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Mandated Reporting and The Legal Educator's Duty

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Cori Alonso-Yoder & Eve Rips [*]

ABSTRACT

As lawyers and educators, law teachers often navigate systems that have failed to account for the needs of the communities that are subject to regulation. These same systems generally fail to appreciate the hybrid role exercised by lawyers who face competing demands as educators. A key example is the tension that exists for legal educators who engage students in clinical and other forms of experiential learning where questions of abuse or maltreatment of vulnerable community members may trigger mandated reporting to government officials. These laws can place legal faculty in the fraught position of needing to reconcile statutory reporting mandates, duties of privilege and confidentiality, and broader social justice considerations. At the same time, this tension presents a unique opportunity for legal educators to confront questions about the implications of mandated reporting head-on, to discuss complex issues about the ethical obligations of attorneys with students, and to work to change the status quo. This article explores the state of the law on mandatory reporting of child maltreatment, while offering practices and pedagogical interventions for legal educators, alongside proposals for legislative reform.

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INTRODUCTION

Reyna[1] was a thirty-something mother of two when she sought legal and social services at a Washington, DC community-based organization. She needed help for herself and for her children to address their immigration legal statuses while resisting her husband's domestic violence. Reyna's husband did not limit his abuse to her; he physically abused their teenage son Daniel and molested their elementary-school-aged daughter Miriam. When seeking services, Reyna learned from her attorney that she should share all the details of her husband's abuse with her attorney, but that disclosing these details with her social worker could lead to a report with Child Protective Services. As her attorney explained to her, while the organization's social worker was a mandated reporter, the attorney was not. As the attorney who advised her at the time, the author was unaware until several years later that this advice was not wholly accurate. Indeed, for one jurisdiction in which the attorney was licensed – Maryland – the law requires universal mandated reporting. Later, when the author began working within an educational setting as a law professor and clinician, the requirements for professional mandated reporting became even more complex.

Now, imagine three different clinical faculty members who are seeking to help families like Reyna's: Nadya from North Dakota, Isla from Indiana, and George from Georgia. All three clinicians are supervising law students in their clinics who believe that a client may be facing child abuse. Nadya is under no legal obligation to report the abuse or neglect, as North Dakota makes neither attorneys nor legal educators mandated reporters.[2] Isla is a mandated reporter because Indiana's law governing mandated reporting requires everyone, regardless of profession, to report abuse and neglect.[3] Finally, George is a mandated reporter of child abuse because in Georgia, although attorneys are generally not mandated reporters, all postsecondary educators are mandated to report child abuse and neglect.[4]

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[1] Client names changed to protect confidentiality. Cori Alonso-Yoder represented Reyna and her children while working at the organization Ayuda (*see* Ayuda, About Us, https://ayuda.com/about-us/ (last visited Dec. 14, 2023).
[2] N.D. CENT. CODE § 50-25.1-03(1) (2021).
[3] IND. CODE § 31-33-5-1 (2022).
[4] GA. CODE ANN. § 19-7-5(b)(12) (2022), GA. CODE ANN. § (c)(1) (2023).

Further complicating the situation are questions of privilege and confidentiality. While Nadya does not legally need to report, if she opted to make a report of her own discretion, she would need to be mindful of whether the communication was privileged or confidential. North Dakota's statute specifies that "[a]ny privilege of communication between husband and wife or between any professional person and the person's patient or client, *except between attorney and client*, is abrogated."[5] George might find himself struggling with the tension between the mandated reporting statute and his professional ethical obligations, as Georgia specifies that reports must be made even when the basis for believing the child to be abused stems from a communication that "is otherwise made privileged or confidential by law."[6] Isla would be left with little statutory guidance, as Indiana's mandated reporting statute is completely silent about issues of attorney-client privilege.[7]

Each clinician would need to navigate a different complex set of moral, professional, and statutory obligations in determining whether a report should be made. These different approaches represent the tip of the iceberg when it comes to the wide range of ways states approach structuring mandated reporting laws.[8] These laws often pit reporting requirements against professional ethical obligations.[9] Ethics opinions issued on the topic frequently fail to give concrete guidance.[10] While this places clinicians in a difficult position, it also presents an opportunity for clinics to engage in critical conversations on topics central to legal pedagogy, as well as to explore ways to advocate for legislative change. This Article serves as a resource for clinicians and law students who represent clients affected by mandated reporting by using the tools of clinical pedagogy and law reform.

In Part I, the Article serves a descriptive function, providing historical, legislative, and interdisciplinary context for understanding mandatory reporting laws. It explores concerns about the laws' challenges and unintended consequences, particularly as they impact lawyers. Though the initial impulse behind mandatory reporting laws is based in best intentions,

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[5] N.D. CENT. CODE § 50-25.1-10 (1995) (emphasis added).
[6] GA. CODE ANN. § 19-7-5(g) (2022). The statute does include an exemption for privileged communication with members of the clergy.
[7] IND. CODE § 31-32-11-1 (2009).
[8] *See infra* Part II.
[9] *See infra* Part III.
[10] *See* Adrienne Jennings Lockie, *Salt in the Wounds: Why Attorneys Should Not Be Mandated Reporters of Child Abuse*, 36 N.M. L. REV. 125, 136–37 (2006).

inquiry demonstrates that they were enacted on questionable premises and in a rush toward passage with relatively sparse study or debate. Moreover, the laws have expanded far beyond the initial scope of mandating reports within medical care to create universal reporting obligations in many states. These issues collide with a growing literature on the racial justice concerns about the U.S. criminal justice system and its pipeline through the child welfare system.

In Part II, the Article documents the complex patchwork of state laws that impact the reporting obligations of legal educators who work with clients. This is aimed in part at helping faculty understand the requirements that may be placed on them by mandated reporting statutes. The section also highlights the messiness and complexity of reporting requirements for legal faculty. In doing so, it provides critical context for justifying the importance of our subsequent normative recommendations. Each state and territory has enacted a mandated reporting statute that governs who is legally required to report child abuse and neglect, when these individuals are required to report, and procedures for reporting. Part II of the Article documents how these laws impact legal educators through a legislative survey that examines four main questions:

1. Whether faculty at postsecondary institutions are mandated reporters;
2. Whether attorneys are mandated reporters;
3. Whether the statute requires mandated individuals to report abuse of all children, or only those known to them professionally; and
4. Whether the statue directly addresses attorney-client privilege with respect to mandated reporting requirements.

Law faculty need to understand the answers to each of these four questions to comprehend the precise situations in which reporting is required.

Next, we highlight in Part III the pedagogical implications of engaging law students on topics related to attorneys' mandated reporting obligations. Mandated reporting presents questions central to clinical legal pedagogy including topics such as professional responsibility, client-centeredness, and the law's pursuit of (or affront to) social justice. Many of these topics are also directly relevant to syllabi in non-clinical coursework, including courses in family law, critical race theory, evidence, and professional responsibility.

Finally, in Part IV, we use these implications to focus our discussion on teaching interventions unique to clinical and experiential learning that relate

to mandated reporting. In particular, we urge the consideration of experiential projects that reform the status quo on mandated reporting, pushing to legislatively exempt attorneys from reporting obligations. As explained in Parts I and II, the complex and varied approach taken by states, territories, and other localities in the United States, poses challenges for the legal practitioner and her client. In addition, a trend in recent legislative reform is to expand reporting obligations through the imposition of universal mandated reporting. This trend is at odds with a growing skepticism of the so-called child welfare system and concerns about inequitable and racist enforcement of child abuse and neglect laws. In this section, we introduce model language that seeks to balance these concerns, including by retaining protections central to the attorney-client relationship and the duty of legal faculty as educators.

I. HISTORY AND MODERN CONTEXT FOR UNDERSTANDING MANDATED REPORTING LAWS

A. The Legislative History of Mandated Reporting

The passage of mandated reporting laws throughout the United States happened rapidly. Within five years in the 1960s, every state in the Nation, including the District of Columbia, had adopted legislative frameworks to mandate reporting of child abuse.[11] Less than a decade later, federal legislation served to shore up state laws by tying mandated reporting to federal funding, further entrenching mandated reporting at the national level.[12] The legislative history of mandated reporting legislation and its impacts on lawyers reveals fascinating lessons in law and policymaking while also offering insights on legislative intent regarding the scope of these laws. This research is critical for understanding the role of legal education in orienting law students to the study of mandated reporting.

1. Early Child Abuse Laws

Public awareness of the maltreatment children became an issue in the Gilded Age. In the post-Civil War era, the rise of the notion of equality and concepts of natural rights fostered an interest in a protected childhood,

[11] BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE 76 (Univ. of Chi. Press, 1984).

[12] *See* Child Abuse Prevention and Treatment Act, Pub. L. No. 93–247, 88 Stat. 5 (1974); *see also* U.S. DEP'T HEALTH AND HUM. SERVS., CHILD.'S BUREAU, ABOUT CAPTA: A LEGISLATIVE HISTORY (2019), https://www.childwelfare.gov/pubPDFs/about.pdf.

introducing the public into a social sphere that had previously been understood to fall within the purview of the family. [13] Economic developments, including the growth of a bourgeois class of families added to the concept, creating, "a standard by which well-to-do-families could measure the social adequacy and integration of less fortunate families."[14]

It bears noting that initial discussion of the issue paid little heed to the mistreatment of non-white children. As noted by Professor Barbara J. Nelson, "until the 1870s maltreatment of white children was not a part of public debate."[15] Black children, many of whom had recently experienced emancipation from chattel slavery, were largely excluded from social reform efforts. Historian Crystal Webster explains that at this time, "white children were increasingly protected and viewed as appropriate beneficiaries of social reform," while these nascent reform efforts "actively excluded or subjugated African American children."[16] Scholar Alan Detlaff traces these historical origins through to the current state of the child welfare system highlighting the rule of racism and white supremacy: "Since its earliest origins, the child welfare system has been designed to maintain the superiority of White Americans while maintaining the oppression of Black Americans by first excluding Black children from services, […] and later through intentional over-inclusion when services shifted to surveillance and separation of families…"[17]

Early laws also permitted the indiscriminate removal of Native children from their homes regardless of the quality of their parents' care for forced cultural assimilation. With the establishment of the first so-called Indian boarding school in 1879, the U.S. Department of Interior and Department of War set to – in the words of the school's founder Lieutenant Richard Henry Pratt – "kill the Indian and save the man."[18] These children were often the victims of state violence at the hands of governmental administrators, including "beatings and military-style punishments." [19] Memoirist Sandy White Hawk describes the experience of being taken from

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[13] *See* NELSON, *supra* note 11, at 5–6.
[14] *Id.* at 7.
[15] *Id.* at 5.
[16] Crystal Webster, *Black children have always known state violence*, N.Y. TIMES (June 15, 2020, 6:00 AM), https://www.washingtonpost.com/outlook/2020/06/15/black-children-have-always-known-state-violence/.
[17] ALAN J. DETLAFF, CONFRONTING THE RACIST LEGACY OF THE AMERICAN CHILD WELFARE SYSTEM: THE CASE FOR ABOLITION 4 (Oxford Univ. Press 2023).
[18] DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 103 (Basic Books 2002).
[19] *Id.* at 104.

her Indian family and placed with an adoptive white couple in the 1950s. She experienced an abusive childhood with her adoptive family and recalls:

> Through it all, I remembered a single piece of information I had about my Indian mother that suggested maybe I was more than a welfare check to spend on booze [an oft-repeated refrain from White Hawk's adoptive mother regarding her birth mother]. That story from my adoptive mother had only one line in it, and I only heard it a couple of times. "Your mother used to come and sit in the back of the church so you wouldn't see her."[20]…I imagined my Indian mother sitting in this very spot, watching me. Here she watched as her brown baby grew away from her.[21]

Despite these glaring injustices, then as now, compelling media accounts served to drive the policy agenda on child abuse. Public affairs Professor Barbara Nelson tracks the original interest in child abuse legislation to the story of "Mary Ellen," a news story that created a sensation in New York City in 1874.[22] A neighbor concerned about the family's treatment of the child brought the girl's circumstances to the attention of Henry Bergh, the founder of the American Society for the Prevention of Cruelty to Animals (ASPCA).[23] Its perhaps stunning to consider that no private, much less governmental entity, had a charge to prevent mistreatment of children, leaving the ASPCA with its mission to protect animal welfare the most likely ally. The ensuing legal drama witnessed the unique legal strategy of applying an old English writ – *de homine replegando* – to remove Mary Ellen from her family's custody. Public attention to the story led to the establishment of the New York Society for the Prevention of Cruelty to Children, founded by none other than Mary Ellen's attorney, Elbridge T. Gerry.[24]

