
**MAKING INTERDISCIPLINARY COLLABORATION BETWEEN SOCIAL
WORKERS AND LAWYERS POSSIBLE**

*By Annery Miranda**

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INTRODUCTION

Since the passage of the Child Abuse Prevention and Treatment Act (CAPTA) in 1974, public consciousness regarding the role of child protective services (CPS) has tilted in favor of strict and punitive measures.¹ The societal impulse to develop interventions that are proportional to the outrageous nature of child abuse has my sympathies. Virtually no one would disagree with the idea that children should not be abused or neglected or that society should do as much as it possibly can to ensure children are safe. However, the mechanisms that were created to address child abuse and neglect have, in the end, done more harm than good. The vast majority of cases reported to CPS each year are unsubstantiated.² Only a small portion of cases actually involve potential physical harm to children.³ Most of the cases that get screened fall in the “neglect” category, which overwhelmingly includes situations that are collateral to being poor.⁴ Due to broad definitions of neglect, “poverty itself is often mistaken for neglect.”⁵ The connection between housing instability, for example, and child welfare system involvement

1 See *Interview: Martin Guggenheim*, PBS: FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/fostercare/inside/guggenheim.html> (last visited Sept. 11, 2021).

2 *Id.*; *Child Maltreatment 2019: Summary of Key Findings*, CHILD’S BUREAU (Apr. 2021), <https://www.childwelfare.gov/pubpdfs/canstats.pdf>; Martin Guggenheim, *Somebody’s Children: Sustaining the Family’s Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1732–33 (2000) (book review).

3 *Interview: Martin Guggenheim*, *supra* note 1.

4 Gary B. Melton, *Mandated Reporting: A Policy Without Reason*, 29 CHILD ABUSE & NEGLECT 9, 11 (2005) (quoting US Advisory Board on Child Neglect and Abuse, “Even the psychological variables that are associated with child maltreatment—depression, low self-esteem, sense of powerlessness, general inadequacy, impulsivity, substance abuse—relate directly to ability to cope with poverty.”). The term “poor” as opposed to “low-income” is used deliberately in this article. “Low-income” narrowly focuses on how much money a person makes; whereas the phenomenon of poverty encompasses the broader array of circumstances which afflict poor people and include a lack of choice, difficulties with upward mobility and a feeling of being stuck. As a derivative of the word “poverty,” “poor” better encapsulates this phenomenon than “low income.” A contemporary example of the way the term is being used is the revival of Dr. Martin Luther King’s “Poor People’s Campaign” by Reverend William Barber in order to “creat[e] a national platform to address the intersecting effects of poverty.” Jelani Cobb, *William Barber Takes on Poverty and Race in the Age of Trump*, NEW YORKER (May 7, 2018), <https://www.newyorker.com/magazine/2018/05/14/william-barber-takes-on-poverty-and-race-in-the-age-of-trump>.

5 Maren K. Dale, *Addressing the Underlying Issue of Poverty in Child-Neglect Cases*, A.B.A. (Apr. 10, 2014), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2014/addressing-underlying-issue-poverty-child-neglect-cases/>.

has been well established,⁶ with one in six CPS-involved families investigated specifically for housing problems.⁷ Instead of meaningfully assisting families facing poverty, the preference is to make reports and referrals to a system that does not have the resources to assist⁸ and, instead, relies on punitive mechanisms to threaten families into compliance.⁹

In recent years, the media has increasingly brought attention to such issues and to the overrepresentation of families of color within the CPS system.¹⁰ Critics have pointed out that the so-called child welfare

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- 6 Katherine E. Marcal, *The Impact of Housing Instability on Child Maltreatment: A Causal Investigation*, 21 J. FAM. SOC. WORK 331, 331–32 (2018) (“An examination of the scope of housing problems among a nationally representative sample of child welfare-involved families found housing instability contributed to risk for foster care placement for one in six children under investigation for maltreatment; moreover, housing problems delayed reunification of children already placed out of home.”); Jerry Milner & David Kelly, *It’s Time to Stop Confusing Poverty with Neglect*, IMPRINT (Jan. 17, 2020), <https://imprintnews.org/child-welfare-2/time-for-child-welfare-system-to-stop-confusing-poverty-with-neglect/40222> (“Children were removed from their parents due to chronic homelessness or housing instability. The children of a young, single mother were removed solely due to an eviction. She had hoped that the system would rally to help her find decent, safe housing only to be told ‘you must comply with this or that in your case plan in order to regain custody.’”); Jody Hearn Escaravage, *Child Maltreatment Entrenched by Poverty: How Financial Need Is Linked to Poorer Outcomes in Family Preservation*, CHILD WELFARE, 2014, at 79, 83.
- 7 Patrick J. Fowler, *U.S. Commentary: Implications from the Family Options Study for Homeless and Child Welfare Services*, CITYSCAPE, 2017, at 255.
- 8 See Letter from Michael Dsida, Deputy Chief Couns., Child. & Fam. L. Div., Comm. for Pub. Couns. Servs., to Mandated Rep. Comm’n (Apr. 21, 2021), <https://www.mass.gov/doc/cpcs42121/download> (“Sadly, DCF’s dysfunctions are long-standing, as illustrated by prior reports of the Child Advocate and others.”).
- 9 See Mical Raz, *Unintended Consequences of Expanded Mandatory Reporting Laws*, PEDIATRICS, Apr. 2017, at 1, 2 (“Well-intentioned individuals may be more inclined to report suspicions of maltreatment rather than attempt to assist families, a concern that is particularly relevant in cases of low-income families suspected of neglect. Rather than stepping in to assist needy families with resources, the new mandatory reporting laws may lead individuals to report underfed or poorly dressed children.”); Melton, *supra* note 4, at 12–13 (“The call is treated as an allegation of wrongdoing, not a concerned neighbor’s plea for help.”).
- 10 See Sarah Stillman, *America’s Other Family-Separation Crisis*, NEW YORKER (Oct. 29, 2018), <https://www.newyorker.com/magazine/2018/11/05/americas-other-family-separation-crisis>; Raz, *supra* note 9; Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480>; Molly Schwartz, *Do We Need to Abolish Child Protective Services?*, MOTHER JONES (Dec. 10, 2020), <https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services/>; Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of ‘Jane Crow’*, N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html>.

system is, in fact, a carceral mechanism¹¹ of punishing poverty, of exerting social control over families of color, and is largely ineffective at preventing child abuse and neglect. Over the last few decades, vernacular has been increasingly emerging to capture these criticisms such as “Jane Crow”¹² and “the family regulation system.”¹³ Instrumental to the operation of CPS are the mandated reporters who are tasked by statute in every jurisdiction in the United States with reporting suspicions of child neglect and abuse. While there are some variations across states, every jurisdiction includes doctors,¹⁴ teachers, and social workers among the enumerated professionals who are required to report on families.¹⁵

11 Schwartz, *supra* note 10.

12 See Clifford & Silver-Greenberg, *supra* note 10.

13 Emma Williams, ‘Family Regulation,’ Not ‘Child Welfare,’ Abolition Starts with Changing Our Language, IMPRINT (July 28, 2020), [https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language/45586#:~:text=The%20family%20regulation%20system%2C%20a,offers%20two%20important%20interventions%20to;Ava Cilia, *The Family Regulation System: Why Those Committed to Racial Justice Must Interrogate It*, HARV. C.R.-C.L. L. REV. \(Feb. 17, 2021\), <https://harvardcrcl.org/the-family-regulation-system-why-those-committed-to-racial-justice-must-interrogate-it/>; *Family Defense Advocates Urge Albany to Reform Family Regulation System*, BRONX DEFS. \(May 3, 2021\), <https://www.bronxdefenders.org/family-defense-advocates-urge-albany-to-reform-family-regulation-system/>.](https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language/45586#:~:text=The%20family%20regulation%20system%2C%20a,offers%20two%20important%20interventions%20to;Ava+Cilia,+The+Family+Regulation+System:+Why+Those+Committed+to+Racial+Justice+Must+Interrogate+It,+HARV.+C.R.-C.L.+L.+REV.+ (Feb.+17,+2021),+https://harvardcrcl.org/the-family-regulation-system-why-those-committed-to-racial-justice-must-interrogate-it/;+Family+Defense+Advocates+Urge+Albany+to+Reform+Family+Regulation+System,+BRONX+DEFS.+ (May+3,+2021),+https://www.bronxdefenders.org/family-defense-advocates-urge-albany-to-reform-family-regulation-system/)

14 Monrad G. Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1, 6 (1967) (“In all the states having child abuse legislation, medical doctors are covered by reporting laws, either by express terms referring to them or because they are obviously in the class ‘any person.’”); CHILD.’S BUREAU, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 2 (2019), <https://www.childwelfare.gov/pubpdfs/manda.pdf>.

15 CHILD.’S BUREAU, *supra* note 14, at 2; ALA. CODE § 26-14-3 (2017); ALASKA STAT. ANN. § 47.17.020 (West 2021); ARIZ. REV. STAT. ANN. § 13-3620 (2019); ARK. CODE ANN. § 12-18-402 (West 2021); CAL. PENAL CODE § 11165.7 (West 2021); COLO. REV. STAT. ANN. § 19-3-304 (West 2022); CONN. GEN. STAT. ANN. § 17a-101 (West 2020); DEL. CODE ANN. tit. 16, § 903 (West 2021); FLA. STAT. ANN. § 39.201 (West 2021); GA. CODE ANN. § 19-7-5 (West 2021); HAW. REV. STAT. ANN. § 350-1.1 (West 2021); IDAHO CODE ANN. § 16-1605 (West 2018); 325 ILL. COMP. STAT. ANN. 5/4 (West 2022); IND. CODE ANN. § 31-33-5-1 (West 1997); IOWA CODE ANN. § 232.69 (West 2019); KAN. STAT. ANN. § 38-2223 (West 2016); KY. REV. STAT. ANN. § 620.030 (West 2020); LA. CHILD. CODE ANN. art. 603 (2021); ME. REV. STAT. ANN. tit. 22, § 4011-A (West 2016); MD. CODE ANN., FAM. LAW § 5-704 (West 2019); MASS. GEN. LAWS ANN. ch. 119, §§ 51A, 21 (West 2020); MICH. COMP. LAWS ANN. § 722.623 (West 2016); MINN. STAT. ANN. § 260E.06 (West 2020) (The words “social worker,” “physician,” and “teacher” do not appear in the list of mandatory reporters; instead these professions are included through the inclusion of a broader category: “a professional . . . who is engaged in the practice of the healing arts, social services, hospital administration, psychological or psychiatric treatment, child care, education”); MISS. CODE ANN. § 43-21-353 (West 2019) (including, in addition to physicians, social workers, and school employees, attorneys as mandated reporters); MO. ANN. STAT. § 210.115 (West

Acknowledging the damage that family separation is wreaking on marginalized communities, some social workers have fled to legal settings, at least partially motivated by a desire to resist the mandated reporting role and, in doing so, more effectively¹⁶ helping families facing poverty in

2021); MONT. CODE ANN. § 41-3-201 (West 2021) (specifying that social workers who are mandated reporters are those who are licensed); NEB. REV. STAT. ANN. § 28-711 (West 2012) (naming physicians, school employees, and social workers, and mandating “[w]hen . . . any other person has reasonable cause to believe that a child has been subjected to child abuse or neglect . . . he or she shall report”); NEV. REV. STAT. ANN. § 432B.220 (West 2022) (providing that *licensed* social workers are considered mandated reporters in addition to physicians and school employees); N.H. REV. STAT. ANN. § 169-C:29 (1979); N.J. STAT. ANN. § 9:6-8.10 (West 2019) (universal mandated reporting law); N.M. STAT. ANN. § 32A-4-3 (West 2021) (universal mandated reporting law excluding privileged information); N.Y. SOC. SERV. LAW § 413 (McKinney 2022); N.C. GEN. STAT. ANN. § 7B-301 (West 2016) (universal mandated reporting law); N.D. CENT. CODE ANN. § 50-25.1-03 (West 2021) (specifying *licensed* social worker); OHIO REV. CODE ANN. § 2151.421 (West 2021) (listing attorneys as mandated reporters); OKLA. STAT. ANN. tit. 10A, § 1-2-101 (West 2022) (universal mandated reporting law explicitly mentioning physicians and school employees, not social workers); OR. REV. STAT. ANN. § 419B.010(1) (West 2022) (providing broadly, as one of three Oregon mandated reporting statutes, that private or public officials are mandated reporters); OR. REV. STAT. ANN. § 419B.005(6) (West 2022) (defining public or private officials as including attorneys, “[r]egulated social worker[s],” school employees, and physicians); OR. REV. STAT. ANN. § 675.510(7) (West 2022) (defining “[r]egulated social worker”); 23 PA. STAT. AND CONS. STAT. ANN. § 6311(a)(14) (West 2022) (including attorneys as part of the enumerated professionals considered mandated reporters); 40 R.I. GEN. LAWS ANN. § 40-11-3(a) (West 2022) (universal mandated reporting law); S.C. CODE ANN. § 63-7-310(A) (West 2022); S.D. CODIFIED LAWS § 26-8A-3 (2022); TENN. CODE ANN. § 37-1-403(a)(1) (West 2022) (universal mandated reporting law); TEX. FAM. CODE ANN. § 261.101(a) (West 2022) (universal mandated reporting law); VT. STAT. ANN. tit. 33, § 4913(a) (West 2022); VA. CODE ANN. § 63.2-1509(A) (West 2022) (including social workers by stating “[a]ny person employed as a social worker or family-services specialist” but not clarifying what kind—whether licensed or master’s level); WASH. REV. CODE ANN. § 26.44.030(1)(a) (West 2022); *Beggs v. State*, 247 P.3d 421, 426 (Wash. 2011) (“A doctor’s duty under RCW 26.44.030(1)(a) to report suspected child abuse does not necessarily arise while the doctor is providing health care.”); W. VA. CODE ANN. § 49-2-803(a) (West 2022) (listing “social service worker” as mandated reporter, not “social worker”); WIS. STAT. ANN. § 48.981(2)(a) (West 2022) (carving out exceptions for health care providers at Wis. STAT. ANN. § 48.981(2m) (West 2022) in order to “allow children to obtain confidential health care services.”); WYO. STAT. ANN. § 14-3-205(a)–(b) (West 2022) (universal mandated reporting law).

16 Some social workers believe that rapport with clients can be hard to build in traditional social work settings because of the exceptions to confidentiality and the fear that at any moment, a slip of the tongue could result in a report to child protective services. In this way, the mandated reporting role can serve as a barrier to effective service for communities facing hardships and marginalization. See Lea Tufford, *Repairing Alliance Ruptures in the Mandatory Reporting of Child Malreatment: Perspectives from Social Work*, 95 FAMS. Soc’y 115, 115 (2014); Jill R. McTavish et al., *Mandated Reporters’ Experiences with Reporting Child*

a way that aligns with the overarching goals of their profession. For these social workers, social work—a field which, in theory, is foundationally about enhancing human well-being—can be better accomplished in anti-poverty legal settings rather than in more traditional social work settings. This is because interdisciplinary collaborations between social workers and lawyers can aid in the provision of more robust services for families in need. Still for other social workers, there is an appeal to the sacrosanct nature of confidentiality found in the legal profession. The exceptions to confidentiality that do exist in the legal arena are largely permissive rather than mandatory. That is, lawyers have more discretion when they encounter a situation that may be cause for alarm and can evaluate the need for reporting on a case-by-case basis. Lawyers who are generally bound by strict evidentiary and ethical rules concerning confidentiality have a concurrent duty to make reasonable efforts to ensure that the non-lawyer professionals working as part of the legal team keep communications confidential.¹⁷ Under this general principle, legal settings working across disciplines—particularly in the holistic defense context—take the view that social workers are considered non-lawyer professionals who are covered by attorney-client privilege and the ethical rules governing confidentiality.¹⁸ However, there is disagreement about whether this argument would hold if it were ever the subject of litigation.¹⁹

In this Note I attempt to capture the nature of this controversy and add some clarity to the literature around navigating the ethical conflicts between the fields of social work and law. Section I provides a historical context for the CPS system in order to make the case that it is important

Maltreatment: A Meta-Synthesis of Qualitative Studies, BMJ OPEN, 2017, at 1, 1.

- 17 See MODEL RULES OF PRO. CONDUCT r. 5.3 (AM. BAR ASS'N 1983); MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 1983).
- 18 Robin Steinberg & Elizabeth Keeney, *Shared Roots and Shared Commitments: The Centrality of Social Work to Holistic Defense*, 22 HAIM STRIKS SCH. L.J. 211, 223–24 (2016) (“At the Bronx Defenders and elsewhere, interdisciplinary defense teams carefully engage social workers as integrated members of clients’ legal defense teams within the umbrella of state and national codes of professional responsibility that extend the duty of confidentiality and attorney-client privilege to non-lawyer employees of legal organizations working at the direction of the lawyer. . . . Where defense social workers are employed as an ‘agent’ of the attorney, they are bound by these same guidelines governing lawyers and their non-lawyer employees.”); Lawrence J. Fox & Daniel T. Goyette, *NAPD Formal Ethics Opinion 14-1*, NAT’L ASS’N FOR PUB. DEF. 3–4 (Dec. 2014), https://www.publicdefenders.us/files/NAPD_Formal_Ethics_Opinion_14-1.pdf.
- 19 See, e.g., Interview with Dan Manning, Litig. Dir., Greater Bos. Legal Servs., in Bos., Mass. (May 24, 2021); Interview with Liliana Ibara, Deputy Dir., Greater Bos. Legal Servs., in Bos., Mass. (Feb. 28, 2022).

to create a way for social workers who elect to, to resist such a system within legal settings.²⁰ Section II describes the holistic defense movement and its recruitment of social workers to address root causes of legal-system involvement. I advocate for a similar model in civil legal aid by showing that the need for holistic intervention is the same whether it arises in a criminal or civil context. Section III addresses the pitfalls and difficulties of including social workers on legal teams. In this section, I will address the tension between the ethical mandates of both professions and the models that have been utilized to successfully navigate the perceived incompatibilities between law and social work. This Note concludes in Section V that, despite a dearth of legal authority directly speaking to the issue, there is existing support for the proposition that a social worker's mandated reporting duties do not necessarily survive when working as part of a legal team. Programs wishing to adopt a holistic representation model can do so on this basis.

I. HISTORICAL ROOTS OF THE CHILD PROTECTIVE SERVICES SYSTEM (CPS) AND DISSENTING VOICES IN SOCIAL WORK

“The vast majority of children who are separated from their parents in the United States are separated for reasons that even state officials concede have nothing to do with the true meaning of safety. That is, those children are not in jeopardy of being physically harmed by their parents . . . All children removed from parents, even children removed from parents for very good reasons, . . . suffer mightily in the process of removal. Preventing that suffering is itself a worthy goal of the state.”²¹

A. *The Origins of Mandated Reporting Laws*

Mandated reporting laws were created approximately sixty years ago in response to a growing awareness of the phenomenon of abused children.²² The publication of a seminal paper written by pediatrician Henry

²⁰ This is in no way a suggestion that social workers are to skirt statutorily imposed duties. The contention of this Note is that there is a way for social workers to lawfully utilize their skills and training in legal settings where the ethical duties of the legal profession take precedence over the mandated reporting duty under a theory of derivative attorney-client privilege and lawyer-client confidentiality. For a discussion on how the field of social work is responding to concerns about punitive CPS policies, see *Mandated Supporting*, J MAC FOR FAMS., <https://jmacforfamilies.org/mandated-supporting> (last visited May 6, 2022).

