January 23, 2023
Kansas House Judiciary Committee

Ethics Testimony re HB 2023: "An Act concerning crimes, punishment and criminal procedure; relating to crimes against the public peace; creating the crime of interference with conduct of a hospital; relating to battery; increasing the criminal penalty for battery of a healthcare provider; amending K.S.A. 2022 Supp. 21-5413 and repealing the existing section."

I am speaking as an ethicist with specialization in bioethics, clinical ethics, and Christian Ethics. I consider my testimony regarding HB 2023 to be neutral, neither for or against, but cautionary and constructive.

Please note that the opinions expressed are my own and not those necessarily of my employers or the healthcare institutions to which I provide ethics education and consultation.

Eight years ago when a similar bill was presented, HB 2526 (2015), several colleagues and I drafted written testimony offering ethics perspective on proposed legislation we found deficient on several grounds. Much of what we concluded then seems apropos to HB 2023. Our critique of HB 2526 was that:

1. Protection of everyone in health care environments is, of course, important and necessary.
2. Enacting harsher sentencing is unlikely to provide that protection. It is a reactive measure that will not attain the stated goal—or not apart from more proven preventive measures.
3. Proactive measures may be more ethically appropriate and pragmatically effective.

All of this, unfortunately, still seems accurate.

One difference between 8 years ago and now is that the morale of healthcare workers in harms way is perceptibly, precipitously low. Both nurses and physicians are leaving the field in record numbers. As we all know, pandemic conditions have exacerbated the situation--of workplace risk or violence, also. So I wonder whether this is the time to be taking a stand against even possibly misguided legislation which nonetheless might signal to weary healthcare workers that we have their back. Opposing such legislation could have the opposite effect. That worries me.

So I am not speaking in overt opposition to HB 2023, but with concern that it too strikes me as pragmatically deficient as drafted. If the goal is workplace safety for healthcare workers—a worthy goal—the response of creating harsher criminal penalties for offenders seems to me insufficient at best. It could even be considered counter-productive given the realities of healthcare contexts in which most violent behavior is by patients who lack decisional capacity and behave "unknowingly." Other, more proven and preventative responses to healthcare workplace violence are available and in need

of funding support. Perhaps that sort of focus could be supplemental to what is worthily intended by HB 2023.

My ethics perspective is as follows:

1. The legislation aims to address a real and worrisome issue—unsafe workplace conditions for healthcare workers.

Data, both anecdotal and scientific, indicate unacceptable and increased levels of some types of violence against health care providers. The ECRI Institute reports that "violence related injuries to healthcare workers account for almost as many similar injuries sustained by workers in all other industries combined." https://www.ecri.org/EmailResources/PSRQ/HRC/Ready,%20Set,%20Go%20-%20Violence%20in%20Healthcare%20Facilities.pdf

As a matter of justice for victims and duty to protect potential victims, it is the responsibility of societal leaders to find ways to address this problem. This is especially true when victims are also our healers. We have a special duty to protect and defend healthcare workers.

Pragmatically, it makes good fiscal sense also for a society to provide a safe environment for highly skilled workers who provide a necessary service like healthcare. Failure to prevent violence against healthcare workers is expensive. One study cited by the ECRI Institute indicated "annual employer costs for nurses who sustained workplace injuries were $94,156." https://www.ecri.org/EmailResources/PSRQ/HRC/Ready,%20Set,%20Go%20-%20Violence%20in%20Healthcare%20Facilities.pdf

I affirm the co-sponsors of HB 2023 for addressing a serious societal problem.

2. I worry that creating legislation is not the only or necessarily the best means of addressing this problem.

Legislation aiming to address violence against healthcare workers should fulfill at least one of several possible goals: prevention, deterrence, rehabilitation, punishment, protection of victims, justice for victims. While the intent of HB 2023 is surely good, it is unclear whether it could sufficiently accomplish any of these goals.

According to OSHA, about 80% of healthcare worker injuries are caused by patients. ("Workplace Violence in healthcare: Understanding the Challenge. 2015. https://www.osha.gov/Publications/OSHA3826.pdf) Anecdotally, from my own observation and consultation in several healthcare facilities, most of that 80% involves behavior of patients that is symptomatic of underlying illness in need of treatment. It should not be considered criminal assault, neither simple nor aggravated, in that it is done unknowingly by someone lacking decisional capacity. In HB 2023, battery is defined (albeit inconsistently) as wrongful conduct that is done "knowingly". The vast

majority of injuries inflicted upon my healthcare colleagues, or me, are not going to be addressed by HB 2023 in any meaningful way.

Consider this scenario: Patient X comes into the ER agitated with suicidal ideation. During assessment and initial treatment, Nurse Y is hit by the patient. Subsequent diagnosis shows that Patient X is acutely ill with a bacterial infection which has triggered psychotic and violent behavior. Hospital security has been called to restrain Patient X. Nurse Y reports the incident to the police, who launch an investigation.

What happens next? What *should* happen next is that Patient X is found to have engaged in a violent act, but not “knowingly.” So any charges that may have been filed are dropped, as is ethically and legally fitting, with or without HB 2023. In this scenario, there is no conviction and no punishment because there is no ethically or legally responsible perpetrator. Therefore, there is no deterrent effect either.