In the years following its incorporation, the Society managed to successfully embed itself in law making and enforcement related to child maltreatment. Within its first year, the Society had established a telegraph link with the NYC police headquarters and a protocol, ensuring the

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[20] SANDY WHITE HAWK, "A CHILD OF THE INDIAN RACE": A STORY OF RETURN 46 (Minn. Hist. Soc'y Press 2022).
[21] *Id.* at 48.
[22] NELSON, *supra* note 11, at 5.
[23] NELSON, *supra* note 11, at 7.
[24] *Id.* at 7–8.

municipal police informed the Society of all cases involving in children.[25] The Society also advocated for the passage of novel legislation in New York geared toward addressing child maltreatment. In 1876 the Society successfully advocated for laws that required custodians provide adequate food, clothing, shelter, and medical care for children, and laws that prohibited child endangerment as well as regulating child labor.[26] In 1881, the Society contributed to the passage of New York legislation creating misdemeanor charges for interference in the duties of a designated child protection agent.[27]

In the years that followed, Societies for the Prevention of Cruelty to Children (SPCCs) were created, primarily in the Midwest and Northeastern United States. These SPCCs were unaffiliated with one another at the national level leading to differing missions and philosophies. While the New York SPCC saw its work as one of child rescue, a differing view, held by the Massachusetts SPCC, championed family rehabilitation.[28] This latter view supported the maintenance of the child within the home with services geared toward alleviating the factors contributing to "destitution."[29] At the dawn of the Twentieth Century, the move to family rehabilitation became the dominant philosophy, particularly as conversations on legislation protecting children turned to the regulation of child labor. National conversations coalesced in a call for a federal Children's Bureau which was eventually passed by an Act of Congress in 1912.[30] In the years of the Depression and World Wars of the Twentieth Century, policy attention shifted away from prevention of child abuse and neglect. That changed with the publication of a groundbreaking study in 1962.

2. "The Battered-Child Syndrome" and Mandated Reporting

In 1962, the Journal of the American Medical Association (JAMA), published the findings of a study led by Dr. C. Henry Kempe. Kempe, a Denver pediatrician, co-authored the article "The Battered-Child Syndrome" to describe what he and his co-authors called "a clinical condition in young children who have received serious physical abuse, generally from a parent

[25] *History*, N.Y.C. SOC'Y FOR THE PREVENTION OF CRUELTY TO CHILD., https://nyspcc.org/about-nyspcc/history/ (last visited Dec. 14, 2023).
[26] *History*, N.Y.C. SOC'Y FOR THE PREVENTION OF CRUELTY TO CHILD., https://nyspcc.org/about-nyspcc/history/ (last visited Dec. 14, 2023).
[27] NELSON, *supra* note 11, at 8.
[28] *Id.* at 9.
[29] *Id.* at 8–9.
[30] NELSON, *supra* note 11, at 33.

or foster parent."[31] The article urged that physicians consider the possibility of the "syndrome" in "any child exhibiting evidence of fracture to any bone, subdural hematoma, failure to thrive, soft tissue swellings or skin bruising."[32] While the article appeared in the medical literature, the authors incorporated a legal dimension into their research, supplementing a nationwide survey of hospitals with a survey of "77 District Attorneys who reported that they had knowledge of 447 cases" in a one year period.[33] While the survey revealed roughly 750 annual cases from its respondents, an accompanying response to the article from the JAMA editors heralded the research. While acknowledging that the study's data was "incomplete," the editors came to the questionable conclusion that battered-child syndrome: "will be found to be a more frequent cause of death than such well-recognized and thoroughly studied diseases such as leukemia, cystic fibrosis, and muscular dystrophy, and it may well rank with automobile accidents and the toxic and infectious encephalitides as causes of acquired disturbances of the central nervous system."[34] The editorial went on to express support for new legislation and law reform to address the medical needs of children, appealing specifically for mandated reporting laws.[35]

The JAMA findings, and a new movement to curtail child abuse, this time led by physicians, contributed to the Children's Bureau renewed interest in child abuse prevention. Kempe and other physicians were central to the development of the Children's Bureau model legislation on mandated reporting.[36] This model language limited its scope to professionals working within a medical setting, specifically to, "[a]ny licensed doctor of medicine, licensed osteopathic physician, intern and resident."[37] The model statute also limited the scope to the maximum age giving the juvenile court jurisdiction in the locality where adopted and made the obligation to report applicable based on "a reasonable cause" for suspecting injuries were caused "other than by accidental means."[38] The model language also

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[31] C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 J. AM. MED. ASSOC. 17, 17 (1962).
[32] *Id.* at 17.
[33] *Id.*
[34] *Id.* at 42.
[35] *Id.*
[36] NELSON, *supra* note 11, at 42.
[37] U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, CHILD'S BUREAU, ABUSED CHILD: PRINCIPLES AND SUGGESTED LANGUAGE FOR LEGISLATION ON REPORTING OF THE PHYSICALLY ABUSED CHILD 11 (1963).
[38] U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, CHILD.'S BUREAU, ABUSED CHILD: PRINCIPLES AND SUGGESTED LANGUAGE FOR LEGISLATION ON REPORTING OF THE PHYSICALLY ABUSED CHILD 11 (1963).

provided immunity from liability for reporting done in good faith,[39] and abrogated the physician-patient, and spousal evidentiary privileges.[40]

In the years following the Children's Bureau promulgating proposed statutory language, states moved at legislative breakneck speed to heed the federal government's call. By 1967, each of the states and the District of Columbia had adopted a mandated reporting law.[41] Prior to the Children's Bureau publishing model language for the states, only California had implemented mandated reporting by physicians and hospitals.[42] According to Professor Barbara Nelson: "These reporting laws diffused through the states at a speed five times faster than the average for public policy innovations between 1933 and 1966."[43] By the time Congress held hearings on the issue in 1973, mandatory reporting was practically a fait accompli. The 1974 Child Abuse and Prevention and Treatment Act (CAPTA) cemented the state legislative schemes. The federal legislation made states' eligibility for federal dollars conditional on the existence of a state reporting regime.[44] The Act also created a National Center on Child Abuse and Neglect[45] and provided for a federal definition of child abuse and neglect:

> For purposes of this Act the term "child abuse and neglect" means the physical or mental injury, sexual abuse, negligent treatment, or maltreatment of a child under the age of eighteen by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is harmed or threatened thereby…[46]

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[39] U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, CHILD.'S BUREAU, ABUSED CHILD: PRINCIPLES AND SUGGESTED LANGUAGE FOR LEGISLATION ON REPORTING OF THE PHYSICALLY ABUSED CHILD 11 (1963).

[40] U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, CHILD.'S BUREAU, ABUSED CHILD: PRINCIPLES AND SUGGESTED LANGUAGE FOR LEGISLATION ON REPORTING OF THE PHYSICALLY ABUSED CHILD 11 (1963).

[41] NELSON *supra* note 11, at 76.

[42] See U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, CHILD.'S BUREAU, ABUSED CHILD: PRINCIPLES AND SUGGESTED LANGUAGE FOR LEGISLATION ON REPORTING OF THE PHYSICALLY ABUSED CHILD 1 (1963) (noting that the working group who worked on the Bureau's model legislation was "impressed by the results reported from California.")

[43] NELSON, *supra* note 11, at 76 (citing Jack L. Walker, *The Diffusion of Innovations among the American States*, 63 AM. POL. SCI. REV. 880, 895 (1969)).

[44] Child Abuse Prevention and Treatment Act § 4(b)(2).

[45] *Id.* at § 2(a).

[46] *Id.* at § 3.

In a 1964 JAMA paper reviewing mandatory reporting legislation, the authors observed: "The need for some such legislation seems clear, and state legislatures are getting busy."[47]

1. Expansion of Mandated Reporting to Attorneys and Universal Mandated Reporting

Since the initial rush of the 1960s and 70s to legislate mandated reporting, states have remained busy on further expanding the scope and reach of mandatory reporting legislation. While the premise of the original legislation was that "injuries of this nature are seen most frequently by physicians in hospitals or private practice," [48] thus limiting reporting obligations to those professionals, states soon created additional obligations for other professionals. Today, mandated reporters include physicians, social workers, teachers, school administrators, and even photo development personnel. [49] Of deepest concern for attorneys and legal educators are the statutes that have created mandatory reporting obligations for legal professionals, post-secondary educators, as well as the more recent trend, adopted in eighteen jurisdictions, creating universal mandated reporting. These efforts have seemed to operate from a principle that if some reporting is good, more reporting is better.

Laws to expand reporting beyond physicians were enacted contemporaneously to the earliest mandated reporting laws. By 1967, twenty-five states expanded the reporting obligation to other medical professionals, including nurses and pharmacists. [50] By this time, other states had also expanded the statutory mandated reporter role to teachers and social workers. [51] Some states went even further. In the initial push for legislation, Nebraska, Tennessee, and Utah enacted the first of what would come to be known as universal mandated reporting laws. [52] These laws "put

[47] John Reinhart & Elizabeth Elmer, *The Abused Child: Mandatory Reporting Legislation*, 188 J. AM. MED. ASS'N 358 (1964).
[48] U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, CHILD.'S BUREAU, ABUSED CHILD: PRINCIPLES AND SUGGESTED LANGUAGE FOR LEGISLATION ON REPORTING OF THE PHYSICALLY ABUSED CHILD 3 (1963).
[49] *See infra* Part II.
[50] Monrad G. Paulsen, *Child Abuse Reporting Laws: The Shape of Legislation*, 67 COLUM. L. REV. 1, 7 (1967) (identifying twenty states (that included nurses in some capacity as reporters, and five states that designated pharmacists or druggists as reporters).
[51] *Id*. ("[O]f the ten most populous states, only Ohio and California have been more inclusive, requiring some teachers and social workers to report").
[52] Leonard G. Brown, III & Kevin Gallagher, *Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States' Current Mandatory Reporting Laws*

an obligation on *all* citizens having evidence of child abuse to report."[53] As the years wore on, states continued to add new categories of professional mandated reporters, while many more embraced universal mandated reporting.[54] As a result, attorneys in twenty-eight states and one territory[55] are designated as a mandated reporters either because they are specifically designated as such in the state statute, or because they are not specifically exempted in the universal mandates reporting jurisdictions. While authors and advocates have raised concerns about reporting regimes in general,[56] the impact of reporting on lawyers' professional obligations has been generally condemned, yet sparsely studied.[57] These legislative regimes conflict with countervailing considerations of attorneys' professional responsibilities and evidentiary privileges relation to attorney-client communications. These considerations are explored in Part II of this article.

B.Bias in the Child Welfare System and the Role of Mandated Reporting

Even at the time of the initial wave of mandatory reporting laws, experts in child abuse and neglect expressed reservations about the efficacy of the new legislation. In a 1964 JAMA paper published during the height of the rush to legislate mandates, two researchers of family abuse and neglect noted concerns that ring familiar to the modern clinician. Among the tradeoffs in the legislation, John B. Reinhart and Elizabeth Elmer noted that it sacrifices patients' protected communications with a physician,[58] and harms adult caretakers who may be "summarily reported to the police because of the assumption that they caused the child's injuries."[59] The paper also bemoaned the laws' reporting of maltreatment to law enforcement noting that: "Police are not usually trained to identify social and psychological problems, to assess family functioning, and to estimate the adequacy of child care."[60] The paper also raised a concern which the researchers framed as being an advantage of reporting: the elimination of bias based on race and socioeconomic status. They related an anecdote illustrative of the problem:

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with a Review of the Laws in the Commonwealth of Pennsylvania, 59 VILL. L. REV. 37, 40 (2013).

[53] *Id.* at 40.

[54] *Id.* at 42.

[55] *See infra* Part II.

[56] *See* Gary B. Melton, *Mandated Reporting: A Policy Without a Reason*, 29 CHILD ABUSE & NEGLECT 9 (2005).

[57] For an exception to this commentary, see Lockie, *supra* note 10.

[58] Reinhart & Elmer, *supra* note 47, at 109.

