MANDATORY REPORTING OF CHILD ABUSE
IN NEBRASKA

Efforts to cope with the child abuse problem are met at the outset with immense practical difficulty. Just as governmental action necessarily depended on and followed awareness of the child abuse problem, corrective action necessarily awaits identification of individual abusers and their victims. The very fact that the general problem went unnoticed until a relatively recent date indicates that some combination of factors tends to keep the individual cases hidden. Therefore the essential objectives of any corrective system should be to identify and overcome factors that prevent public cooperation in uncovering abuse, and to erect as few new obstacles as possible. Legislative imposition of a duty to report, abrogation of various testimonial privileges, and immunization of the reporter from liability for statements made in a report have been the universal approaches to these objectives. Criminal penalties are prescribed in the statutes of some states, including Nebraska, as an incentive to compliance. Nebraska currently has two independent and overlapping reporting laws that specifically deal with child abuse.

THE MANDATORY REPORT

Sections 28-481 et seq. [hereinafter referred to as Article 4]

1. The medical profession brought child abuse to general attention. Dr. John Chaffey's article, Multiple Fracture in the Long Bones of Infants Suffering from Chronic Subdural Hematoma, 56 AM. J. ROENTGENOLOGY 163 (1946), is generally looked upon as the genesis of the continuing inquiry by the medical profession that resulted by the 1960's in a fairly general appreciation that there was a problem. The progress of this inquiry is chronicled in McCoid, The Battered Child and Other Assaults Upon the Family, 50 MINN. L. REV. 1 (1965). The article also traces the translation of this awareness into legislative action with the enactment of early reporting legislation in the 1960's.

2. For discussion of competing factors that must be balanced in drafting an effective reporting law see Clements, Child Abuse: The Problem of Definition, also published in this symposium.


In addition to protecting minor children, both acts cover abuse of incompetent or disabled persons.
provide the older of Nebraska's two reporting laws, having been enacted in 1965. It is patterned after the Children's Bureau Model Act of 1963. Under this law any person who has reason to believe that a parent, guardian, or custodian has willfully inflicted severe physical injury on his ward must report the injury to the county attorney for the county in which the parent, guardian, or custodian resides. Willful failure to report the injury is a misdemeanor that carries a maximum penalty of $100.

Sections 28-1501 et seq. [hereinafter referred to as Article 15] were enacted in 1973, and are considerably more elaborate than Article 4. While Article 15 follows the "any person" approach in defining the reporting class, it first mentions particular groups specifically. It then divides the circumstances under which a report is required into two categories: (1) where the reporter has "reasonable cause to believe" that abuse has occurred, and (2) where the reporter "observes (a child) being subjected to conditions or circumstances which reasonably would result in abuse." Abuse is defined as:

knowingly, intentionally, or negligently causing or permitting a minor child or an incompetent or disabled person to be: (a) Placed in a situation that may endanger his life or health; (b) tortured, cruelly confined, or cruelly punished; (c) deprived of necessary food, clothing, shelter, or care; or (d) left unattended in a motor vehicle, if such minor child is six years of age or younger.

The Article 15 reporter is specifically permitted to initiate his report by telephone, but he is required to leave his name and address at that time, and he must follow the oral report with a written one of prescribed content. The report is made to the police or town marshall, or to the sheriff in unincorporated areas, rather than to the county attorney. Willful failure to file an Article 15 report is also a misdemeanor carrying a penalty of up to $100.

The Nebraska Legislature is now considering a proposed

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8. Id. § 28-484.
9. Id. § 28-1502: "... any physician, medical institution, nurse, school employee, social worker, or any other person . . . ."
10. Id.
11. Id.
12. Id. § 28-1501(3).
13. Id. § 28-1502. See text at note 38 infra.
15. Id. § 28-1508.
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amendment to Article 15.16 L.B. 20 would repeal the Article 4 reporting law, and add the requirement to Article 15 that a report be made when the reporter has "reasonable cause to believe" that neglect has occurred, or when he observes "conditions or circumstances which reasonably would result" in neglect. The term neglect is not defined. The amendment would also change the agency to whom the report must be made in certain instances.17

The present existence of two reporting laws reflects the fact that the general concept of child abuse is evolving. The two laws also reflect two sides of several issues in the ongoing debate among experts as to the proper scope of a compulsory report. The arguments involved on all sides of this debate have been extensively discussed in other portions of this symposium18 and in recent literature.19 A brief resume of the arguments is included in the following discussion of the present Nebraska laws and the proposed amendment.

