

Testimony before the Senate Committee on Health

Senator André Jacque

September 27, 2023

Madam Chair and Colleagues, thank you for the opportunity to testify as the author of Senate Bill 127, the *Patient Privacy Protection Act*, which would require informed consent before performing a pelvic exam on a patient who is under general anesthesia or unconscious.

Historically, one practice of teaching medical students how to perform pelvic exams has been on unconscious, sedated patients undergoing gynecological medical procedures. This practice, however, for the sole educational benefit of a medical student, has often failed to obtain the specific, informed consent of the sedated patient.

Unfortunately and unbelievably, this practice continues at some hospitals, as detailed in a 2018 article in *Bioethics* and in anecdotal reports right here in Wisconsin. At certain hospitals, gynecological surgery patients under anesthesia continue to be used as practice tools for medical students, often without the patient's specific consent that they will be undergoing a pelvic exam by a medical student for solely educational purposes. This is a violation of a patient's rights and trust between patient and doctor, and directly ignores a patient's right to bodily autonomy.

Studies document the persistent nature of unauthorized pelvic examinations. A recent 2020 survey accepted to the 2021 Council on Resident Education in Obstetrics and Gynecology & The American College of Obstetricians and Gynecologists Annual Meeting reported that 83.6% of the medical students surveyed across five medical schools attached to large academic medical centers performed a pelvic exam on a patient under anesthesia. When asked how often patients were explicitly told that an educational pelvic examination would take place under anesthesia, only 17% of surveyed students replied "every time." Notably, 22.3% replied "rarely" and 20.3% replied "never."

In recent years, many women have felt empowered for the first time to discuss experiences of sexual assault and harassment. The practice of trauma informed care has emerged as an essential treatment tool in clinical settings to address the experience of trauma patients. This bill helps ensure compassionate practice and that the experiences and voice of the patient is respected.

Wisconsin's two medical schools either have a policy or are in the process of adopting a policy to require specific written consent before a pelvic exam may be performed by a medical student. This bill makes certain that all hospitals training and teaching medical students also abide by obtaining specific patient consent in these instances.

Under Senate Bill 127, hospitals must have and enforce a policy requiring written and verbal informed consent to be obtained from a patient before a medical student, a nursing student, any

person providing nursing care, or any other person authorized to perform pelvic examinations may perform a pelvic examination on a patient who is under general anesthesia or otherwise unconscious.

This legislation passed the Assembly Committee on Health unanimously last session as 2021 SB 127/AB 128, when it had strong bi-partisan co-sponsorship by more than 30 legislators and the formal support of the Wisconsin Nurses Association, Wisconsin Coalition Against Sexual Assault, Wisconsin Alliance for Women's Health and End Domestic Abuse Wisconsin. It also reflects the stated consensus of professional medical organizations that healthcare providers should obtain explicit consent for intimate teaching exams, including the American Association of Medical Colleges and the American College of Obstetricians and Gynecologists.

Wisconsin should join the list of 25 states that already require explicit consent for pelvic examinations on unconscious patients for medical teaching purposes. Female patients deserve to have their bodily integrity respected when they are unconscious and vulnerable during a medical procedure. Foregoing consent before educational intimate examinations leads to moral distress in medical students, and embedding explicit consent requirements into law will not threaten educational goals, as the majority of patients will consent to these examinations, and will improve the system of medical education, as students will leave their training with more respect for patient's bodies and knowledge of the importance of informed consent.

Thank you for your consideration of Senate Bill 127. I'd be happy to answer any questions.



JANEL BRANDTJEN

STATE REPRESENTATIVE • 22ND ASSEMBLY DISTRICT

Chairwoman Cabral-Guevara and Members,

SB 127 requires hospitals to implement and enforce a policy mandating written and verbal informed consent before a pelvic examination is performed on a patient who is under general anesthesia or otherwise unconscious. I firmly believe that this bill represents a critical step in upholding patient rights, ensuring ethical medical practice, and promoting transparency within our healthcare system.

Pelvic examinations are essential medical procedures, often performed for diagnostic or educational purposes. However, when conducted without the patient's explicit consent, particularly when the patient is unconscious or under anesthesia, it raises significant ethical and legal concerns. Patients should have the fundamental right to make informed decisions about their medical care, including the right to provide or withhold consent for any procedure performed on their bodies.

The key provisions of SB 127 are commendable and necessary for the following reasons:

1. **Patient Autonomy:** The bill upholds patients' right to make informed decisions about their medical care, even when they cannot provide consent at the moment.
2. **Protection Against Unwanted Procedures:** It guards against unauthorized pelvic examinations, preventing invasive procedures without explicit patient consent.
3. **Education and Accountability:** The bill promotes education on informed consent and establishes a framework for disciplinary actions against violators, fostering accountability within healthcare institutions.
4. **Enhancing Trust:** It reinforces trust between patients and healthcare providers, ensuring patients' dignity and consent are respected.
5. **Ethical Medical Practice:** SB 127 aligns with ethical medical principles, emphasizing patient-centered care and informed decision-making.

In conclusion, I believe that SB 127 is a crucial piece of legislation that will help protect patients' rights, uphold ethical standards in medicine, and strengthen the trust between patients and healthcare providers. I urge you to support and pass this bill, as it represents a significant step toward a more transparent, respectful, and patient-centered healthcare system.

Thank you for your attention to this important matter, and I hope to see this bill enacted into law for the benefit of all patients in our state.

State Representative Janel Brandtjen

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September 25, 2023

BY EMAIL

Re: SENATE SUBSTITUTE AMENDMENT 1 TO SENATE BILL 127

Dear Committee on Health:

We write to support Senate Substitute Amendment 1 to Senate Bill 127 (“Senate Substitute Amendment 1”) which would require “written informed consent” of patients “before a pelvic exam is performed ... solely for educational purposes while the patient is under general anesthesia or otherwise unconscious.”¹

The passage of Senate Substitute Amendment 1 will ensure that norms of autonomy for patients are honored and that patients are not treated as a means to an end. As we explain below, requiring written informed consent for pelvic exams done for teaching purposes guarantees the dignity and respect that patients deserve *without* jeopardizing the quality of patient care or medical education in Wisconsin.

Part A of this letter applauds this important bill, which if signed into law, would place Wisconsin as the 26th state in the nation to give patients the right to decide whether medical trainees will perform pelvic exams on them for the students’ learning. Part B addresses the claim that unconsented exams simply *no longer* occur in Wisconsin—I understand that you are hearing from Sarah Wright as a Wisconsin patient.² If unconsented exams occur, asking for specific consent gives patients the dignity and autonomy all patients deserve—and if teaching exams never occur without consent, Senate Substitute Amendment 1 still reinforces the norm that all patients should be respected in deciding what happens with their bodies. Part C details the extent of pelvic examinations for medical training without the patient’s consent. Part D documents the strong consensus of medical ethics groups is that such pelvic exams should not occur without explicit consent. Parts E, F, and G refute common justifications for performing such pelvic exams without permission. Specifically, Parts E and F rebut the unfounded justification that patients have impliedly or expressly consented upon admission to the hospital. Part G shows empirically, that when asked, patients consent to teaching exams in overwhelming numbers and consequently, should be enlisted as “respected partners”³ in medical teaching. Part H remarks on the thoughtful construction of the bill’s text.

¹ Senate Substitute Amendment 1 to Senate Bill 127,
https://docs.legis.wisconsin.gov/2023/related/amendments/sb127/ssa1_sb127.

² Emma Goldberg, *She Didn’t Want a Pelvic Exam. She Received One Anyway*, N.Y. TIMES (Feb. 17, 2020),
<https://www.nytimes.com/2020/02/17/health/pelvic-medical-exam-unconscious.html>.