[59] *Id.* at 111.

[60] *Id.*

> A common human tendency is to attribute undesirable human behavior to people who are different as to socioeconomic status or color. An extreme example was the young resident who appeared unusually apathetic about the plight of a nonwhite child whose injuries seemed deliberately inflicted. He explained his failure to examine the family relationships: "What's the use? You'd have to take all their children away from all of them if you wanted to clean up the mess."[61]

By mandating reporting and creating procedures that apply to all legislated conduct, the authors reasoned, "bias is diluted and rational management extended." [62] Despite this optimistic view, history has demonstrated just the opposite effect. Professor Dorothy Roberts writes that as "mandated reporting expanded, the number of maltreatment reports skyrocketed – from ten thousand in 1967 to more than two million annually two decades later."[63] While this massive growth in reporting means that a large proportion of children in the United States, an estimated 37.4%, will experience a child protection investigation, the racial breakdown is even more staggering.[64] According to a 2017 study, 53% of Black children will be subjected to investigation compared to 28.2% of white children.[65] In a report by the Annie E. Casey Foundation, Black children represented 22% of all children in foster care, despite representing a mere 14% of the total population of children in the United States.[66]

II. CURRENT REPORTING OBLIGATIONS

Whether clinicians are mandated to report child abuse and neglect, and the scope of their reporting requirements, varies significantly by state and territory. This Part documents how these laws impact clinicians through a legislative survey that examines four main questions: whether faculty at postsecondary institutions are mandated reporters; whether attorneys are mandated reporters; whether the statute requires mandated individuals to report abuse of all children, or only those known to them professionally;

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[61] *Id.* at 109.
[62] *Id.*
[63] ROBERTS, *supra* note 18, at 166.
[64] *Id.* at 37 (citing Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among U.S. Children*, 107 AM. J. PUB. HEALTH 274, 278 (2017)).
[65] *Id*.
[66] *Black Children Continue to Be Disproportionately Represented in Foster Care*, ANNIE E. CASEY FOUND. (May 14, 2023), https://www.aecf.org/blog/us-foster-care-population-by-race-and-ethnicity.

and whether the statute directly addresses attorney-client privilege and the duty of confidentiality with respect to mandated reporting requirements. Clinicians need to understand the answers to each of these four questions in order to comprehend the precise situations in which reporting is required. This Part looks first at questions of who is mandated to report, and then at when the reporting requirement applies. It then examines how these reporting requirements might play out for clinicians in different circumstances and considers the reporting implications for clinical students as well.

A. Who is Mandated to Report?

Postsecondary faculty members who are also practicing attorneys can be mandated to report in three distinct ways: states can designate postsecondary educators as mandated reporters, can designate attorneys as mandated reporters, or can require universal mandated reporting in which everyone, regardless of profession, is legally required to report child abuse and neglect.[67] Eighteen states and one territory require universal reporting.[68] Collectively, clinicians and other practicing attorneys who teach at postsecondary institutions are mandated reporters in twenty-eight states and one territory.

1. Mandated Reporting Requirements for Postsecondary Educators

Twenty-seven states and one territory require faculty at postsecondary institutions to report child abuse and neglect.[69] Of these, ten states explicitly name postsecondary educators as reporters, and the remainder require universal reporting. An additional eight states might require mandated reporting of postsecondary educators in certain circumstances. Sometimes this is because of a statutory catchall, such as requiring any "other person

[67] *See infra* Part II, Figure 1, Figure 2.
[68] *See id.*
[69] *See infra* Part II, Figure 1. We treated states as mandating postsecondary educators to report if the statute listed "educators," without additional qualifications, as mandated reporters. We treated states that mandate "teachers," "school officials," or "school personnel" to report as not including postsecondary faculty, unless the statute contains a definition section that specifically defines "teachers" or "schools" in a way that includes postsecondary institutions. For example, Georgia's mandated reporting statute defines "school" as "any public or private pre-kindergarten, elementary school, secondary school, technical school, vocational school, college, university, or institution of postsecondary education." GA. CODE ANN. § 19-7-5 (b)(16) (2022).

with responsibility for the care of children"[70] to report abuse or neglect. In other cases, it is because the state only requires certain types of postsecondary educators to report.[71]

Figure #1: Are Postsecondary Educators Mandated to Report?

Yes, postsecondary educators are enumerated as	Yes, universal mandated reporting[73]	No, postsecondary educators are not mandated to report[74]	Other[75]

[70] MO. REV. STAT. § 210.115(1) (2021).

[71] *See, e.g.,* IOWA CODE ANN. § 232.69(1)(b) (2022) (mandating community college instructors to report).

[73] DEL. CODE ANN. tit. 16, § 903 (2003); FLA. STAT. ANN. § 39.201(1)(a)2, (b)1 (2021); IDAHO CODE ANN. § 16-1605(1) (2023); IND. CODE § 31-33-5-1 (2022); KY. REV. STAT. § 620.030(1) (West 2012); MD. CODE ANN., FAM. LAW § 5-704(a) (West 2022), MD. CODE ANN., FAM LAW § 5-705(a)(1) (West 2011); MISS. CODE ANN. § 43-21-353(1) (2019); NEB. REV. STAT. § 28-711(1) (2022); N.H. REV. STAT ANN. § 169-C:29 (1979); N.J. STAT. ANN. § 9:6-8.10 (2019); N.M. STAT. ANN. § 32A-4-3(A) (2021); N.C. GEN. STAT. § 7B-301(a) (2016); OKLA. STAT. ANN. tit. 10A, § 1-2-101(B)(1) (2022); P.R. LAWS ANN. tit. 8, §§ 446(a)–(b) (2003); 1956 R.I. GEN. LAWS § 40-11-3(a) (2016); TENN. CODE ANN. § 37-1-403(a)(1) (2020); TEX. FAM. CODE ANN. § 261.101(a) (West 2021); UTAH CODE ANN. § 80-2-602(1) (West 2022); WYO. STAT. ANN. § 14-3-205(a) (West 2020).

[74] ALASKA STAT. ANN. § 47.17.020(a) (West 2021); AM. SAMOA CODE ANN. § 45.2002(b) (1988); COLO. REV. STAT. § 19-3-304(2) (2023); D.C. CODE § 4-1321.02(b) (2023); HAW. REV. STAT. § 350-1.1(a) (2021); KAN. STAT. ANN. § 38-2223(a)(1) (2012); MASS. GEN. LAWS ANN. ch. 119, § 21 (2020); MICH. COMP. LAWS § 722.623(1)(a), (c) (2022); MONT. CODE ANN. § 41-3-201(2) (West 2023); N.Y. SOC. SERV. LAW § 413(1)(a) (McKinney 2021); N.D. CENT. CODE § 50-25.1-03(1) (West 2021); 6 N. MAR. I. CODE § 5313(a) (2010); OHIO REV. CODE § 2151.421(A)(1)(b) (2023); S.C. CODE § 63-7-310(a) (2018); S.D. CODIFIED LAWS § 26-8A-3 (2021); VT. STAT. ANN. tit. 33, § 4913(a) (2021); V.I. ANN. CODE tit. 5, § 2533(a) (2019); WASH. REV. CODE ANN. § 26.44.030(1)(a) (West 2019); W. VA. CODE § 49-2-803(a) (2018); WIS. STAT. ANN. § 48.981(2)(a) (2023).

[75] ARIZ. REV. STAT. § 13-3620(A)(5) (2023) (mandating "[a]ny other person who has responsibility for the care or treatment of the minor" to report); 19 GUAM CODE ANN. § 13201(a) (2022) (mandating an individual to report when "in the course of his or her employment, occupation or practice of his or her profession, [he] comes into contact with children" and when he suspects abuse "on the basis of his medical, professional or other training and experience"); HAW. REV. STAT. § 350-1.1(a) (2021) (mandating "employees or officers of any public or private agency or institution, or other individuals, providing social, medical, hospital, or mental health services, including financial assistance" to report); IOWA CODE ANN. § 232.69(1)(b) (2022) (requiring only community college instructors, but not other postsecondary personnel, to report); ME. REV. STAT. ANN. tit. 22, § 4011-A(1)(B) (2023) (requiring "[a]ny person who has assumed full, intermittent or occasional responsibility for the care or custody of the child, regardless of whether the

mandated reporters[72]			
AL, AR, CA, CT, GA, IL, LA, MN, OR, VA	DE, FL, ID, IN, KY, MD, MS, NE, NH, NJ, NM, NC, OK, PR RI, TN, TX, UT, WY	AK, AS, CO, DC, KS, MA, MI, MT, NY, ND, MP, OH, SC, SD, VT, VI, WA, WV, WI	AZ, GU, HI, IA, ME, MO, NV, PA

2. Mandated Reporting Requirements for Attorneys

In twenty-one states and one territory, attorneys are mandated to report. Three of these states specifically designate all lawyers as reporters, while the remaining states and territory that require reporting from attorneys have universal mandated reporting laws. Twelve states and one territory only require reporting from certain types of attorneys, or might be thought of as requiring certain attorneys to report under a legislative catchall. States that

person receives compensation" to report); MO. STAT. REV. STAT. § 210.115(1) (2021) (mandating any "other person with responsibility for the care of children" to report); NEV. REV. STAT. § 432B.220(4)(l) (2023) (mandating "[a]ny adult person who is employed by an entity that provides organized activities for children" to report); 23 PA. CONS. STAT. § 6311(a)(7) (2019) (mandating "[a]n individual paid or unpaid, who, on the basis of the individual's role as an integral part of a regularly scheduled program, activity or service, is a person responsible for the child's welfare or has direct contact with children" to report).

[72] ALA. CODE § 26-14-3(a) (2017); ARK. CODE ANN. § 12-18-402(a)(24) (2023); CAL. PENAL CODE § 11165.7(a)(41) (2021); GA. CODE ANN. § 19-7-5 (b)(12) (2022), GA. CODE ANN. § (c)(1)(H)–(I) (2023); 325 ILL. COMP. STAT. 5/4(a)(4) (2022); CONN. GEN. STAT. § 17a-101(b)(14) (2022); LA. CHILD. CODE ANN. art. 603(17)(d) (2022); MINN. STAT. § 260E.06(1)(a)(1) (2020); OR. REV. STAT. § 419B.005(6)(c) (2023), OR. REV. STAT. § 419B.010(1) (2013); VA. CODE ANN. § 63.2-1509(A)(18) (2022).

mandate only certain types of attorneys to report typically focus on guardians at litem[76] or on district attorneys.[77]

Figure #2: Are Attorneys Mandated to Report?

Yes, attorneys are enumerated	Yes, universal mandated reporting[79]	No, attorneys are not	Other[81]

[76] ARK. CODE ANN. §§ 12-18-402(a)(31) (2023) (mandating an "attorney ad litem in the course of his or her duties as an attorney ad litem" to report); MONT. CODE ANN. § 41-3-201(2)(i) (West 2023) (mandating "a guardian ad litem or a court-appointed advocate who is authorized to investigate a report of alleged abuse or neglect" to report); WASH. REV. CODE ANN. § 26.44.030(1)(e) (West 2019) (mandating guardians ad litem to report when they learn about abuse or neglect in the course of representing a child). Although guardians ad litem are not always attorneys in some states, attorneys may serve in the role of guardian ad litem in both Montana and Washington. MONT. CODE ANN. § 40-4-205 (West 2023) (specifying that "the guardian ad litem may be an attorney"); *Guardians ad Litem in Family Law Cases*, NW.JUST. PROJECT 3 (2022), https://www.washingtonlawhelp.org/files/C9D2EA3F-0350-D9AF-ACAE-BF37E9BC9FFA/attachments/392E868B-CE46-7D13-32C7-470570A58AA8/3103en_guardian-ad-litems-in-family-law-cases.pdf (explaining that "A GAL can be a lawyer, mental health professional, or volunteer").

[77] *See, e.g.,* N.Y. SOC. SERV. LAW § 413(1)(a) (McKinney 2021) (mandating district attorneys and assistant district attorneys to report).

[79] *See supra* note 70.