²¹ *Interview: Martin Guggenheim*, *supra* note 1.

²² Kasia O'Neill Murray & Sarah Gesirrech, *A Brief Legislative History of the Child Welfare System*, MASS. LEGAL SERVS. 2 (Nov. 1, 2004), <https://www.masslegalservices.org/system/files/library/Brief%20Legislative%20History%20of%20Child%20>

Kempe²³ in 1962, “The Battered-Child Syndrome,” has been credited with the explosion in legislation concerning child abuse and neglect that followed.²⁴ The rationale for these laws at the outset was that mandated reporting would aid in the detection of child abuse,²⁵ which is often hidden in the privacy of the home. Thus, the question of who in society should bear the responsibility of reporting suspicions of child abuse revolved around those professions which came most frequently into contact with children, and which had the capacity to adequately evaluate the signs of child abuse. The United States Children’s Bureau of the Department of Health, Education, and Welfare initially identified physicians as particularly well-suited to identify child abuse and maltreatment.²⁶ The American Medical Association (AMA), however, feared that if they alone were to bear the burden of reporting, this would disincentivize families from bringing their children in for medical treatment.²⁷ For this reason, the AMA advocated

Welfare%20System.pdf.

- 23 Vincent A. Fulginiti, *C. Henry Kempe*, 126 J. PEDIATRICS 152 (1995).
- 24 Leonard G. Brown III & Kevin Gallagher, *Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States’ Current Mandatory Reporting Laws with a Review of the Laws in the Commonwealth of Pennsylvania*, 59 VILL. L. REV. TOLLE LEGE 37, 37–39 (2014) (“The direct causal link between *The Battered-Child Syndrome* and the subsequent passage of mandatory reporting laws has become something of a truism in modern scholarship, with many scholars noting that within three years of the study, all fifty states had mandatory reporting laws.”).
- 25 *See id.* at 41; Brian G. Fraser, *A Glance at the Past, a Gaze at the Present, a Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 CHI.-KENT L. REV. 641, 650 (1978) (“The first generation of reporting statutes had a rather simple focus. Their purpose was to mandate certain professionals to report suspected cases of child abuse. It was an identification function. It was believed that if a case of suspected child abuse could be identified and funneled into the system, appropriate relief would be provided.” (footnote omitted)). This remains a challenge with mandated reporting, generally. Mandated reporting can create an atmosphere of mistrust among communities most adversely affected by the presence of CPS and may obstruct the otherwise trusting relationships between providers who are considered mandated reporters and the communities they are trying to serve. Interview with Elizabeth McIntyre, Senior Att’y, EdLaw Project, in Bos., Mass. (Sept. 2, 2021); Interview with Olivia Dubois, Ne. Reg’l Soc. Serv. Advocs. Supervisor, Comm. for Pub. Couns. Servs., in Bos., Mass. (Feb. 28, 2022).
- 26 Brown & Gallagher, *supra* note 24, at 40; Paulsen, *supra* note 14, at 3 (“The reporting requirement was limited to doctors for a number of reasons. First, the Bureau embraced the view that abused children most frequently come to public attention when a caretaker seeks medical assistance for a child.” (footnote omitted)).
- 27 Paulsen, *supra* note 14, at 5 (“Officially, the American Medical Association (AMA) objected to physicians’ being singled out for a special reporting duty. . . . The AMA objection was based, in part, on the fear that if doctors alone were to report, parents and other custodians of children would fail to bring their children in for needed medical care.” (footnote omitted)). Notably, the AMA’s concern that mandated reporting can obstruct the provision of services persists to this day with respect to mandated reporters in fields outside

for the expansion of the types of professionals tasked with reporting.²⁸ The thought was that if a wider array of occupations bore this burden, the blame for family separation would be dispersed and any potential disincentive to seek medical care would be mitigated.²⁹ The American Humane Association agreed with the AMA but took the position that “all persons” should share in this burden of reporting suspicions of child abuse and neglect.³⁰

Ultimately, these organizations saw the fruit of their advocacy efforts when Congress passed the Child Abuse Prevention and Treatment Act (CAPTA) of 1974, which required states to create reporting laws and investigative mechanisms regarding child abuse and neglect.³¹ CAPTA was instrumental to the expansion of professionals deputized as mandated reporters. Prior to the passage of CAPTA, almost every jurisdiction required doctors to report child abuse, but only twenty-five jurisdictions required the same of social workers.³² Just a few years after the passage of CAPTA, however, most jurisdictions in the United States included social workers in mandated reporting statutes.³³

Instrumental to the effectuation of these statutes during this time was the development of model legislation, which listed specific occupations and excluded lawyers from that list.³⁴ “The history of the enactment of reporting laws thus demonstrates that lawyers . . . were not a prime target of the mandatory reporting requirements.”³⁵ Importantly, however, they

of medicine. *See supra* note 16. Mandated reporting can create an atmosphere of mistrust among communities most adversely affected by the presence of CPS and may stand in the way of the otherwise trusting relationships between providers who are considered mandated reporters and the communities they are trying to serve. Interview with Elizabeth McIntyre, *supra* note 25; Interview with Olivia Dubois, *supra* note 25.

28 Paulsen, *supra* note 14, at 5.

29 *Id.*

30 *Id.*

31 O’Neill Murray & Gesiriech, *supra* note 22, at 3.

32 Brown & Gallagher, *supra* note 24, at 42 (“By 1974, thirty-four states required nurses to report, twenty-four required teachers to report, twenty-five required social workers to report, and nine required police officers to report. Just four years later, due to the passage of CAPTA, forty-eight states required nurses to report . . . forty-nine required social workers to report . . .” (footnote omitted)); *id.* at 40 (“[I]n 1963, Ohio, one of the first states to pass a mandatory reporting law, required ‘physicians and other medical personnel to report any case of child injury which they believed to have been caused by physical abuse.’ Forty-six other states followed Ohio’s lead in the period between 1963 and 1965, including Pennsylvania.” (footnote omitted)).

33 *Id.* at 42.

34 Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 212, 214 (1992).

35 *Id.*

were not completely left out.³⁶ Some states retained universal mandatory reporting laws,³⁷ as contemplated by the American Humane Association.³⁸ Still today, there are some jurisdictions in which lawyers are technically considered mandated reporters.³⁹ In some of these states, there is ambiguity regarding the relationship between attorney-client privilege and the lawyer's duties under the mandated reporting statutes, although the American Bar Association has clarified that in certain jurisdictions the lawyer's professional duties under the Model Rules of Professional Responsibility take precedence over these universal mandated reporting statutes.⁴⁰ In the vast majority of states today, lawyers are not mandated reporters.

36 *Id.* at 214–15.

37 States that have universal reporting laws include Delaware, Florida, Idaho, Indiana, Kentucky, Maryland, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Utah, and Wyoming. Rebecca McElroy, *An Analysis of State Laws Regarding Mandated Reporting of Child Maltreatment*, ChildFocus (Sept. 2012), http://www.ncdsv.org/images/SPARC-FF-CF-AnAnalysisOfStateLawsRegardingMandatedReportingOfChildMaltreatment_9-2012.pdf.

38 Paulsen, *supra* note 14, at 8.

39 Brown & Gallagher, *supra* note 24, at 57 (nineteen states have universal mandatory reporting); CHILD.'S BUREAU, *supra* note 14, at 40, 43, 61, 66. Lawyers are specifically listed as mandated reporters in several states. *See supra* note 15. Attorneys are considered mandated reporters in Mississippi, Ohio, Oregon, and Pennsylvania. In states with universal mandated reporting laws, it is possible that a lawyer is also statutorily considered a mandated reporter. Such universal mandated reporting states include Delaware, Florida, Indiana, Kentucky, Maryland, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Utah, and Wyoming. *The Interdisciplinary Defense Team & Confidentiality: What Defenders Need to Know*, NAT'L LEGAL AID & DEF. ASS'N (Aug. 2016), <https://njdc.info/wp-content/uploads/2016/10/Defense-Dream-Team-NLADA-Defense-Team-Confidentiality.pdf>.

40 David L. Hudson Jr., *Conflicted Over Confidentiality: Indiana Ethics Opinion Says Lawyers Not Always Obligated to Report Child Abuse*, A.B.A. (Mar. 1, 2016), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-35/march-2016/conflicted-over-confidentiality--indiana-ethics-opinion-says-law/#:~:text=Indiana%20law%20requires%20anyone%20%E2%80%9Cwho,constitutes%20a%20class%20B%20misdemeanor (“The opinion acknowledges the ‘conflict between the lawyer’s ethical duty to keep silent and the apparent statutory duty to speak.’ But given the Indiana Supreme Court’s ‘authority over the legal profession, its Rules of Professional Conduct control over conflicting legislation.’ To conclude otherwise, says the committee, would violate separation-of-powers provisions set forth in the state constitution.”).

B. *Mandated Reporting Laws Do Not Accomplish What They Set Out To*

Although mandated reporting laws have been widely used to deal with child abuse and neglect, there is no clear evidence that they have been effective in the detection of child abuse or in increasing child safety.⁴¹ Instead, it can be argued that their over inclusiveness has had the opposite effect and has actually obstructed the detection of child abuse.⁴²

The definition of neglect, in particular, has been so broadly construed⁴³ that it has encouraged a flood of reports.⁴⁴ In 2019, of the 3,476,000 children who were the subjects of investigated reports, 2,820,000 children were screened out and excluded from the classification of “victim” used by the United States Department of Health & Human Services Children’s Bureau. Most of the children in cases that were screened in were not found to have experienced physical abuse.⁴⁵ According to some studies, at various points in the last twenty years, only one third of the reports nationally have been substantiated.⁴⁶ In the process, an already overtaxed and under-resourced system expends valuable resources investigating and fielding these reports, making it more difficult to invest the necessary resources in the cases these statutes were actually designed to address.⁴⁷

41 See Raz, *supra* note 9; Melton, *supra* note 4, at 10 (“Notwithstanding the charitable motives of the system’s founders . . . the evidence is overwhelming that many of the catastrophic problems in contemporary child protection work in the United States are a direct product of the system’s design.”); Mical Raz, Comment Letter on Proposed Expansion of Massachusetts Mandated Reporting, <https://www.mass.gov/doc/mical-raz42021/download> (last visited May, 10, 2022); Grace W.K. Ho et al., *Universal Mandatory Reporting Policies and the Odds of Identifying Child Physical Abuse*, 107 AM. J. PUB. HEALTH 709 (2017); Mical Raz, *Preventing Child Abuse: Is More Reporting Better?*, U. PENN. (Apr. 10, 2017), <https://ldi.upenn.edu/our-work/research-updates/preventing-child-abuse-is-more-reporting-better/>.

42 Raz, *supra* note 9.

43 Fraser, *supra* note 25, at 652–53 (“Neglect, unlike the element of non-accidental physical injury, seems to defy definition. Neglect denotes a standard of care or behavior. It is the standard of care that a child is entitled to receive, or it is the standard of care and support that a parent is required to provide. There is no agreement of a common standard. At best, the result might be described as chaotic. . . . Since neglect cannot be defined, great emotionalism surrounds it. . . . The application of the standard is often criticized as being culturally emasculated with a middle class orientation. It is.” (footnotes omitted)).

44 *Interview: Martin Guggenheim*, *supra* note 1 (“[N]eglect, as defined in most state laws, [rarely] involves imminent danger to a child’s health or safety. What it involves instead is some condition in the home that’s below adequacy that deserves attention.”).

45 CHILD’S BUREAU, CHILD MALTREATMENT 2019 (2019), <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2019.pdf>.

46 Guggenheim, *supra* note 2, at 1732–33.

47 Raz, *supra* note 9, at 2 (“Actively increasing the number of reports from

Of those children who were screened in and considered victims in 2019, sixty-one percent were screened in on account of neglect, as opposed to abuse.⁴⁸ Definitions of neglect vary by state, but some practitioners in the field say that, on the whole, they effectively equate neglect with poverty.⁴⁹ In Massachusetts, the Department of Children and Families (DCF) utilizes the following definition:

[F]ailure by a caregiver, either deliberately or through negligence or inability, to take those actions necessary to provide a child with minimally adequate food, clothing, shelter, medical care, supervision, emotional stability and growth, or other essential care, provided, however, that such inability is not due solely to inadequate economic resources or solely to the existence of a handicapping condition.⁵⁰

While there is a laudable provision in this regulation that accounts for inadequate economic resources or disability, determinations of neglect are often based on inadequate investigations.⁵¹ It is also exceedingly difficult to parse out the difference between failing to provide a child with basic necessities due to inability—which would constitute neglect—and “due solely to inadequate economic resources.”⁵² For families wishing to challenge the characterization of their circumstances as neglect and who wish to explain that their inability to provide food, clothing, or supervision is due to inadequate economic resources, the appeals mechanism is riddled

nonspecialized individuals may cause harm in a number of ways. Most saliently, mechanisms to increase reporting do not necessarily include increased funding or additional personnel dedicated to children’s services. Accordingly, increased reporting depletes resources that are already spread thin and diverts attention away from children who need it the most.”)

48 CHILD.’S BUREAU, *supra* note 45, at ii (“The 2019 data show . . . [s]ixty-one percent are neglected only, 10.3 percent are physically abused only, and 7.2 percent are sexually abused only.”).

49 *See Interview: Martin Guggenheim, supra* note 1; TINA LEE, CATCHING A CASE: INEQUALITY AND FEAR IN NEW YORK CITY’S CHILD WELFARE SYSTEM 106 (2016); Dale, *supra* note 5. 50 110 MASS. CODE REGS. § 2.00 (2017).

51 THE RIPPLES GRP., REPORT TO THE OFFICE OF THE CHILD ADVOCATE AND THE LEGISLATURE REGARDING THE DEPARTMENT OF CHILDREN AND FAMILIES (DCF) FAIR HEARING SYSTEM 32–37 (2015) [hereinafter RIPPLES].

52 Larissa MacFarquhar, *When Should a Child Be Taken from His Parents?*, NEW YORKER (July 31, 2017), <https://www.newyorker.com/magazine/2017/08/07/when-should-a-child-be-taken-from-his-parents>; *Definitions of Abuse and Neglect*, MASS.GOV, <https://www.mass.gov/info-details/definitions-of-abuse-and-neglect> (last visited May 2, 2022).

with hurdles.⁵³ In Massachusetts, for example, there is no requirement that adjudicators who hear appeals on these cases be legally trained,⁵⁴ there have been documented problems with access to case files and evidence, and families who are largely unrepresented often have trouble understanding their cases.⁵⁵ It is because of regulations like this that “neglect . . . [has come to be] invariably associated with poverty.”⁵⁶ Given the fact that Black and Latino/a/x⁵⁷ families in Massachusetts are overrepresented among the poor, this regulation necessarily disproportionately impacts them.⁵⁸

Although CPS departments are supposed to provide resources for families,⁵⁹ they are often so under-resourced and the staff so undertrained⁶⁰ that they are unable to deliver the kinds of services that would actually help.⁶¹

53 See RIPPLES, *supra* note 51, at 23.

54 *Id.* at 20; NE. UNIV. SCH. OF L. L. OFF. 12, FAMILY MATTERS: A SOCIAL JUSTICE ANALYSIS OF THE FAIR HEARING PROCESS AT THE MASSACHUSETTS DEPARTMENT OF CHILDREN AND FAMILIES (2018) (on file with Professor Elizabeth Bloom).

55 RIPPLES, *supra* note 51, at 24–26.

56 See *Interview: Martin Guggenheim*, *supra* note 1.

57 This Note, when referencing people of Latin American descent, will use the term Latino/a/x unless it is in reference to a direct quote. As a native Spanish speaker, this author appreciates the dilemmas arising from the use of the term “Latinx” for members of the Spanish-speaking community and, in equal measure, the importance of revising terminology in order to be inclusive of gender-non-conforming people. For discussions of the term, see Luis Noe-Bustamante et al., *About One-in-Four U.S. Hispanics Have Heard of Latinx, but Just 3% Use It*, PEW RSCH. CTR. (Aug. 11, 2020), <https://www.pewresearch.org/hispanic/2020/08/11/about-one-in-four-u-s-hispanics-have-heard-of-latinx-but-just-3-use-it/>; Terry Blas, “*Latinx*” Is Growing in Popularity. I Made a Comic to Help You Understand Why., VOX, <https://www.vox.com/the-highlight/2019/10/15/20914347/latin-latina-latino-latinx-means> (Oct. 23, 2019); Evan Odegard Pereira, Editorial, *For Most Latinos, Latinx Does Not Mark the Spot*, N.Y. TIMES (June 15, 2021), <https://www.nytimes.com/2021/06/15/learning/for-most-latinos-latinx-does-not-mark-the-spot.html>; Benjamin Francis-Fallon, *¿La relación entre latinos y ‘latinxs’? Es complicada*, L.A. TIMES (Nov. 30, 2020), <https://www.latimes.com/espanol/vida-y-estilo/articulo/2020-11-30/un-estudio-muestra-que-solo-el-3-de-los-adultos-latinos-usan-la-etiqueta>.

58 Letter from Michael Dsida to Mandated Rep. Comm’n, *supra* note 8.

59 MASS. GEN. LAWS ANN. ch. 119, § 51B(g) (West 2013).

60 MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 206 (2005).

61 See Melton, *supra* note 4, at 14; Joan Levy Zlotnik, *The Use of Title IV-E Training Funds for Social Work Education*, J. HUM. BEHAV. SOC. ENV’T, 2003, at 5, 17 (lack of training); ROB GEEN & KAREN C. TUMLIN, STATE EFFORTS TO REMAKE CHILD WELFARE: RESPONSES TO NEW CHALLENGES AND INCREASED SCRUTINY 4, 11, 15 (1999) (“[C]hild welfare workers reported difficulty accessing needed services for the families they serve. Access to certain specialized services has long been a problem for child welfare caseworkers. . . . In particular, child welfare staff in almost every state we visited reported that families often face long waiting lists for mental health services (especially for children) and substance abuse treatment.”).

Psychologist and Director of the Institute on Family and Neighborhood Life, Gary Melton, has aptly observed that “there is no logical relation between the problems presented and the response undertaken.”⁶² When a child appears unkempt or underfed and a concerned observer makes a report to CPS, the logical response one would expect is that the family would be provided with services to sustainably feed, clothe, and shelter the referred family.⁶³ Instead, the report triggers an investigation into an allegation of neglect. The process is largely adversarial and if the family does not comply with the plan in place, CPS can use this noncompliance as justification for taking the child from the home.⁶⁴ Instead of meaningfully assisting a family in need, CPS workers effectively become the parent police.