³ Jennifer Goedken, *Pelvic Examinations Under Anesthesia: An Important Teaching Tool*, 8 J. HEALTH CARE L. & POL’Y 234, 235 (2005).

A. Senate Substitute Amendment 1 Would Provide Crucial Protections

To be clear, “the pelvic examination is a critical tool to aid in the diagnosis of women’s health conditions and remains an important skill necessary for students to master before becoming physicians.”⁴ The only question is: should patients have the ability to consent to such critical medical teaching.

Passage of Senate Substitute Amendment 1 would place Wisconsin within an emerging legislative trend to require healthcare providers to ask permission before using patients as tools for teaching pelvic exams. Arizona, Arkansas, California, Connecticut, Colorado, Delaware, Florida, Hawaii, Illinois, Iowa, Louisiana, Maine, Maryland, Montana, New Hampshire, New Jersey, New York, Oregon, Utah, Virginia, Washington, Texas, Rhode Island, Nevada, and most recently, Missouri all require explicit consent for pelvic examinations performed on unconscious patients for teaching purposes.⁵ Nineteen of these states enacted laws in the last fifty-six months. With the passage of Senate Substitute Amendment 1, Wisconsin has the opportunity to flip the map, making a majority of states that would require informed consent to educational pelvic exams. See Table 1.

**Table 1
Features of Enacted Pelvic Exam Legislation**

Table 1. Features of Proposed and Enacted Intimate Exam Legislation

Enacted Laws	Gender Neutral Language	Types of Exams Covered		Patients Protected		Regulates Educational Exams			Actors Regulated			Regulated Actions		
		Pelvic Exams Only	Pelvic Exams and Others	Anesthetized or Unconscious	Consent	Educational Only	Educational and Others	Other Exams Only	Trainees	Healthcare Professionals	Healthcare Systems*	Perform	Supervise**	Observe
MT HB 417 (2021)	✓		✓	✓				✓				✓	✓	
CO HB 1077 (2020)	✓		✓	✓				✓				✓	✓	
MO SB 106 (2020)	✓		✓	✓				✓				✓	✓	
CT HB 3278 (2022)	✓		✓	✓				✓				✓	✓	
NJ S1771 (2022)	✓		✓	✓				✓				✓	✓	
RI HB5544 (2021)		✓	✓	✓				✓				✓	✓	
NV SB 196 (2021)	✓		✓	✓				✓				✓	✓	
TX HB 1434 (2021)	✓		✓	✓				✓				✓	✓	
AZ SB 1017 (2021)	✓		✓	✓				✓				✓	✓	
AR HB 1137 (2021)	✓		✓	✓				✓				✓	✓	
NH HB 1630 (2020)	✓		✓	✓				✓				✓	✓	
VA SB 5282 (2020)	✓		✓	✓				✓				✓	✓	
ME LD 1948 (2020)	✓		✓	✓				✓				✓	✓	
LA HB 435 (2020)	✓		✓	✓				✓				✓	✓	
FL SB 696 (2020)	✓		✓	✓				✓				✓	✓	
NY SB 1062 (2019)	✓		✓	✓				✓				✓	✓	
DE HB 239 (2019)	✓		✓	✓				✓				✓	✓	
MD SB 609 (2019)	✓		✓	✓				✓				✓	✓	
VT SB 188 (2019)	✓		✓	✓				✓				✓	✓	
IL HB 313 (2017)	✓		✓	✓				✓				✓	✓	✓
IA HF 653 (2017)	✓		✓	✓				✓				✓	✓	
HI HB 2232 (2012)	✓		✓	✓				✓				✓	✓	
OR HB 2908 (2011)	✓		✓	✓				✓				✓	✓	
VA HB 2989 (2006)	✓		✓	✓			✓					✓	✓	
CA AB 663 (2003)	✓		✓	✓			✓					✓	✓	

* "Healthcare System" refers to hospitals and institutions.

** Even if trainees are not explicitly mentioned in the language of the bill, the bill applies to them if there is mention of a health care professional "supervising" an exam.

⁴ Maya M. Hammoud et al., *Consent for the Pelvic Examination Under Anesthesia by Medical Students*, 134 *Obstetrics & Gynecology* 1303 (2019).

Like the laws of those states, Senate Substitute Amendment 1 would ensure that every hospital will have a policy requiring requires written consent of a patient before a trainee performs a pelvic examination on the unconscious or anesthetized patient for the student's benefit.

This duty can be fulfilled with no added cost. Hospitals already facilitate the duty by physicians to obtain informed consent to medical procedures.⁶ Thus, hospitals can facilitate informed consent to medical teaching.

Bioethicists see this as a given. The former director of the Center for Bioethics and Medical Humanities at the Medical College of Wisconsin, Robyn Shapiro, said: "I would be very surprised to run across a state that didn't have that sort of a law."⁷

B. Answering The Claim That It "Does Not Happen Here" and "If It Does, We Transparently Ask"

Some medical educators and hospital administrators reflexively assume that unconsented medical teaching exams never occur. As we show below, pelvic teaching exams without consent have persisted for more than the two decades that one of us has worked on this question.

As McGill University Bioethics Professor Phoebe Friesen states, medical students widely report being asked to do such exams without the specific consent of the patients.⁸

A 2022 survey of 1,169 people within the United States drawn from a drew on a nationally representative sample found that "1.4 percent of respondents reported having received a pelvic or prostate exam within the past five years without their explicit prior consent."⁹ The authors extrapolated from that figure to estimate that "potentially 3.6 million U.S. residents may have received an unconsented rectal, prostate or pelvic exam.

Against this evidence, some medical educators contend that laws are unnecessary because the communication about the educational nature of the exam is already transparent.¹⁰

In the recent years, patients have come forward after discovering that they have been used for medical teaching without permission, as we show below. The patients say they were never asked. Without disclosure, how would they have ever known? By their very nature, pelvic exams for the purpose of teaching abnormal anatomy occur while the patient is under anesthesia or unconscious. Asking patients to police

⁶ Alan Meisel, *Canterbury v. Spence: The Inadvertent Landmark Case*, HEALTH LAW AND BIOETHICS: CASES IN CONTEXT (Sandra H. Johnson, Joan H. Krause, Richard S. Saver, & Robin Fretwell Wilson, eds., Aspen Publishers, 2009).

⁷ Lorelei Laird, *Pelvic exams performed without patients' permission spur new legislation*, AMER. BAR. ASSN. J. (Sept. 1, 2019), <https://www.abajournal.com/magazine/article/examined-while-unconscious>.

⁸ Phoebe Friesen, *Why Are Pelvic Exams on Unconscious, Unconsenting Women Still Part of Medical Training?*, SLATE (Oct. 30, 2018), <https://slate.com/technology/2018/10/pelvic-exams-unconscious-women-medical-training-consent.html>.

⁹ Lori Bruce, Ivar Hannikainen, & Brian Earp, *New Findings on Unconsented Intimate Exams Suggest Racial Bias and Gender Parity*, 52 HASTINGS CENTER REPORT 7 (2022).

¹⁰ Julia Cron & Shefaly Pathy, *2 Ob-Gyns, on Pelvic Exams and Patients' Consent*, THE N.Y. TIMES (Feb. 24, 2020), <https://www.nytimes.com/2020/02/24/opinion/letters/pelvic-exams-consent.html>.

what is happening to them while they are asleep is asking them to do the impossible. And asking medical students to act as whistleblowers to end this practice is unrealistic and unfair.

Given the fast pace of medical education and teaching on the wards, teaching faculty may simply be unaware when a student or faculty member forgets to ask for specific permission, whether advertent or inadvertent. Further, given the rise of community teaching hospitals, it is difficult for medical schools and their principal teaching hospitals to know whether their rigorous consent practices are adhered to at smaller, far-flung hospitals where medical teaching occurs.¹¹ Hence the need for this bill.