The essential features of a reporting law are the definitions of (1) the class of persons who may incur the duty to report, (2) the knowledge or state of mind that matures the duty of a member of that class to report, (3) the person or agency to whom the report must be made, (4) the required form and content of the report, and (5) the consequences of failure to report. It will be convenient to discuss the Nebraska laws in terms of these definitions.

THE REPORTING CLASS20

Beyond a general reluctance to get involved in the personal problems of others, one factor that would tend to keep child abuse hidden from authorities exists when those who observe abuse refuse to acknowledge a duty, or acknowledging a duty they do not know what to do. Under both Articles 4 and 15 any person21 with the requisite knowledge and state of mind incurs a statutorily defined duty to report to a specified agency. The any person approach reflects an unwillingness on the part of the Nebraska Legislature to exclude any potential source of information.

Some experts argue that only physicians and other professionally trained observers should be required to report because (a) the

17. See text at note 43 infra.
20. For discussion as to who should be included in the reporting class see Sussman, supra note 19, at 269-76.
“battered child syndrome” is so complicated that only a trained person can be expected to recognize it, and (b) the expansion of the duty to report will result in a situation where the duty of all becomes the duty of none. The validity of the first argument turns on the definition of abuse employed in the statute, and Nebraska law assumes that much child abuse is blatant enough that the non-professional can be expected to identify it. The second argument is outweighed by the fact that not all abused children come to professional attention, but they are likely to be observed by friends, relatives, teachers, or others.

There is some indication that the broadened approach results in more reports, which, so long as the reports are correct, is the object of the two statutes. Specific mention of various professional groups, but inclusion of “anyone,” is a feature of Article 15 that tends to focus the requirement of reporting on the specific groups, while retaining the advantages of a broad reporting class. L.B. 20 would not alter this feature of Article 15.

CIRCUMSTANCES THAT MATURE A DUTY TO REPORT

The duty to report depends on the type and amount of information that a potential reporter has to offer and not on the conclusions that he has actually drawn. Rather, the known facts are subjected to an objective “reasonableness” test, and the conclusions that this operation allows or demands (state of mind) are compared with a description of the kinds of injury or circumstances with which the statute is concerned (defined standard of abuse). It is not necessary for the reporter to have actually observed all the elements of the abuse standard, nor that all of the elements actually exist.

In Article 4 “reason to believe” is the test by which the reporter’s information is weighed, and severe physical injury willfully inflicted by a parent is the standard of abuse to which the information must point. An example of the reasoning that would be required of a doctor under this statute may be found in a recent California decision:

The doctor was familiar with the elements of “battered child syndrome” . . . . The doctor found these indicia present in the baby’s history in the instant case.

23. Id.
24. Sussman, supra note 19, at 274.
A finding, as in this case, of the "battered child syndrome" is not an opinion by the doctor as to whether any particular person has done anything, but, as this doctor indicated, "it would take thousands of children to have the severity and numbers and degree of injuries that this child has over the span of time that we had" by accidental means. In other words, the "battered child syndrome" simply indicates that a child found with the type of injuries outlined above has not suffered those injuries by accidental means . . . . The additional finding that the injuries were probably occasioned by someone who is ostensibly caring for the child is simply a conclusion based upon logic and reason. Only someone regularly "caring" for the child has the continuing opportunity to inflict these types of injuries . . . . (Emphasis added.)

A determination that the "battered child syndrome" exists is, then, sufficient to mature a duty to report, even though the doctor isn't personally convinced that the parent has intentionally inflicted any particular injury. However, the "battered child syndrome" is a complicated diagnosis, and the standard of abuse used in Article 4 has been criticized because it requires that the reporter have a great deal of information before a state of mind arises that will result in a report. As a practical matter the Article 4 "reporting state of mind" will usually arise only after the child has been taken to a doctor, but not even all doctors are familiar with the "battered child syndrome." Even if the doctor is familiar with the symptoms, he may well be reluctant to make the diagnosis.