The intervention of CPS becomes a burden that is scaffolded on top of the myriad stressors of poverty. Families are sent to various programs, sometimes under court order, which are often ill-suited to meet underlying needs.⁶⁵ They may be sent to a parenting class, for example, when the underlying issue is lack of access to housing, child care,⁶⁶ or medical care. The quality and availability of the services families are referred to as a condition for reunification with their children may also pose further obstacles to complying with the CPS case manager recommendations, which can lead to a finding of noncompliance by a judge.⁶⁷ According to some studies, “[p]arents who do not comply with court-ordered services are extremely likely to lose custody of their children.”⁶⁸ Parents may be required to attend various classes and meetings irrespective of how they comport with

62 Melton, *supra* note 4, at 12.

63 *Id.*

64 *Id.* In Massachusetts, this is done through a care and protection petition. See MASS. GEN. LAWS ANN. ch. 119, § 51(b)(g) (West 2013).

65 See *Interview: Martin Guggenheim*, *supra* note 1 (“One of the questions about therapies and programs like parenting classes is how well-adapted they are to the individual person they claim to be serving. When they become cookie-cutter-like rules, like recipes for making soup, they rarely translate to anything meaningful in a person’s life. Things like ‘Listen carefully to your children and treat them with respect’ don’t really cut it when they are spoken at a level of a sermon-like, in a church, statement of good parenting. Rather, serious help for individuals comes at the level of a significant interaction with a thoughtful therapist. And I’m not always certain that the programs offered to parents have those professionals in place.”).

66 GUGGENHEIM, *supra* note 60, at 189 (discussing that according to a study in the 1980s, the greatest need among CPS-involved families was child care and yet “the primary child welfare ‘service’ the government has offered families [was] foster care.”).

67 See Elizabeth Brico, *How Child Protective Services Can Trap the Parents They’re Supposed to Help*, TALK POVERTY (July 16, 2019), <https://talkpoverty.org/2019/07/16/child-protective-services-trap-parents/>.

68 Eve M. Brank et al., *Parental Compliance: Its Role in Termination of Parental Rights Cases*, 80 NEB. L. REV. 335, 343 (2001).

their work schedules or transportation needs,⁶⁹ which can lead to job loss,⁷⁰ and even greater difficulties with child care, placing reunification with their children even more out of reach.⁷¹ Many families balancing multiple jobs and commitments to various public service agencies may be placed in an impossible bind of having to choose between going to work, showing up to housing court, making a public benefits appointment, or attending a court ordered therapy session.⁷² The failure to attend any one of these could result in homelessness, loss of wages, loss of critical, household-sustaining income, or termination of parental rights.⁷³ Caseworkers, whose testimony in court is given a lot of weight,⁷⁴ may punish parents for disagreeing with their assessments and service plans by reducing visitation with children and even recommending removal of the child from the home.⁷⁵ According to one study, caseworkers may use service plans as a retributive mechanism for how the parent has allegedly treated the child.⁷⁶

The consequences of becoming CPS-involved—even if a report is not screened in—are often catastrophic for families.⁷⁷ The intrusion into the family home places stress on the family system, undermines the credibility

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- 69 Erin Findley & Jandel Crutchfield, *Accessibility of Transportation to Child-Welfare Involved Parents and the Related Impact on Court-Ordered Service Participation*, CHILD & FAM. SOC. WORK EARLY VIEW, Jan. 2022, at 1, 5–6 (noting the difficulties CPS families experience in getting to all of the services required by court-order including caseworkers who may not put a lot of effort into securing an accessible service provider).
- 70 *Id.* at 6 (“Well, if it’s going to take you three hours to get somewhere . . . because you have to take two different buses . . . if you’re trying to work while you’re also doing court-ordered services, then many people have to choose sometimes keep a job, keep an income or get these services done.”); MacFarquhar, *supra* note 52 (“These services are intended to help you, but, if you want to get your kids back, they are not really voluntary, even though they may be so time-consuming and inflexibly scheduled that you lose your job.”).
- 71 Findley & Crutchfield, *supra* note 69, at 8 (finding that transportation access had an impact on a parent’s success or failure in complying with court-ordered services which ultimately impacts the possibility of reunification).
- 72 *See generally* LEE, *supra* note 49, at 140-181.
- 73 *Id.*
- 74 GUGGENHEIM, *supra* note 60, at 189 (“[T]hose [judges] who are aware ‘routinely “rubber stamp” assertions by social service agencies.’”).
- 75 LEE, *supra* note 49.
- 76 Brenda D. Smith, *Child Welfare Service Plan Compliance: Perceptions of Parents and Caseworkers*, 89 FAMS. SOC’Y 521, 525 (2008).
- 77 LISA SANGOI, “WHATEVER THEY DO, I’M HER COMFORT, I’M HER PROTECTOR.” HOW THE FOSTER SYSTEM HAS BECOME GROUND ZERO FOR THE U.S. DRUG WAR 6, 35–36 (2020), <https://www.timeforchangefoundation.org/media/pdfs/MFPDDrugWarFosterSystemReport.pdf>.

of the parent before their children,⁷⁸ and can be experienced as a psychic blow⁷⁹ to a parent who is already over-stressed by their circumstances. The psychological effect of CPS involvement is no small thing. A filing against a family is effectively an accusation of poor parenting that purportedly merits the watchful eye of the state. EdLaw Project attorney, Elizabeth McIntyre, explains that even when families are not reported on, the threat of CPS involvement hovers over communities of color. “[F]amilies are constantly aware that the state has the power to take your kids.”⁸⁰

The Massachusetts Mandated Reporter Commission⁸¹ acknowledged in its final report that “children of color are overrepresented at all stages of involvement with Child Protective Services, including the initial reporting stage.”⁸² Not only is class disparity among families of color driving abuse and neglect reports, but racial bias is playing a prominent role. Research shows that “even when families have the same characteristics and problems, Black children are most likely to be placed in foster care.”⁸³ In Massachusetts, Black children are three times more likely to have an open DCF case than white children.⁸⁴ Latino/a/x children are 2.6 times more likely to have an open DCF case.⁸⁵ It is for this reason that legal scholar, Dorothy Roberts, has pointed out that “[w]ithout considering race, we do not capture the full spectrum of the harm caused by taking large numbers

78 MacFarquhar, *supra* note 52 (“And, after your children see that you are powerless to protect them, this will permanently change things between you. Whatever happens later—whether the kids come back the next week, or in six months, or don’t come back at all—that moment can never be undone.”).

79 Letter from Elizabeth McIntyre, Senior Att’y, Greater Bos. Legal Servs., to Mandated Rep. Comm’n (Apr. 20, 2021), <https://www.mass.gov/doc/anonymous-caregivers-testimonygreater-boston-legal-services42021/download> (“DCF has always eventually closed my cases, but it makes me feel ashamed when they come look into my house. I know it’s not my fault, but it’s hard to remember that sometimes. I am worried that what you are considering doing is going to make life worse for minority parents and kids, and we are already disadvantaged in this country.”).

80 Interview with Elizabeth McIntyre, *supra* note 25.

81 *See infra* Section IV.B.

82 THE MANDATED REP. COMM’N, FINAL REPORT TO THE MASSACHUSETTS LEGISLATURE WRITTEN AND PRESENTED BY THE OFFICE OF THE CHILD ADVOCATE 25 (2021), <https://www.mass.gov/doc/mandated-reporter-commission-final-report-63021/download>.

83 *Professor Dorothy Roberts Argues, in Her Book “Shattered Bonds,” that Child Welfare Discourse Fails to Factor in Racial Bias*, NW. PRITZKER SCH. L. (Jan. 8, 2002), <https://www.law.northwestern.edu/about/news/newsdisplay.cfm?ID=136>.

84 Letter from Elizabeth Egan, Bos. Med. Ctr., Genevieve Preer, Bos. Med. Ctr., Joanne Timmons, Bos. Med. Ctr., Jill Baker, Bos. Med. Ctr., Eileen Costello, Bos. Med. Ctr., Kristin Reed, Bos. Med. Ctr., and Sara Stulac, Bos. Med. Ctr., to Mandated Rep. Comm’n 2 (Apr. 21, 2021), <https://www.mass.gov/doc/boston-medical-center42121/download>.

85 *Id.*

of Black children from their families.”⁸⁶ As Massachusetts Law Reform Institute attorney, Virginia Benzan, poignantly highlighted in her public comment in response to the Massachusetts Mandated Reporter Commission,⁸⁷ “our country has a long history and a sordid comfortability of separating non-white children from their parents, starting with tearing Black children away during slavery, sending Native American children to reform school, separating Japanese children during internment, and most recently separating Latinx children at the southern border.”⁸⁸

When children are taken from the home—even when that home is not ideal—children experience this as inordinately traumatic.⁸⁹ A clinical social worker at a local community health clinic in Massachusetts explained that when she has asked her child clients to compare the level of distress experienced by the abuse versus the separation from the parent, some of the children she worked with rated the separation from their parent many times more distressing than the abuse that precipitated the removal from the home.⁹⁰ She explained that a lot of the children she has worked with who have been removed from their homes “report feeling unsafe, threatened, . . . and

86 DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 228–29 (2002).

87 *Mandated Reporter Commission*, MASS.GOV, <https://www.mass.gov/mandated-reporter-commission> (last visited May 2, 2022).

88 Letter from Virginia Benzan, Dir., Racial Equity & Just. Project, Mass. L. Reform Inst., to Mandated Rep. Comm’n 2 (Apr. 21, 2021), <https://www.mass.gov/doc/virginia-benzanmassachusetts-law-reform-institute42121/download>.

89 *Trauma Caused by Separation of Children from Parents*, A.B.A. 10–11 (2019), https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf; Allison Eck, *Psychological Damage Inflicted by Parent-Child Separation Is Deep, Long-Lasting*, PBS: NOVA (June 20, 2018), <https://www.pbs.org/wgbh/nova/article/psychological-damage-inflicted-by-parent-child-separation-is-deep-long-lasting/> (“Even when children are in the care of parents who may not be able to meet their needs or to keep them safe, they still organize their behaviors and thinking around these relationships and go at great lengths to maintain them,” said Carmen Rosa Noroña, Child Trauma Clinical Services and Training Lead of Boston Medical Center’s Child Witness to Violence Project. Moreover, when these attachment relationships are suddenly subverted and there is no other adult who can help the child make meaning—or a story—of what has happened, the child might experience not only a sense of confusion and terror but might also blame himself or herself for losing the parent.”); JOSEPH GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* 155 (1998) (acknowledging the loss a child experiences when “she passes, even temporarily, from the personal authority of parents to the impersonal authority of the law”).

90 Interview with Sarah Friend, Behav. Health Clinician, Bowdoin St. Health Ctr., in Bos., Mass. (Mar. 4, 2022).

can develop regressive behaviors.”⁹¹ It is tempting to dichotomize CPS-involved families in terms of the “evil parent” and the “victimized child,” particularly when unfortunate—but rare⁹²—events involving harm to children appear in the media.⁹³ Such reductionist characterizations are especially tempting because they invite easy solutions: take the child away from the “evil parent” and the child is safe. This oversimplification fails to acknowledge the important insights from attachment theory which explain how dependent human beings are on parents with whom they have formed strong attachments—which for many children involves their biological parents—for their psychological and emotional well-being.⁹⁴ This false dichotomy of evil parent versus child-in-need-of-rescue further minimizes “the deep and abiding interest [children maintain] in their birth relations.”⁹⁵

This is not to say that there are never appropriate instances where children should be removed from the home—despite the distress they may experience as a result. But it is to say that attachment bonds are one of the most important aspects of childhood development, the severing of which often results in long-term psychological and emotional damage.⁹⁶ To take a child from their parent, the benefits of doing so must be seriously considered against the trauma of separation from their caregiver. The rate at which children—particularly Black children⁹⁷—are being separated from their parents for situations that are sometimes nothing more than related to lack of economic resources is alarming considering the harm that befalls foster children. By impulsively separating children from their parents, we aid in the collective traumatization of children in the foster care system. The

91 *Id.*

92 GUGGENHEIM, *supra* note 60, at 175.

93 GEEN & TUMLIN, *supra* note 61, at 9.

94 Annette Ruth Appell, *The Myth of Separation*, 6 NW. J.L. & SOC. POL'Y 291 (2011).

95 *Id.*

96 Mario Mikulincer & Phillip R. Shaver, *An Attachment Perspective on Psychopathology*, 11 WORLD PSYCHIATRY 11, 14 (2012). The concept of attachment theory was first articulated by British psychoanalyst, John Bowlby, author of a famous study, “The Strange Situation,” in which infants were observed in their interactions with their mothers. The range of infant reactions were classified into various attachment styles: secure, anxious, disorganized and ambivalent. “In particular, the theory holds that young children attach to their parents, usually their mothers, and that their later functioning can be explained by the quality of this attachment.” Pamela S. Ludolph & Milfred D. Dale, *Attachment in Child Custody: An Additive Factor, Not a Determinative One*, 46 FAM. L.Q. 1, 2 (2012).

97 Chris Gottlieb, *Black Families Are Outraged About Family Separation Within the U.S. It's Time to Listen to Them*, TIME (Mar. 17, 2021), <https://time.com/5946929/child-welfare-black-families/>.

term “foster-care to prison pipeline”⁹⁸ exists for a reason. “[O]ne quarter of foster care alumni will become involved with the criminal [legal] system within two years of leaving care.”⁹⁹ Children in group homes face an even greater probability of being involved in the criminal legal system than those placed with foster families.¹⁰⁰ “[M]ore than 90% of youth in foster care with five or more moves will become involved in the juvenile [legal] system.”¹⁰¹ The more than 200,000 children entering foster care each year,¹⁰² who are separated from their families and placed with strangers—sometimes in the middle of the night—are taken away from their friends and their schools. They may be shuffled around from the home of one stranger to another.¹⁰³ They are sometimes subjected to even greater abuse in foster homes,¹⁰⁴ leading to astonishingly poor life outcomes.¹⁰⁵

98 *What Is the Foster Care-to-Prison Pipeline?*, JUV. L. CTR. (May 26, 2018), <https://jlc.org/news/what-foster-care-prison-pipeline>; Elizabeth Amon, *New Washington Laws Aim to Interrupt Foster Care-to-Prison Pipeline*, IMPRINT (Aug. 9, 2021), <https://imprintnews.org/law-policy/new-washington-laws-aim-to-interrupt-foster-care-to-prison-pipeline/57613> (“If you could feel the conflagration of rage born out of powerlessness and the feeling of worthlessness that is cultivated inside a young person raised by the state, you might begin to understand the problem—why raising young people in this way, then throwing them out onto the street makes them incompatible with society—at least incompatible with any society that endeavors to uphold the principle of human dignity.” (quoting Arthur Longworth)); Youngmin Yi & Christopher Wildeman, *Can Foster Care Interventions Diminish Justice System Inequality?*, FUTURE CHILD., Spring 2018, at 37.

99 *What Is the Foster Care-to-Prison Pipeline?*, *supra* note 98.

100 *Id.*

101 *Id.*; Interview with Sarah Friend, *supra* note 90 (recounting working with a child who was placed in twenty-seven foster homes in the last eighteen months and expresses concern about the trauma of removing children without “a solid plan in place”).

102 CHILD WELFARE INFO. GATEWAY, CHILD.’S BUREAU, FOSTER CARE STATISTICS 2019 (2021), <https://www.childwelfare.gov/pubPDFs/foster.pdf>.

103 Almost half of children placed in foster care are placed in nonrelative foster family homes, which means they go to live with strangers (46% are in nonrelative foster family home, 24% are with relatives, 10% go to institutions, 6% go to group homes). *Id.* at 4; Kay P. Kindred, *Of Child Welfare and Welfare Reform: The Implications for Children When Contradictory Policies Collide*, 9 WM. & MARY J. WOMEN & L. 413, 446 (2003) (“Stays in foster care turned out to be long for many children, often with multiple moves from place to place.”).

104 Josh Salman et al., *Foster Kids Live with Molesters. No One Told Their Parents.*, USA TODAY (Oct. 15, 2020) (updated Oct. 16, 2020), <https://www.usatoday.com/in-depth/news/investigations/2020/10/15/no-one-checks-on-kids-who-previously-lived-with-abusive-foster-parents/5896724002/>; Kindred, *supra* note 103, at 448 n.203 (“In Los Angeles, where roughly 41 percent of all California’s children in foster care receive services, an audit revealed that the county failed to protect children in foster care from substandard conditions and physical and sexual abuse.”).

105 ROBERTS, *supra* note 86, at 223.

Family preservation, thus, is not a reification of the parent's rights over and against the child's rights. It is in the child's interest for society to do everything it can to address concerns within the family unit and to remove a child only in the most extreme circumstances. As Martin Guggenheim explains, "[a]ttempting to consider the needs of (very young children) without simultaneously taking into account the rights and needs of parents is akin to attempting to isolate someone's arm from the rest of their body."¹⁰⁶ Underlying much of the policy choices with respect to child welfare is a false sense of heroism which finds its roots in the child saving movement.¹⁰⁷ However, child well-being cannot be disconnected from the well-being of the parents. According to the psychology literature, parents are the primary organizers of their children's experience.¹⁰⁸ In choosing family separation in the name of child welfare over helping the entire family unit, we facilitate the traumatization of mothers,¹⁰⁹ cast them away to deal with their poverty and to mourn the loss of their children in addition to traumatizing the children themselves. Any meaningful child welfare intervention must take into account the well-being of the parent as connected to that of the child.

Our current system fails to address some of the root causes of child-welfare system involvement. Unstable sources of parental income are the major determinant of children's removal from their parent's custody, while the severity of child maltreatment is not as strong an indicator.¹¹⁰ This finding is further supported by studies which have found that increasing welfare payments reduces neglect filings and foster care placements.¹¹¹ Conversely, reductions in welfare payments have been shown to have

106 GUGGENHEIM, *supra* note 60, at 14.

107 Frank Edwards, *Saving Children, Controlling Families: Punishment, Redistribution, and Child Protection*, 81 AM. SOCIO. REV. 575 (2016).

108 ALICIA F. LIEBERMAN & PATRICIA VAN HORN, DON'T HIT MY MOMMY! A MANUAL FOR CHILD-PARENT PSYCHOTHERAPY WITH YOUNG WITNESSES OF FAMILY VIOLENCE (ZERO TO THREE, 1st ed. 2005).

109 See MacFarquhar, *supra* note 52; Interview with Sarah Friend, *supra* note 91 ("I've worked with mothers who have had their children removed, and for them, the pain from a severed mother-child bond is almost unbearable; not a day passes in which they don't feel guilt, remorse, and loss.").