Take as an example the stock disclosure given at one time by a significant teaching hospital elsewhere, Yale University Hospital. Yale's hospital admission form shows that the educational nature of exams is anything but transparent. The form vaguely provides:

"I understand that some of the system hospitals are teaching hospitals. Doctors or other health practitioners who are members of the care team and are in training may **help** my practitioner with the procedure."⁹

Helping care for the patient and training by using the patient are two different things. This sentence does not alert the patient that a pelvic or prostate examination may be performed for somebody else's educational benefit. Senate Substitute Amendment 1 asks that the involvement of medical trainees be explicitly explained.

Similarly, UnityPoint Health-Meriter's 2017 Consent Form indicates that it:

offers educational experiences to medical/surgical residents, medical students, and other health care students. These residents/students may observe and if appropriate, may **participate in the procedure(s)**. I understand that these residents/students are not employees or agents of UnityPoint Health-Meriter. The acts or omissions of such residents/students are the responsibility of their sponsoring institutions and not UnityPoint Health Meriter.¹²

UnityPoint Health-Meriter's 2017 Consent Form further asks patients to agree that:

I agree that resident(s), physician assistant(s), nurse practitioner(s), medical student(s) or other assistant(s) present during my procedure will be able to, while under the supervision of my primary physician(s)/surgeon(s) as noted above, perform and assist with **important parts of the procedure(s)**. Important parts of the procedure may include but is not limited to, harvesting of grafts, dissecting tissue, removing tissue, implanting devices, altering tissues, suturing and the use of approved medication(s).¹³

Neither disclosure indicates that an exam may be performed solely **for the student-learner's benefit**. Instead, the words "important part of the procedure" suggest that the patient requires the teaching exam **for the patient's benefit**. Likewise, telling patients that "residents/students may observe and if appropriate, may participate in the procedure(s)" suggests that the educational exam is **needed for the patient's care**.

¹¹ Robin Fretwell Wilson, *Autonomy Suspended: Using Female Patients to Teach Intimate Exams without Their Knowledge or Consent*, 8 J. Health Care L. & Pol'y 240 (2005).

¹² Consent for Surgery and Invasive Procedures, Mr-FORM-0212 100022, UnityHealth Meriter (08/17) (emphasis added).

¹³ Consent for Surgery and Invasive Procedures, Mr-FORM-0212 100022, UnityHealth Meriter (08/17) (emphasis added).

Other states have explained the need for these laws as responding to concerns by medical students that they may be asked to act unethically, by not candidly and forthrightly securing informed consent to their training. Maryland recognized that while the state's teaching hospitals have informed consent policies, an explicit state law would not only protect patients but assure students that they would not be asked to do something unethical.¹⁴ Maine lawmakers enacted a specific consent law precisely so that "medical students asked to perform the procedure know they are acting ethically."¹⁵ The sponsor of New York's recent law, Senator Jessica Ramos, put it this way: "The importance of instilling the value of informed consent on medical students cannot be underestimated."¹⁶

In her interview on Wisconsin Public Radio on April 25, 2023, Chief Executive Officer of the Wisconsin Nurses Association Gina Dennik-Champion succinctly captured how consent and voluntary participation forms the essence of medical ethical principles:

[W]e have our code, and no one should be coerced into number one, performing an exam where they're not comfortable. Secondly, not having the permission of that individual. It smacks us right into our code of ethics....¹⁷

Trust in the health care system and professions is vital as it affects patient satisfaction, willingness to seek care, and treatment compliance.¹⁸ Moreover, trust is essential to the physician-patient relationship because of the inherent risk and uncertainty of medical care.¹⁹ In 2018, only 34% of Americans reported a positive view of the healthcare industry.²⁰ This is a staggering decrease from 1975, when 80% reported a positive view.

More fundamentally, Senate Substitute Amendment 1 is valuable and should be enacted, *whether or not* strong evidence shows that unconsented exams are occurring. If unconsented exams do occur, asking for specific consent gives patients the dignity and autonomy all patients deserve. And if such exams never occur without consent, Senate Substitute Amendment 1 will reinforce the norm that all patients should be respected in deciding what happens with their bodies. And it will teach students that consent is non-negotiable.

¹⁴ Jennifer McDermott & Carla K. Johnson, *States Seek Explicit Patient Consent for Pelvic Exams*, NBC CONN. (May 12, 2019, 1:48PM), <https://www.nbcconnecticut.com/news/local/bills-seek-special-consent-for-pelvic-exams-under-anesthesia/153538/>.

¹⁵ Associated Press, *States seek explicit patient consent for pelvic exams*, NEWS CTR. ME. (May 12, 2019), <https://www.newscentermaine.com/article/news/nation-world/states-seek-explicit-patient-consent-for-pelvic-exams/417-03352df8-4979-4152-8b58-26e7b7e205a4>.

¹⁶ 2019 New York S. 3353.

¹⁷ Trevor Hook, *Renewed bipartisan legislation pushes for consent for pelvic exams on unconscious patients*, Wisconsin Public Radio (April 25, 2023), <https://www.wpr.org/renewed-bipartisan-legislation-pushes-consent-pelvic-exams-unconscious-patients>.

¹⁸ See generally Oswald A.J. Mascarenhas et al., *Hypothesized Predictors of Patient-Physician Trust and Distrust in the Elderly: Implications for Health and Disease Management*, 1 CLINICAL INTERVENTIONS AGING 175 (2006).

¹⁹ Katrina Armstrong et al., *Racial/Ethnic Differences in Physician Distrust in the United States*, 97 AMERICAN J. PUB. HEALTH 1283, 1283 (2007).

²⁰ Daniel Wolfson, *Commentary: Erosion of trust threatens essential element of practicing medicine*, MOD. HEALTHCARE (Mar. 9, 2019, 1:00AM), <https://www.modernhealthcare.com/opinion-editorial/commentary-erosion-trust-threatens-essential-element-practicing-medicine>.

Wisconsin hospitals have already shown leadership in building patient trust and modelling respect. For example, in 2019 UW Health embraced a policy requiring informed consent for “educational sensitive exams.”²¹

Senate Substitute Amendment 1 is a no-harm-no-foul proposition, even as to facilities that have already instituted policies that respect patient autonomy. It will ensure that specific consent is afforded to patients.

C. The Extent of the Practice

Despite widespread ethical condemnation that “the practice of performing pelvic examinations on women under anesthesia, without their knowledge and approval, [is] unethical and unacceptable,”²² experience shows that unauthorized exams continue across the U.S. One of us wrote about a woman in Arizona who discovered she received an unauthorized pelvic exam after *stomach*, not gynecological surgery.²³ In testimony to the Utah Senate Health and Human Services Committee, Ms. Ashley Weitz testified that she had an unauthorized pelvic exam while sedated in the emergency room.²⁴ Medical students spanning the country from North Carolina to Ohio to Texas report that they have been asked to do exams without consent.²⁵

Sarah Wright will speak to her experience in Wisconsin. Empirical studies document the persistent nature of unauthorized pelvic examinations. A recent 2020 survey accepted by the 2021 Council on Resident Education in Obstetrics and Gynecology & The American College of Obstetricians and Gynecologists Annual Meeting reported that 83.6% of the medical students surveyed across five medical schools attached to large academic medical centers performed a pelvic exam on a patient under anesthesia.²⁶ When asked how often patients were explicitly told that an educational pelvic examination would take place under anesthesia, only 17% of surveyed students replied “every time.” Notably, 22.3% replied “rarely” and 20.3% replied “never.” Clearly, ethics pronouncements and media attention alone have not sufficed to ensure that patients are asked to be used for teaching purposes.

