate examinations for medical training without the patient's consent. Part C describes legislation in four states that proscribes unauthorized educational pelvic examinations. The consensus of medical ethics groups is that such intimate exams should not occur without consent. Parts D, E, and F refute a number of common justifications for performing such intimate exams without permission. Specifically, Parts D and E rebut the unfounded justification that women have impliedly or expressly consented upon admission to the hospital. Part F shows empirically, that when asked patients consent to practice exams in overwhelming numbers and consequently, should be enlisted as "respected partners" [2] in medical teaching.

A. Senate Bill 1092/Assembly Bill 6325 Would Provide Crucial Protections

Passage of Senate Bill 1092/Assembly Bill 6325 would place New York at the forefront of an emerging legislative trend among states, requiring healthcare providers to ask permission before using a patient as a tool to teach intimate exams. Virginia, California, Hawaii, Illinois, Iowa, and Oregon all now require explicit consent for pelvic examinations performed on unconscious patients for teaching purposes.[3]

Like the laws of those states, Senate Bill 1092/Assembly Bill 6325 prohibits pelvic examinations on a patient unless she gives prior informed consent, except when the "examination is within the scope of the

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[1] *See generally* Mayo Clinic, Pelvic Exam, https://www.mayoclinic.org/tests-procedures/pelvic-exam/about/pac-20385135.

[2] Jennifer Goedken, *Pelvic Examinations Under Anesthesia: An Important Teaching Tool*, 8 J. HEALTH CARE L.& POL'Y 234, 235 (2005).

[3] See *infra* Part C.

surgical procedure or diagnostic examination to be performed on the patient" or "the pelvic examination is required for diagnostic purposes."[4]

B. The Extent of the Practice

Despite widespread ethical condemnation recognizing that "the practice of performing pelvic examinations on women under anesthesia, without their knowledge and approval [is] unethical and unacceptable,"[5] experience shows that unauthorized exams continue across the U.S. In her testimony to the Utah Senate Health and Human Services Committee, Ms. Ashley Weitz, testified that she had been subjected to an unauthorized pelvic exam while sedated in the emergency room. Similar accounts have been reported recently, including an incident in Arizona where a woman discovered she was subjected to an unauthorized pelvic exam after stomach surgery.[6] Staunch defenses in the media of unauthorized practices by teaching faculty confirm that patient consent is "not a pre-requisite" for many institutions.[7]

Empirical studies document the widespread nature of unauthorized pelvic examinations. In 2003, Peter Ubel and colleagues reported that 90% of medical students at five Philadelphia-area medical schools performed pelvic examinations on anesthetized patients for educational purposes during their obstetrics/gynecology rotation.[8] In 1992, Charles Beckmann reported that 37.3% of United States and Canadian medical schools reported using anesthetized patients to teach pelvic exams.[9] A study from the United Kingdom found that 53% of students at a single English medical school performed approximately 700 intimate examinations on anesthetized patients.[10] Students acted without any written or oral consent in 24% of the exams.[11]

C. The Legislative and Professional Response

In response to this widespread use of patients, six U.S. jurisdictions by legislation now require explicit consent for pelvic examinations on unconscious patients for medical teaching purposes.[12]

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[4] Senate Bill 1092/Assembly Bill 6325.

[5] Am. Ass'n of Med. Colls., AAMC Statement on Patient Rights and Medical Training (June 12, 2003).

[6] Robin Fretwell Wilson & Anthony Michael Kreis, *#JustAsk: Stop Treating Unconscious Female Patients Like Cadavers*, CHI. TRIB. (Nov. 30, 2018) https://www.chicagotribune.com/news/opinion/commentary/ct-perspec-pelvic-nonconsensual-exam-medical-students-vagina-medical-1203-story.html.

[7] Robin Fretwell Wilson, *Unauthorized Practice: Regulating the Use of Anesthetized Recently Deceased, and Conscious Patients in Medical Training*, 44 IDAHO L.REV. 423, 427 (2008) (presenting comments by faculty at George New York University Hospital, UCLA Medical Center, and the Medical University of South Carolina).

[8] 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*, 16 AM. J. OBSTETRICS & GYNECOLOGY 575, 579 (2003).