In an effort to force reporting even before the child is seriously injured and under a doctor's care, and to demand reports when a minimum of symptoms exist, Article 15 substantially extends the duty to report. Article 15 removes the "willful" and the "parental infliction" elements from its standard of abuse. It also replaces

27. People v. Jackson, 18 Cal. App. 3d 504, 507-08, 95 Cal. Rptr. 919, 921 (Ct. App. 1971) (issue was whether doctor's testimony invaded province of the jury in prosecution of parent).
28. (1) the child is usually under three years of age; (2) there is evidence of bone injury at different times; (3) there are subdural hematomas with or without skull fractures; (4) there is a seriously injured child who does not have a history given that fits the injuries; (5) there is evidence of soft tissue injury; (6) there is evidence of neglect.
Id. at 507, 95 Cal. Rptr. at 921.
the “severe physical injury” element with four “abusive” factual situations, i.e., possible danger to health, gross corporal punishment, deprivation of necessities, and a child less than six years old left in automobile.\(^{31}\)

The reasonableness test employed in Article 15 is also an expansion over that in Article 4. Its first branch, “reasonable cause to believe,”\(^{32}\) is essentially identical to the test in Article 4. It requires the reporter to evaluate information as evidence of present and past abusive situations. The second branch, “reasonably would result,”\(^{33}\) requires the reporter to evaluate present observations as a prediction of present or future abusive situations. Under Article 15, then, if the reporter has reason to believe that a child has, is, or will be placed in any of the abusive situations, the only excuse for failure to report occurs when, from the facts known to the reporter, non-negligent accident or mistake is as reasonable an explanation as knowing, intentional, or negligent\(^{34}\) causes.

Because Article 15 represents a considerable expansion of the reporting duty, any person incurring the legal duty to make an Article 4 report incurs a similar duty to file a separate report under Article 15. L.B. 20 would abolish this dualism by repeal of Article 4. L.B. 20 would retain the reasonableness tests of Article 15, and would expand the standard of abuse yet further, to include “neglect,” and in addition to the four abusive situations listed in Article 15, it would expand the definition of “abuse” to include cases where the child is

(a) Placed in a situation that may endanger his . . . mental health . . . or (e) sexually abused. . . .\(^{35}\)

The wisdom and desirability of requiring the public to predict future “abuse,” as in Article 15 and L.B. 20, or future “neglect,” as in L.B. 20, and of going beyond physical injury to encompass mental health, as in L.B. 20, is critically examined (and denied) in other portions of this symposium.\(^{36}\) The thrust of these requirements is that the world at large should feel a very great obligation toward all children and, simultaneously, very little reluctance to cause an official investigation into the family life of an acquaintance or friend. One virtue of focusing on physical injury, as in

\(^{31}\) See text at note 12 supra.


\(^{33}\) Id.

\(^{34}\) Id. § 28-1501(3).


\(^{36}\) Clements, Child Abuse: The Problem of Definition, also published in this symposium.
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It is obvious that Article 15 is concerned from the outset with what will be done after the report is made, rather than merely with having possible cases of abuse brought to attention. There may be some danger in this. Once the reporter is in contact with the authorities, they can presumably ask the necessary questions. The leverage the law may give to authorities in eliciting additional information from a reticent reporter by specifically setting forth what the reporter must tell them could well be offset by the number of reporters discouraged from getting involved at all. This is all the more true when there is a heavy implication that the reporter will be expected to become involved in judicial proceedings.

Article 4 does not mention the manner of making a report, and presumably a telephone call to the district attorney's office would discharge the reporter's duty; the generation of written reports would be an administrative task of the district attorney's office that would develop with his investigation. Article 15 shifts a portion of this task to the reporter, whose duty is no longer discharged.

38. Id. § 28-1502.
until a written report is made. 89

PERSON TO WHOM THE REPORT IS MADE

The present Nebraska system requires that a report be made to a law enforcement agency under any reporting situations, 40 and a report to both the law enforcement agency and the county attorney under Article 4 circumstances. 41 This system is unfortunately complicated. L.B. 20 remedies this situation by abolishing the Article 4 report altogether.