110 Naomi Cahn, *Placing Children in Context: Parents, Foster Care, and Poverty*, in WHAT IS RIGHT FOR CHILDREN? 145, 145 (Martha Albertson Fineman & Karen Worthington eds., 2009); Mary B. Larner et al., *Protecting Children from Abuse and Neglect: Analysis and Recommendations*, 8 FUTURE CHILD. 4, 16 (1998) ("National data indicate that abuse or neglect are 22 times as likely to occur in families earning less than \$15,000 per year as they are in families earning more than \$30,000 per year.").

111 Cahn, *supra* note 110, at 151 ("[A] large study finds that higher benefit levels were associated with lower levels of neglect and fewer children in foster care.").

the opposite effect.¹¹² This powerful data demonstrating that increasing economic resources can help reduce child-protective services involvement should lead to the provision of greater economic resources for struggling families.¹¹³ Instead, policymakers have elected to do the opposite.¹¹⁴ Rather than directly providing poor families with funds, it is the foster families who are provided resources to help take care of the children removed from poor homes.¹¹⁵

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- 112 Christina Paxson & Jane Waldfogel, *Welfare Reforms, Family Resources, and Child Maltreatment*, 22 J. POL'Y ANALYSIS & MGMT. 85, 85 (2003) (“Evidence strongly indicates that reductions in states’ welfare benefit levels increase the number of children in out-of-home care, and some evidence indicates that strict lifetime welfare limits and tougher sanctions for noncompliance are related to higher levels of substantiated maltreatment.”); Maria Cancian et al., *Making Parents Pay: The Unintended Consequences of Charging Parents for Foster Care*, 72 CHILD. & YOUTH SERVS. REV. 100, 101–02 (2017) (“A number of authors have found that reductions in welfare payments are associated with a higher risk of CPS involvement. Shook (1999) using data from Illinois, found that reductions in welfare benefits, in the absence of increases in earnings, were associated with CPS involvement”); *The Child Allowance Is a Child Welfare Issue*, CHILD.’S DEF. FUND (May 2021), <https://www.childrensdefense.org/wp-content/uploads/2021/05/Child-Allowance-Child-Welfare-Talking-Points.pdf>; see Alexia Pappas, Note, *Welfare Reform: Child Welfare or the Rhetoric of Responsibility?*, 45 DUKE L.J. 1301, 1304–06 (1996); Cahn, *supra* note 110, at 150 (“Studies show that children in families with incomes less than \$15,000 per year are 45 times more likely to be victims of substantiated neglect than children in families with incomes greater than \$30,000 per year.”).
- 113 *See How Do Economic Supports Benefit Families and Communities?*, CASEY FAM. PROGRAMS (Feb. 15, 2022), <https://www.casey.org/economic-supports/>.
- 114 *See Interview: Martin Guggenheim*, *supra* note 1 (“Child welfare is, in some ways, the residual outcome of a political choice in our country not to help families directly. But if it became too family-friendly, it would become an indirect subsidy just for needy families. So what we require instead is not merely that you demonstrate a need, but that we decide—we, meaning the officials who will help you—that you have failed in some respect.”); Kindred, *supra* note 103, at 444 (explaining that after the passage of the Social Security Act which created the Aid to Dependent Child program, “most states used those federal monies to fund foster care programs rather than to provide support services to families whose children remained in the home”); see also *id.* at 445–46 (“Cases considered serious are investigated, but few resources are available to provide continued social services to families even when evidence of maltreatment is found.”).
- 115 Historically, there has been a longstanding tension between either “saving children from neglectful or abusive families . . . or on helping families better provide and care for their children.” Kindred, *supra* note 103, at 443; MacFarquhar, *supra* note 52 (“While the case dragged on and Mercedes drifted, the agency was helping the foster mother with housing. ‘They done moved this lady three times, and every time the apartment’s getting bigger,’ Mercedes said bitterly. ‘But you can’t help the biological mother who’s showing you that she wants her kids? If they would have done that for me in the first place, I wouldn’t be in the situation that I’m in now, and I’d have my kids.’”).

In this way, child protective services systems are failing to meaningfully address child abuse and neglect, let alone advancing child welfare. More specifically, they are failing at providing safe alternatives for those children who come into their care.¹¹⁶ Many years ago, when I went to visit a child who had been in the foster care system, living in a residential home after having been sexually abused by an uncle, I saw him locked in a bare room, hovered in a corner crying. I will never forget his words to me: “I know I need help, but these people aren’t helping me. My uncle is the one that did this, and he is free. I’m the one who is locked up.” There must be a better way.

C. *Dissenting Social Workers*

Social workers who endorse the data¹¹⁷ showing that mandated reporting is not very effective in solving the problem of child abuse and neglect, and who do not wish to be complicit in a system that punishes poverty and polices families of color, are in a bind. That is, as long as the current mandated reporting statutes remain in force. There is an inherent tension between the broader goals of the profession and the effects of mandated reporting. According to the National Association of Social Workers (NASW) Code of Ethics, which guides social worker conduct, “[t]he primary mission of the social work profession is to enhance human well-being and help meet the basic human needs of all people, with particular attention to the needs and empowerment of people who are vulnerable, oppressed, and living in poverty.”¹¹⁸ But, as previously established, mandated reporting has not served this purpose of enhancing human well-being and meeting the basic needs of *all* people. Both the children and the parents from whom they are taken often experience the opposite of enhancement.

116 See Kindred, *supra* note 103, at 448 (“Twenty-one states have been sued because of inadequate child protection programs, and a number of state foster care systems are under federal court supervision because of multiple failures to meet state and federal requirements.”); Sixto Cancel, *I Will Never Forget that I Could Have Lived with People Who Loved Me*, N.Y. TIMES (Sept. 16, 2021), <https://www.nytimes.com/2021/09/16/opinion/foster-care-children-us.html>; Sarah Fathallah & Sarah Sullivan, *Away from Home: Youth Experiences of Institutional Placements in Foster Care*, THINK US (July 2021), https://assets.website-files.com/60a6942819ce8053cefd0947/60f6b1eba474362514093f96_Away%20From%20Home%20-%20Report.pdf.

117 *Preventing Child Abuse: Is More Reporting Better?*, *supra* note 41; see Kelley Fong, *Public Comment on Mandated Reporter Commission Report*, MASS.GOV (Apr. 2021), <https://www.mass.gov/doc/kelley-fong41921/download>.

118 *Code of Ethics*, NAT’L ASS’N SOC. WORKERS, <https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English> (last visited May 2, 2022).

Further, mandated reporting statutes have created a culture of fear in many social work settings, which shifts the focus from family-centered work to compliance with the statute.¹¹⁹ In other words, social workers believe they must put their fear ahead of what's best for the client. Graduate level social work programs often do not train social workers on the meaning of the pertinent statute,¹²⁰ leading many social workers to assume that they have less discretion than they actually have when it comes to reporting on families and creating a feeling that they have to "cover their backs" or that they are "better safe than sorry."¹²¹ Indeed, many social workers and mental health professionals shy away from any collaboration with lawyers due to a mistaken belief that mandated reporting duties will always conflict with the attorney client privilege without understanding the specific circumstances that trigger the mandated reporting duty.¹²²

My experience as a social work student in a practicum setting is instructive in this regard.

I had been providing therapy to a domestic violence survivor under the supervision of a licensed clinical social worker (LCSW). The client disclosed that she was experiencing ongoing emotional and verbal abuse and that her child often witnessed it and hid behind furniture. She expressed wanting to leave the relationship but was concerned about her lack of financial solvency. We were working together on a plan to identify ways for her to both leave the relationship and continue providing for her and her child. As a student working under the license of a superior, I was obligated to share what transpired in our sessions with

119 Haymarket Books, *Social Work and Abolishing the Family Regulation System*, SOUND CLOUD, at 7:14 (June 2021), <https://soundcloud.com/haymarketbooks/social-work-and-abolishing-the-family-regulation-system>; see also *Interview: Martin Guggenheim*, *supra* note 1 ("When the agency itself was involved in the sensational case that gets in the media, a form of panic and hysteria actually takes over. Each employee asks the first question in the next case: What can I do to be sure I don't get my name in the paper tomorrow? And the answer to that question almost invariably is, remove the child. There have never been media headlines over a wrongful removal of a child from a parent's home. The headlines have always been about the failure to remove a child. So the system gets skewed dramatically in favor of overprotection. Overprotection here now is not just overprotection of the child, because that discounts the harm to children."); GEEN & TUMLIN, *supra* note 61, at 8–9 ("Child welfare staff are now so afraid of hostile attention, according to our respondents, that they are removing children from their parents' homes and/or choosing not to reunite families whenever they have even the smallest doubt about a child's safety.").

120 Interview with Olivia Dubois, *supra* note 25.

121 Haymarket Books, *supra* note 119, at 7:14 ("Everyone is cautious, covering their own behinds.").

122 See generally Brigid Coleman, *Lawyers Who Are Also Social Workers: How to Effectively Combine Two Different Disciplines to Better Serve Clients*, 7 WASH. U. J.L. & POL'Y 131 (2001).

them. Upon hearing about the child hiding, they commanded me to call the Department of Children and Families (DCF).¹²³ DCF already had an open case with this family, so I explained my disagreement with my supervisor's assessment that a call to DCF was necessary. I further expressed concern that our work would be disrupted, and our rapport severed should I make disclosures about our confidential sessions to a DCF worker who, in the end, would not have the resources to help the family in the way our office could. I felt strongly that our duties of confidentiality here were not subject to a mandated reporting exception in this circumstance because I did not characterize what was going on in the home as child abuse or neglect as statutorily defined. Even if I did think the situation rose to the level of child abuse or neglect, DCF was already involved. They promptly dismissed my concern and parked themselves in a chair next to me while forcing me to make the call. Later, during a staff meeting where I once again raised my concerns, they responded, "[a]t least, in the end, we did what we were supposed to do." As a young social worker, I felt cornered to act against my ethical sensibilities and felt that I had no options but to comply. As predicted, the client stopped returning my calls until a month later when I tried her again at which point, she told me about the level of stress she had been under due to DCF intensifying their involvement. She confirmed that she had not managed to find a way to leave her partner and quickly got off the phone. Here, my supervisor was less concerned about the negative effect that a phone call to DCF would have on the therapeutic work we were doing, on the safety of the mother and child, or affirming the agency and self-determination of the client. Their hypervigilance about their duties as a mandated reporter took precedence and caused them to act less like a therapist and more like the parent police.¹²⁴

Because social workers use their discretion to decide whether a client disclosure triggers their mandated reporting duties, it is possible to execute these duties in a sensitive way within social work settings. For example, if cause for concern arises over the course of working with a client, the social worker may have a frank conversation with the client about their duties and observations. They may first work with the family to address the concern under the theory that if the client is working on the identified problem, they are not neglectful or abusive and thus there is no reason to report—particularly, if there is evidence that the parent has resolved the issue. If unable to resolve the concern, the social worker may use psychotherapeutic tools to prepare the family to call CPS together with the social worker and frame the call as a request for assistance. However, there is a certain disingenuousness to this method because, as previously established, CPS departments are not equipped to assist. They are equipped to surveil

123 In Massachusetts, the CPS agency is called the Department of Children and Families.

124 Memorandum from author to Ed. Bd., Ne. Univ. L. Rev. (Mar. 5, 2022) (on file with Northeastern University Law Review).

and to ensure compliance.¹²⁵

For this reason, many social workers have elected to work in anti-poverty legal settings where they are more fully able to advocate for their clients' needs without complicity in the family regulation system. Because lawyers are not mandated reporters, legal settings tend to have less of a fear-based culture—in contrast to the social work setting described above—and are more apt to proceed with care should a situation rising to the level of abuse or neglect present itself. Because the profession places value on the zealous representation of a client's interests,¹²⁶ a client's self-determination and agency are also highly prized. The permissive rule that allows lawyers to break confidentiality, should a situation warrant it,¹²⁷ allows for more care and use of discernment in the decisions to report on families.

Some legal settings hire social workers in an attempt to work holistically with clients—particularly in the world of public defense.¹²⁸ Other legal programs may incidentally hire social workers to function as legal advocates or paralegals who advocate for their clients' public benefits.¹²⁹ Still others, hire clinical social workers to work separately as therapists,¹³⁰

125 See ROBERTS, *supra* note 86, at 39–40 (“In my conversations with mothers in Chicago, I soon discovered a pattern of legitimizing their long-term involvement in the system. Their children were initially removed for reasons directly related to their financial situation, ostensibly to protect children from harm. Once under agency control, the mothers were subjected to intense scrutiny that included mandatory parenting classes, supervised visits with their children, and a battery of psychological evaluations. Any failure to attend a required class, inappropriate interaction with their children, a diagnosis of mental distress became grounds to extend their children's time in foster care. State authorities could find fault with any parent subjected to so much monitoring and examination.”).

126 MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. (AM. BAR ASS'N 2020) (“A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.”).

127 MODEL RULES OF PRO. CONDUCT r. 1.6(b) (AM. BAR ASS'N 2020).

128 *Social Work*, BRONX DEFS., <https://www.bronxdefenders.org/our-work/soc-work/> (last visited Jan. 4, 2022). Most Committee for Public Counsel Services offices across Massachusetts hire Social Service Advocates (SSAs). Most SSAs who are hired are master's level social workers. Interview with Olivia Dubois, *supra* note 25.

129 Interview with Dan Manning, *supra* note 19. Greater Boston Legal Services does not hire for social work positions, but a few of their paralegals have had MSWs. The current paralegal in the Welfare Unit has an MSW and works primarily as a legal advocate for welfare recipients.

130 Interview with Elizabeth Brusie, Assistant Legal Dir., De Novo, in Bos., Mass. (June 7, 2021). De Novo in Cambridge, MA is a multidisciplinary agency which has a counseling practice staffed by clinical social workers in addition to a legal practice.

as expert evaluators, or consultants who are recruited on a case-by-case basis,¹³¹ depending on the needs of the particular legal case. Allowing spaces for social workers within legal settings can be mutually beneficial—the legal setting supports a social worker’s resistance to the broken CPS system, all the while benefitting from their expertise and skills.¹³²

II. HOLISTIC DEFENSE

There are complicated child welfare cases in which familial trauma, the trauma of poverty, and racism, require more than financial assistance in order to prevent family separation.¹³³ Many have observed that to effectively address child neglect and abuse, “all-encompassing service[s]”¹³⁴ and an “intricate untangling of the multiple causes of pain, abuse and deprivation” are necessary.¹³⁵ For families in need of such robust interventions, a few referrals for food stamps, housing search, and welfare benefits are inadequate. Often, the trauma these families have experienced is generational and deeply entrenched, which calls for greater support from persons with expertise in psychological trauma who can be a consistent source of support over a longer period of time.

Addressing such complex problems may sound like an impossible task. It is for this reason that some supporters of the family regulation system

An ethical wall has been created between the two wings of the agency in order to navigate any potential ethical conflicts related to mandated reporting.

131 Interview with Cristina F. Freitas, Att’y, Freitas & Freitas, and Debbie F. Freitas, Att’y, Freitas & Freitas, in Bos., Mass. (2021).

132 See *infra* Part III.

133 Lucy A. Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 FORDHAM URB. L.J. 1159 (1995).

134 Interview: Martin Guggenheim, *supra* note 1.

135 See Williams, *supra* note 133, at 1195–96; Kindred, *supra* note 103, at 417 (“Concentrating most of the resources of the child protection system at the end of the services continuum results in a greater need for child welfare intervention and treatment than would be required if families were provided support before their problems reached crisis levels that put children in jeopardy. . . . In the case of reported child maltreatment, the response of the child protection system is all too often to remove a child from the home and to place him or her in foster care. In cases of child neglect, as opposed to child abuse, this response may be primarily a function of a greater availability of funding for foster care than funding for other alternative services. Thus, removal and out placement often becomes the default child protection method of choice.”); *id.* at 418 (“As suggested by the National Commission, reform of child protection policy and practice requires broad-based interdisciplinary changes—drawing on the interrelated efforts of social services agencies, courts, and state legislatures and administrative agencies.”).

have taken it as a given that our society does not provide such services,¹³⁶ all the while agreeing that “[w]e don’t support families up front in ways designed to ensure their success, waiting instead until families are in such trouble that preservation efforts are often doomed.”¹³⁷ However, there is strong support in the field of psychology for the effectiveness of robust interventions with psychologically vulnerable families. Child psychologist and lead developer of Child-Parent Psychotherapy, Alicia Lieberman, has explained a modality that aims to work around the severing of attachment bonds between parents and their children.¹³⁸ She explains that human behavior and identity do not exist in a vacuum.¹³⁹ They are very much determined by the surrounding circumstances a parent or family might be experiencing.¹⁴⁰ Borrowing a phrase commonly used in Latin American cultures, “I am myself and my circumstances,” she elaborates on psychoanalyst, Donald Winnicott’s ideas to provide solutions to traumatized families—particularly when that trauma is inter-generational,¹⁴¹

... I am myself and my circumstances . . . My identity is shaped by my circumstances. And as my circumstances change, so might my identity change. Winnicott talked about “there’s no such thing as a baby.” We like to say, “there’s no such thing as a parent;” “there’s no such thing as a family.” When we give parents and families the circumstances they need to feel protected by society their parenting changes and their child changes. And in child-parent psychotherapy, we like to give ourselves the time to ask parents about their circumstances so that we understand, how come these things happened to them? In what context? And it helps the parent understand how *their* parents were often influenced by their circumstances. So, it becomes an intergenerational process that goes beyond two generations into understanding, “how come?” What were the hardships that my parents were experiencing as

136 Guggenheim, *supra* note 2, at 1722 (“Bartholet . . . contradicts her assumption that child welfare officials make their best efforts by articulating two additional premises. First, Bartholet reasons that, even if society has not given its best efforts to assist marginal families, we cannot reasonably expect significant change in the foreseeable future. Bartholet thus occasionally acknowledges the inadequacy of society’s efforts to change the terrible conditions in which poor children are raised . . .” (footnote omitted)).

137 *Id.*

138 Child-Parent Psychotherapy, *The Importance of Family Circumstances in Child-Parent Psychotherapy*, YouTube (Sept. 20, 2019), <https://www.youtube.com/watch?v=VDNpmJTGSpw&t=132s>.