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

[10] Yvette Coldicott et al., *The Ethics of Intimate Examinations -- Teaching Tomorrow's Doctors*, 326 BRIT. MED. J. 97, 98 tbl. 2 (2003).

[11] *Id*. at 98.

[12] Va. Code Ann. § 54.1-2959 (2010) ("Students participating in a course of professional instruction or clinical

This legislation reflects the consensus of American professional medical organizations that healthcare providers should obtain explicit for intimate teaching exams.[13] In the "Statement on Patient Rights and Medical Training" in 2003, the American Association of Medical Colleges, which represents 125 accredited U.S. medical schools and over 400 teaching hospitals, described "pelvic examinations on women under anesthesia, without their knowledge and approval ... [as] unethical and unacceptable."[14]

In an August 2011 Committee on Ethics ruling, the American College of Obstetricians and Gynecologists affirmed that "[r]espect for patient autonomy requires patients be allowed to choose to not be cared for or treated by [medical student] learners when this is feasible."[15] The Ethics Committee ruling applied this ethical tenant to pelvic examinations specifically: "Pelvic examinations on an anesthetized woman that

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training program shall not perform a pelvic examination on an anesthetized or unconscious female patient unless the patient or her authorized agent gives informed consent to such examination, the performance of such examination is within the scope of care ordered for the patient, or in the case of a patient incapable of giving informed consent, the examination is necessary for diagnosis or treatment of such patient"); 410 ILCS 50/7 (2010) ("Any physician, medical student, resident, advanced practice nurse, registered nurse, or physician assistant who provides treatment or care to a patient shall inform the patient of his or her profession upon providing the treatment or care, which includes but is not limited to any physical examination, such as a pelvic examination. In the case of an unconscious patient, any care or treatment must be related to the patient's illness, condition, or disease"); 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"); Oregon Rev. Stat. § 676.360 ("(1) A person may not knowingly perform a pelvic examination on a woman who is anesthetized or unconscious in a hospital or medical clinic unless: (a) The woman or a person authorized to make health care decisions for the woman has given specific informed consent to the examination; (b) The examination is necessary for diagnostic or treatment purposes; or (c) A court orders the performance of the examination for the collection of evidence (2) A person who violates subsection (1) of this section is subject to discipline by any licensing board that licenses the person"); Haw. Rev. Stat. § 453-18 ("A physician, osteopathic physician, surgeon, or student participating in a course of instruction, residency program, or clinical training program shall not perform a pelvic examination on an anesthetized or unconscious female patient unless: (1) The patient gives prior verbal or written informed consent to the pelvic examination; (2) The performance of a pelvic examination is within the scope of care for the surgical procedure or diagnostic examination scheduled to be performed on the patient; or (3) The patient is unconscious and the pelvic examination is required for diagnostic purposes.").

[13] *See, e.g.*, Am. Ass'n of Med. Colls., AAMC Statement on Patient Rights and Medical Training (June 12, 2003); 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").

[14] Am. Ass'n of Med. Colls., AAMC Statement on Patient Rights and Medical Training (June 12, 2003).

[15] 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.

offer her no personal benefit and should be performed only with her specific informed consent before surgery."[16]

Teaching faculty offer a number of justifications for dispensing with the simple step of asking for permission[17] — justifications that simply do not withstand scrutiny, as the next Parts of this letter demonstrate.

D. Patients Have Not Implicitly Consented to Intimate Educational Exams.

The first justification that teaching faculty advance for not obtaining specific consent for educational pelvic exams is that patients have implicitly consented by accepting care at a teaching hospital. Empirical evidence suggests that many patients do not consciously chose teaching facilities or even know they are in one.

One study, for example, found that 60% of patients at a teaching hospital in Great Britain were unaware that they were at a teaching hospital until they encountered students for the first time.[18] Indeed in the U.S., an overwhelming number of facilities in the United States give little indication to prospective patients of the hospital's teaching status.[19] Public disclosure of hospitals' teaching status varies drastically. Some hospitals, like Duke University Medical Center[20] and New York-Presbyterian —The University Hospital of Columbia and Cornell,[21] indicate their medical school affiliation in their name. These two examples are exceptions to the rule, however. Of the approximately 400 members of the Council of Teaching Hospitals and Health Systems, only 94 -- less than 25% -- contain the word "college" or "university" in their name.[22]

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[16] *Id*.