[81] ARIZ. REV. STAT. § 13-3620(A)(5) (2023) (mandating "[a]ny other person who has responsibility for the care or treatment of the minor" to report); ARK. CODE ANN. §§ 12-18-402(a)(20), (31) (2023) (mandating prosecuting attorneys and attorneys ad litem to report information learned "in the course of his or her duties as an attorney ad litem"); CONN. GEN. STAT. § 17a-101(b)(36) (2017) (mandating "the Child Advocate and any employee of the Office of the Child Advocate" to report); 19 GUAM CODE ANN. § 13201(a) (2022) (mandating an individual to report when "in the course of his or her employment, occupation or practice of his or her profession, [he] comes into contact with children" and when he suspects abuse "on the basis of his medical, professional or other training and experience"); HAW REV. STAT. § 350-1.1(a) (2021) (mandating "employees or officers of any public or private agency or institution, or other individuals, providing social, medical, hospital, or mental health services, including financial assistance" to report); MICH. COMP. LAWS § 722.623(1)(a) (2022) (mandating "anyone employed by the Office of the Friend of the Court" to report); ME. REV. STAT. ANN. tit. 22, § 4011-A(1)(B) (2023) (requiring "[a]ny person who has assumed full, intermittent or occasional responsibility for the care or custody of the child, regardless of whether the person receives compensation" to report); MO. REV. STAT. § 210.115(1) (2021) (mandating any "other person with responsibility for the care of children" to report); MONT. CODE ANN. § 41-3-201(2)(i) (West 2023) (mandating "a guardian ad litem or a court-appointed advocate who is authorized to investigate a report of alleged abuse or neglect" to report); NEV. REV. STAT. § 432B.220(4)(l) (2023) (mandating "[a]ny adult person who is employed by an entity that provides organized activities for children" to report); N.Y. SOC. SERV. LAW § 413(1)(a)

as mandated reporters[78]		mandated to report[80]	
NV, OH, OR	DE, FL, ID, IN, KY, MD, MS, NE, NH, NJ, NM, NC, OK, PR, RI, TN, TX, UT, WY	CA, CO, DC, GA, IL, IA, LA, MA, MN, ND, MP, SC, SD, VT, VI, VA, WV, WI	AZ, AK, CT, GU, HI, KS, ME, MI, MO, MT, NY, PA, WA

3. When Postsecondary Personnel Are Also Attorneys

Two states have partially addressed the complexities of reporting requirements for attorneys who are also postsecondary educators. California specifies that mandated reporters include employees of postsecondary institutions who see children on a regular basis as part of their work, but then immediately makes clear that with respect to the mandate on postsecondary educators, "nothing in this paragraph shall be construed as altering the lawyer-client privilege."[82] Similarly, Virginia specifies that mandated reporters include "[a]ny person employed by a public or private institution of higher education other than an attorney who is employed by a public or private institution of higher education as it relates to information gained in the course of providing legal representation to a client."[83] These approaches provide potential models for addressing the dual role of clinicians.

(McKinney 2021) (mandating district attorneys and assistant district attorneys to report); 23 PA. CONS. STAT. § 6311(a)(7) (2015) (mandating "[a]n attorney affiliated with an agency, institution, organization or other entity, including a school or regularly established religious organization that is responsible for the care, supervision, guidance or control of children" to report); WASH. REV. CODE ANN. § 26.44.030(1)(e) (West 2019) (mandating guardians ad litem to report when they learn about abuse or neglect in the course of representing a child).

[78] NEV. REV. STAT. § 432B.220(4)(i) (2024); NEV. REV. STAT. § 432B.225 (2013); OHIO REV. CODE ANN. § 2151.421(A)(1)(b) (2021); OR. REV. STAT. § 419B.005(6)(m) (2024); OR. REV. STAT. § 419B.010(1) (2013).

[80] CAL. PENAL CODE § 11165.7(a)(18) (West 2021); COLO. REV. STAT. § 19-3-304.2 (2022); D.C. CODE § 4-1321.02(b) (2023); GA. CODE ANN. § 19-7-5(c)(1) (2022); 325 ILL. COMP. STAT. ANN. 5/4(a) (2023); IOWA CODE ANN. § 232.69(1)(b) (2023); LA. CHILD. CODE art. 603(17)(b) (2022); MASS. GEN. LAWS ANN. ch. 119, § 21 (2020); MINN. STAT. ANN. § 260E.06(1)(a)(1) (West 2020); N.D. CENT. CODE § 50-25.1-03(1) (2021); 6 N. MAR. I. CODE § 5313(a) (2010); S.C. CODE § 63-7-310(a) (2018); S.D. CODIFIED LAWS § 26-8A-3 (2021); VT. STAT. ANN. tit. 33, § 4913(a) (2023); V.I. ANN. CODE tit. 5, § 2533(a) (2019); VA. CODE ANN. § 63.2-1509(A) (2022); W. VA. CODE § 49-2-803(a) (2018); WISC. STAT. ANN. § 48.981(2)(a), (c), (d) (West 2023).

[82] CAL. PENAL CODE § 11165.7(a)(41) (West 2021).

[83] VA. CODE ANN. § 63.2-1509(A)(18) (2022).

B.When is Reporting Required?

Individuals who are mandated reporters are not necessarily required to report every instance of child abuse or neglect that they become aware of. Some states require reporting only when the reporter has a particular connection to the child, typically specifying that the reporter is only mandated to notify authorities when the child is known to him or her in a professional capacity.[84] Additionally, when attorneys are mandated to report abuse and neglect, attorney-client privilege and the duty of confidentiality may sometimes restrict the ability of the lawyer to make a report.[85]

1. Relationship to the Child

In thirty-three states and three territories, mandated reporters are responsible for making a report for any child who they believe to have been abused or neglected.[86] Generally universal mandated reporting states do not require a professional connection to the child.[87] Conversely, fifteen states, two territories, and DC only require mandated professionals to make a report for certain children, typically those they know in a professional or official capacity.[88]

Statutes are typically silent on what it means to know an individual in one's professional capacity, although a handful of state laws include language providing more specifics. For example, Pennsylvania takes a hybrid approach, requiring either a professional connection to the child or a direct disclosure of abuse. The Pennsylvania statute lists four circumstances in which a reporter must notify authorities: (1) when the reporter "comes into contact with the child in the course of employment, occupation and practice of a profession"[89] or a during regularly scheduled professional program; (2) when the reporter is responsible for the care of

[84] *See infra* Part II, Figure 3.
[85] *See infra* Part III.
[86] *See infra* Part II, Figure 3.
[87] *See supra* Part II, Figure 1, Figure 2 (listing universal mandated reporting states); *infra* Part II, Figure 3 (listing states in which no professional connection is required).
[88] In an additional two states, the required relationship between the reporter and the child is more complicated. In Maine, it depends on who the reporter is. In Pennsylvania, it depends on how the reporter learns of the alleged abuse or neglect.
[89] 23 PA. CON. STAT. § 6311(b)(1) (2015).

the child or works for an organization responsible for the care of the child; (3) when an individual makes a disclosure to the reporter that "an identifiable child" is the victim of abuse; or (4) when an individual aged fourteen or older discloses directly that he or she has committed child abuse.[90] Illinois mirrors Pennsylvania's approach but only applies to children known professionally. The Illinois statute includes language that closely tracks with the first two circumstances in which Pennsylvania reporters are required to notify authorities. However, it only extends requirements to report following a direct disclosure to cases in which that disclosure was about "an identifiable child" and the disclosure "happens while the mandated reporter is engaged in his or her employment or practice of a profession, or in a regularly scheduled program, activity, or service."[91]

Figure 3: When must a mandated individual make a report?

[90] *Id.*
[91] 325 ILL. COMP. STAT. ANN. 5/4 (c)(1) (2022).

For any child[92]	Professional connection required [93]	Hybrid[94]
AL, AS, AZ, AR, CO, DE, FL, GA, ID, IN, KS, KY, LA, MD, MI, MN, MS, MO, NE, NH, NJ, NM, NC, OK, OR, PR, RI, SD, TN, TX, UT, VT, VI, WA, WV	AK, CA, CT, DC, GU, HI, IL, IA, M, MT, NV, NY, ND, MP, OH, SC, VA, WI	ME, PA

[92] ALA. CODE § 26-14-3(a) (2017); AM. SAMOA CODE ANN. § 45.2002(b) (1988); ARIZ. REV. STAT. § 13-3620(A) (2023); ARK. CODE ANN. § 12-18-402(a) (2023); COLO. REV. STAT. § 19-3-304(1)(a) (2023); DEL. CODE ANN. tit. 16, § 903 (2003); FLA. STAT. ANN. § 39.201(1)(a) (2021); GA. CODE ANN. § 19-7-5(c)(1) (2023); IDAHO CODE ANN. § 16-1605(1) (2023); IND. CODE § 31-33-5-1 (2022); KAN. STAT. ANN. § 38-2223(a)(1) (2012); Ky. REV. STAT. ANN. § 620.030(1) (West 2012); LA. CHILD. CODE ANN. art. 609(A)(1)(a) (2012); MD. CODE ANN., FAM. LAW § 5-704(a) (West 2022), MD. CODE ANN., FAM. LAW § 5-705(a)(1) (West 2011); MICH. COMP. LAWS § 722.623(1)(a) (2022); MINN. STAT. § 260E.06(1)(a) (2020); MISS. CODE ANN. § 43-21-353(1) (2019); MO. REV. STAT. § 210.115(1) (2021); NEB. REV. STAT. § 28-711(1) (2022); N.H. REV. STAT. ANN. § 169-C:29 (1979); N.J. STAT. ANN. § 9:6-8.10 (2019); N.M. STAT. ANN. § 32A-4-3(A) (2021); N.C. GEN. STAT. § 7B-301(a) (2016); OKLA. STAT. tit. 10A, § 1-2-101(B)(1) (2022); OR. REV. STAT. § 419B.010(1) (2013); P.R. LAWS ANN. tit. 8, §§ 446(a), (b) (2003) (MAY NEED MORE EXPLANATION); 1956 R.I. GEN. LAWS § 40-11-3(a) (2016); S.D. CODIFIED LAWS § 26-8A-3 (2021); TENN. CODE ANN. § 37-1-403(a)(1) (2020); TEX. FAM. CODE ANN. § 261.101(a) (West 2021); UTAH CODE ANN. § 80-2-602(1) (West 2022); VT. STAT. ANN. tit. 33, § 4913(a) (2021); V.I. CODE ANN. tit. 5, § 2533(a) (2019); WASH. REV. CODE ANN. § 26.44.030(1)(a) (West 2019); W. VA. CODE § 49-2-803(a) (2018); WYO. STAT. ANN. § 14-3-205(a) (West 2020).

[93] ALASKA STAT. ANN. § 47.17.020(a) (West 2021); CAL. PENAL CODE § 11166(a) (2022); CONN. GEN. STAT. § 17a-101(a)(1) (2017); D.C. CODE § 4-1321.02(a) (2023); 19 GUAM CODE ANN. § 13201(a) (2022); HAW. REV. STAT. § 350-1.1(a) (2021); 325 ILL. COMP. STAT. 5/4(a), (c)(1) (2022); IOWA CODE ANN. § 232.69(1)(b) (2022); MASS. GEN. LAWS ANN. ch. 119, § 51A(a) (West 2020); MONT. CODE ANN. § 41-3-201(1) (West 2023); NEV. REV. STAT. § 432B.220(1) (2023); N.Y. SOC. SERV. LAW § 413(1)(a) (McKinney 2021); N.D. CENT. CODE § 50-25.1-03(1) (West 2021); 6 N. MAR. I. CODE § 5313(a) (2010); OHIO REV. CODE § 2151.421(A)(1)(a) (2023); S.C. CODE ANN. § 63-7-310(a) (2018); VA. CODE ANN. § 63.2-1509(A) (2022); WIS. STAT. ANN. § 48.981(2)(a) (2023).

[94] ME. REV. STAT. ANN. tit. 22, § 4011-A(1)(B) (2023) (mandating enumerated professions to report for any child, regardless of relationship, but including a catchall provision for other individuals that only applies to situations in which the person has "assumed full, intermittent or occasional responsibility for the care or custody of the child"); 23 PA. CONS. STAT. § 6311(b)(1) (2015) (mandating reporting in circumstances where the reporter learns of the abuse or neglect in a professional context, as well as in all cases where there is a direct disclosure of abuse or neglect to the reporter).