Historic studies show the same pattern. A 2005 survey of medical students at the University of Oklahoma found that a large majority had performed educational pelvic examinations on patients under anesthesia—

²¹ Jessie Opoien, *Wisconsin lawmakers renew effort to require informed consent for pelvic exams under anesthesia*, The Cap Times (July 29, 2021), https://captimes.com/news/local/govt-and-politics/election-matters/wisconsin-lawmakers-renew-effort-to-require-informed-consent-for-pelvic-exams-under-anesthesia/article_fffd891f-8369-5772-86b0-271b18b7eed0.html.

²² Am. Ass’n of Med. Colls., *AAMC Statement on Patient Rights and Medical Training* (June 12, 2003).

²³ Robin Fretwell Wilson & Anthony Michael Kreis, #JustAsk:StopTreatingUnconsciousFemalePatientsLikeCadavers, CHI. TRIB. (Nov. 30, 2018), <https://www.chicagotribune.com/news/opinion/commentary/ct-perspec-pelvic-nonconsensual-exam-medical-students-vagina-medical-1203-story.html>.

²⁴ Lorelei Laird, *Pelvic exams performed without patients' permission spur new legislation*, AMER. BAR. ASSN. J. (Sept. 1, 2019), <http://www.abajournal.com/magaine/article/examined-while-unconscious>.

²⁵ Associated Press, *Bills seek special consent for pelvic exams under anesthesia*, SAVANNAH MORNING NEWS (May 12, 2019), <https://www.savannahnow.com/zz/news/20190512/bills-seek-special-consent-for-pelvic-exams-under-anesthesia/1>; Interview with Krithika Shamanna, Symone on MSNBC (Date?), <https://drive.google.com/file/d/14bwqysIJUVzIVtoxQnI1MFIcKpuz9Gpl/view>; Lisa Desjardins, *Why more states are requiring consent for pelvic exams on unconscious patients*, PBS NEWSHOUR (Feb. 11, 2023), <https://www.pbs.org/newshour/show/why-more-states-are-requiring-consent-for-pelvic-exams-on-unconscious-patients> (quoting medical student Alexandra Fontaine).

²⁶ Hannah Millimet et al., *Medical Student Perspective on Pelvic Exams Under Anesthesia: A multi-Institutional Study* (2020) (unpublished manuscript) (on file with author).

in nearly three of four instances, consent was not obtained.²⁷ In 2003, Peter Ubel and Ari Silver-Isenstadt 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.²⁸ In 1992, Charles Beckmann reported that 37.3% of United States and Canadian medical schools reported using anesthetized patients to teach pelvic exams.²⁹

As Table 1 above shows, the latest iteration of laws across the country also extends protection to men, for rectal and prostate exams. Yet the overwhelming evidence is that the widespread practice of teaching intimate exams without consent is a practice of using women to teach pelvic exams.³⁰

D. The Legislative and Professional Response

In response to the unauthorized use of patients, twenty-five U.S. states by legislation now require explicit consent for pelvic examinations on unconscious patients for medical teaching purposes.³¹ This legislation reflects the consensus of professional medical organizations that healthcare providers should obtain explicit for pelvic teaching exams.³² In the “Statement on Patient Rights and Medical Training” in 2003, the American Association of Medical Colleges, which—represents 144 accredited U.S. and 17 accredited Canadian medical schools; nearly 400 major teaching hospitals and health systems, including 51 Department of Veterans Affairs medical centers; and 90 academic and scientific societies described—“pelvic examinations on women under anesthesia, without their knowledge and approval ... [as] unethical and unacceptable.”³³

In an August 2011 Committee on Ethics ruling reaffirmed in 2020, the American College of Obstetricians and Gynecologists provided 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.”³⁴ The Ethics Committee

²⁷ S. Schniederjan G.K. Donovan, *Ethics versus education: pelvic exams on anesthetized women*, 98(8) *J Okla State Med Assoc* 386 (2005).

²⁸ 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).

²⁹ Charles R. B. Beckmann et al., *Gynaecological Teaching Associates in the 1990s*, 26 *MED. EDUC.* 105, 106 (1992).

³⁰ *But see* Lori Bruce, Ivar Hannikainen, & Brian Earp, *New Findings on Unconsented Intimate Exams Suggest Racial Bias and Gender Parity*, 52 *HASTINGS CENTER REPORT* 7 (2022) (reporting that “1.4 percent of male and 1.3 percent of female respondents answer[ed] “yes” to having received a [unconsented intimate teaching exam] within the past five years”).

³¹ *Unauthorized Pelvic Exams: Public Engagement Initiative*, THE EPSTEIN HEALTH LAW AND POLICY PROGRAM, <https://www.epsteinprogram.com/pelvic-exams> (last visited March 29, 2021).

³² *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.aspx?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”).

³³ Am. Ass'n of Med. Colls., *AAMC Statement on Patient Rights and Medical Training* (June 12, 2003).

³⁴ American College of Obstetricians and Gynecologists Committee on Ethics, *Professional Responsibilities in Obstetric-Gynecologic Medical Education and Training*, Ruling No. 500 (August 2011),

ruling applied this ethical tenant to pelvic examinations specifically: “Pelvic examinations on an anesthetized woman that offer her no personal benefit and are performed solely for teaching purposes should be performed only with her specific informed consent before her surgery.”³⁵ An American Medical Association Forum in January 2019, authored by Professor of Medical Science Eli Y. Adashi at Brown University’s Warren Alpert Medical School, called unconsented exams “a lingering stain on the history of medical education.”³⁶

A growing chorus of bioethicists challenge the need for unconsented exams. Pelvic examinations have a “different moral significance than suturing a wound.”³⁷ Even when pelvic examinations are done with a woman’s knowledge, women are “frequently nervous before [the procedure], reporting feeling vulnerable, embarrassed, and subordinate.” Significantly, the feelings of distress are heightened for victims of sexual assault.³⁸ Pelvic examinations are especially sensitive experiences.

As the next Parts of this letter demonstrate, however, some teaching faculty offer a number of falsifiable justifications for dispensing with the simple step of asking for permission.³⁹

E. Patients Have Not Implicitly Consented to Pelvic Educational Exams

The first justification that teaching faculty advance is that patients have implicitly consented by accepting care at a teaching hospital. Empirical evidence suggests that many patients do not consciously choose teaching facilities or even know they are in one.⁴⁰

Indeed, in the U.S., a large number of facilities give little indication to prospective patients of the hospital’s teaching status. Public disclosure of hospitals’ teaching status varies drastically. Some hospitals, like Duke University Medical Center and The Johns Hopkins Hospital, indicate their medical school affiliation in their name.

Of the approximately 400 members of the Association of American Medical Colleges Hospital/Health System Members, only 94—less than 25%—contain the word “college” or “university” in their name.⁴¹

<http://www.acog.org/~media/Committee%20Opinions/Committee%20on%20Ethics/co500.ashx?dmc=1&ts=20120112T1021153539>.

³⁵ *Id.*

³⁶ Eli Y. Adashi, *Teaching Pelvic Examination Under Anesthesia Without Patient Consent*, JAMA F. (Jan. 16, 2019), <https://newsatjama.jama.com/2019/01/16/jama-forum-teaching-pelvic-examination-under-anesthesia-without-patient-consent/>.

³⁷ Phoebe Friesen, *Why Are Pelvic Exams on Unconscious, Unconsenting Women Still Part of Medical Training?*, SLATE (Oct. 30, 2018), <https://slate.com/technology/2018/10/pelvic-exams-unconscious-women-medical-training-consent.html>.

³⁸ *Id.*; Robin Fretwell Wilson et al., #JustAsk: Stop treating unconscious female patients like cadavers, CHI. TRIB. (Nov. 29, 2018, 3:25PM), <https://www.chicagotribune.com/opinion/commentary/ct-perspec-pelvic-nonconsensual-exam-medical-students-vagina-medical-1203-story.html>.