139 *Id.*

140 *Id.*

141 *Id.*

they raised me that are now shaping how I'm raising my child? And so, compassion kind of goes back. And anger needs to be turned to the people who create—who tolerate those conditions of inequality and racism and discrimination and oppression.¹⁴²

Interventions—such as the ones Lieberman describes—that more carefully consider the dynamic of a traumatized family are worth investing in. By using more sophisticated tools than what the current system offers, we can more effectively prevent the traumatization caused by family separation among our most vulnerable members of society. Moreover, given the intergenerational nature of family trauma, more robustly investing in the two generations who come under the State's investigation through CPS, can prevent the further deterioration of the lives of those subsequent generations. While federal and state governments have made these choices not to provide the necessary high-quality services, there are ways to create programs that fill in the gap with a multi-faceted and holistic approach to working with struggling families.¹⁴³

Holistic defense holds promise as a model that attempts to provide the kind of wrap-around interventions that the state has failed to invest in. To put it in Lieberman's terms, such services can constitute an attempt to change family and parent circumstances in such a way that they feel supported by society instead of antagonized—at least by their advocacy team—which in turn, can foment the kind of healing families need to ensure everyone's safety—particularly that of the child.¹⁴⁴

The holistic defense model arose out of a recognition that indigent defendants are brought into the criminal legal system for wide-ranging reasons and that merely representing a client in the particular criminal case for which they are referred to a public defender does not equate with justice. Once a person is brought into the criminal legal system, it is inordinately difficult to get out of it.¹⁴⁵ The collateral consequences of poverty have

142 *Id.*

143 See Lorelei Laird, *Immigrant Advocates*, A.B.A. J., Sept. 2016, at 18, 19 (showing how a nonprofit rose to the occasion to address the lack of right to counsel in immigration cases); J. Michael Norwood & Alan Paterson, *Problem-Solving in a Multidisciplinary Environment? Must Ethics Get in the Way of Holistic Services?*, 9 CLINICAL L. REV. 337 (2002).

144 See Child-Parent Psychotherapy, *supra* note 138.

145 According to the Pew Center on the States, our criminal legal system is failing in its deterrence goals, as “more than four out of [ten] adult American offenders still return to prison within three years of their release.” PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 2 (2011), https://www.pewtrusts.org/~//media/legacy/uploadedfiles/pcs_assets/2011/pewstateofrecidivismpdf.pdf.

been repeatedly found to contribute to incarceration and recidivism.¹⁴⁶ For example, the adverse childhood experiences associated with poverty have been connected to the development of psychiatric problems including substance abuse;¹⁴⁷ the lack of upward mobility in poor communities can stymie the kind of educational and employment opportunities available,¹⁴⁸ leading to a reliance on means of surviving that are criminalized,¹⁴⁹ arrests can rapidly lead to loss of housing,¹⁵⁰ loss of employment,¹⁵¹ and deportation.¹⁵² A criminal record can bar persons from many public benefits and employment.¹⁵³ Recognizing this, holistic defenders have developed a model which aims to address the underlying conditions that keep people trapped in a “revolving door.”¹⁵⁴

- 146 Nayely Esparza Flores, *Contributing Factors to Mass Incarceration and Recidivism*, 6 THEMIS 56, 63 (2018) (“[W]hen individuals in neighborhoods have high rates of crime, poverty, and high social disorganization, the risk of youth falling into the criminal justice system also increases.”); McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney’s Guide to Using Invisible Punishments as Advocacy Strategy*, 36 U. TOL. L. REV. 479, 481 (2005) (“[M]ost people cycle through the criminal justice system as a result of deep and interrelated social problems that existing social services have failed to address, such as homelessness, addiction, unemployment, or mental illness.”).
- 147 Maia Szalavitz, *Addictions Are Harder to Kick When You’re Poor. Here’s Why*, GUARDIAN (June 1, 2016), <https://www.theguardian.com/commentisfree/2016/jun/01/drug-addiction-income-inequality-impacts-recovery>.
- 148 Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, DAEDALUS, Summer 2010, at 8, 9 (“Class inequalities in incarceration are reflected in the very low educational level of those in prison and jail. The legitimate labor market opportunities for men with no more than a high school education have deteriorated as the prison population has grown, and prisoners themselves are drawn overwhelmingly from the least educated.”); PHILIPPE BOURGOIS, IN SEARCH OF RESPECT: SELLING CRACK IN EL BARRIO 320–22 (2d ed. 2003).
- 149 See Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 682 (2009); BOURGOIS, *supra* note 148, at 320–21 (“Any realistic attempt to address the ‘drug problem’ has to alter the economic imbalance between the rewards of the legal economy versus those of the underground economy. . . . Experts estimate it costs approximately \$8 to \$10 to produce an ounce of pure powder cocaine. This same ounce in East Harlem is worth more than \$2,000, once it is adulterated and packaged into \$10 quarter-gram vials. This extraordinary \$1,990 profit represents the economic incentive for participation in the most violent and destructive facet of the underground economy.” (footnote omitted)).
- 150 *Know Your Rights: Housing and Arrests or Criminal Convictions*, BRONX DEFS. (Oct. 2, 2010), <https://www.bronxdefenders.org/housing-and-arrests-or-criminal-convictions/>.
- 151 See Western & Pettit, *supra* note 148, at 13.
- 152 See *Aggravated Felonies: An Overview*, AM. IMMIGR. COUNCIL (Mar. 16, 2021), <https://www.americanimmigrationcouncil.org/research/aggravated-felonies-overview>.
- 153 Smyth, *supra* note 146, at 497.
- 154 *The Holistic Defense Toolkit*, ASS’N PROSECUTING ATT’YS (2017), <https://www.apainc.org/wp-content/uploads/2017/08/Holistic-Defense-Toolkit.pdf> (“As public defenders we are first-hand witnesses to the revolving door that is our criminal justice

As initially conceived, there are four pillars to the holistic defense model: (1) “[s]eamless access to services that meet clients’ legal and social support needs”; (2) “[d]ynamic, interdisciplinary communication”; (3) “[a]dvocates with an interdisciplinary skill set”; and (4) “[a] robust understanding of, and connection to, the community served.”¹⁵⁵ Indigent defendants are provided with an interdisciplinary team, often consisting of criminal and civil lawyers, social workers, peer advocates, and community organizers.¹⁵⁶ The work often involves community engagement in addition to direct service.¹⁵⁷ Importantly, although the expertise of each professional on the team is valuable, of greater importance is the iterative, generative process fostered by a culture of “open, frequent and meaningful communication”¹⁵⁸ that is centered on the client’s well-being. The result is a team of people all of whom are well-informed about a client’s needs and progress. “The client, in turn, sees himself as being represented by a team of dedicated advocates all of whom are in communication with each other, rather than by a single advocate who grasps only part of the big picture that is the client’s life.”¹⁵⁹

Recent data have shown that the holistic defense model is quite effective. According to a large-scale study Harvard Law School conducted on the model, the use of holistic defense has helped at least 4,500 defendants avoid jail sentences.¹⁶⁰ Holistic defense reduces expected sentence length significantly.¹⁶¹ In the Bronx, New York, where the pioneers of the model practice, the difference between the acquittal rates for jury trials among those who were beneficiaries of the model, as opposed to those who were not, was quite stark. While an average of 57.4 percent of jury trials in the Bronx result in acquittals, clients of the Bronx Defenders—who benefit from a holistic defense model—experienced an 86.7 percent rate of success

system and we experience daily the futility of equating a successful legal defense with the achievement of justice.”).

155 *Id.*

156 Hélène Barthélemy, *How an Unusual Team Helps Extricate Bronx Residents from NYC’s Justice System*, NATION (Nov. 9, 2015), <https://www.thenation.com/article/archive/how-an-unusual-team-helps-extricate-bronx-residents-from-nycs-criminal-justice-system/> (“For legal cases, BxD created multidisciplinary teams (there are now 10) that work together on each case, including criminal defense, immigration, civil and family defense attorneys, as well as legal advisers, community-intake specialists, and parent advocates and social workers, and, finally, a policy-and-community organizer to translate cases into larger organizing efforts.”).

157 *The Holistic Defense Toolkit*, *supra* note 154.

158 *Id.*

159 *Id.*

160 James M. Anderson et al., *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 865 (2019).

161 *Id.*

between July 2003 and June 2005.¹⁶²

III. CIVIL LEGAL AID AND HOLISTIC REPRESENTATION

Holistic approaches are utilized far more often in criminal defense settings than in civil legal aid.¹⁶³ In the Greater Boston area for example, almost all public defender offices employ social workers to work as part of the legal team; however, most of the regional civil legal aid agencies funded by the Massachusetts Legal Assistance Corporation (MLAC) do not specifically recruit social workers to work holistically with clients.¹⁶⁴ There are reasons for this. The need for social workers might be more self-evident in the criminal context because of the important role that understanding a client's history of trauma and psychopathology might play in sentencing. Further, social workers who are knowledgeable about the landscape of services, can offer assistance to the defense lawyer in arguing for alternatives

162 Cara Tabachnick, *The Crime Report: Can the 'Holistic Approach' Solve the Crisis in Public Defense?*, BRONX DEFS. (Mar. 8, 2011), <https://www.bronxdefenders.org/can-the-holistic-approach-solve-the-crisis-in-public-defense-the-crime-report/>.

163 For example, in Massachusetts there are six major regional legal agencies which are funded by the Massachusetts Legal Assistance Corporation, but most do not employ a holistic model as described in Part II. *Funding Civil Legal Aid \$41 Million for FY23*, MASS. LEGAL ASSISTANCE CORP., https://mlac.org/wp-content/uploads/2022/01/FY23-Fact-Sheet_Updated-2022.1.28.pdf (Jan. 2022); *see, e.g., People*, CMTY. LEGAL AID, <https://communitylegal.org/about/people/> (last visited Mar. 4, 2022); *Board & Staff*, METROWEST LEGAL SERVS., <https://mwlegal.org/about/staff> (last visited Mar. 4, 2022); *About Us*, NE. LEGAL AID, <https://www.northeastlegalaid.org/mission> (last visited Mar. 4, 2022); *About SCCLS*, S. COASTAL CNTYS. LEGAL SERVS., <https://sclcs.org/about-us/> (last visited Mar. 4, 2022); *Who We Are*, GREATER BOS. LEGAL SERVS., <https://www.gbbs.org/about> (last visited Mar. 4, 2022); Interview with Liliana Ibara, *supra* note 19.

164 A local civil legal aid agency (also funded by MLAC), De Novo, has a counseling and case management practice. They specifically hire social workers as therapists who provide mental health services; however, there is an ethical wall (a separation with protocols around communication to insure against conflict of interest) between the legal and counseling departments. Most clients do not utilize both counseling and legal services simultaneously, but many clients of both programs do benefit from case management services. Interview with Elizabeth Brusie, *supra* note 130. Greater Boston Legal Services does not hire social workers to offer social work services but counts among its staff a few people with Master's in Social Work, one of whom supervises a graduate level social work student to carry out case management services in the Welfare Unit of the agency but is not necessarily involved in the legal case. A Licensed Independent Clinical Social Worker is contracted to offer consults to attorneys on staff and she also participates in the supervision of the social work student. Interview with Dan Manning, *supra* note 19; Interview with Liliana Ibara, *supra* note 19.

to incarceration and finding programs that might divert the defendant from prison. Finally, by the time someone is involved with the public defender's office, chances are that concerns about abuse have been formally recognized through criminal charges or involvement with CPS, lessening the concern about an unexpected disclosure of neglect or abuse of a minor.

Although not as obvious in the civil legal aid context, psychological factors and lack of services play a prominent role in the development of the case theory, in the formation of legal strategy, in the sustainability of the hoped-for outcome in the long run, and in the efficiency of the services provided. This is true to such a degree that social work services are very often offered informally in legal aid settings even when they are not institutionally recognized or advertised. Indeed, even when legal aid agencies do not formally employ holistic models of representation, by virtue of the needs among their clients, many attorneys find themselves inadvertently working on the social services or collateral issues that arise in their client's cases. Daniel Santiago at the Mabel Center for Immigrant Justice explains that many of his clients have only recently arrived in the U.S. and struggle to navigate American institutions.¹⁶⁵ As an immigration lawyer, he and his staff are some of the few trusted professionals his clients are in touch with and he often gets requests for guidance and assistance with leaving an abusive relationship, avoiding homelessness, or accessing the job market in order to sustain a household and provide for children.¹⁶⁶ There are benefits and downsides to when compassionate anti-poverty lawyers attempt to address the collateral needs of their clients in settings that do not explicitly offer social work services. On the one hand, some lawyers are naturally gifted at showing interest in the client's personhood without being required to by their job. This builds rapport with clients and can be very healing to experience. Lawyers who offer these services do not have to jump through institutional hoops in order to do right by their clients. On the other hand, there are some difficulties: (1) lawyers working with poor people often have high caseloads and doing social service coordination and life coaching can detract from their legal work or sharply increase their workload; (2) attorneys without experience or training in mental health or social service coordination may find themselves re-inventing the wheel, trying to teach themselves a skill that social workers are already trained in and can fulfill more efficiently;¹⁶⁷

165 Interview with Daniel Santiago, Co-Founder, Mabel Ctr. for Immigrant Just., in Bos., Mass. (Mar. 19, 2022).

166 *Id.*

167 It should be noted that not all people who have an MSW or LCSW are capable of providing the same level of services. It is very possible that a lawyer with experience in the social services landscape or with a particularly high level of emotional

(3) well-meaning attorneys may pass off the social service coordination to administrative staff who are already overwhelmed with their existing duties and who may not receive the necessary support to meet the need; and (4) when the provision of social work is not formally recognized as a service the legal aid agency provides, those clients who happen upon a lawyer interested in the larger context of their life will benefit from additional services whereas those clients whose lawyers are not equipped to do the same but have the same need or even greater need may not benefit in the same way. The lack of formal recognition of social work in a legal aid agency, in this way, can create inequity in the provision of services.

The needs of indigent criminal defendants and the clientele served by civil legal aid agencies are overlapping, for which a holistic model would be appropriate. Both indigent criminal defendants and legal aid clients suffer from a “revolving door” phenomenon.¹⁶⁸ Many legal aid clients end up returning for legal services because of the underlying conditions that bring about the legal problem are not addressed.¹⁶⁹ For example, a restraining order may leave a mother without the income of a former partner, which can also affect her ability to pay for housing, resulting in homelessness. Depending on where in the state she is sent for shelter she may be too far to reach her place of employment.¹⁷⁰ Involvement in legal proceedings around domestic violence and divorce can cause missed days from work which may result in discharge from a job. Despite receiving eviction defense services, if she is then left without a sustainable income that would allow her to afford an apartment, it’s often only a matter of time before the client is in need of legal defense to an eviction once again.¹⁷¹ Or if child care is a significant barrier to sustained employment, even after securing benefits and getting a new job, the obstacles to attending work may still be present and leave her vulnerable to yet another separation from work, which may require representation once again.

Further, the loss of a job, housing, or public benefits often has a domino effect that creates global instability in the life of a client. If we care about life outcomes for people in poverty, addressing a discrete legal issue

intelligence may be able to offer more emotional support and service coordination than a very inexperienced social worker. On the whole, however, having a social worker whose sole job is to focus on collateral issues can relieve an attorney with a high caseload whose main job is legal representation.

168 See *The Holistic Defense Toolkit*, *supra* note 154.

169 Interview with Liliana Ibara, *supra* note 19.

170 See Mass. Law Reform Inst., *Where Can You Be Placed if You Qualify for EA Shelter?*, MASSLEGALHELP (Dec. 2019), <https://www.masslegalhelp.org/homelessness/emergency-assistance/advocacy-guide/14-dta-placements>.

171 Interview with Liliana Ibara, *supra* note 19.

may only be the tip of the iceberg. The loss of income from a job may result in becoming behind on rent, which can lead to eviction and, in turn, homelessness. Homelessness has been proven to have a powerful negative effect on psychological well-being¹⁷² and also has the potential to invite investigation from the child welfare system.¹⁷³ Evictions have been shown to “disrupt people’s health, relationships, work, and education.”¹⁷⁴

Lawyers are not necessarily equipped to handle this web of dilemmas—at least not alone.¹⁷⁵ Legal advocates can address the legal aspects of these needs by staving off evictions, filing restraining orders, advocating for public benefits, representing clients at unemployment hearings, and going after stolen wages; however, the underlying conditions keeping clients stuck are often areas lawyers do not assist with.¹⁷⁶ Some contend that referrals for these services are adequate when weighed against the challenges of creating interdisciplinary teams, but there is a cost to the kind of narrow specialization that results in a family having to jump from service provider to service provider, often in a confusing maze of referrals which may or may not lead to high quality assistance.¹⁷⁷ When the psychological presentation of a client obstructs the legal process,¹⁷⁸ referrals for mental

172 MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 5, 296 (2017).

173 Cyleste C. Collins et al., *Housing Instability and Child Welfare: Examining the Delivery of Innovative Services in the Context of a Randomized Controlled Trial*, 108 *CHILD. & YOUTH SERVS. REV.* 1 (2020).

174 Joe Pinsker, *The Coming Wave of Evictions Is More Than a Housing Crisis*, ATLANTIC (Sept. 3, 2021), <https://www.theatlantic.com/family/archive/2021/09/cdc-eviction-ban-housing-crisis/619960/>; Mass. L. Reform Inst., *supra* note 170 (“If you are placed in EA shelter [Emergency Assistance is a Massachusetts program which provides shelter to qualifying homeless families], DHCD [the Department of Housing and Community Development is the Massachusetts state administering agency of the Emergency Assistance program] must place you in a shelter within 20 miles of your home community if there are any openings in the area. However, there often are no openings within 20 miles and you could be placed very far away.”).

175 Interview with Cristina F. Freitas and Debbie F. Freitas, *supra* note 131.

176 *See id.*

177 Interview with Dan Manning, *supra* note 19; *see* Alexis Anderson et al., *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism and Mandated Reporting*, 13 *CLINICAL L. REV.* 659, 699 (2007) (offering a critique of programs which create ethical walls between social workers and lawyers). The walls “inhibit substantially the prospect of effective interdisciplinary lawyering work . . . by its ineluctable interference with the free sharing of information among lawyers, clients, and law firm employees.” Anderson et al., *supra*, at 699. By extension, sending people to various programs creates further distance between the lawyer and important collaterals. *Id.*

178 For an example of how a social worker on a legal team can help when a client has a trauma response, *see* Mariana Ferreira, *Beyond Education and Litigation: The Social Work Program at HIRC*, HLS *CLINICAL & PRO BONO PROGRAMS* (Aug. 28, 2019), <https://>

health services outside of the agency may be inadequate—there are often long waitlists for therapeutic services and the therapist’s presence outside of the legal interview would probably make little difference to the legal case in circumstances such as these.¹⁷⁹ Further, many social services agencies are limited in what they can provide; whereas an in-house social worker, peer advocate, or community organizer can practice flexibility in their role and provide services like housing search, particularly when there are special vulnerabilities such as undocumented status, lack of credit, or a language barrier. A community organizer can identify systemic causes of housing instability such as a massive practice of pricing tenants out of the housing market and can mobilize communities to participate in demonstrations while empowering clients with tools to respond to the systemic elements of their plight.

Holistic representation is about more than just the formation of interdisciplinary teams.¹⁸⁰ The addition of a social worker does not, in of itself, constitute holistic representation,¹⁸¹ particularly when the social worker is disconnected from the legal case. However, for agencies which agree with the ambitions of the model without the resources to hire multiple staff members and form such teams, one step towards meeting the goals of the model might involve the recruitment of a non-lawyer professional who has a view towards improving client life outcomes and not just legal ones.¹⁸²

clinics.law.harvard.edu/blog/2019/08/beyond-education-and-litigation-the-social-work-program-at-hirc/.