A serious question in the minds of experts is whether the report should be made to a social welfare agency in the first place rather than to either of the agencies specified in Articles 4 and 15. 42 The idea is based on the philosophy that child abuse is more a social problem than it is a criminal problem, and therefore social workers are in a better position to assess the problem and correct it while still preserving the family. If legal action is required, the law enforcement agency can be called in by the social worker.

A benefit of substituting the welfare agency for a law enforcement agency is the decreased reluctance that a reporter may feel in causing a welfare agent rather than a policeman to call on his neighbor or patient. In the case of Article 4, one expects that a reporter's suspicions would have to be fairly strong before he would notify the county attorney.

L.B. 20 would make a partial substitution in agencies to receive the report, requiring that it be made to the protective services unit of the county division of public welfare in those counties having a population of two hundred fifty thousand or more. 43

Even when the report is not made to a welfare agency in the first instance, it should end up with them. Under present Nebraska law in Article 4 report to the county attorney must be turned over to the Department of Public Welfare if (a) the county attorney causes that department to be assigned to investigate the report, 44 or (b) after his own investigation the county attorney determines that such action is necessary to prevent further injury, 45 or (c) in

39. Id.
40. Id.
41. Id. §§ 28-481, -1502. Any Article 4 case would also fall within Article 15 and the duties that mature under such circumstances are independent.
42. Sussman, supra note 3, at 280-91.
45. Id.
any case where it is determined that there is evidence that a parent or guardian actually did willfully inflict severe physical injury on his ward. 46

An Article 15 report must be referred to the Department of Public Welfare within one working day of receipt if the law enforcement agency determines that an investigation should be made. 47 L.B. 20 would amend Article 15 to require that "[a]ll reports shall be referred, whether an investigation is conducted or not." 48

Once the report is in the hands of the Department of Public Welfare it is the duty of that department to file the report in a registry. 49 Access to the registry is limited to county attorneys, juvenile courts, and directors of county or state public welfare departments. 50 A doctor, who must decide whether or not to report, and the law enforcement agency that is charged under Article 15 with determining whether an investigation is warranted are not permitted direct access to the registry.

Consequences of Failure to Report 51

The Children's Bureau Model Act carried a penalty provision, 52 and this is the approach that has been taken in all Nebraska reporting legislation. Many states have refused to follow this practice. 53

The criminal penalties of Nebraska reporting laws are only applicable when the failure to report was willful. 54 A conviction would therefore require not only proof that the legal duty had accrued, but also proof that the reporter understood that a duty had

46. Id.
47. Id. § 28-1503.
50. Id. § 28-1506.
51. While only criminal liability is examined here, a possibility exists that civil actions could be based on the theory that a violation of the reporting statute is negligence per se or evidence of negligence. See Ramsey and Lawler, The Battered Child Syndrome, 1 PEPPERDINE L. REV. 372, 374-81 (1974); Note, The Child Abuse Epidemic: Illinois' Legislative Response and Some Further Suggestions, U. OF ILL. L.F. 403, 408-14 (1974). Both articles discuss inter alia Robinson v. Elvin, Civil No. 37607 (Cal. Sup. Ct., San Luis Obispo, filed Sept. 4, 1970) in which a one million dollar settlement was obtained on this theory.
accrued and had thereafter voluntarily failed to comply.\textsuperscript{55} This standard would make it difficult to obtain a conviction under a statute such as Article 4, where the duty is very narrow and leaves a great deal of discretion to the reporter. Ignorance of the statutes may also be a defense, at least until the existence and content of the statutes is generally known. In any case, ignorance negatives the element of willfulness.\textsuperscript{56}

**ABROGATION OF PRIVILEGES AND PROVISION OF IMMUNITY FROM LIABILITY**

Abrogation of the physician-patient privilege and the marital privileges is a measure more logically related to the judicial proceedings that may follow a report than it is to the report itself. For this reason Nebraska's Article 4 reporting law did not include such a provision: rather it is contained in a separate statute. Section 25-1207 declares that the testimonial privileges shall be deemed to be waived in any juvenile court proceeding and in any criminal proceeding involving injuries to children or willful failure to report such injuries.\textsuperscript{57}

Article 15 includes a provision abrogating the privileges. It provides that neither the physician-patient nor the marital privileges "... shall ... be a ground for excluding evidence in any judicial proceeding resulting from a report ..." (Emphasis added).\textsuperscript{58} This provision is inadequate because it does not cover actions based on the failure to report. Fortunately L.B. 20, which would repeal Article 4, would not repeal Section 25-1207.