³⁹ 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 Washington University Hospital, UCLA Medical Center, and the Medical University of South Carolina).

⁴⁰ 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).

⁴¹ *AAMC Hospital/Health System Members*, ASSOCIATION OF AMERICAN MEDICAL COLLEGES, <https://members.aamc.org/eweb/DynamicPage.aspx?site=AAMC&webcode=AAMCOrgSearchResult&orgtype=Hospital/Health%20System>.

To make this concrete, consider UW Health, which, as noted above, has adopted a policy requiring consent to educational intimate exams. As its webpage notes, “[a]ffiliated hospitals statewide play an important role in residency and fellowship programs.”⁴² UW Health’s “affiliated institutions” include American Family Children’s Hospital, William S. Middleton Memorial Veterans Hospital, Unity Point Health-Meriter, St. Mary’s Hospital, as well as “Marshfield Clinic and St. Joseph’s Hospital in Marshfield, Lutheran Hospital and Gundersen Clinic in LaCrosse and Sinai Samaritan Medical Center in Milwaukee.” Its webpage notes that “The UW Department of Family Medicine and Community Health has residency training sites at St. Mary’s Hospital Medical Center in Madison, Sacred Heart and Luther hospitals in Eau Claire, Aspirus Wausau Hospital in Wausau, Appleton Medical Center and St. Elizabeth Hospital in Appleton, and St. Luke’s Medical Center in Milwaukee.”⁴³ Yet, these names do not suggest an affiliation with the University of Wisconsin or otherwise tip patients off to their statuses as teaching facilities. This example—by a leader in ethical consent practices—is used only to make the point that patients are unaware of the educational nature of many patient encounters.

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. Reasonably, a patient may know that New York-Presbyterian Hospital, located less than sixty feet from the Columbia Medical University College of Physicians & Surgeons, is a teaching hospital.⁴⁴ However, patients at the 11 facilities associated with Columbia’s medical school throughout New York, Connecticut, and New Jersey cannot possibly know on constructive notice without doing their own research online.⁴⁵

F. Patients Have Not Expressly Consented to Pelvic Educational Exams

Many teaching faculty assert that the patient has consented to educational exams upon admission.⁴⁶ 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.⁴⁷ A variant on this claim holds that if consent was obtained for one procedure, it encompasses consent for additional, educational procedures.⁴⁸

This is just not so as a matter of contract interpretation. In a typical consent form, patients will:

⁴² UW Health and affiliates (wisc.edu), available at <https://www.med.wisc.edu/education/graduate-medical-education/uw-health-and-affiliates/>.

⁴³ *Id.*

⁴⁴ 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.

⁴⁵ *Affiliated Hospitals and Institutions*, COLUMBIA VAGELOS COLLEGE OF PHYSICIANS AND SURGEONS, <https://www.ps.columbia.edu/about-us/explore-vp-s/affiliated-hospitals-and-institutions> (last visited Mar. 15, 2021).

⁴⁶ AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS (ACOG), COMM. OPINION 181: ETHICAL ISSUES IN OBSTETRIC-GYNECOLOGICAL EDUCATION 2 (1997).

⁴⁷ 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”).

⁴⁸ 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).

[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.⁴⁹

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

Some teaching faculty and residents believe that additional exams by students are, in fact, for the patient's benefit because the student might detect something missed by others. Yet, a patient would not receive multiple exams in a non-teaching facility context. The better practice would be to ask for permission for all exams—both those needed to reconfirm a diagnosis before surgery and any additional educational exam.

UnityPoint Health-Meriter's hospital consent form, quoted previously in Part B, would lead a reasonable patient to believe that the exams and procedures are needed for the patient's benefit. Consider the following provisions from the consent form⁴⁸:

medical/surgical residents, medical students, and other health care students ... may observe and if appropriate, may **participate in the procedure(s)**.

I agree that ... medical student(s) ... during my procedure will be able to, while under the supervision of my primary physician(s)/surgeon(s) as noted above, perform and assist with **important parts of the procedure(s)**.⁵⁰

The former provision gives permission to be a part of **the patient's procedure**. The latter provision only gives permission to medical students to assist in the course of **the patient's procedure**. This authorization would encompass only the treatment that patients would expect to receive when checking into a health care facility—treatment that provides the patients with a direct benefit.

As previously mentioned in Part C, those in training sometimes do help with the patient's actual procedure. However, UnityPoint Health-Meriter's description and the resulting authorization by patients of students' role would **not** encompass educational exams conducted for the students' own learning experience.

Some teaching faculty and residents believe that additional exams by students are, in fact, for the patient's benefit because the student might detect something missed by others. Yet, a patient would not receive multiple exams in a non-teaching facility context. The better practice would be to ask for permission for all exams—both those needed to reconfirm a diagnosis before surgery and any additional educational exam.

G. 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 won't consent.”

However, studies have shown that women will consent to pelvic examinations for educational purposes. These include not only “hypothetical” studies—asking patients how they would respond if asked to do a variety of things—but also studies of actual women giving consent to real exams.

⁴⁹ *About Prisma Health*, PALMETTO HEALTH RICHLAND, <https://www.palmettohealth.org/patients-guests/about-prisma-health>.

⁵⁰ Consent for Surgery and Invasive Procedures, Mr-FORM-0212 100022, UnityHealth Meriter (08/17) (emphasis added).

For example, in 2021 Julie Chor found that after asking for explicit consent in a family planning clinic, 89.6 percent of surgical patients agreed an additional exam for the medical training of the next generation of providers.⁵¹

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.⁵² In a private practice setting, another study found refusal rates of approximately 5% to perform educational pelvic exams.⁵³ 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.⁵⁴

Even more women consent to examinations before surgery. In one study in the U.K., 85% of patients awaiting surgery consented to educational exams by students while the patient was under anesthesia.⁵⁵ 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.⁵⁶

Operationalizing consent so that it is not a barrier to teaching requires nothing more than planning and common-sense devices. Maya and colleagues suggest, as one example, "[s]tickers on the main consent form attesting that discussion of examination under anesthesia was done and consent obtained (similar to "time out" documentation stickers)."⁵⁷

As Gina Dennik-Champion, Chief Executive Officer of the Wisconsin Nurses Association, has said:

[W]e can easily remedy this, if we just be very open with and honest with that individual by letting them know oh, by the way, or will you give us permission to perform, teach our students how to perform pelvic exam. So it's all about permission.⁵⁸

H. Thoughtful Construction of Senate Substitute Amendment 1 and The Need for Regulation

⁵¹ J. Chor, "Consenting for Pelvic Exams under Anesthesia with Learners," paper presented at the 33rd Annual MacLean Center Conference, Chicago, IL, November 13, 2021, <https://www.youtube.com/watch?v=wbFWn0K11VI>.

⁵² S. Wainberg et al., *Teaching pelvic examinations under anaesthesia: what do women think?*, 32 J OBSTET. GYNAECOL CAN 49 (2010).

⁵³ Lawton et al., *Patient Consent for Gynaecological Examination*, 44 BRIT. J. HOSP. MED. 326, 329 (1990)

⁵⁴ Peter A. Ubel & Ari Silver-Isenstadt, *Are Patients Willing to Participate in Medical Education?*, 11 J. CLINICAL ETHICS 230, 232-33 (2000)

⁵⁵ Lawton, *supra* n. 46, at 329.

⁵⁶ Ubel & Silver-Isenstadt, *supra* note 47, at 234.

⁵⁷ Maya M. Hammoud et al., *Consent for the Pelvic Examination Under Anesthesia by Medical Students*, 134 Obstetrics & Gynecology 1303 (2019).

⁵⁸ Trevor Hook, *Renewed bipartisan legislation pushes for consent for pelvic exams on unconscious patients*, Wisconsin Public Radio (April 25, 2023), <https://www.wpr.org/renewed-bipartisan-legislation-pushes-consent-pelvic-exams-unconscious-patients>.