[17] Robin Fretwell Wilson, *Unauthorized Practice: Regulating the Use of Anesthetized Recently Deceased, and Conscious Patients in Medical Training*, 44 IDAHO L.REV. 423, 427 (2008) (presenting comments by faculty at George New York University Hospital, UCLA Medical Center, and the Medical University of South Carolina).

[18] 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).

[19] Wilson, *supra* n. 17, at 432.

[20] *See, e.g.,* Duke University Medical Center website, at http://www.dukehealth.org. See also The University Hospital, University of Medicine & Dentistry of New Jersey website, at http://www.uhnj.org/; Johns Hopkins Hospital & Health System website, at http://www.hopkinsmedicine.org.

[21] 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 NewYork-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).

[22] 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.

While a hospital's name or website may not relay its teaching mission to patients, physical proximity to a medical school can, arguably, give patients constructive notice of a hospital's teaching status. It is reasonable to assume that a patient at New York-Presbyterian, located less than sixty feet from the Columbia Medical University College of Physicians & Surgeons, knows the facility is a teaching hospital.[23] But, patients at the 50 different facilities associated with Columbia's medical school located throughout New York, New Jersey, and Connecticut,[24] cannot possibly be on constructive notice.

E. Patients Have Not Expressly Consented to Intimate Educational Exams

Many teaching faculty assert that the patient has consented upon admission to a teaching facility.[25] This claim takes two forms: In the stronger form, teaching faculty assert that the student's pelvic exam is an ordinary component of the surgery to which the patient has consented.[26] A variant on this claim holds that if consent was obtained for one procedure, it encompasses consent for additional, related procedures.[27] This is just not so as a matter of contract interpretation. In a 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.[28]

The typical admission form authorizes care for the patient's benefit, not for student educational purposes.

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[23] Google Maps gives the distance from Columbia's location at 630 W. 168th Street to New York Presbyterian's location at 622 W. 168th Street as less than 0.01 miles,. maps.google.com.

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

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

[26] Liv Osby, *MUSC May Change Pelvic Exam Practice*, GREENVILLE NEWS (S.C.), Mar. 13, 2003 (quoting the OB/GYN clerkship director at the Medical University of South Carolina, who indicated that "no specific permission" is sought for educational pelvic exams and acknowledged, "maybe this is something we need to revisit").

[27] *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).

[28] Palmetto Health Richland, *About Prisma Health*, https://www.palmettohealth.org/patients-guests/about-prisma-health.

This authorization should encompass only the treatment that a patient would reasonably expect to receive when checking into a health care facility— treatment that provides the patient with a direct benefit to her.

F. Exaggerated Fears of Widespread Refusal

Some members of the medical education community argue that performing educational exams without specific consent is necessary. Their argument is essentially that “we can't ask you, because if we ask you, you won't consent.”

These fears are wholly misplaced. Study after study has shown that women will consent to pelvic examinations for educational purposes. These include not only “hypothetical” studies -- studies asking patients how they would respond if asked to do a variety of things -- but also studies of actual women giving actual consent to real exams.

A 2010 Canadian study found that 62% of women surveyed said they would consent to medical students doing pelvic examinations, 5% would consent for female students only, and only 14% would refuse.[29] A study in the United Kingdom found that 46% of women in outpatient care did not object to having students perform pelvic exams on them.[30] In a private practice setting, another study found refusal rates of approximately 5% to perform educational pelvic exams.[31] In yet another study, 61% of outpatients reported that they would definitely allow, probably allow, or were unsure whether they would allow a pelvic examination.[32]

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.[33] 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.[34]

G. Conclusion

Without adequate safeguards to protect the autonomy of women to consent to medical teaching, many will be reduced into acting as “medical practice dummies” without their permission. You should simply not allow such disrespectful treatment of patients who would gladly consent if only asked.

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

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

[31] Lawton, *supra* n. 38, at 329.

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

[33] Lawton, *supra* n. 38, at 329.

[34] Ubel & Silver-Isenstadt, *supra* note 40, at 234.

We welcome any opportunity to provide further information, analysis, or testimony to the New York Legislature.

Respectfully Yours,[35]

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[35] Academic affiliation is for identification purposes only. The universities that employ the signers take no position on this or any other bill.