- 179 This is not to underestimate the crucial role that clinical evaluators play in providing evidence of trauma from outside the legal agency, particularly in the immigration context. But it should be noted that a mental health professional can make a great difference in real time with greater understanding of their client’s triggers. For a discussion of the effect that the asylum process has on refugees who have experienced trauma, see Katrin Schock et al., *Impact of Asylum Interviews on the Mental Health of Traumatized Asylum Seekers*, EUR. J. PSYCHOTRAUMATOLOGY, 2015, at 1.
- 180 *The Holistic Defense Toolkit*, *supra* note 154, at 5.
- 181 This author recognizes that while skilled, intelligent, and compassionate social workers can be a tremendous asset to clients, the field of social work has also suffered from an “abiding tension between social control and social service.” Yoosun Park, *Facilitating Injustice: Tracing the Role of Social Workers in the World War II Internment of Japanese Americans*, 82 SOC. SERV. REV. 447, 449 (2008). The field of social work—like many of the helping professions in the United States—has deep roots in paternalism. See MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS 89–91 (1994). The calls to grapple with the complicity of the field in the perpetuation of racial injustice has been heartening in recent years. *NASW Apologizes for Racist Practices in American Social Work*, NAT’L ASS’N SOC. WORKERS (June 17, 2021), <https://www.socialworkers.org/News/News-Releases/ID/2331/NASW-apologizes-for-racist-practices-in-american-social-work>.
- 182 See Mandated Reporter Commission, Office of the Child Advocate 2 (Oct. 27, 2020)

There is a natural alignment between the goals of the social work profession and that of anti-poverty lawyers, given the field's express anti-poverty commitment as enshrined in the code of ethics.¹⁸³ It comes as no surprise then that one of the most common interdisciplinary partnerships in the world of poverty law is the one between the lawyer and the social worker.¹⁸⁴ Social workers are well poised to address the underlying social needs of clients interfacing with the legal system due to the wide-array of skills they are trained in.¹⁸⁵ Particularly through their practicums, social workers are often exposed to a variety of social service providers and can tap into the networks built during their graduate programs in order to connect clients to housing resources, mental health services, public benefits, rehabilitation programs, adult education, child care, and the like.

Beyond utilizing social workers to address referral needs, a social worker's mental health training can be useful in picking up on psychological issues that may not be obvious to the untrained eye.¹⁸⁶ Even when not practicing in an explicitly therapeutic role, social workers can use particular tools from therapeutic modalities¹⁸⁷—e.g. motivational interviewing,¹⁸⁸

(meeting minutes), <https://www.mass.gov/doc/draft-october-27-2020-meeting-minutes/download> (“CPCS uses a ‘holistic defense’ model informed by current research which is premised on a legal defense team that approaches legal issues from a life-outcomes perspective.”).

183 *Code of Ethics*, *supra* note 118.

184 Anderson et al., *supra* note 177, at 662.

185 “Social work practice consists of the professional application of social work values, principles, and techniques to one or more of the following ends: helping people obtain tangible services; counseling and psychotherapy with individuals, families, and groups; helping communities or groups provide or improve social and health services; and participating in legislative processes.” *Practice*, NAT’L ASS’N SOC. WORKERS, <https://www.socialworkers.org/Practice> (last visited Mar. 3, 2022).

186 This can include indicia of psychopathology but can also be more subtle such as the identification of toxic stress which may inhibit a client from engaging in clear or consistent decision making. *What Is the Difference Between Psychologists, Psychiatrists and Social Workers?*, APA.ORG (July 2017), <https://www.apa.org/ptsd-guideline/patients-and-families/psychotherapy-professionals> (“Social workers are trained to perform psychotherapy, with a particular emphasis on connecting people with the community and support services available there.”); Ferreira, *supra* note 178; *The Important Role Social Workers Play in Mental Health*, GOODTHERAPY (Dec. 14, 2015), <https://www.goodtherapy.org/blog/the-important-role-social-workers-play-in-mental-health-1214157>.

187 Interview with Olivia Dubois, *supra* note 25; Interview with Cristina F. Freitas and Debbie F. Freitas, *supra* note 131.

188 “MI is a collaborative, goal-oriented style of communication with particular attention to the language of change. It is designed to strengthen personal motivation for and commitment to a specific goal by eliciting and exploring the person’s own reasons for change within an atmosphere of acceptance and compassion.”

internal family systems,¹⁸⁹ cognitive behavioral therapy¹⁹⁰—to help “clients get not only good legal outcomes but also good life outcomes.”¹⁹¹ Their observations about psychological challenges can sometimes be crucial in the development of the legal theories of the cases themselves and can help shape the kinds of arguments and evidence attorneys might put forth in support of their client’s claims. Relatedly, social workers who are not deeply acculturated by the legal system might provide an important perspective because they are removed from legal cultures. They might be uniquely positioned to remind attorneys of the importance of highlighting their client’s humanity in addition to arguing based on legally cognizable categories. They may serve an essential translating function from “legalese” into layman’s terms to clients. Due to their intensive training in client interviewing, they may prove instrumental to fact-finding or picking up on body language that suggests that a client is not understanding an aspect of their case, despite signaling to the attorney that they do understand. Social work as a profession tends to have more representation from underserved backgrounds than the legal field.¹⁹² Thus, the probability that a social worker might be more intimately

Understanding Motivational Interviewing, MINT 1 (Aug. 2019) (quoting WILLIAM .R MILLER & STEPHEN ROLLNICK, *MOTIVATIONAL INTERVIEWING: HELPING PEOPLE CHANGE* (2013)), https://motivationalinterviewing.org/sites/default/files/understanding_mi_aug_2019.pdf.

- 189 Internal Family Systems is a therapeutic modality which draws upon “two . . . paradigms: systems thinking and the multiplicity of the mind.” Richard Schwartz, *Evolution of the Internal Family Systems Model*, IFS INST., <https://ifs-institute.com/resources/articles/evolution-internal-family-systems-model-dr-richard-schwartz-ph-d> (last visited Jan. 5, 2022). It emphasizes the fact that the human personality may have various parts similar to a family which are often in conflict with one another. *Id.* While recognizing that most human beings have defensive parts stemming from childhood wounding, the modality acknowledges that every human being has a core “[s]elf” from which one can draw “perspective, confidence, compassion, and acceptance.” *Id.* When clients are conflicted or feel paralyzed before important decisions, principles from this modality can be useful to help a client explore the source of the conflict or paralysis by identifying the inner parts that are in conflict. *Id.*
- 190 “CBT is based on the theory that the way individuals perceive a situation is more closely connected to their reaction than the situation itself.” *Introduction to CBT*, BECK INST., <https://beckinstitute.org/about/intro-to-cbt/> (last visited Jan. 5, 2022).
- 191 Interview with Cristina F. Freitas and Debbie F. Freitas, *supra* note 131.
- 192 See *New Report Provides Insights into New Social Workers’ Demographics, Income, and Job Satisfaction*, NAT’L ASS’N SOC. WORKERS (Dec. 11, 2020), <https://www.socialworkers.org/News/News-Releases/ID/2262/New-Report-Provides-Insights-into-New-Social-Workers-Demographics-Income-and-Job-Satisfaction> (“More than 22% of new social workers are Black/African American and 14% are Hispanic/Latino.”); see also *Lawyers by Race & Ethnicity*, A.B.A., https://www.americanbar.org/groups/young_lawyers/projects/

acquainted with the cultural, class context of the client and their narrative preferences might be greater than for attorneys generally. To illustrate, consider the following vignette:

A client whose primary language was not English came to our offices. She asked for assistance with a finding of fraud and monetary assessment issued against her by a benefits agency. The basis of the agency's finding of fraud was that she had misrepresented her level of income. The agency had discovered she had been receiving undeclared income while simultaneously receiving benefits.

After conducting an intake in my office, I asked the attorney on duty to join our meeting, during which the client explained that it had been her child who had been interfacing with the agency on her behalf and reporting the status of her income—something she had not told the agency adjudicator when asked. A look of skepticism appeared on the attorney's face. When the client left and we discussed the case, the attorney explained that her story was replete with inexplicable contradictions and determined she was not credible.

I, however, believed this woman. For one, having been the product of an immigrant household myself I was intimately acquainted with the way children in immigrant households are often tasked with navigating complicated systems on behalf of their parents. Thus, her story was plausible to me. In the same vein, I have been exposed to the narrative preferences of many limited English proficient persons who, in my experience, had exhibited trouble understanding what is considered relevant in a proceeding without the guidance of counsel, despite their ability to speak some English. Finally, something about the client's affect and the way she expressed herself caused me to wonder whether there were any cognitive difficulties or trauma affecting her narrative and way of telling the story. The attorney on duty agreed to order a psychological evaluation and revisit whether to take the case based on the results.

The psych eval revealed a history that explained why the client would have difficulties in understanding and processing information. Feeling better about the client's credibility and the plausibility of her story, the attorney decided to proceed with the case by making a technical argument about language access and fraud. There was no easy way to make a legal argument about the client's psychological state, but they nonetheless referred to the psych eval in their brief and attached it. The day of the hearing in court, the judge was entirely unpersuaded by the more technical argument and he seemed ready to affirm the finding of fraud; however, at the very end of the hearing he added, "But if it is true that the client has psychological difficulties I would want the agency to explore whether this impacted the fraud finding, so I'm going to remand the case" (paraphrase). The attorney handling the case was stunned as they did not think the psych eval would weigh so heavily in the judge's decision.

men-of-color/lawyer-demographics/ (last visited May 2, 2022) (highlighting "5% of all lawyers are African American – the same percentage as 10 years earlier" and "[s]imilarly, 5% of all lawyers are Hispanic").

The remand instructions were onerous and involved a hearing totaling almost eight hours. I handled the representation but was also asked to swear in to testify about the role I played in identifying potential psychiatric challenges and in making the referral to the evaluating psychologist. I was also able to, in my closing, cite research about the prevalence of children acting on behalf of their parents in immigrant households. The adjudicator in this case did, in fact, give weight to research submitted into evidence about the dynamics in an immigrant household. Their decision found that the adult-child's testimony about having handled their mother's claim was credible. The decision further took note of the article I submitted into evidence explaining how common it is for children of immigrants to help their parents navigate American institutions. The client won the case, the fraud finding was removed, and she was eventually able to get almost \$18,000 forgiven."¹⁹³

In this way, the paralegal/social worker's training and skills afforded to her by her social work background were instrumental to the success of the client counseling in this case; it helped inform the credibility assessment of the client, and contributed to the litigation strategy. Her background as a daughter of immigrants was also instrumental as it compelled her to find research that would help the adjudicator understand a phenomenon that might seem implausible to someone from a different cultural context.

IV. CHALLENGES OF SOCIAL WORK-LAW PARTNERSHIPS

A. *The Nature of the Controversy*

For as many skills and benefits social workers can bring to a legal aid agency, there are also challenges to working collaboratively. The concern that is raised most often with respect to this collaboration is the potentially conflicting ethical duties social workers and lawyers have with regard to maintaining the confidences of their clients.¹⁹⁴ The harm which

193 Memorandum from author to the Ed. Bd., Ne. Univ. L. Rev. (Feb. 27, 2022) (on file with Northeastern University Law Review). A further positive outcome of this story was the chance for an ongoing discussion between the paralegal/social worker and the thoughtful supervising attorney who reflected on the importance of a trauma-informed lens in legal advocacy. They later expressed regret about their initial judgments, and the paralegal/social worker expressed understanding for the attorney's initial evaluation. This is an added benefit of working across disciplines.

194 As far as the author of this note can tell, there have been no cases decided which hold that a social worker working in a legal setting is a mandated reporter. Anderson et al., *supra* note 178, at 663, 691; Stephanie Conti, Note, *Lawyers and Mental Health Professionals Working Together: Reconciling the Duties of Confidentiality and Mandatory Child Abuse Reporting*, 49 FAM. CT. REV. 388, 388–89 (2011); Paula Galowitz, *Collaboration*

could result from the conflict has been aptly characterized as “potential and unpredictable.”¹⁹⁵ Anderson, Barenburg, and Trembley from Boston College have noted that “few reported cases can be found involving prosecution of a professional for failing to report suspected abuse under the 51 mandatory reporting statutes existing across the United States.”¹⁹⁶ When civil claims have been brought against social workers, these cases have rarely prevailed.¹⁹⁷ Nation-wide, no cases have definitively decided that a social worker working in a legal setting as part of a legal team is a mandated reporter.¹⁹⁸ Recently, in *Elijah W. v. Superior Court*, the Los Angeles Juvenile Court initially characterized this very issue of conflicting confidentiality duties between a mental health professional and a lawyer as purely academic. The court was deciding on a motion for appointment of a forensic psychologist who agreed not to report child abuse to the authorities. The ruling underscores the rarity of this issue:

[T]he court initially dismissed Elijah’s confidentiality concern as “merely academic,” explaining, “In the hundreds of [Evidence Code section] 730 appointments that this court has granted, and in the thousands that have been granted by the juvenile and adult courts, this issue has never been raised. Nor, has there ever been a case brought to the court’s attention where a minor has divulged child abuse or made a threat to commit a crime during a competency evaluation and the statement was later introduced in court or even prompted a report.”¹⁹⁹

The concern about social worker-lawyer ethical conflicts, then, is potentially overblown.²⁰⁰ Many social workers find that the need to report to DCF rarely

Between Lawyers and Social Workers: Re-Examining the Nature and Potential of the Relationship, 67 FORDHAM L. REV. 2123, 2134–35 (1999); Jacqueline St. Joan, *Building Bridges, Building Walls: Collaboration Between Lawyers and Social Workers in a Domestic Violence Clinic and Issues of Client Confidentiality*, 7 CLINICAL L. REV. 403, 426, 460 (2001) (domestic violence clinic); Marie Weil, *Research on Issues in Collaboration Between Social Workers and Lawyers*, 56 SOC. SERV. REV. 393, 402–03 (1982); Mary Ann Forgey & Lisa Colarossi, *Interdisciplinary Social Work and Law: A Model Domestic Violence Curriculum*, 39 J. SOC. WORK EDUC. 459, 461 (2003).

195 Randy Retkin et al., *Attorneys and Social Workers Collaborating in HIV Care: Breaking New Ground*, 24 FORDHAM URB. L.J. 533, 554 (1997).

196 Anderson et al., *supra* note 177, at 708.

197 *Id.*

198 *Id.*

199 *Elijah W. v. Superior Ct.*, 156 Cal. Rptr. 3d 592, 597 (Ct. App. 2013).

200 *See, e.g.*, Interview with Olivia Dubois, *supra* note 25.

comes up²⁰¹ in their day-to-day work, as people are not abusing their children en masse such that social workers are constantly finding their mandated reporting duties are triggered by client disclosures. The National Legal Aid & Defender Organization has endorsed the holistic defense model²⁰² and, as discussed above, many public defender offices incorporate social workers into their legal practices nationally.²⁰³ Medical-legal partnerships suffer from the same potential conflicts, as doctors are also mandated reporters and yet, far less has been written about mandated reporting concerns in regard to these programs than what has been written about social work-legal partnerships.²⁰⁴ There is a certain irony to this as physicians were the first mandated reporters.²⁰⁵ Social workers only came to be identified as mandated reporters in almost all jurisdictions after the passage of CAPTA.²⁰⁶ In other words, there is no difference between the mandated reporting duties of a doctor and a social worker. Thus, if medical-legal partnerships are endorsed as a legitimate model of interdisciplinary practice, by extension, social work-legal partnerships should be as well.

One theory as to why social workers have come to be more closely associated with mandated reporting than their physician counterparts is because of the central role social workers have historically played in the

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- 201 See, e.g., Interview with Claire Donahue, Assistant Clinical Professor, Bos. Coll. L. Sch., in Bos., Mass. (Mar. 16, 2022); Interview with Olivia Dubois, *supra* note 25.
- 202 *The Interdisciplinary Defense Team & Confidentiality: What Defenders Need to Know*, *supra* note 39.
- 203 See, e.g., ANDREEA MATEI ET AL., ASSESSING A SOCIAL WORKER MODEL OF PUBLIC DEFENSE 2 (2021), https://www.urban.org/sites/default/files/publication/103811/assessing-a-social-work-model-of-public-defense_1.pdf; Rick Jones, *The Power of Public Defense*, NDS (July 26, 2018), <https://neighborhooddefender.org/blog/the-power-of-public-defense/>. See generally BROOKLYN DEF. SERVS., <https://bds.org/> (last visited Feb. 28, 2022); *Mental Health*, LAW OFFS. L.A. CNTY. PUB. DEF., <https://pubdef.lacounty.gov/mental-health-court-branch/> (last visited Feb. 28, 2022) (“Attorneys and social workers in the Office of the Public Defender represent individuals who have violated probation or parole and advocates to link them to housing, treatment, support, and benefits in an effort to end their re-incarceration cycle.”).
- 204 As of March 13, 2022, HeinOnline search with search terms “Mandated reporting” and “medical-legal partnerships” yielded eleven articles on ethical conflicts concerning confidentiality, whereas similar search terms involving social workers yielded 145 articles.
- 205 See Brown & Gallagher, *supra* note 24. Some have observed that resident physicians in a medical-legal partnership context can be less attuned to the dangers of child welfare system involvement and see CPS as benevolent. In one advocate’s experience working with medical-legal partnerships as an attorney, she observed that the social workers were much more aware of the potential negative consequences of calling DCF than the resident physicians who tended to err on the side of reporting. Interview with Elizabeth Brusie, *supra* note 131.
- 206 See Brown & Gallagher, *supra* note 24.

development of adoption processes and orphanages, from which the current family regulation system arose.²⁰⁷ While the role of doctors is understood as primarily dealing with physical health, the role of social workers has been more ambiguous. Adding further confusion, case workers in many CPS departments are sometimes called “social workers” even though most of them have no formal social work training or licenses,²⁰⁸ solidifying the association between the field of social work and involvement in the family regulation system. This close association between social workers and mandated reporting in the public consciousness, however, should not be a major obstacle in the formation of otherwise beneficial collaborations between social workers and lawyers.

Nevertheless, however rare the issue of a conflict in duties of confidentiality in collaborations between social workers and lawyers, lawyers must do everything to ensure that they can keep the disclosures of their clients confidential. Model Rule of Professional Responsibility (MR) 5.3 places a duty on supervising lawyers to make reasonable efforts to ensure that everyone working as part of a legal team takes on the same ethical responsibilities as the lawyer, including confidentiality. It is important, then, for lawyers who believe that the benefits of collaboration outweigh the risks, to figure out how they will ensure that they are abiding by the duties set forth in MR 1.6—the duty of confidentiality—and MR 5.3 and not compromising their clients’ cases.