In order to be protective and preventive, a law must serve as a deterrent. In order to be a deterrent, there would need to be a significant prevalence of intentional assault and battery incidents involving health care workers. If instead there are a high percentage of unintentional incidents, perhaps symptomatic of acute or chronic mental illness, then even a tough law like HB 2023 has minimal deterrent effect.

And what about Nurse Y? Does HB 2023 provide her any recourse or protections? None. When hurt by patients whose unintentional violence is symptomatic of underlying illness, health care providers have no more protection with this law than without it.

3. **Another concern about HB 2023, as presented, is the potential for prejudice in its application and effect**.

I am uncomfortable with the term "recklessly", which is added to "knowingly" in some sentences. Neither of these terms appear to be defined. Perhaps they should be. Reckless behavior is very often symptomatic of underlying illness and accompanies, is indicative of, decisional incapacity. It seems categorically different than violence done "knowingly", at least when done by patients. Also, the term "knowingly" drops out at Sec. 2 (b) (3) and (4). Without the modifier consistently placed, this seems to criminalize patient behaviors that are violent but engaged in unknowingly due to decisional incapacity.

It seems likely that those who are unable to afford legal representation will be disproportionately affected under this legislation. If someone like Patient X is charged with criminal assault, despite having unknowingly engaged in a violent act while encephalopathic, will his defense be as successful if publicly defended as in non-publicly defended cases? Additionally, some studies indicate that lower risk offenders, such as those whose violence is illness induced, are negatively affected by harsher penalties and longer periods of incarceration.

Patient populations often involved in assault and battery cases include patients with untreated addictions and mental health disorders. Racial and ethnic minorities as well as those of lower socioeconomic status tend to have less access to appropriate mental health care. HB 2023 does not address the underlying social determinants of health, illness, and illness induced violence. Instead, it potentially widens the gap between disparate populations. As such, this law, as presented, may actually exacerbate health care violence rather than deter it. It could make the ER more dangerous rather than less so by proffering court dates and increased incarceration rates when what is truly needed is access to healthcare and treatment.

4. For the small minority of injuries sustained by healthcare workers that are perpetrated by patients who are *knowingly* malicious, or by co-workers (about 3%, per OSHA), or by visitors (12%), perhaps HB 2023 has some relevance.

At the very least, it signals to wary and weary healthcare workers that we are paying attention to their plight. They are particularly tired of being abused by some family members of patients. When violent incidents are perpetrated by family members of patients, it is surely almost always of the "knowingly" sort.

I have empathy for those on the healthcare frontlines, in healthcare administration, and in the legislature who want to say to those who "knowingly" engage in abusive behaviors against healthcare workers: "Enough is enough. And if you perpetrate, we will prosecute and penalize." That sort of message seems reasonable as a matter of justice for vulnerable healthcare worker victims.

5. However, a more pragmatic and useful response to healthcare workplace violence, the vast majority of it, would be to support and fund preventative measures.

These include de-escalation training, behavioral response teams, reporting mechanisms with appropriate follow up, etc.

I have no expertise in risk management, safety, and prevention strategies, but others do. For example, the ECRI Institute provides such resources to healthcare organizations. Their proactive "action recommendations" include the following:

- Develop and enforce comprehensive policies and procedures for violence prevention
- Identify levels of risk
- Train staff to recognize the warning signs of violent behavior and respond proactively
- Encourage all employees and other staff to report incidents of violence or any perceived threats of violence.
- Ensure appropriate follow-up to violent events

Instead of punitive legislation, increased funding for mental health services such as addiction treatment, rehab, and case management may be more effective. If patients

have additional resources, it is possible fewer assaults, knowingly and unknowingly, would occur. Or perhaps hospitals should be provided with more particularized state funding so that emergency department assessment and triage can occur in safer environments.

From a public health perspective, there are proactive measures that can address the real problem of violence against health care workers that does not result in incarceration. Some suggestions include:

- Make cultural competence training routine. Teach all clinicians how to work better with mental health patients, those using illicit substances, etc.—and specifically those with diagnoses most likely to exhibit symptoms that can become violent.
- Provide funding to train behavioral response teams who specialize in de-escalation.
- Devise plans and protocols that utilize specially trained social workers and case managers for intervention rather than calling security or law enforcement. People in the community are oriented very differently toward social workers than they are to police officers, and will respond differently.
- Health care providers and patients, especially those from racially/ethnically diverse populations and mental health consumers, could strategize together on ways to mitigate violence in the health care environment. Engage the wider community in these discussions, with facilitation by experts already available in Kansas healthcare institutions and universities.

There are many ways to protect health care providers who are trying their best to serve patients and family members whose behavior can be unpredictable and threatening. Enacting harsher sentencing does not provide that protection, or insufficiently so. It is mostly a reactive measure that is unlikely to attain the stated goal. Proactive measures may be more ethically appropriate and pragmatically effective.

HB 2023 might not be the place for additional language about healthcare and public institutions' responsibilities for ensuring workplace safety via prevention measures that have proven effective. Perhaps there is more legislation to be drafted instead. If so, I encourage doing so—with gratitude for the work done by each of you on behalf of healthcare workers, our patients and their families.

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