2. Status of Attorney-Client Privilege and Confidentiality

States and territories also take a wide range of different approaches to attorney-client privilege and to confidentiality. Several states explicitly re-affirm attorney-client privilege or confidentiality in at least some settings.[95] Other states are silent on all forms of privilege.[96] Still others discuss certain forms of privilege, such as doctor-patient or clergy-penitent, but are silent on attorney-client privilege.[97] Finally, some states fully abrogate all forms of privilege.[98] States further vary with respect to whether language about privilege or confidentiality applies to the initial reporting requirement, or only to excluding evidence from legal proceedings.[99]

Statutes are frequently unclear about whether language protecting attorneys from reporting information related to client representation applies just to the attorney-client privilege or applies to attorney-client confidentiality more broadly. Confidentiality is an ethical duty grounded in rules of professional conduct, while privilege is rooted in common law tradition and in state legislation.[100] Under the ABA Model Rules of Professional Conduct, a "fundamental principle in the client – lawyer relations is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation."[101] Confidentiality "contributes to the trust that is the hallmark of the client – lawyer relationship."[102] Attorney-client privilege protects communications from disclosure that are made by a client to an attorney, in confidence, for the purposes of seeking legal advice.[103] The duty of confidentiality is generally broader than the attorney-client privilege and includes information that relates to the representation no matter what the source of

[95] *See infra* pages 22-25.
[96] *See id.*
[97] *See id.*
[98] *See id.*
[99] *See id.*
[100] Sue Michmerhuizen, *Confidentiality, Privilege: A Basic Value in Two Different Applications*, AM. BAR ASS'N. CTR. FOR PRO. RESP. (2007), www.americanbar.org/content/dam/aba/administrative/professional_responsibility/confidentiality_or_attorney.authcheckdam.pdf.
[101] MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. (AM. BAR ASS'N 1983).
[102] *Id.*
[103] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (AM. L. INST. 2000); *see also* Daniel Northrop, *The Attorney-Client Privilege and Information Disclosed to an Attorney with the Intention That the Attorney Draft a Document To Be Released to Third Parties: Public Policy Calls for at Least the Strictest Application of the Attorney-Client Privilege,* 78 FORDHAM L. REV. 1481, 1486–87 (2009).

the information was.[104] The ABA Model Rules of Professional Conduct permit disclosure of confidential information "to prevent reasonably certain death or substantial bodily harm" as well as "to comply with other law or a court order."[105]

Twenty-six states and two territories explicitly mention attorney-client privilege or confidentiality in their mandated reporting statutes.[106] Of those, twenty-one states, the Northern Mariana Islands, and the Virgin Islands all explicitly re-affirm the attorney-client privilege or the duty of confidentiality in at least some circumstances.[107] Some of those states only re-affirm the attorney-client privilege or the duty of confidentiality in limited contexts. For example, Arizona, Idaho, and Wyoming re-affirm privilege in the context of providing evidence, but are silent about initial reporting requirements, [108] while California re-affirms attorney-client privilege only in the context of the reporting requirements of postsecondary personnel.[109]

An additional four states re-affirm the attorney-client privilege or the duty of confidentiality in some circumstances, but then explicitly abrogate it in others. Of those four states, Texas and Arkansas both abrogate attorney-client privilege with respect to reporting but re-affirm privilege with respect to providing testimony.[110] Nevada protects attorney-client privilege when either the client has been accused of abuse or neglect or the client is a victim of abuse or neglect, but abrogates it in all other circumstances.[111] Ohio takes

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[104] Michmerhuizen, *supra* note 100.
[105] MODEL RULES OF PRO. CONDUCT r. 1.6(b)(1), (6) (AM. BAR ASS'N 1983).
[106] *See infra* pages 23-24.
[107] ARIZ. REV. STAT. § 13-3620(A), (K) (2023); CAL. PENAL CODE § 11165.7(a)(41) (2021); DEL. CODE ANN. tit. 16, § 909(a) (2003); FLA. STAT. ANN. § 39.204 (2002); IDAHO CODE ANN. § 16-1606 (2005); 325 ILL. COMP. STAT. 5/4(g) (2023); Ky. REV. STAT. ANN. § 620.030(5) (2013); MD. CODE ANN., FAM. LAW §§ 5-705(a)(2)(i)–(iii) (West 2011); MICH. COMP. LAWS § 722.631 (2003); MO. REV. STAT. § 210.140 (2001); N.H. REV. STAT. ANN. § 169-C:32 (1979); N.C. GEN. STAT § 7B-310 (1999); N.D. CENT. CODE § 50-25.1-10 (West 1995); 6 N. Mar. I. Code § 5313(a) (2010); OR. REV. STAT. § 419B.010(1) (2013); 23 PA. CONS. STAT. § 6311.1(b)(2) (2014); 1956 R.I. GEN. LAWS § 40-11-11 (1988); S.C. CODE ANN. § 63-7-420 (2008); UTAH CODE ANN. § 80-2-602(3)(b) (2022); V.I. CODE ANN. tit. 5, § 2538 (1983); WASH. REV. CODE ANN. § 26.44.030(1)(b) (West 2023); W. VA. CODE § 49-2-811 (2015); WYO. STAT. ANN. § 14-3-210 (1985).
[108] ARIZ. REV. STAT. §§ 13-3620(A), (K) (2019); IDAHO CODE ANN. § 16-1606 (2005); WYO. STAT. ANN. § 14-3-210 (1985).
[109] CAL. PENAL CODE § 11165.7(a)(41) (2021).
[110] ARK. CODE ANN. § 12-18-402(c)(1) (2023), ARK. CODE ANN. § 12-18-803(b) (2009); TEX. FAM. CODE ANN. § 261.101(c) (2021), TEX. FAM. CODE ANN. § 261.202 (1995).
[111] NEV. REV. STAT. § 432B.220(4)(i) (2023), NEV. REV. STAT. § 432B.225 (2013).

almost the opposite approach and abrogates attorney-client privilege when the client is a minor and faces a threat of harm from abuse or neglect, but protects attorney-client privilege in all other contexts.[112]

Finally, only one state, New York, explicitly abrogates the attorney-client privilege in some contexts, without reaffirming it in others.[113] In New York, attorney-client privilege is abrogated with respect to providing evidence, but the statute is silent about initial reporting requirements.[114]

The remaining twenty-four states, three territories, and DC are all silent with respect to attorney-client privilege and the duty of confidentiality, but may address privilege indirectly or through a more general discussion of all forms of privilege.[115] In four of those states, and Guam, statuary language specifies that all, or almost all, types of privilege are abrogated, in at least some contexts.[116] Sixteen states, American Samoa, and DC are silent on attorney-client privilege, but discuss select other forms of privilege, such as doctor-patient or clergy-penitent.[117] Of these states, none explicitly name attorneys as mandated reporters to begin with. It is therefore possible that individuals drafting the statute didn't contemplate the implications for attorneys. Nonetheless, in seven of the sixteen states, clinicians are mandated reporters, either because the state has universal mandated

[112] OHIO REV. CODE § 2151.421(A)(1)(a) (2023).
[113] N.Y. SOC. SERV. LAW § 415 (2013).
[114] *Id.*
[115] *See infra* pages 24-25.
[116] *See* GA. CODE ANN. § 19-7-5(g) (2022) (abrogating all type of privilege except clergy-penitent); 19 GUAM ANN. CODE 19, § 13201(a) (2022) (abrogating all types of privilege); LA. CHILD. CODE ANN. art 609(A)(1)(a) (2012) (abrogating all types of privilege), Okla. Stat. tit. 10A, § 1-2-101(B)(4) (2019) (abrogating all types of privilege), VT. STAT. ANN. tit. 33, §§ 4913(i), (j) (2023) (abrogating all type of privilege except clergy-penitent).
[117] ALA. CODE § 26-14-3(f) (2017); ALASKA STAT. ANN. § 47.17.060 (2023); AM. SAMOA CODE ANN. § 45.2016 (1980); COLO. REV. STAT. § 19-3-311 (2019); D.C. CODE § 4-1321.05 (2008); HAW. REV. STAT. § 350-5 (1992); IND. CODE § 31-32-11-1 (2009); IOWA CODE ANN. § 232.74 (1987); KAN. STAT. ANN. § 38-2249(a) (2017); ME. REV. STAT. ANN. tit. 22, § 4011-A(1)(B) (2023), ME. REV. STAT. ANN. tit. 22, § 4015 (2016); MASS. GEN. LAWS ANN. ch. 119, § 51A(j) (2020); MINN. STAT. § 260E.04 (2020); NEB. REV. STAT. § 28-714 (2005); N.M. STAT. ANN. § 32A-4-5 (2009), N.M. STAT. ANN. § 32A-4-3(A) (2021); S.D. CODIFIED LAWS § 26-8A-15 (1991); TENN. CODE ANN. § 37-1-411 (1985); VA. CODE ANN. § 63.2-1509(A)(19) (2022), VA. CODE ANN. § 63.2-1519 (2020); WIS. STAT. ANN. § 48.981(2)(r) (2023).

reporting,[118] or because postsecondary educators are mandated to report.[119] One state, Montana, abrogates "physician-patient or similar" privileges.[120] Three states and Puerto Rico are completely silent on all forms of privilege.[121]

C.Implications for Faculty

For clinicians, or other postsecondary faculty members who are also practicing attorneys, unpacking exactly when a report is required can be a complex legal question. Obligations to notify authorities in states where clinicians are mandated reporters can be thought of as falling into four categories: concerns about potential abuse or neglect of clients, concerns about children connected to clients, concerns about other children known at work outside of client representation, and concerns about children known entirely outside of work.

One category of children are clients who are represented by a postsecondary faculty member. If a clinician learns information from a client that makes her suspect the client is facing abuse or neglect, and the clinician is in a state where attorneys or postsecondary educators are mandated to report, the clinician will need to determine whether the communication was privileged or confidential and whether requirements to report the abuse or neglect come into conflict with attorney-client privilege mandates and the duty of confidentiality. If a clinician learns about abuse or neglect from direct communication with the client, her obligations to report will turn on statutory wording about privilege and confidentiality, as well as on any ethics opinions issued by the state Bar. The clinician could also learn information about potential abuse or neglect of a client though communication with or observation of a client's family member, or through direct observation of a client. In those situations, the information might be confidential but not privileged, and reporting obligations may turn both on whether the mandated reporting statute addresses confidentiality as well as on whether exceptions to confidentiality for preventing substantial bodily

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[118] IND. CODE § 31-32-11-1 (2009); NEB. REV. STAT. § 28-714 (2005); N.M. STAT. ANN. § 32A-4-5 (2009), N.M. STAT. ANN. § 32A-4-3(A) (2021); TENN. CODE ANN. § 37-1-411 (1985).

[119] ALA. CODE § 26-14-3(f) (2017); MINN. STAT. § 260E.04 (2020); VA. CODE ANN. § 63.2-1509(A)(19) (2022); VA. CODE ANN. § 63.2-1519 (2020).

[120] MONT. CODE ANN. § 41-3-201(6) (West 2023).

[121] CONN. GEN. STAT. § 17a-101a(a)(1) et. seq. (2017); MISS. CODE ANN. § 43-21-353(1) (2019); N.J. STAT. ANN. § 9:6-8.10 et. seq. (2019); P.R. LAWS ANN. tit. 8, § 446 et. seq. (2003).

harm or for complying with other laws apply. If the clinician learns about the potential abuse outside of the context of privileged or confidential communication, reporting requirements still apply.