1. The Conflict

Both professions place a high value on confidentiality. For clinical social workers, a guarantee of confidentiality allows a client to disclose damning or troubling aspects of their life that they would, otherwise, perhaps not be compelled to disclose or work on in therapy. For precisely this

207 “The current child protection system evolved out of the alms-houses, orphanages, and anti-cruelty societies of the past.” Kindred, *supra* note 103, at 441.

208 NAT’L ASS’N SOC. WORKERS, “IF YOU’RE RIGHT FOR THE JOB, IT’S THE BEST JOB IN THE WORLD” 9 (2004), <https://www.socialworkers.org/LinkClick.aspx?fileticket=Mr2sd4diMUA%3D&portalid=0> (“A recent study of local Child Protection Services agencies conducted by the Children’s Bureau, found that child protection agencies had an average of 26 staff, that included social workers or caseworkers, supervisors, support staff, case aides, specialist workers, and managers. These agencies averaged ‘3 staff with less than a Bachelor’s degree, 13 staff with a Bachelor’s degree, 3 with a Master of Social Work (M.S.W.) degree, and 1 employee (or staff person) with some other type of advanced degree.” (citations omitted)); *see also* Melissa Russiano, *Social Work License Requirements*, SOCIALWORKLICENSE.ORG (Nov. 4, 2020), <https://socialworklicense.org/articles/social-work-license-requirements/>.

reason, the United States Supreme Court in *Jaffee v. Redmond* extended the psychotherapist privilege to clinical social workers, acknowledging mental health as a public good worthy of protection:²⁰⁹

Effective psychotherapy depends upon an atmosphere of confidence and trust, and therefore the mere possibility of disclosure of confidential communications may impede development of the relationship necessary for successful treatment. The privilege also serves the public interest, since the mental health of the Nation's citizenry, no less than its physical health, is a public good of transcendent importance. In contrast, the likely evidentiary benefit that would result from the denial of the privilege is modest.²¹⁰

In some respects, *Jaffee v. Redmond* placed “the confidentiality of a social worker’s therapeutic relationship with a client . . . on the same ground as the confidentiality between a lawyer and her client and a husband and wife.”²¹¹ Social workers also have concurrent duties to keep client information confidential pursuant to the NASW Code of Ethics²¹² and, depending on the state, particular state statutes and regulations.²¹³

With respect to lawyers, a similar principle animates the rules governing lawyer confidentiality. In *In re Shargel*, the Second Circuit noted that “[t]he underlying theory . . . is that encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively, justly, and expeditiously, and that these benefits outweigh the risks posed by barring full revelation in court.”²¹⁴ There are two main sources which deal with an attorney’s duty not to reveal their client’s confidences. While related, they are not coterminous.²¹⁵ The attorney-client privilege is a rule of evidence, which governs what is admissible in court and the more general

209 Vicki Lens, *Protecting the Confidentiality of the Therapeutic Relationship: Jaffee v. Redmond*, 45 SOC. WORK 273, 274–76 (2000) (clarifying that the privilege was extended in the context of civil actions in federal court).

210 *Jaffee v. Redmond*, 518 U.S. 1, 2 (1996).

211 Lens, *supra* note 209, at 275.

212 *Code of Ethics*, *supra* note 118.

213 *See, e.g.*, 258 MASS. CODE REGS. § 22.03 (2017); MASS. GEN. LAWS ANN. ch. 112, § 135A (West 1993).

214 *Shargel v. United States*, 742 F.2d 61, 62 (2d Cir. 1984).

215 Sue Michmerhuizen, *Confidentiality, Privilege: A Basic Value in Two Different Applications*, A.B.A. CTR. FOR PRO. RESP. 1 (May 2007), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/confidentiality_or_attorney_authcheckdam.pdf.

confidentiality rule governing the lawyer-client relationship is found in the Model Rules of Professional Responsibility.²¹⁶ Each state has their own version of the Model Rules.²¹⁷

Dating back to the sixteenth century,²¹⁸ the attorney-client privilege aims to prevent an attorney from being compelled to testify against their client.²¹⁹ There is a recognition that the attorney-client privilege competes with broader goals of truth-finding;²²⁰ however, courts in the United States have repeatedly decided that society's interest in "the observance of law and administration of justice" through the provision of fully informed legal advice²²¹ outweighs this former goal. As the Massachusetts Supreme Judicial Court has stated,

The attorney-client privilege is so highly valued that, while it may appear 'to frustrate the investigative or fact-finding process . . . [and] create [] an inherent tension with society's need for full and complete disclosure of all relevant evidence during implementation of the judicial process,' . . . it is acknowledged that the "social good derived from the proper performance of the functions of lawyers acting for their clients. . . outweigh[s] the harm that may come from the suppression of the evidence."²²²

Importantly, the attorney-client privilege is not without limit.²²³ The purpose of the communication between the client and the attorney matters with respect to what the privilege covers.²²⁴ Communicating with a third

216 *Id.*

217 *See Jurisdictional Rules Comparison Charts*, A.B.A., https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/ (last visited Feb. 28, 2022).

218 Note, *The Attorney-Client Privilege and the Corporate Client: Where Do We Go After Upjohn?*, 81 MICH. L. REV. 665, 666 (1983).

219 *Attorney Client Privilege*, WAYNE ST. U., <https://generalcounsel.wayne.edu/legal/attorney-privilege> (Apr. 2011).

220 Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 209, 211-12 (2006) ("That privilege, of course, frustrates the search for the truth because the lawyer ordinarily may not reveal what has been learned during the representation of the client, even after the client's death.").

221 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

222 *Comm'r v. Comcast Corp.*, 901 N.E.2d 1185, 1195 (Mass. 2009).

223 Doug Gallagher & Manasi Raveendran, *Attorney-Client Privilege for In-House Counsel*, A.B.A. (2017), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2017-18/november-december/attorney-client-privilege-inhouse-counsel/ ("Attorneys and clients would be unwise to consider all communications between the clients and attorneys as receiving the privilege protection.").

224 *Fisher v. United States*, 425 U.S. 391, 403 (1976) ("Confidential disclosures by a client

party outside of the attorney-client relationship can trigger a waiver of the privilege.²²⁵ There is also a crime-fraud exception, in which statements made in furtherance of a crime or to conceal a crime are not privileged.²²⁶

The more general rule of confidentiality which governs the attorney-client relationship found in the Model Rules prohibits disclosure of information related to the representation of the client.²²⁷ Attorneys are allowed to break confidentiality if the lawyer reasonably believes the disclosure is necessary under the conditions set forth in the Model Rules.²²⁸ The rules are very clear that “[a] lawyer *shall not* reveal information relating to the representation of a client unless the client gives informed consent” but, “[a] lawyer *may* reveal information . . . to the extent the lawyer reasonably believes necessary: to prevent reasonably certain death or substantial bodily harm.”²²⁹

Herein lies a crucial difference between the contours of the social worker’s duty of confidentiality and that of the lawyer: the social worker *must* report suspicions of child abuse and neglect—mandatory²³⁰—and the lawyer *can* report if the disclosure is necessary to prevent bodily harm—permissive.²³¹ One can imagine instances where the two duties overlap. A lawyer working with a social worker might determine that the nature of the client’s disclosure merits breaking confidentiality in order to prevent the substantial bodily harm of a child. This poses no difficulty to a social worker who is required to report.

The challenge comes in when the social worker on the legal team might suspect child abuse or neglect and (a) the lawyer does not deem disclosure reasonably necessary to prevent substantial bodily harm, or (b) the lawyer does not elect to avail herself of the permissive rule in the code of ethics allowing her to disclose. In this situation, a social worker’s disclosure in

to an attorney made in order to obtain legal assistance are privileged.”); *see also In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973).

225 *In re Horowitz*, 482 F.2d at 81 (“We deem it clear that subsequent disclosure to a third party by the party of a communication with his attorney eliminates whatever privilege the communication may have originally possessed, whether because disclosure is viewed as an indication that confidentiality is no longer intended or as a waiver of the privilege.”).

226 *See In re Grand Jury Investigation*, 445 F.3d 266, 274 (3d Cir. 2006) (“[T]he privilege can be overridden if the client used the lawyer’s services to further a continuing or future crime or fraud.” (citing *In re Grand Jury Proc.*, 604 F.2d 798, 802 (3d Cir. 1979))).

227 MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS’N 2020).

228 *Id.*

229 *Id.*

230 CHILD.’S BUREAU, *supra* note 14.

231 MODEL RULES OF PRO. CONDUCT r. 1.6(b) (AM. BAR ASS’N 2020).

a legal setting is effectively a breach of the lawyer's confidentiality duties.²³² Hypothetically, a social worker's report has the potential of piercing the client-attorney privilege due to the disclosure to a third party, which could bear evidentiary consequences in court.²³³ Depending on the nature of the case, a social worker's disclosure could weaken the client's defense bolstering evidence against them, particularly if the findings and investigation of a CPS department become material to the case. More generally, it could ruin the rapport between the client and the legal team.

Many legal agencies which employ social workers across the country take the position that the aforementioned scenarios are avoided because social workers are covered both by attorney-client privilege and by the rules of confidentiality enshrined in the Model Rules of Professional Responsibility and their respective state analogues. That is, as long as they are working in furtherance of the legal case. Under this theory, social workers can enjoy a safe harbor from the mandated reporting rules when working as part of a legal team. This is the view taken by the pioneers of the holistic defense model mentioned above.²³⁴ In a small number of states social workers are explicitly exempt from mandated reporting when working as part of the legal team.²³⁵ However, in the majority of jurisdictions, without legal authority explicitly exempting social workers from mandated reporting, some worry that the derivative attorney-client privilege and confidentiality theories are not foolproof escape hatches or are plainly legally indefensible. Should facts give rise to a suspicion of child abuse or neglect during the course of representation, some lawyers worry that, even in legal settings which have decided a social worker is not a mandated reporter, a social worker's failure to report could result in the revocation of the social worker's license²³⁶ or other penalties including fines and imprisonment, despite any internal policy that protects them.²³⁷ Others worry that a social worker will

232 Anderson et al., *supra* note 177, at 697–98.

233 Steven D. Ginsburg, *How to Lose Attorney-Client Privilege*, A.B.A. (Mar. 16, 2017), <https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/practice/2017/how-to-lose-attorney-client-privilege/> (“Either voluntary or inadvertent disclosure to outside or non-covered recipients, professional advisors outside the privilege, and experts and consultants, can result in waiver as a matter of law.”).

234 *See supra* note 18.

235 Fox & Goyette, *supra* note 18.

236 For this reason, some social workers working in legal settings have elected not to pursue licenses with their respective state boards. Interview with Dan Manning, *supra* note 19.

237 *See Social Work Online Course Reporting Mandates*, ADELPHI U., <https://www.adelphi.edu/social-work/hands-on-learning/mandated-reporter-training/reporting-mandates/> (last visited Sept. 11, 2021).

decide, during the course of the representation, to break confidentiality—in violation of their previous agreement—and report on a client in service of the mandated reporting statute. For some lawyers, working with a mandated reporter is risky if they cannot be absolutely certain that the social worker will take on the lawyer’s ethical duties, as contemplated by Model Rule 5.3.

B. *Mandated Reporting in Massachusetts*

1. The State of Mandated Reporting in Massachusetts

The Massachusetts mandated reporting statute was written in 1973.²³⁸ It has been updated periodically but in “piecemeal fashion.”²³⁹ Generally, it is not uncommon for such updates and changes in child welfare policy to be rooted in reaction to a public scandal.²⁴⁰ Indeed, in 2019, the Massachusetts legislature created a mandated reporter commission (the Commission) in response to the Larry Nassar scandal.²⁴¹ In expressing urgency around addressing the fact that athletic organization employees are not mandated reporters in Massachusetts, the House Committee on Post Audit and Oversight seems to have implied that if only mandated reporting laws were stricter and encompassed a wider range of professionals in child athletics, more could have been done to prevent the abuse that occurred.²⁴²

The Commission was tasked with making “recommendations on how to improve the response to, and prevention of, child abuse and neglect.”²⁴³ The overarching direction of the Commission was towards an expansion of the mandated reporting statute. Specifically, they considered “expand[ing] [the] definition of abuse and neglect, . . . lower[ing] [the] standard [that would] trigger[] a 51A report[.]”²⁴⁴ and expanding the list

238 Shira Schoenberg, *Commission on Child Abuse Reporting Fails to Reach Consensus*, COMMONWEALTH (June 28, 2021), <https://commonwealthmagazine.org/state-government/commission-on-child-abuse-reporting-fails-to-reach-consensus/>.

239 *Id.*

240 GEEN & TUMLIN, *supra* note 61, at 9.

241 Schoenberg, *supra* note 238; Act of Nov. 26, 2019, 2019 Mass. Legis. Serv. ch. 124 (West).

242 HOUSE COMMITTEE ON POST AUDIT AND OVERSIGHT, *RAISING THE BAR: A VISION FOR IMPROVING MANDATED REPORTING PRACTICES IN THE COMMONWEALTH* (May 17, 2018); *see also* Schoenberg, *supra* note 238.

243 Act of Nov. 26, 2019, 2019 Mass. Legis. Serv. ch. 124 (West).

244 MASS. GEN. LAWS ANN. ch. 119, § 51A (West 2021) is the mandated reporting statute. The reports filed to the Department of Children and Families pursuant to this section are colloquially known as “51As.” *Reporting Alleged Child Abuse and Neglect (Filing a 51A Report)*, MASS.GOV, <https://www.mass.gov/service-details/reporting-alleged-child-abuse-or-neglect-filing-a-51a-report> (last visited May 2, 2022); Letter from ACLU

of professionals considered mandated reporters.²⁴⁵ Part of their discussions included whether to make the mandate universal for the sake of clarity, as opposed to keeping a statute which identified particular professions.²⁴⁶ This idea was abandoned, however, because “there is no evidence that universal reporting schemes result in an increase in substantiated reports.”²⁴⁷

Although the Commission focused most of its time on the expansion of the Massachusetts mandated reporting law, it spent some time considering a proposal by the Committee of Public Counsel Services to exclude social workers from the mandated reporting statute in order to more effectively continue working according to a holistic defense model.²⁴⁸ This proposal was opposed by the NASW²⁴⁹ and the Commission ultimately rejected it.²⁵⁰

Importantly, the Commission held a public comment period in which there was a backlash of concern from advocates, medical professionals, social workers, academics, and impacted families.²⁵¹ It became clear through testimony and written comment that, in Massachusetts, there is a widely-held concern about the disproportionate and negative impact an expansion of the statute would have on communities of color.²⁵² Ultimately, the Commission took these comments seriously and produced a report which identified some of the problems with the mandated reporting schema but made few substantive recommendations.²⁵³ Since the report, the Massachusetts mandated reporting statute has not undergone any significant changes.²⁵⁴

Mass. to Mandated Rep. Comm’n (Apr. 21, 2021), <https://www.mass.gov/doc/aclu-massachusetts42121/download>.

245 ACLU Mass., *supra* note 244.

246 THE MANDATED REP. COMM’N, *supra* note 82, at 24.

247 *Id.* at 25.

248 *Id.* at 43; Schoenberg, *supra* note 238; Letter from Michael Dsida to Mandated Rep. Comm’n, *supra* note 8, at 1.

249 Letter from Rebekah Gewirtz, Exec. Dir., Nat’l Ass’n Soc. Workers, to Mandated Rep. Comm’n (Apr. 20, 2021), <https://www.mass.gov/doc/rebekah-gewirtznational-association-of-social-workers42121/download>.

250 THE MANDATED REP. COMM’N, *supra* note 82, at 43.

251 See *Public Comment Period & Public Hearings*, MASS.GOV, <https://www.mass.gov/lists/public-comment-period-public-hearings> (last visited May 2, 2022).

252 THE MANDATED REP. COMM’N, *supra* note 82, at 11, 13, 25, 32, 66.

253 *Id.* at 21–23; *Massachusetts Commission Declines to Recommend Expansion of Mandated Reporters*, IMPRINT (July 12, 2021), <https://imprintnews.org/news-briefs/massachusetts-commission-declines-to-recommend-expansion-of-mandated-reporters/56821>.

254 MASS. GEN. LAWS ANN. ch. 119, § 51A (West 2022).

2. Massachusetts-specific guidance

In Massachusetts, social worker confidentiality is governed by Massachusetts General Laws chapter 112, section 135A, which requires licensed social workers to keep all communications between themselves and their clients confidential. There are several exceptions including when a client shows they are a danger to themselves or have threatened to kill or inflict serious bodily injury upon another.²⁵⁵ Massachusetts General Laws chapter 112, section 135A(a) references other laws which may provide exceptions to the confidentiality mandate. Chapter 119, section 51A is one such exception and is the state mandated reporting statute. Chapter 119, section 21, where mandated reporters are listed, distinguishes between “clinical social worker” and “social worker” both of whom are considered mandated reporters

With regards to attorney confidentiality, the Supreme Judicial Court Rule 3:07: Rules of Professional Conduct is the Massachusetts analogue to the Model Rules of Professional Conduct. Model Rules 1.6 and 5.3 mentioned above are also found in the state rules. Respectively, these concern the duty of confidentiality and a lawyer’s responsibilities of ensuring that a nonlawyer employee conduct themselves in a manner that is compatible with the lawyer’s obligations. “The ABA Standing Committee on Ethics and Professional Responsibility has instructed that individuals to whom lawyers have ‘outsourced’ aspects of their representation (not just employees) also fall under the Rule 1.6 obligation not to disclose client information.”²⁵⁶ Thus, social workers who work as part of a legal team whose services can be characterized as an aspect of the representation, may be covered under this derivative confidentiality doctrine.²⁵⁷

There is an argument that *non-licensed* social workers are not mandated reporters. “Social worker” is defined in Massachusetts General Laws chapter 112, section 130 which is applicable to sections 130–37 of that same chapter.²⁵⁸ “‘Social worker’ [is] an individual who by training and experience meets the requirements for licensing by the board *and* is duly licensed to engage in the practice of social work in the commonwealth.” (emphasis added).²⁵⁹ Although the mandated reporting statute is outside of the sections this definition explicitly applies to, it would defy the canons of statutory construction, according to which there is a presumption of

255 MASS. GEN. LAWS ANN. ch. 112, § 135A(c)(1)–(2) (West 1993).

256 *The Interdisciplinary Defense Team & Confidentiality: What Defenders Need to Know*, *supra* note 39, at 7.

257 *Id.*

258 MASS. GEN. LAWS ANN. ch. 112, § 130 (West 1977).

259 *Id.*

consistent usage, to construe the definition of “social worker” in a fashion contrary to its definition under Massachusetts General Laws chapter 112, section 130.²⁶⁰ Further, in regards to the concern that chapter 112 only applies to sections 130-37, it can be argued that the mention of any other law in chapter 112, section 135(A)(a) includes the mandated reporting statute. Chapter 119, where the mandated reporting statute is located, is more explicitly cross referenced in chapter 112, sections 135A(e), 135B(e) and (f). Under this theory, non-licensed social workers, then, are not “social workers” within the meaning of the mandated reporting statute and as such are not mandated reporters. This means that unlicensed social workers working with attorneys can make the argument that they are not mandated reporters according to chapter 112, section 130.