Self-regulation in the medical field is prized.⁵⁹ But states, in fact, regulate healthcare and transparency in particular when important societal values are at stake. Consider medical records. Alongside the federal medical records protections,⁶⁰ Wisconsin enacted laws ensuring access to patient health care records.⁶¹ Such Wisconsin statutes give patients the right to inspect their own patient records, which helps to ensure the accuracy of health information.

The sponsors of this bill have put much thought into constructing the language of Senate Substitute Amendment 1 so that its implementation does not become a burden. Senate Substitute Amendment 1 uses a straight-forward test for when a patient's written consent is needed: when the exam is "solely for educational purposes."⁶²

Some have rightly raised concerns that, if badly constructed, an explicit consent statute might inadvertently impede the care of patients who have experienced a sexual assault or who need emergency care.⁶³ Note that the test in Senate Substitute Amendment 1 does *not impede care* for patients who present in an emergency or who present unconscious but may have experienced a sexual assault. Senate Substitute Amendment 1 is tailored so it would be feasible in practice and not hinder these vital medical processes.

Importantly, Senate Substitute Amendment 1 promotes accountability by establishing a Department of Health Services rule that requires hospitals to maintain written policies regarding the duty to secure the written consent of patients to educational exams.⁶⁴ Healthcare facilities play a primary oversight role in medicine and have tremendous resources to ensure compliance with regulation. They are subject to audits and they are especially well suited to ensure compliance with Senate Substitute Amendment 1's basic norm of respect for patients.

I. Conclusion

Without adequate safeguards to protect the autonomy of women and men to consent to medical teaching, many will be reduced into acting as "medical practice dummies" without their permission. Patients would gladly consent if only asked.

Senate Substitute Amendment 1 to Senate Bill 127 would bring Wisconsin into line with other states that give women the autonomy to decide to participate in medical teaching. It would affirm the dignity of persons at a time of great vulnerability, building trust in the healthcare system.

⁵⁹ Roger Collier, *Professionalism: The Privilege and Burden of Self-regulation*, 184 CAN. MED. ASS'N J. 1559(2012).

⁶⁰ 45 C.F.R. § 164.508 Uses and disclosures for which an authorization is required.

⁶¹ Wisconsin Statute Section 146.83.

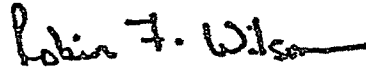
⁶² Senate Substitute Amendment 1, lines 6-10.

⁶³ Trevor Hook, Renewed bipartisan legislation pushes for consent for pelvic exams on unconscious patients, Wisconsin Public Radio (April 25, 2023), <https://www.wpr.org/renewed-bipartisan-legislation-pushes-consent-pelvic-exams-unconscious-patients> (quoting Gina Dennik-Champion, Chief Executive Officer, Wisconsin Nurses Association).

⁶⁴ Senate Substitute Amendment 1, lines 6-10.

We welcome any opportunity to provide further information or analysis or testimony to the State of Wisconsin Legislature.

Respectfully Yours,⁶⁵



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⁶⁵ Academic affiliation is for identification purposes only. We write in our individual capacities and our universities take no position on this or any other bill.



WISCONSIN COALITION AGAINST SEXUAL ASSAULT

Testimony

To: Members of the Senate Committee on Health
From: Wisconsin Coalition Against Sexual Assault (WCASA)
Date: September 27, 2023
Re: Senate Bill 127
Position: Support

The Wisconsin Coalition Against Sexual Assault (WCASA) appreciates the opportunity to offer this written testimony for your consideration. WCASA is a hybrid organization: functioning both to support member Sexual Assault Service Providers (SASPs), while advancing the anti-sexual assault movement in the state and nationally.

WCASA thanks Committee Chair Cabral-Guevara for bringing this important piece of legislation forward for a hearing today. We also thank the leading sponsors of the bill, Senators Jacque and Taylor and Representatives Brandtjen and Andraca for their leadership on this legislation in both houses.

A survey of 101 medical students from seven medical schools and found that 92% percent reported performing a pelvic exam on an unconscious patient¹. 61% reported performing this procedure without explicit patient consent.² Furthermore, a survey conducted in 2005 at the University of Oklahoma found that a majority of medical students had performed pelvic exams to gynecologic surgery patients under anesthesia, and that in nearly 75% of these cases the women had not consented to the exam³. We support SB 127 as it requires hospitals to have and enforce a policy requiring written and verbal informed consent before a medical student, nursing student, or anyone providing nursing care may perform a pelvic examination upon a patient who is under general anesthesia or otherwise unconscious.

The emphasis on consent and body autonomy in this legislation are important as they are cornerstones of sexual violence prevention efforts. As a result, SB 127 not only reflects the values of the anti-sexual violence movement, but it is also extremely important for survivors seeking healthcare. A sexual violence survivor has already experienced a violation of their bodily autonomy. Performing a pelvic examination without their informed consent represents yet another violation – however this time it is when they are seeking critical healthcare services. By ensuring survivors' boundaries are respected during medical procedures, this bill prevents re-traumatization by ensuring no pelvic examination is performed without their written and verbal permission.

This legislation also reflects the values of patient-centered health care, which is defined as care that “is respectful of and responsive to individual patients’ preferences, needs and values, and ensures the patients’ values guide all clinical designs.”⁴ Given the invasive nature of a pelvic exam, it only makes sense that a patient’s consent is obtained before a medical student performs such an exam upon a patient who is not able to provide informed consent. Patient-centered health care represents a cultural shift in our health care

¹ <https://www.elle.com/life-love/a28125604/nonconsensual-pelvic-exams-teaching-hospitals/>

² Ibid.

³ <https://www.ncbi.nlm.nih.gov/pubmed/16206868>

⁴ “What are Important for Patient Centered Care?” Journal of Caring Sciences. Published November 2013.

system, and this legislation honors that shift by focusing on the patient's preferences and shared decision making with their health care provider.

We thank you for your attention to this matter and for your continued efforts to improve health care responses for sexual assault survivors. If you have any questions, you can reach me at ianh@wcasa.org.

September 27, 2023

Senate Committee on Health

Re: Senate Bill 127 Relating to requiring informed consent before performing a pelvic examination on a patient who is under general anesthesia or unconscious.

Dear Committee on Health:

My name is Ari Silver-Isenstadt and I support Senate Bill 127.

I am a pediatrician based in Baltimore, Maryland, and I co-authored one of the significant studies about consent practices for educational pelvic exams in the United States. This research has been highlighted in *At Your Cervix*, a new award-winning documentary.

I am asking for your help—for my patients, my students, and my profession.

30 years ago—when I was in medical school during my gynecology rotation, I was expected to hone my pelvic exam skills on already anesthetized women. It was clear to me that these women did not know that I was there for my own educational needs and that my teachers expected me to use their intimate parts as my classroom without their knowledge or permission.

I refused and was brought before the deans. I felt that my medical education was threatened—I had a choice to make—do what they wanted and graduate—or defend my integrity.

Ultimately, I took time off and did research.

Our study revealed that 90% of the surveyed medical students from the five Philadelphia-area medical schools practiced pelvic examinations on anesthetized patients for educational purposes during their obstetrics/gynecology rotation. I emphasize this number 90% because THIS is how many medical students learn.

Our research also found that the importance medical students place on informed consent erodes as they progress through their education. I found this with my own classmates—initially many agreed that we needed permission to examine people—as we went farther along—more responded with statements like—if we ask, they may say no and how else will we learn?

I believe that people outside of medicine see this problem more clearly. It seems obvious that people be able to explicitly authorize how their bodies are going to be used and by whom.

For the last 20 years, I have taught medical students. Students have cried in my office, worried about how the patients would feel if they found out that the student did what they did.