Attorneys here may be placed in a difficult situation when statutory language about privilege or confidentiality is ambiguous: erring on the side of reporting leaves the attorney at risk of violating attorney-client privilege and the duty of confidentiality, while erring on the side of protecting the communication leaves the attorney at risk of violating mandated reporting requirements, which can be a criminal offense.[122] In cases where statutory language is unclear as to whether attorney-client privilege is abrogated, attorneys should consider reaching out to state attorney ethics hotlines and reviewing any relevant ethics opinions issued by the state Bar or guidance from bar associations for potential additional information. However, ethics opinions do not always fully answer relevant questions in this space, and in some states, whether to report privileged or confidential information may remain a true legal gray area.[123]

The second category includes suspected abuse or neglect of children that are connected to clients, such as a client's siblings or children. If an attorney suspects abuse or neglect of a client's siblings or children, the attorney will have to consider not only whether privilege or confidentiality is implicated, but also whether her duty to report applies only to children she knows

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[122] *See* Bruce Boyer, *Ethical Issues in the Representation of Parents in Child Welfare Cases*, 64 FORDHAM L. REV. 1621, 1632 (1996) (arguing that the tension between mandated reporting requirements for attorneys and attorney-client privilege and the duty of confidentiality "suggest a quandary" and "the safer course may be to favor maintaining client confidences. The costs of avoiding disciplinary action, however, may include both the possibility that the attorney becomes subject to prosecution for a violation of mandatory reporting laws and the possibility that a child might be victimized by future abuse"); Howard Davidson, *Reporting Suspicions of Child Abuse: What Must a Family Lawyer Do*, 17 WTR FAM. ADVOC. 50 (1995) (finding that in some situations in which reporting requirements are pitted against privilege or confidentiality there are "no easy answers" and suggesting that "awareness of state child abuse laws, relevant ethics opinions, and the general area of child maltreatment can aid an attorney to more competently address these conflicts"); Lockie, *supra* note 10, at 136–37 (noting that "ethics opinions frequently fail to provide clear guidance to attorneys though they often confirm the conflicts inherent in requiring attorneys to report child abuse" and that "though several bar committees and associations have developed guidelines by attorneys who are mandated child abuse reporters, attorneys are frequently left to their own devises to resolve the conflict.").

[123] *See* Lockie, *supra* note 10, at 136–37 (noting that "ethics opinions frequently fail to provide clear guidance to attorneys though they often confirm the conflicts inherent in requiring attorneys to report child abuse"); Davidson, *supra* note 122, at 51 (finding that the "unifying thrust of these bar opinions is that lawyers must exercise discretion and weigh that discretion against a possible duty to disclose").

professionally. In states in which reporting is only mandated for children known to an individual in his or her professional capacity, the question of whether a client's child or sibling who the attorney has not actually met counts as a known child may be a complicated one, and may turn on specifics of statutory wording or may be legally unclear.

A third category of children are those known at work, but not through client representation. This would include any children a clinic works with on community education or policy projects, but who are not formally clients of the clinic. If a clinician learns about the suspected abuse or neglect entirely outside of client representation, such while participating at a community lawyering event, mandated reporting requirements will likely apply.

Finally, a fourth group of children are those that a postsecondary faculty member encounters entirely outside of work, such as neighbors, family friends, or classmates of the faculty member's own children. Here, the postsecondary faculty member would be legally mandated to report abuse or neglect only in states where postsecondary educators or lawyers are mandated to report and where no professional connection to the child is specified in statute.

Clinicians should also be mindful of the distinction between mandatory and permissive reporting. In situations in which reporting is not statutorily mandated, individuals generally may still make a report of their own volition, provided it does not violate requirements regarding privilege and confidentiality. Indeed, some states include statutory language encouraging individuals to report even when not mandated to do so.[124] However, if an attorney learns information in the course of legal representation, and attorney-client privilege or the duty of confidentiality is protected by statute, or statutory language is ambiguous, serious caution around discretionary reporting may be warranted.

D.What About Students?

In some states, law students, too, are mandated reporters. In universal mandated reporting states, all law students, assuming they are over the age

[124] *See, e.g.,* CAL. PENAL CODE § 11165.7 (2021) (stating that volunteers who work with children, while not mandated reporters, are "encouraged to obtain training in the identification and reporting of child abuse and neglect and are further encouraged to report known or suspected instances of child abuse or neglect . . . ").

of eighteen, will be mandated to report abuse and neglect. In states in which postsecondary educators or attorneys are explicitly named as mandated reporters, the reporting requirements of clinic students will turn closely on the precise wording of the statute. Some states also explicitly designate volunteers and other personnel who work with mandated reporters as also required to report. When students are mandated to report, questions of whether a professional connection to the child is required and whether privilege attaches will closely mirror the statutory requirements for clinical faculty.

If both a clinical supervisor and a student are aware of the same suspected instance of abuse or neglect, the clinical team may need to consider how the mandated reporting statute addresses cases where multiple actors within the same institution are aware of abuse or neglect. States take a number of approaches to questions of institutional reporting. Some states require individuals who become aware of abuse or neglect to notify the heads of their institutions and specify that the head of the institution or that individual's designee should be the one to make the report.[125] Other states take the inverse approach and require individuals to make a report of abuse or neglect first, before notifying the head of their institution.[126] Many states include statutory language prohibiting employers from taking any steps that would prevent an employee from making a report.[127]

[125] *See, e.g.,* GA. CODE § 19-7-5(c)(2) (2022) (specifying that "if a person is required to report child abuse pursuant to this subsection because such person attends to a child pursuant to such person's duties as an employee of or volunteer at a hospital, school, social agency, or similar facility, such person shall notify the person in charge of such hospital, school, agency, or facility, or the designated delegate thereof, and the person so notified shall report or cause a report to be made in accordance with this Code section.")

[126] *See, e.g.* MICH. COMP. LAWS § 722.623(1)(a) (2022) (specifying that "[i]f the reporting person is a member of the staff of a hospital, agency, or school, the reporting person shall notify the person in charge of the hospital, agency, or school of his or her finding and that the report has been made, and shall make a copy of the written or electronic report available to the person in charge. A notification to the person in charge of a hospital, agency, or school does not relieve the member of the staff of the hospital, agency, or school of the obligation of reporting to the department as required by this section.").

[127] *See, e.g., id.* (specifying that "[a] member of the staff of a hospital, agency, or school shall not be dismissed or otherwise penalized for making a report required by this act or for cooperating in an investigation.").

III. MANDATED REPORTING & PEDAGOGICAL IMPLICATIONS

A. Teaching Law Students About Mandatory Reporting Obligations

As Parts I and II illustrate, there is much for law students (and lawyers) to learn about the ways in which mandated reporting laws have come to proliferate throughout the United States. The varying legislative approaches described in Part II also mean that attorneys and law students are impacted to varying degrees depending on what their states or localities require. Despite this rich content, mandated reporting laws have been the subject of little legal scholarship or pedagogical intervention. Mandated reporting laws seek to remedy the societal problem of child maltreatment through a criminal legislative framework. Given this context, one can envision a number of entry points for teaching mandated reporting in the law school curriculum. Courses including family law, professional responsibility, evidence, legislation, statutory interpretation, criminal law, and critical legal studies, including gender and the law and critical race theory, all of which intersect with mandated reporting laws. Yet the space in the law school where these issues are most likely to arise is in the clinical learning environment. We argue that while pedagogical interventions across any of the doctrinal subject matter mentioned above are important places for discussion of the topic, clinicians and clinic students are most appropriately situated to learn about the doctrine, history, and social implications of mandated reporting.

Clinic students and professors are already confronting many of these issues. While we believe this area of the law warrants a more robust literature, clinicians have been writing on mandated reporting of child maltreatment for several years.[128] Not only are lawyers and students in law clinics regularly confronted with scenarios implicating mandated reporting, they also interact with professionals in other disciplines who are subject to reporting obligations.[129] Much of the existing literature arising from clinical pedagogy takes for granted that lawyers are not mandated reporters.[130]

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[128] *See e.g.* Sabrineh Ardalan, *Construction or Counterproductive? Benefits and Challenges of Integrating Mental Health Professionals into Asylum Representation*, 30 GEO. IMMIGR. L. J. 1 (2016); Sara R. Benson, *Beyond Protective Orders: Interdisciplinary Domestic Violence Clinics Facilitate Social Change*, 14 CARDOZO J. L. & GENDER 1 (2007); Jacqueline St. Joan, *Building Bridges, Building Walls: Collaboration Between Lawyers and Social Workers in a Domestic Violence and Issues of Client Confidentiality*, 7 CLINICAL L. REV. 403 (2001).

[129] *See id.*

[130] Jacqueline St. Joan, *Building Bridges, Building Walls: Collaboration Between Lawyers and Social Workers in a Domestic Violence and Issues of Client Confidentiality*,

Instead, this scholarship problematizes and seeks solutions for integrating non-lawyer collaborators into the lawyer's ethical duties. As explored above, the premise that lawyers are not mandated reporters is dubious. While there are many sound theoretical, doctrinal, and policy reasons for why lawyers should not be mandated reporters, statutory language in the majority of the United States do not provide clear indications of their exemption. Indeed, in Nevada,[131] Oregon,[132] and Ohio,[133] attorneys are explicitly enumerated to report. The harms of mandated reporting are gaining interest in the policy realm, particularly within a growing movement to abolish existing child welfare systems. Within this movement, clinic students and educators are well-positioned to push for system reform.

Law clinics are also on the cutting edge of addressing emerging legal needs and representing individuals, communities, and organizations in justice reform. In this Part, we outline the ways in which clinical legal educators can bring topics related to mandated reporting into the clinical classroom.

B.The ABA Standards

The American Bar Association (ABA) sets the curricular standards and manages accreditation of law school educational programs in the United States.[134] The ABA standards on the Program of Legal Education for law schools nationwide dictate the minimum requirements for legal education programming. [135] These standards offer many educational objectives relevant to the teaching of mandated reporting statutes in law schools, particularly as the topic relates to clinical legal education. Because the ABA standards represent the "floor" of programming in the law school curriculum, they offer helpful initial guidance on how learning about mandated reporting supports those objectives.

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7 CLINICAL L. REV. 403, 425 (2001) ("Social workers are mandatory reporters of child abuse and neglect. Lawyers are not.").

[131] NEV. REV. STAT. § 432B.220(4)(i) (2013). *But see*, NEV. REV. STAT. § 432B.225, exempting attorney-client privileged communications from reporting obligations (2013).

[132] OR. REV. STAT. § 419B.010(1) (noting under this same provision that attorneys are not required to report communications that are privileged under OR. REV. STAT. § 40.225).

[133] OHIO REV. CODE § 2151.421(A)(1)(b).

[134] *See* STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (AM. BAR ASS'N SECTION LEGAL EDUC. AND ADMISSIONS TO BAR 2022–2023) https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2022-2023/2022-2023-standards-and-rules-of-procedure.pdf; 2022–2023 STANDARDS FOR APPROVAL OF LAW SCHOOLS (AM. BAR ASS'N 2022–2023).

[135] *See id.* at Ch. 3 (AM. BAR ASS'N 2022–2023).

1. Standards 301 and 302: Objectives and Learning Outcomes

ABA Standard 301 sets the objectives for legal education programs.[136] It states that: "A law school shall maintain a rigorous program of legal education that prepares its students upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession."[137] The standards go on to explain how the objectives of standard 301 should be tied to learning outcomes:

> Standard 302. LEARNING OUTCOMES
> A law school shall establish learning outcomes that shall, at a minimum, include competency in the following:
> (a) Knowledge and understanding of substantive and procedural law;
> (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;
> (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and
> (d) Other professional skills needed for competent and ethical participation as a member of the legal profession.[138]

These outcomes promote the objectives of effective and ethical membership in the legal profession, both in service of clients but also to better the broader legal system. Statutes governing mandated reporting of child maltreatment implicate issues of effectiveness and ethics for lawyers, particularly for lawyers practicing in jurisdictions where lawyers are mandated reporters of child abuse. To be effective, attorneys must gain the trust of and establish rapport with their clients. Mandated reporting obligations can threaten those principles by requiring attorneys to pierce the bounds of client confidentiality when it comes to information related to child maltreatment. In some situations, the statute may even require the attorney to take an action adverse to their client's interests leading to life-altering consequences for the client and to potential destruction of the attorney-client relationship. As one scholar has observed, "[a]ttorneys cannot represent clients adequately if they are required to take adverse actions against their clients."[139]

Mandated reporting obligations undermine the effectiveness of the attorney by directly conflicting with the attorney's ethical duties. As

[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] Lockie, *supra* note 10, at 131.

explored in greater depth below, mandated reporting obligations conflict with or constrain the attorney's duties of zealous representation, communication, and confidentiality. Moreover, mandated reporting obligations are of questionable efficacy and feed a system that promotes carceral solutions to societal problems. Standard 302's expression of a duty of responsibility to the legal system supports the need for more robust education of law students regarding mandated reporting statutes. Consistent to ABA standards, law schools should be doing much more to instruct students on the implications of mandated reporting obligations to promote ethical and effective practice in the profession.