However, there are two issues with relying on this theory alone to justify collaborations between social workers and lawyers—particularly when they are working as part of the same team: (1) this theory has not been formally put to the test; (2) there are licensed social workers reluctant to give up their licenses—particularly for those who want to practice as therapists at any given point in their careers—who may elect to work in legal settings. What then?

Whether the mandated reporting duty survives depends on the role the social worker is playing with respect to the legal case.²⁶¹ In a paper written in 2007 by two attorneys and a social worker from Boston College Law School, the authors set out three possibilities for a social worker role in legal settings: (1) “a social worker serving as a member of a legal [] team”; (2) a social worker with an independent relationship to the client apart from the legal case; and (3) “[a] social worker [who] ‘parachutes into’ the lawyering sector to assist with a case as a consultant or expert.”²⁶² According to the authors, the mandated reporting duty only survives in the second scenario. Otherwise, social workers with no independent relationship to the client who are part of the legal team in some respect, are not mandated reporters.

260 See *Gustafson v. Alloy Co.*, 513 U.S. 561, 568 (1995) (“In seeking to interpret the term ‘prospectus,’ we adopt the premise that the term should be construed, if possible, to give it a consistent meaning throughout the Act. That principle follows from our duty to construe statutes, not isolated provisions.”).

261 Anderson et al., *supra* note 177, at 709–15.

262 *Id.*

TABLE 1: SOCIAL WORK ROLES AND LEVEL OF POTENTIAL CONFLICT

NO CONFLICT	DEPENDS ON PRACTICE MODEL	GREATER LIKELIHOOD OF CONFLICT
Case Manager	Social Service Advocate (MSW)	Social worker as therapist
MSW Paralegal	Social worker as part of legal team	

TABLE 2: COLLABORATIVE MODELS AND LEGAL THEORIES

TYPE	ROLE	AGENCY EXAMPLES	HOW TO MANAGE DIFFERENCES IN ETHICAL DUTIES
Social worker as member of legal team	<p>Social worker²⁶³</p> <ul style="list-style-type: none"> -is apprised of the developments of the legal case -offers clinical expertise and emotional support in furtherance of legal case -consultation to attorneys -crisis intervention services -social science research -aid in sentencing -assistance with development of case strategy 	<i>Bronx Defenders</i>	Derivative attorney-client privilege and lawyer-client confidentiality
	<p>Social Worker as Social Services Advocate (SSA)²⁶⁴</p> <ul style="list-style-type: none"> -consultation to attorneys -crisis intervention -clinical evaluations for aid in sentencing -case management and referral services -offers clinical expertise and emotional support in furtherance of legal case 	<i>Committee of Public Counsel Services</i>	Some divisions operate under a theory of derivative attorney-client privilege and lawyer-client confidentiality The protocol of at least one division is to give clients an engagement letter describing the risks of working with a social worker.

263 Telephone Interview with Caitlin Becker, Managing Dir. of Soc. Work, Bronx Defs. (Apr. 11, 2022).

264 Interview with Olivia Dubois, *supra* note 25.

	<p>Social worker at law school clinical program²⁶⁵</p> <ul style="list-style-type: none"> -Information gathering and referrals -case management -re-entry planning -consultation on case theory development -social science research and contributions to pleadings and amicus briefs - in house trainings for law students 	<i>Boston College Law School clinics</i>	Derivative attorney-client privilege and lawyer-client confidentiality
	<p>Social worker at law school clinical program²⁶⁶</p> <ul style="list-style-type: none"> -Offers trauma-informed lens to legal team and emotional support to clients -case management²⁶⁷ -co-teaches course: Trauma, Refugees and Asylum Law -clinical supervision to students -clinical assessments²⁶⁸ 	<i>Harvard Immigration and Refugee Clinical Program</i>	Derivative attorney-client privilege and lawyer-client confidentiality
Social worker not working as social worker but as a member of legal team	<p>Social worker as paralegal²⁶⁹</p> <ul style="list-style-type: none"> -brings social work training and perspective to bear on legal advocacy while not explicitly delivering social work services 	<i>Greater Boston Legal Services</i>	Paralegal with MSW is not a mandated reporter, not acting in their capacity as social worker.

265 Interview with Claire Donahue, *supra* note 201.

266 Interview with Liala Buoniconiti, Soc. Worker, Harvard Immigr. & Refugee Clinical Program, Harvard L. Sch., in Bos., Mass. (Apr. 5, 2022).

267 *Social Work*, HARV. L. SCH. CRIM. JUST. INST., <https://clinics.law.harvard.edu/cj/social-work/> (last visited May 9, 2022).

268 *Id.*

269 Interview with Dan Manning, *supra* note 19; Interview with Liliana Ibara, *supra* note 19.

<p>Social worker parachutes into legal sector²⁷⁰</p>	<p>Social worker as consultant, independent contractor²⁷¹ -May consult on particularly difficult aspects of a legal case such as when a client is presenting with difficulties of a psychological or emotional nature.</p>	<p><i>Greater Boston Legal Services</i></p>	<p>Any potential conflict is avoided because the consulting services of the social worker can be utilized without sharing anything about the client-attorney communications.</p>
	<p>Social worker as evaluator for particular case</p>	<p><i>Widely used in immigration practice with asylum seekers</i></p>	<p>No ethical conflict because the evaluator is working with client separately and is not necessarily apprised of the client-attorney communications.</p>
<p>Social worker with independent relationship to client</p>	<p>Social worker as therapist²⁷² -Offers mental health services to clients -Offers forensic/psychological evaluations for immigration cases -Offers trainings on clinically relevant topics to legal team</p>	<p><i>De Novo</i></p>	<p>An ethical wall exists between the counseling and legal programs. The in-house policy requires client's informed consent when working with a non-lawyer who may be a mandated reporter.</p> <p>Legal team has a non-mandated reporter case manager working to handle social service and public benefit needs. Individualized determinations about when social workers and lawyers should meet together with clients are made.</p>

270 Anderson et al., *supra* note 177.

271 Interview with Dan Manning, *supra* note 19; Interview with Liliana Ibara, *supra* note 19.

272 Interview with Elizabeth Brusie, *supra* note 130.

Non-social worker offering social services	Case manager (not an MSW) ²⁷³ -Offers assistance with housing search and access to resources/public benefits	<i>De Novo</i>	No ethical conflict because case managers are not included in the list of mandated reporters in the mandating reporting statute in Massachusetts.
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While acknowledging Model Rule 5.3 as a possible source of protection for social workers from mandated reporting duties,²⁷⁴ Anderson, Barenberg, and Tremblay warn that the analysis does not stop there. The authors do not go into depth about the reasons Model Rule 5.3 is not enough,²⁷⁵ but one likely explanation is that the Model Rules—and their state analogues—are only binding on attorney conduct and not social worker conduct.²⁷⁶ It is the lawyer, according to this rule, who “shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer.”²⁷⁷ Although it is implied that the non-lawyer professional will abide by the lawyer’s confidentiality duties, this says very little about the non-lawyer’s duties to the lawyer.²⁷⁸ This concern would be consistent with Anderson, Barenberg, and Tremblay’s observations about the District of Columbia Bar Association Ethics Committee (D.C. Ethics Committee) opinion on this question. The D.C. Ethics Committee is the only known authority to have directly opined on the issue of social work mandated reporting duties in legal settings.²⁷⁹ While recognizing that “Rule 1.6(e) allows no exception to the duty to ensure that the social worker preserves the confidences and secrets of the lawyer’s client,” they added, “[i]

273 *Id.*

274 *See supra* Section IV.A.

275 Anderson et al., *supra* note 177, at 699 (“It may be tempting to conclude that the lawyer’s Rule 5.3 obligation confirms that a social worker working within a law firm must comply with Rule 1.6 in all respects, but Rule 5.3’s strictures cannot support that conclusion. A law firm might respond to the cross-professional role tension either by refusing to collaborate with any mandated reporter . . . or alternatively by establishing stringent protocols (‘walls’) to deter access by any mandated reporter to the kind of disclosures which might trigger his reporting duty” (footnote omitted)).

276 Although, the duty on the non-lawyer agent is implied. *Id.* at 698–99 (“The Restatement does not directly describe the obligations of nonlawyers, but it plainly implies that nonlawyers, like the social worker in our example, must comply with the ethical obligations of the law firm’s lawyers.”).

277 MODEL RULES OF PRO. CONDUCT r. 5.3(a) (AM. BAR ASS’N 2020).

278 MODEL RULES OF PRO. CONDUCT r. 5.3 (AM. BAR ASS’N 2020).

279 Anderson et al., *supra* note 177, at 704.

t is arguable that the social worker has no mandatory reporting obligations in these circumstances . . . [but] . . . [t]he Rules of Professional Conduct cannot insulate a social worker from obligations otherwise imposed by law.”²⁸⁰ The authors more strongly rely on the underlying policy rationale for the exclusion of attorneys from mandated reporting statutes. A social worker’s report to DCF in a legal setting would be a breach of the attorney’s duties and, in effect, would cause the lawyer to “be governed by the reporting duty.”²⁸¹ This would be antithetical to the legislature’s intent that lawyers not be mandated reporters. On the other hand, a disclosure by a social worker with an independent relationship to a legal services client does not necessarily result in a breach of the lawyer’s duties; therefore, operating in her own professional capacity as a social worker, the rules of her profession control with no superseding authority to mitigate her mandated reporting responsibilities.²⁸²

In the attorney-client privilege arena—as opposed to the broader ethical rule on confidentiality—there has been slightly more guidance on whether non-attorneys are covered. In general, “courts have no power to recognize implied exceptions to the lawyer-client privilege.”²⁸³ There has been a longstanding recognition that “the assistance of [non-attorney] agents [is often] indispensable to [the attorney’s] work and the communication of the client being often necessarily committed to [the agents] by the attorney or by the client himself, the privilege must include all the persons who act as the attorney’s agents.”²⁸⁴ Massachusetts Rule of Evidence 5.02 describes the attorney-client privilege, explaining that the client is the holder of the privilege and that the privilege applies to “communications made for the purpose of obtaining or providing legal services”²⁸⁵ The privilege, pursuant to this rule, extends to communications between the client and the attorney’s representative as well as between the client’s attorney and the attorney’s representative.²⁸⁶

The Second Circuit in *United States v. Kovel* more explicitly acknowledged the existence of a derivative attorney-client privilege in certain cases where the non-lawyer is functioning as an agent of the attorney.²⁸⁷

280 *Id.*

281 *Id.* at 702.

282 *Id.* at 711.

283 *Elijah W. v. Superior Ct.*, 156 Cal. Rptr. 3d 592, 604 (Ct. App. 2013).

284 *The Interdisciplinary Defense Team & Confidentiality: What Defenders Need to Know*, *supra* note 39, at 7.

285 MASS. G. EVID. § 502(b).

286 *Id.* § 502(a)(4) (“A ‘representative of the attorney’ is one used by the attorney to assist the attorney in providing professional legal services.”).

287 *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961)(quoting 8 WIGMORE, EVIDENCE

With regards to non-lawyers on legal teams, the court noted,

the complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others; few lawyers could now practice without the assistance of secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts. 'The assistance of these agents being indispensable to his work and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents.

Effectively, *Kovel* holds that "when non-legal experts act as 'interpreters' of client communications for the purpose of aiding the client's legal representations—for instance, accountants, in that case—they become cloaked by the privilege."²⁸⁸ Many courts have repeatedly acknowledged psychologists and psychiatrists as attorney agents, who are covered by attorney-client privilege.²⁸⁹ Given the Supreme Court's recognition of the field of social work as on par with its sister-mental health fields such as psychology and psychiatry for evidentiary purposes,²⁹⁰ it is not a stretch to make the argument that clinical social workers should be similarly characterized as agents of lawyers when providing their services to the legal team or lawyer and should be similarly covered by attorney-client privilege.²⁹¹

While embracing the doctrine of derivative attorney-client privilege, the Massachusetts Supreme Judicial Court has clarified that the derivative attorney-client privilege doctrine is "limited in scope" and "attaches only when the third party's role is to clarify or facilitate communications between attorney and client."²⁹² Thus, to make the argument that a social worker is an agent as contemplated by *Kovel*, advocates should make sure that the social worker's role in the firm is, in fact, to facilitate communications between the

§ 2301).

288 *The Interdisciplinary Defense Team & Confidentiality: What Defenders Need to Know*, *supra* note 39, at 8.

289 *Elijah W. v. Superior Ct.*, 156 Cal. Rptr. 3d 592, 604 (Ct. App. 2013); *United States v. Alvarez*, 519 F.2d 1036, 1045 (3d Cir. 1975); *State v. Pratt*, 398 A.2d 421, 426 (Md. 1979); *Ake v. Oklahoma*, 470 U.S. 68, 78 (1985); *Houston v. State*, 602 P.2d 784, 790 (Alaska 1979); *People v. Lines*, 531 P.2d 793 (Cal. 1975); *Ex parte Ochse*, 238 P.2d 561 (Cal. 1951); *City & Cnty. of S.F. v. Superior Ct. In and For City of S.F.*, 231 P.2d 26 (Cal. 1951).

290 *Jaffee v. Redmond*, 518 U.S. 1, 2 (1996); *Lens*, *supra* note 209, at 274–76.

291 *The Interdisciplinary Defense Team & Confidentiality: What Defenders Need to Know*, *supra* note 39, at 9.

292 *Comm'r v. Comcast Corp.*, 901 N.E.2d 1185, 1197 (Mass. 2009).

attorney and a client in a way that is analogous to an interpreter or to the accountant in *Kovel*, and that the social worker's services were not merely "useful and convenient."²⁹³

For those wary of hanging their hats on the derivative attorney-client privilege and confidentiality theories—especially those concerned about the narrowing of the doctrine in *Kovel*—protocols can be instituted when social workers and lawyers collaborate. For instance, lawyers may screen a case as inappropriate for social work services and refrain from involving the social worker on those particular cases. A client can also be apprised of the social worker's mandated reporting duty so that whenever the client speaks while the social worker is present, they can exhibit necessary caution.

The result is that there is necessarily ambiguity on the question of whether social workers working as part of legal teams are mandated reporters. As demonstrated above, there are some arguments lawyers can use in support of their holistic representation models, but each argument carries with it some unsettled aspect. Many legal settings operating holistically do so while living in this ambiguity and are prepared to put forth some of the aforementioned arguments to the test should the unforeseen occur and a situation arises where this question must be litigated. In the many decades in which Boston College Law School has been operating their clinic with a social worker staff person actively working on cases, clinic staff have never been the objects of disciplinary action.²⁹⁴ For most of the clinic's forty years of including social workers on their legal teams no cases have resulted in reports to DCF.²⁹⁵ The same is true of the other area law schools as is the case with Harvard Law School's Immigration and Refugee Clinical Program which works under a holistic model.²⁹⁶

293 *Id.* Social workers on legal teams do perform an interpreting function when they are working in furtherance of the legal case, particularly when there are indicia of psychological or emotional challenges. Social workers bring many of the functions the Supreme Court in *Ake* acknowledged as indispensable to a criminal defendant; these include crucial clinical insight to the defense, perspective on "the effects of any disorder on behavior," the ability to "identify the 'elusive and often deceptive' symptoms" of mental disorders, and ability to translate a medical diagnosis into language that makes sense to an audience not clinically trained. 470 U.S. at 78. See Ferreira, *supra* note 178, for illustration of how a social worker brings clinical skills to bear without which important facts would not have been elicited.

294 Interview with Claire Donahue, *supra* note 201.

295 *Id.*

296 Sabrineh Ardalan, *Constructive or Counterproductive? Benefits and Challenges of Integrating Mental Health Professionals into Asylum Representation*, 30 GEO. IMMIGR. L.J. 1 (2015); Interview with Liala Buoniconti, *supra* note 267.

CONCLUSION

The child welfare system has strayed far away from its original purpose to protect children from abuse and neglect. Mandated reporting statutes have proven to be an ineffective way of addressing child abuse and neglect, at best and at worst, they are a traumatizing force for marginalized communities, which perpetuates oppression. Social workers who recognize this harm are in a bind due to their obligations under those same mandated reporting statutes. Social workers can act conservatively with respect to these duties in typical social work settings and use their judgment and therapeutic tools to mitigate some of the harm the statutes impose, but they encounter two main problems: (1) cultures of fear which may leave them with no choice but to report; and (2) without any superseding mandate, their mandated reporting duties remain intact, tying their hands in certain circumstances which do rise to the level of the broad statutory definition of child abuse or neglect.

Lawyers, on the other hand, have the freedom to use judgment and discernment should concern about the well-being of their clients and their children arise. Bringing social workers onto legal teams can be a way of supporting resistance to the family regulation system in its current form. At the same time, it can foster the kind of holistic representation which has the potential to yield powerful outcomes for clients entangled within the difficult circumstances poverty often facilitates. In some ways, holistic representation holds more promise than mandated reporting statutes in addressing the underlying conditions that lead to what these mandates have labeled “neglect.”

Ideally, mandated reporting statutes would change to narrow the definition of neglect and to allow for an exception when social workers are working on legal teams.²⁹⁷ Until then, legal agencies working with social

297 Recently, the Committee for Public Counsel Services (CPCS) advocated for an exemption to mandated reporting for social workers working in legal settings before the Mandated Reporter Commission in Massachusetts. This proposal was opposed by the National Association of Social Workers (NASW) despite endorsement from other social work groups working in the criminal defense spaces. Letter from Michael Dsida to Mandated Rep. Comm’n, *supra* note 8, at 1 (“We also strongly support the proposal to clarify that the state’s mandated reporter law does not apply to social workers, physical and mental health professionals, and other experts retained by attorneys or employed by legal service providers when those experts are assisting attorneys in their representation of clients.”); THE MANDATED REP. COMM’N, *supra* note 82, at 43 (“The Commission has considered, in-depth, the proposal by the Committee for Public Counsel Services (CPCS) that the definition of mandated reporter explicitly exclude persons who are working on legal defense teams in a holistic defense model. The Commission hosted comments from CPCS in support of the proposal and comments

workers will have to live in the ambiguity created by competing duties. Because no definitive authority has ruled on this question of how a social worker's mandated reporting duties coincide with their confidentiality duties in a legal team, there should still be some awareness of the tensions, but a legally defensible position as advocated by many holistic defenders and practitioners is that as long as a social worker is practicing as part of a legal team and does not have an independent social work-client relationship with the law firm's client, her mandated reporting duties are superseded by attorney-client privilege and the lawyer's more general duties of confidentiality.

from the National Association of Social Workers-Massachusetts Chapter (NASW) in opposition to the proposal. Some Commission members expressed strong opposing views of the proposed explicit exclusion. Commission members' discussion on this topic ended in disagreement on the proposal.²⁹).