We need you, as legislators, to help put an end to this offensive and embarrassing training practice. As a medical profession, we have been unable to do this ourselves.

Arguments against getting explicit informed consent fall flat under scrutiny. And research shows that patients are willing to provide consent to these examinations, but they want to be asked.

Patients' trust in physicians is crucial for successful health outcomes. Without it, patients may delay seeking care.

Don't we want our physicians to value truth-telling and to respect our bodily autonomy? Why do we accept a training model that indoctrinates the opposite? I want my profession to stop training practices that hurt both patients. I hope you will help ALL of us and vote favorably on this bill.

I write in my individual capacity.

Very Truly Yours,

Ari Silver-Isenstadt, MD

Sept 26th, 2023

Re: Senate Bill 127 Relating to: requiring informed consent before performing a pelvic examination on a patient who is under general anesthesia or unconscious.

Dear Committee on Health:

I am writing in support of Bill 127, which requires hospitals in Wisconsin to have a policy requiring written and verbal informed consent before a medical student can perform a pelvic examination on a patient who is under general anesthesia or otherwise unconscious. While these examinations are an important teaching tool, performing them without the consent of patients is a violation of patient rights and is a remnant of medicine's paternalistic past. It is time to follow the rest of the world and the country in requiring consent before these examinations are performed on anesthetized patients.

I am an Assistant Professor of Medical Ethics at McGill University and have been researching and writing about this topic for several years. Below, I speak to three topics that I have considered within my scholarship: I. Medical Student Experiences and Moral Distress, II. Non-consensual Exams as Violations of Autonomy, Bodily Rights, and Trust, III. Objections to a Legal Consent Requirement.

I. Medical Student Experiences and Moral Distress

I first learned of this practice while teaching ethics to medical students in New York. The students were asked to write summaries of ethical dilemmas they had encountered in their training so that I could help them engage in ethical analyses of these cases. Countless students wrote about their experiences of performing pelvic examinations on anesthetized patients who had not consented to the examination. Many of these students reported considerable moral distress accompanying the experience, reporting that it felt wrong and inappropriate, and that they wouldn't want the same to be done to them. Importantly, because the teaching faculty that were asking them to perform the examinations were also the ones that were evaluating them within medical school, and often writing their reference letters for residency, very few students felt comfortable raising their concerns with their instructors. Beyond the discomfort of medical students, engaging in this practice without consent teaches a problematic lesson to our future doctors: using an unconscious woman's body as a teaching tool, without her consent, is permissible. Today's students are aware that medicine has moved beyond the paternalism that has characterized its past and that practices like this need to be made into history ¹.

In the years since I learned of this practice, I have spoken to medical students across the country

¹ Barnes, S. S. (2012). Practicing pelvic examinations by medical students on women under anesthesia: why not ask first? *Obstet Gynecol*, 120(4), 941-943. Tsai, J., June 24, 2019). Cundall, H. L., MacPhedran, S. E., & Arora, K. S. (2019). Consent for pelvic examinations under anesthesia by medical students: historical arguments and steps forward. *Obstetrics and gynecology*, 134(6), 1298. Medical Students Regularly Practice Pelvic Exams On Unconscious Patients. Should They? *ELLE*. Retrieved from <https://www.elle.com/life-love/a28125604/nonconsensual-pelvic-exams-teaching-hospitals/>

and have heard the same concerns expressed from coast to coast. The evidence is limited, but the data that does exist suggests that the practice is widespread. In 2019, ELLE magazine polled students from across the United States and found that 61% of students had performed a pelvic examination on a female patient under anesthesia without her explicit consent. Of these students, 49% had never met the patient and 47% of these students felt uncomfortable with how their schools had handled these exams ². In 2005, a survey of medical students at the University of Oklahoma found that a large majority of the sample had given pelvic examinations to patients under anesthesia, and that consent had not been obtained in nearly three quarters of the cases ³. Similarly, a survey from 2003 reported that the majority of medical students at five medical schools in Philadelphia had performed pelvic examinations on patients who were anesthetized before a gynecological surgery and it was unclear how many of them had consented ⁴. Research has also shown that educational pelvic examinations under anesthesia have been common in the United Kingdom and New Zealand, each of which is taking, or has already taken, measures to ensure that specific consent for these examinations is always obtained ⁵. Within the United States, consent has become a legal requirement for educational pelvic examinations in more than 25 states ⁶. It is time that Wisconsin joins them in putting patient rights first.

II. Non-consensual Exams as Violations of Autonomy, Bodily Rights, and Trust

Teaching medical students to perform pelvic, prostate, or rectal examinations on unconscious patients who have not consented constitutes a significant violation of the autonomy, the bodily rights, and the trust of those who are subjected to these examinations ⁷. Autonomy refers to one's ability to self-govern, to act in accord with one's values, goals, and desires ⁸. This ability is not afforded to those on whom pelvic, prostate, or rectal examinations are performed while they are anesthetized and who have not been given an opportunity to consent. Consent allows patients to exercise their autonomy, to choose what is aligned with their goals and values within

² Tsai, J. (2019, June 24, 2019). Medical Students Regularly Practice Pelvic Exams On Unconscious Patients. Should They? *ELLE*. Retrieved from <https://www.elle.com/life-love/a28125604/nonconsensual-pelvic-exams-teaching-hospitals/>

³ Schniederjan, S., & Donovan, G. K. (2005). Ethics versus education: pelvic exams on anesthetized women. *J Okla State Med Assoc*, 98(8), 386-388.

⁴ Ubel, P. A., Jepson, C., & Silver-Isenstadt, A. (2003). 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. *American journal of obstetrics and gynecology*, 188(2), 575.

⁵ Coldicott, Y., Pope, C., & Roberts, C. (2003). The ethics of intimate examinations--teaching tomorrow's doctors. (Education and debate). *British Medical Journal*, 326(7380), 97. Medical students, sensitive examinations and patient consent: a qualitative review. *The New Zealand Medical Journal (Online)*, 131(1482), 29-37. General Medical Council. *Intimate examinations and chaperones*. Retrieved from <https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/intimate-examinations-and-chaperones/intimate-examinations-and-chaperones> Bagg, W., Adams, J., Anderson, L., Malpas, P., Pidgeon, G., Thorn, M., . . . Merry, A. F. (2015). Medical Students and informed consent: A consensus statement prepared by the Faculties of Medical and Health Science of the Universities of Auckland and Otago, Chief Medical Officers of District Health Boards, New Zealand Medical Students' Association and the Medical Council of New Zealand. *N Z Med J*, 128(1414), 27-3.

⁶ NBC Nightly News "More than 3.5 million patients given pelvic exams without consent, study estimates" Retrieved at: <https://www.nbcnews.com/nightly-news/video/more-than-3-5-million-patients-given-pelvic-exams-without-consent-study-estimates-193321541876> ; Friesen, P., Wilson, R. F., Kim, S., & Goedken, J. (2022). Consent for Intimate Exams on Unconscious Patients: Sharpening Legislative Efforts. *Hastings Center Report*, 52(1), 28-31.

⁷ Friesen, P. (2018). Educational pelvic exams on anesthetized women: Why consent matters. *Bioethics*, 32(5), 298-307.

⁸ Dworkin, G. (1988). *The Theory and Practice of Autonomy* (Vol. 102): Cambridge University Press.

their medical care. Crucially, the vast majority of patients do consent to medical students performing pelvic examinations on them when asked⁹. However, 100% wish to be specifically consented for such examinations beforehand¹⁰. This shows how consent is not merely an instrumental act of gaining permission, but is an intrinsically valuable one, which respects the rationality and values of those being asked¹¹.