2. Standards 303 and 304: Curriculum and Clinical Education

ABA Standard 303 sets the scope of the minimum curricular requirements for U.S. law schools. These standards require 1) two credit hours in professional responsibility; 2) two writing experiences; and 3) a minimum of six credit hours in experiential coursework, including in a law clinic. [140] Recently, the ABA revised the standards in 303 to include mandatory opportunities for, "the development of a professional identity" and "education to law students on bias, cross-cultural competency, and racism."[141]

Again, these standards intersect well with studying mandated reporting statutes. The case for understanding mandated reporting within the context of professional responsibility appears again in this standard. Within the two credit hours required by the ABA, Standard 303(a)(1) explains that professional responsibility should include "substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members." [142] Mandated reporting and its potential conflict with questions of client confidentiality and attorney-client privilege fit neatly into the topics contemplated in the standard.

Mandatory reporting studies also reflect the revised standards for professional identity development and education on bias, cross-cultural competency, and racism. Reflections on professional identity are inherent to mandated reporting statutory schemes which often premise duties to

[140] STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 134, at Ch. 3.
[141] *Id.* §§ (b)(3) and (c); *see also* Neil W. Hamilton & Louis D. Bilionis, *Revised ABA Standards 303(b) and (c) and the Formation of a Lawyer's Professional Identity, Part 1: Understanding the New Requirements*, NALP BULL. (May 2022), https://www.nalp.org/revised-aba-standards-part-1#:~:text=The%20American%20Bar%20Association's%20revisions,their%20graduates%20and%20the%20school.
[142] STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 134.

report on membership in particular professions. Indeed, some lawyers have even directly linked their professional identities as lawyers to reactions to experiences with mandated reporting in other professions. Attorney Annery Miranda shares how her dissatisfaction with her mandated reporting obligations as a social worker accounted in part for her pursuit of a career in the law. She relates how a supervisor coerced her into reporting a family she was serving to child protective services (CPS):

> Here, my supervisor was less concerned about the negative effect a phone call to [CPS] 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.[143]

Arguing that the law provides more durable protection for the attorney-client relationship, Miranda explains that "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."[144] Here, Miranda seems to echo the numerous scholars who have suggested that lawyers' professional obligations somehow supplant any statutory mandated reporting obligations. While we disagree that these exemptions of lawyers are well-defined by statute, the opportunities afforded to understand the lawyer's professional identity via mandatory reporting obligations are manifold.

Miranda's experiences as a social worker and lawyer also illustrate the link between mandated reporting and questions of bias, racism, and cross-cultural deficits in the law. She explains how overinclusive reporting of inadequate economic resources as instances of neglect has disproportionately impacted families living in poverty while "obstruct[ing] the detection of child abuse."[145] As explained in Part I, Miranda confirms that this targeting of the poor leads to outsize effects on communities of color, especially Black and Latinx families, who are "overrepresented among the poor."[146] The realities of these statutes' effects on communities marginalized by race, socioeconomic status, and

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[143] Annery Miranda, *Making Interdisciplinary Collaboration Between Social Workers and Lawyers Possible*, 14 NE. U. L. REV. 715, 741 (2022).
[144] *Id.*
[145] *Id*. at 729.
[146] *Id.* at 730.

other biases provides an opportunity for education consistent with Standard 303(c) guidance.

Again, while many of these standards could be integrated into coursework via discussion of mandated reporting across the curriculum, the clinic curriculum is particularly well-suited. Not only have clinicians been advancing their clinical model to account for interdisciplinary collaborations that require consideration of mandatory reporting obligations, they are also the most likely to be impacted by client circumstances that raise the issue. While Standard 303(a)(3) introduces the curricular requirement for experiential learning opportunities like clinic, Standard 304 provides much more in-depth guidance. In the standards for experiential coursework, the ABA has specified that these opportunities must: "integrate doctrine, theory, skills, and legal ethics."[147] For all of the reasons explored thus far in this Article, mandated reporting provides a rich opportunity for exploring theories and doctrine of harm prevention, criminalization, public interest, and family privacy. Exercises applying mandated reporting considerations to learning lawyering skills, particularly those related to client-centered legal representation are also available to clinicians and students. The ethical considerations are particularly central as reiterated throughout this Article and explored in even further detail below.

C.ABA Model Rules of Professional Conduct

Conflicts between mandated reporting and attorneys' professional responsibilities are some of the most problematic issue for analysis. Scholar Adrienne Jennings Lockie, now Judge Adrienne Jennings Noti of the Superior Court of the District of Columbia, has identified how lawyers make particularly unsuitable mandated reporters within representations of domestic violence survivors.[148] She argues that attorneys in these contexts should not be mandated reporters for two reasons: to avoid harm to clients and to preserve the effectiveness of lawyers within the attorney-client relationship.[149] Noti is concerned that "[w]omen of color and women with limited economic resources who are victims of domestic violence are particularly harmed by mandatory child abuse reporting by attorneys."[150] In her exploration of the challenges posed by reporting statutes within

[147] STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 134, Standard 304(a)(1).
[148] Lockie, *supra* note 10.
[149] *Id.*
[150] Lockie, *supra* note 10, at 125.

domestic violence representation, she discusses the attorney's professional duty of confidentiality:

> Although persons other than attorneys who have a privileged relationship must often report child abuse, the attorney-client relationship is fundamentally different in such a way that attorneys should not be mandated reporters of child abuse. The attorney-client relationship arguably relies on confidentiality to a greater extent than do other professions where confidentiality is important because it is an essential component of the service provided.[151]

Of course, confidentiality is a duty central to the legal profession regardless of the specific area of practice. As discussed above, Rule 1.6 of the ABA Model Rules of Professional Conduct mandates that generally a "lawyer shall not reveal information relating to the representation of a client…"[152] Notably for the context of child abuse, the rule becomes more permissive stating that a lawyer may reveal otherwise confidential information "to the extent the lawyer reasonably believes necessary […] to prevent reasonably certain death or substantial bodily harm."[153] Yet, states that enumerate attorneys as mandatory reporters or provide for universal mandated reporting run roughshod on the attorney's professional responsibilities.

Moreover, in states where attorneys are mandated reporters the Model Rules suggest a finetuned approach to their professional duties. Rule 1.1 providing for the attorney's duty of competence and Rule 1.4 on the duty of communication are both relevant here. Rule 1.1 provides that, "[a] lawyer shall provide competent representation to a client."[154] According to the rules, "competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[155] In addition, the professional duty of communication under Rule 1.4 requires a lawyer to: "promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules."[156] Attorneys who are mandated reporters should 1) consistent to their duty of competence, be aware of their reporting requirements; and 2) consistent to their duty of communication, promptly inform their clients of and explain their

[151] *Id*.
[152] MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS'N 1983).
[153] MODEL RULES OF PRO. CONDUCT r. 1.6(b)(1) (AM. BAR ASS'N 1983).
[154] MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 1983).
[155] *Id*.
[156] MODEL RULES OF PRO. CONDUCT r. 1.4(a)(1) (AM. BAR ASS'N 1983).

responsibilities as mandated reporters. Law students in the jurisdictions conferring mandated reporting obligations on attorneys should be trained on these requirements pursuant to the ABA's Model Rules and Standards for Approval of Law Schools.

Key among the ABA's Model Rules are their expressions of the principles and values that the Rules are designed to promote in the profession. In its preamble on a lawyer's responsibilities, the ABA states that "[a] lawyer, as a member of the legal profession, is a representative of clients, an office of the legal system, and a public citizen having a special responsibility for the quality of justice."[157] While the law clinic's unique ability to prepare students for the ethical questions present in legal practice support teaching mandated reporting, so to do the Rules' appeal to improve the justice system. Indeed, access to justice and justice reform are at the heart of the clinical educational enterprise.

IV. TEACHING MANDATED REPORTING IN CLINICS

A. Clinical Pedagogy Teaching Methods

Clinical legal education pioneers Susan Bryant, Elliott Milstein, and Ann Shalleck have broadly categorized potential learning goals for clinic students into seven areas: "professional identity, the legal and other systems, practice indeterminacies, expanded thinking like a lawyer, human dimensions of practice, learning to learn, and lawyering skills."[158] In addition to these goals, Bryant, Milstein, and Shalleck have outlined four methodologies for pedagogy in the law school clinic. The four methodologies are seminar, rounds, supervision, and fieldwork.[159] In exploring how law instructors in law school clinics can build the teaching of mandatory reporting into this structure, it is helpful to consider each of the methodologies.

1. The Clinic Seminar

The clinic seminar is perhaps the most readily-understood of the clinical teaching methods. Most institutes of higher learning have a frame of reference for how a seminar is structured executed. As explained by Bryant, et al, "[i]n the seminar, students learn at a level of theory and practice that equips for clinic and future work."[160] In achieving this broad purpose, the

[157] MODEL RULES OF PRO. CONDUCT Preamble and Scope (AM. BAR ASS'N 1983).
[158] SUSAN BRYANT ET AL., TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY 6 (2014).
[159] *Id.* at 4.
[160] *Id.* at 6.

seminar component offers an opportunity for students to "engage in classroom and simulation learning, usually based on readings and assigned problems that prepare them for classroom learning."[161]

2. Rounds

In 2007, Susan Bryant and Elliott Milstein labeled rounds "a signature pedagogy for clinical education."[162] In describing the methodology, Bryant and Milstein explain that, "[i]n these facilitated classroom conversations in which they discuss with each other their cases or projects, students apply and test lawyering theory in the real world as well as extract theory from their and their classmates' experiences."[163] Rounds offers an opportunity for students to externalize the work for collaboration outside of their discrete assignments, while sharing and building knowledge among themselves. The methodology also provides an opportunity for clinical instructors to observe their students' learning in a way that complements the third methodology.

3. Supervision

It bears mention that the first two of the Bryant/Milstein/Shalleck pedagogical methods are also supported in some of the standards referenced above. ABA Standard 304 requires a classroom instructional component or other means of "ongoing, contemporaneous, faculty-guided reflection."[164] Likewise, the third methodology employed in the framework – supervision – is supported in the standards. Standard 304(a)(6) requires that an experiential course include faculty's direct supervision of students.[165] Of course, working with a supervisor is not only a prime mode of clinical education, it is also a skill central to legal work outside of the law school. In the view of Bryant, et al, "faculty supervision is crucial to shaping students' learning from their experience having responsibility for clients."[166] Some of the concepts that students learn from supervision include, "habits of thought and action, discrete skills, and a commitment to justice."[167] Bryant, Milstein, and Shalleck explain how the relationship of the clinician as supervisor fosters learning by tailoring learning to the individual student. This individualized approach helps students to "learn

[161] *Id.* at 4.
[162] *See* Susan Bryant & Elliott Milstein, *Rounds: A "Signature Pedagogy" for Clinical Education?*, 14 CLINICAL L. REV. 195 (2007) (internal quotations omitted).
[163] *Id.* at 196.
[164] MODEL RULES OF PRO. CONDUCT r. 304(a)(5)–(6) (AM. BAR ASS'N 1983).
[165] MODEL RULES OF PRO. CONDUCT r. 304(a)(6) (AM. BAR ASS'N 1983).
[166] Bryant, *supra* note 158, at 8.
[167] *Id.* at 9.

about themselves as lawyers and as learners and construct their professional identity."

4. Fieldwork

The final methodology of fieldwork is the one where we envision some of the richest learning when it comes to the topic of mandated reporting. In Parts I and II of this Article, we have demonstrated how mandatory reporting offers an ill-fitting solution to a complex social issue – particularly in how it impacts on the professional obligations of attorneys. Where we see many of these impacts most clearly is in how mandated reporting intersects with the clinic's representation of clients within clinic fieldwork. In discussing the value of this methodology, "the experience of being a real lawyer for real clients on real matters [is] central to clinical learning."

B.Context and Status Quo

In this Part, we use the clinical pedagogy methodologies to outline how clinicians may introduce topics related to questions of mandated reporting into their work with clinic students. In addition to building on the four methodologies outlined by Bryant et al (seminar, rounds, supervision, fieldwork) we overlay our own framework for considering pedagogy in this space. This comes from the value we see in training and education of law students around the current legislative mandated reporting obligations – including the implications for attorneys' professional responsibilities, inequities in the law, and the development of mandated reporting legislation. But on top of this, and perhaps where clinics are uniquely equipped to instruct students while advancing justice, is a curriculum developed around law reform and changing the status quo. We proceed first by exploring teaching interventions focused on understanding and exploring the current state of the law and conclude by outlining opportunities for law reform. These pedagogies are readily applicable to clinics who tackle subject matters ranging from general practice to family law, juvenile justice, and immigration, as well as clinics that deal with racial justice, gender justice, and economic justice. At the same time, many of these suggestions could just as easily apply in doctrinal coursework that intersect with these subjects.