By including a section on privileges Article 15 has the advantage that it emphasizes the intent to include spouses and family physicians in the reporting class. This is a feature that L.B. 20 would retain. While the emphasis so provided may not have much practical effect in the case of spouses, it may be an important ad-

\textsuperscript{55} "The word willfully or purposely means intentionally and not accidentally or involuntarily, ..." Sall v. State, 157 Neb. 688, 696, 61 N.W.2d 256, 261 (1953). If an analogy between the use of the word "willfully" in the reporting law and its use in federal revenue law is well taken, then it is now well settled that "willfully" ... means more than intentionally or voluntarily, and includes an evil motive or bad purpose, so that evidence of an actual bona fide misconception of the law, such as would negative knowledge of the existence of the obligation, would, if believed by the jury, justify a verdict for the defendant. Wardlaw v. United States, 203 F.2d 884, 885 (5th Cir. 1953).

\textsuperscript{56} Wardlaw v. United States, 203 F.2d 884, 885 (5th Cir. 1953).


\textsuperscript{58} Id. § 28-1505.
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vantage in the case of doctors, to whom the dictates of professional
counter might otherwise seem in conflict with reporting. On the
other hand, inclusion of the provisions emphasizes the possibility
of future involvement in judicial proceedings.

Immunity from civil and criminal liability has been deemed es-
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sential to reduce an otherwise natural reluctance to report.\textsuperscript{59} This
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consideration is also of special force in regard to professionals, who
must customarily give great deference to their clients' privacy.
Both Article 4 and Article 15 provide civil and criminal immunity.\textsuperscript{60}
In Article 4 immunity is given only with respect to information
contained in the report required by the provisions of that act.\textsuperscript{61}
Since only a report of "the injury" is required, one could argue
that the immunity granted is rather narrow. It is almost certain,
however, that it would cover all but willfully false
\textsuperscript{62} statements.
Article 15 protects any person involved in investigation, reporting,
or judicial proceedings pursuant to that article, but maliciously
false statements are specifically excluded from protection.\textsuperscript{63}

In addition, Article 15 makes it a criminal offense to release
confidential information other than as required by that article.\textsuperscript{64}
It would therefore be at least a technical violation of the law for
a doctor to make a report to the "wrong" agency. This is presum-
ably not the purpose of the law, but it is remarkable that a law
which is urgently soliciting information, and attempting to over-
come a professional regard for confidentiality, also suggests a new
source of liability.

CONCLUSION

Under present Nebraska law there are two mandatory report-
ing schemes. Each embodies its own working definition of child
abuse, delineation of circumstances that require a report, specifica-
tions of report content and proper agency to whom the report must
be made, provisions of immunity from liability and abrogation of
privileges, and criminal penalties. What currently exists is a dual
system, with no apparent justification for the overlap.

\textsuperscript{59} See Sussman, supra note 3, at 292-93 for a list of authorities who
concur on the indispensibility of immunity provisions.
\textsuperscript{61} Id. § 25-482.
\textsuperscript{62} McCoid, The Battered Child and Other Assaults Upon the Family,
50 Minn. L. Rev. 1, 39 (1965); see also Sussman, supra note 3, at 292-
95.
\textsuperscript{64} Id. § 28-1508.
L.B. 20 is another and yet broader reporting scheme that is currently under consideration by the Nebraska Legislature. Framed as an amendment to Article 15, L.B. 20 would achieve the desirable result of eliminating Nebraska's current dual reporting system by repeal of Article 4. Other reforms contemplated by L.B. 20, such as the expansion of purpose to include identification of possible neglect and possible danger to a child's mental health, are less desirable. The proposed expansion reflects a wholly laudable concern for children's welfare, but it follows in a trend that has already considerably decreased the clarity and urgency with which the duty to report can be impressed on the minds of potential reporters. At some point the effective limitations on mandatory reporting will have been exceeded, notwithstanding expanding appreciation of the abused child's problems.

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