Within medicine, consent also operates as a waiver of one's bodily rights; such waivers displace the usual boundaries around one's body, temporarily and in a limited way. The waiver that is given in a consent form before a surgery permits the surgical team to perform several acts on a body in order to promote the patient's wellbeing, some of which may be unanticipated and risky. In a teaching hospital, the surgical team may include the medical students, although this is not often understood by patients¹². In the case of pelvic examinations performed at the start of a gynecological surgery, however, medical students are not contributing to the care of the patient, but are merely using her body as an educational tool. This constitutes a clear violation of her bodily rights, rights that are not waived within the consent form.

Finally, this practice violates trust, the foundation of medicine. When seeking care, patients are required to make themselves extremely vulnerable in order to access treatment; they admit to engaging in unhealthy or stigmatized behaviors, remove their clothing, and allow themselves to be poked and prodded, often with little understanding of why. It only physicians who have been given the power and privilege to treat patients who are vulnerable in this way. Such power and privilege combined with such vulnerability creates a strong obligation for doctors to seek trust and be deserving of it¹³. Performing pelvic, prostate, or rectal examinations on unconscious patients without their consent significantly jeopardizes this foundation of trust, as can be demonstrated by the shock and outrage of many who have learned about this practice¹⁴. I have received countless emails and messages from women who are horrified that this is still occurring within medical schools. It is important to consider these responses in light of the prevalence of sexual assault. One in three women in the United States have experienced sexual violence, but this jumps to nearly one in two for American Indian / Alaska Native women or women who are multiracial. One in five women have experienced completed or attempted rape¹⁵. Pelvic examinations can be very distressing to those with a history of sexual trauma, even when performed while patients are conscious and have

⁹ Wainberg, S., Wrigley, H., Fair, J., & Ross, S. (2010). Teaching pelvic examinations under anaesthesia: what do women think? *J Obstet Gynaecol Can*, 32(1), 49-53. Martyn, F., & O'Connor, R. (2009). Written consent for intimate examinations undertaken by medical students in the operating theatre—time for national guidelines? *Irish medical journal*, 102(10), 336-337.

¹⁰ Bibby, J., Boyd, N., Redman, C., & Luesley, D. (1988). Consent for vaginal examination by students on anaesthetized patients. *Lancet*, 2, 115

¹¹ Dworkin, G. (1988). *The Theory and Practice of Autonomy* (Vol. 102): Cambridge University Press.

¹² Goedken, J. (2005). Pelvic Examinations Under Anesthesia: An Important Teaching Tool. *Journal of Health Care Law and Policy*, 8(2), 232-239.

¹³ Rhodes, R. (2001). Understanding the Trusted Doctor and Constructing a Theory of Bioethics. *Theoretical Medicine and Bioethics*, 22(6), 493-504.

¹⁴ See the comments section of: Friesen, P. (2018, October 30, 2018). Why Are Pelvic Exams on Unconscious, Unconsenting Women Still Part of Medical Training? *Slate*. Retrieved from <https://slate.com/technology/2018/10/pelvic-exams-unconscious-women-medical-training-consent.html>

¹⁵ National Sexual Violence Resource Center. (2023). Statistics in Depth. Accessed Sept 19, 2023. Retrieved from <https://www.nsvrc.org/node/4737>

consented¹⁶. To learn that a sensitive examination has occurred, or may have occurred, while one was unconscious and without consent, can amplify this trauma, leading to significant harm and disengagement from clinical care.

III. Objections to a Legal Consent Requirement

Some argue that a legal requirement for specific consent for educational pelvic, prostate, or rectal examinations under anesthesia will stand in the way of medical education and prevent future clinicians from learning the skills they need. Because the majority of patients consent to these examinations when asked, this is very unlikely to be the case. There are also no reports of issues related to student training in jurisdictions where consent is legally required.

Others insist that consent to pelvic, prostate, or rectal examinations by medical students is already implied when a patient signs a consent form before a surgery¹⁷. As has been argued, this is only the case for aspects of the surgery that are part of the clinical care and contribute to the wellbeing of the patient. As these examinations are purely educational, they serve to benefit the medical trainees and not the patient¹⁸. Furthermore, the consent that is obtained before surgery may be a legal one, but is often not an informed one¹⁹.

Others argue that the law is not the appropriate tool for changing this practice and that medical professionals should be responsible²⁰. However, a long history of medical professionals speaking out about this practice has led to little traction in terms of changing practice. An opinion published in 2001 by the American Medical Association's Council on Ethical and Judicial Affairs, a press release by the Association of American Medical Colleges in 2003, an opinion from the American College of Obstetricians and Gynecologists in 2011, as well as a statement from the Association of Professors of Gynecology and Obstetrics in 2019, all asserted that explicit consent ought to be obtained for educational pelvic examinations on patients who are anesthetized²¹. Given that the practice is still common, we can conclude that recommendations from professional bodies are not sufficient, and a more effective tool, such as a legal one, is needed.

¹⁶ Larsen, M., Oldeide, C. C., & Malterud, K. (1997). Not so bad after all..., Women's experiences of pelvic examinations. *Family Practice*, 14(2), 148-152.

¹⁷ See interview with William Dignam, head of OB-GYN clerkships at UCLA in: Warren, A. (2003). Using the Unconscious to Train Medical Students Faces Scrutiny. *The Wall Street Journal*, (March 12). Retrieved from <http://www.wsj.com/articles/SB104743137253942000>

¹⁸ Barnes, S. S. (2012). Practicing pelvic examinations by medical students on women under anesthesia: why not ask first? *Obstet Gynecol*, 120(4), 941-943.

¹⁹ Wilson, R. F. (2005). Autonomy suspended: using female patients to teach intimate exams without their knowledge or consent. *J. Health Care L. & Pol'y*, 8, 240.

²⁰ Yale University School of Medicine. (2019). *Statement of Yale University School of Medicine Concerning SB 16, An Act Prohibiting an Unauthorized Pelvic Exam on a Woman Who is Under Deep Sedation or Anesthesia*. Retrieved from <https://www.cga.ct.gov/2019/PHdata/Tmy/2019SB-00016-R000204-Yale%20University%20School%20of%20Medicine-TMY.PDF>

²¹ American Medical Association, *Medical Student Involvement in Patient Care: Report of the Council on Ethical and Judicial Affairs*. Virtual Mentor, 2001. 3(3). Association of American Medical Colleges. (2003). Statement on Patient Rights and Medical Training. *Committee opinion no. 500: Professional responsibilities in obstetric-gynecologic medical education and training*. *Obstet Gynecol*, 2011. 118(2 Pt 1): p. 400-4. Association of Professors of Gynecology and Obstetrics (APGO) (2019) "APGO Statement on Teaching Pelvic Exams to Medical Students" Retrieved from: <https://apgo.org/page/teachingpelvicexamstomedstudents>

Others have suggested that the practice itself is trivial and that patients do not need to be consented because, in the eyes of medical professionals, these examinations are not sensitive or sexual at all; they involve parts of the body that are just like any other ²². This objection is a paternalistic one that has no place in medicine today. It is not the perspective of the clinician that matters, but that of patients, who have the right to decide what they deem sensitive and what happens to their bodies while they are unconscious.

IV. Closing

It is overwhelmingly clear that foregoing consent before educational pelvic, prostate, or rectal examinations leads to moral distress in medical students, violates the autonomy and bodily rights of women, and jeopardizes the foundation of trust on which the health care system rests. Embedding explicit consent requirements into law will not threaten educational goals, as the majority of women will consent to these examinations, and will improve the system of medical education, as students will leave their training with more respect for patient's bodies and knowledge of the importance of informed consent.

Respectfully yours,

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²² Carugno, J. A. (2012). Practicing pelvic examinations by medical students on women under anesthesia: why not ask first? *Obstet Gynecol*, 120(6), 1479-1480.

²³ Academic affiliation is for identification purposes only. I write in my individual capacity and my university takes no position on this or any other bill.