When approaching these topics, we urge instructors to consider discussing ground rules with students and to approach the conversations with humility and sensitivity. With one study estimating that more than a third of all children in the U.S. experience a child protective services

investigation before the age of eighteen,[168] instructors should leave space for students to share and learn from the variety of their lived experiences with this topic.

1. In the Clinic Seminar

Conversations about attorneys' obligations as mandated reporters are readily applicable to the clinic seminar. Depending on the relevant statute in the clinic's jurisdiction of practice, an initial question may be: Are attorneys mandated reporters? This general question could serve as an important initial inquiry inviting statutory and caselaw research.

In places where there is ambiguity, classroom conversations could explore arguments for and against the role of attorneys as reporters. An exercise in statutory interpretation could be employed as a prompt to students to consider why attorneys should or should not be mandated reporters. Given the policy arguments on either end, these conversations could be rich opportunities to engage students in simulations. Students could take on the roles of defense and prosecution in the conviction of an attorney for failure to report, arguing on each why the statute should be interpreted by a court consistent to each side's litigation strategy. Study and discussion of the relevant provisions of the state's rules of professional conduct provide an additional method of analyzing the statute while integrating policy considerations.

Readings could include an Indiana ethics opinion in which the Legal Ethics Committee of the State Bar analyzed an attorney's obligation to report child abuse under the state's universal reporting mandate. In that opinion, the Committee reasoned that "a lawyer's duty to report is limited by the lawyer's obligation to protect client confidentiality."[169] According to the opinion, the Indiana Supreme Court's "Rules of Professional Conduct control over conflicting legislation."[170] Otherwise, the Committee reasoned, the issue would present a potential separation-of-powers violation under the constitution of the state.

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[168] Roberts, *supra* note 18, at 37 (citing Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among U.S. Children*, 107 AM. J. PUB. HEALTH 274, 278 (February 2017)).

[169] David L. Hudson Jr., *Conflicted Over Confidentiality: Indiana Ethics Opinion Says Lawyer Not Always Obligated to Report Child Abuse*, AM. BAR ASS'N (March 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/.

[170] *Id.* (quoting INDIANA STATE BAR ASS'N LEGAL ETHICS COMM., Op. No. 2 (2015) https://cdn.ymaws.com/www.inbar.org/resource/resmgr/2015-ethics-op-2.pdf.).

In jurisdictions where attorneys are mandated reporters, clinicians may engage students in simulations with clients to explain mandated reporting obligations consistent to the attorney's duties of confidentiality and communication with clients. Students could practice legal drafting by proposing a retainer agreement that explains the attorney's mandatory reporting obligations to a potential client. Students could also discuss and workshop messaging that balances the attorney's obligation to the client with the obligation under the mandated reporting statute.

In developing these conversations, instructors could engage students in directed training around the locality's mandated reporting statutes, including who is a mandated reporter. This training could include best practices for reducing harm to clients within the context of the attorney-client relationship. These trainings could also introduce study of what is and is *not* abuse or neglect that triggers the reporting obligation.

Regardless of the jurisdictions' requirements of attorneys to report, discussions of system inequities and critiques of the law could factor into classroom discussions. Namely, discussion about institutional racism in child welfare systems could foster thoughtful consideration of legal and policy implications. These conversations may include discussion of data on racial disparities in the child welfare system and providing historic context about interactions between Black and indigenous families and child protective services.[171]

On the topic of systemic bias, students in seminar could also engage in training about implicit bias and the impact of implicit bias in mandated reporting. This might include reading news stories about Black and brown parents being referred to child protective services for behavior that generally goes unreported when white parents are responsible, and taking implicit association tests. A corollary to this topic is the discussion of the growing movement to abolish the child welfare system, or as argued by Dorothy Roberts the "family policing" system.[172] Guided conversation on complex questions about what it means to be a mandated reporter if you also espouse or are sympathetic to this abolitionist movement. This classroom discussion would not aim to provide concrete answers, but rather to encourage students to reflect critically about the implications of

[171] *See supra* Part I.
[172] *See* Roberts, *supra* note 18, at 2.

mandated reporting laws and about their own roles in a complex and fraught system.

2. During Rounds Discussions

In rounds discussions, students may develop peer-informed strategies to prepare the way for addressing mandated reporting issues that could arise in client representation. Susan Bryant and Elliot Milstein explain that when planning rounds teachers should consider topics that "build community, illustrate the value of collaborative conversation, and promote group learning."[173] Rounds could also be a helpful place to address student learning and client representation both in terms of proactive case management as well as responsiveness to emerging issues concerning mandated reporting.

Because rounds conversations tend to involve student fieldwork with clients, issues relating to client representation may be foreseeable or springing. Again, Bryant and Milstein have a helpful framework for understanding rounds in these contexts: "Because students talk about topics they need to and want to address, they engage in "in-time" learning…the students deeply engage in figuring out what to do in their cases."[174] By contrast, Bryant and Milstein recognize, "[m]uch of what students have learned in law school … is "just-in-case" learning. While some of the discussions and exercises explored in the clinic seminar above could account for this just-in-case learning, rounds offer a unique forum for learning just-in-time. The topics could relate to seeking strategies and gathering information for explaining confidentiality and any reporting obligations based on other students' experiences. They could also help to analyze discussion of a scenario to determine if the facts and circumstances give rise to a reporting obligation. And if so, to discuss professional obligations and next steps.

Rounds discussions could also bring in conversations about the boundaries of attorney-client privilege, and how to handle tough cases that may sit in a gray area. These discussions could also reference study of the ABA's Model Rules of Professional Conduct as well as the professional responsibility rules of particular localities.

[173] Bryant & Milstein, *supra* note 162, at 137.
[174] *Id*. at 117.

3. In Supervision

Discussion of mandatory reporting obligations in clinic supervision could arise in many of the same circumstances that foster discussion in clinic rounds. In determining whether to address issues related to mandatory reporting obligations in rounds or supervision, the clinician's initial impulse – particularly based on practice experience – may be to respond to any concern within the context of supervision. Indeed, students' inclination may and should be to raise issues of which they become aware with a supervisor.

Depending on a number of factors, supervisors will need to make judgment calls to respond according to their obligations as teachers and as legal professionals. When considering supervision responsibilities, clinicians Jane Aiken and Ann Shalleck encourage clinical legal educators to use an approach that "think[s] concurrently about the arcs of client representation and student learning."[175] In evaluating supervision choices, Aiken and Shalleck explain that the arc of client representation considers "how each student takes on responsibility for serving clients that each case or project requires."[176] Likewise, when teachers consider student learning they "focus on how each student learns from the experiences embedded in representing clients."

In deciding when to respond to issues posed by mandatory obligations, supervisors will need to consider their own understanding of their statutory and ethical obligations within the arc of client representation while balancing student learning. Here, the rounds considerations of community building, collaboration, and shared learning could militate in the direction of extracting mandatory reporting discussions related to client work out supervision and into the rounds format. In all of these decisions, reflecting on Annery Miranda's experience with her supervisor in a social work context is instructive.[177] There, the supervisor steamrolled the supervisee's concerns and hesitations, ultimately impacting the family dynamic and professional relationship. A legal supervisor's response should balance considerations of empowering student and client wherever feasible.

4. In Fieldwork

Client fieldwork, whether it involves representing clients, conducting community lawyering, or representing issues of legislative reform all represent potential entry points on legal issues related to mandatory reporting. We explore topics of reform-oriented fieldwork below and have

[175] *Id.* at 174.
[176] *Id.*
[177] *See* Miranda, *supra* note 143.

already hinted at some of the fieldwork-related learning that may arise implication mandated reporting. Clinics who work with children and families may see these issues suddenly arise, and they must be professional equipped to address them if or when they do. But clinics may also decide to more proactively seek out issues that present mandatory reporting obligations.

As mentioned above, many clinics have sought to establish relationships with social workers which enrich client service, but also necessitate discussion and training around reporting obligations.[178] Clinics could choose to represent children or parents enmeshed in the child welfare system. Clinicians could also seek to represent professionals facing professional or criminal consequences for failure to make a mandator report. When making these design choices it is helpful to bear in mind the observations of Frank Bloch: "The goal should be cases and settings that not only help students learn how to function in the legal profession, but also offer students insight into how the legal system works, and how it should work to meet society's needs."[179] It with particular attention to those considerations of how the law should work on mandated reporting that we offer insights on lawyering for social change.

C. Changing the Status Quo

Law school clinics may also be particularly well-situated not just to discuss and to critique mandated reporting laws but also to change the laws themselves. Taking on a legislative project may provide opportunities for clinics to tackle problems that cannot be addressed in the courtroom.[180] Legislative work "enables students to aspire to the highest ethical standards as set forth in the preamble to the ABA Model Rules of Professional Conduct, which states that all lawyers 'should cultivate knowledge of the

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[178] *See e.g.* St. Joan, *supra* note 130.

[179] Frank S. Bloch, *Framing the Clinical Experience: Lessons on Turning Points and the Dynamics of Lawyering*, 64 TENN. L. REV. 989, 992 (1997).

[180] *See, e.g.,* Katherine R. Kruse, *Biting Off What They Can Chew: Strategies for Involving Students in Problem-Solving Beyond Individual Client Representation*, 8 CLINICAL L. REV. 405, 410 (2002) (noting that "larger projects, both inside and outside the law school, often arise out of the noble recognition that representing individual clients neither adequately addresses the need for structural changes in the systems that deny the clients justice, nor helps solve the problem of access to justice for the mass of people who cannot afford or otherwise access individual representation."); Robert R. Kuehn & Peter A. Joy*, An Ethics Critique of Interference in Law School Clinics*, 71 FORDHAM L. REV. 1971, 2037 (2003). (asserting that "[i]n some circumstances, lobbying a legislature or an executive branch agency for a change in the law or regulations may be the lawyer's most effective, or only, way to address the client's need.")

law beyond its use for clients [and] employ that knowledge in reform of the law.'" [181] Law school experiential programs may take on legislative advocacy efforts through stand-alone legislative clinics, though integrated clinics that engage in both direct client representation and legislative projects, or through partnerships between clinics and external policy groups.

Currently 13 percent of law schools have clinics that focus principally on legislative and policy work.[182] At those schools, legislative projects related to client representation may provide an opportunity for collaboration between clinics. Other clinics work through a hybrid, or "integrated," approach and engage in both direct representation and legislative work.[183] This approach can help students "develop analytical skills and identify the connections between the legal issues facing individual clients, the broader problems to be solved, and the political realities that impact how these issues can be addressed."[184]

Legislative projects can help expand student understanding of the legislative process, statutory interpretation, tools for researching legislative history, systems for tracking and monitoring bill status, and best practices in legislative drafting and advocacy.[185] Engaging in legislative advocacy work can also help students gain a broader set of skills including creative problem solving skills, negotiation skills, and partnership building skills.[186] Legislative clinical projects are helpful in diversifying the toolkit new lawyers bring to the table.[187] Even for students who are not ultimately planning on pursuing career pathways focused on legislative advocacy, "the skills student attorneys learn are transferable to any legal job, but especially the growing number of legal positions that involve understanding and applying statutory and regulatory text to create social change."[188] For clients, legislative work may be able to address problems that litigation alone cannot.[189] Finally, legislative work can also play an important role for law schools themselves. Successful legislative efforts can present an

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[181] *See* Kevin Barry & Marcy Karin, *Law Clinics and Lobbying Restrictions*, 84 U. COLO. L. REV. 985, 987 (2013).
[182] ROBERT R. KUEHN ET AL., 2019-20 SURVEY OF APPLIED LEGAL EDUCATION 7 (Ctr for Study Applied L. Edu. ed., 2020).
[183] Marcy L. Karin & Robin R. Runge, *Toward Integrated Law Clinics that Train Social Change Advocates*, 17 CLINICAL L. REV. 563, 569 (2011).
[184] *Id.* at 566.
[185] *See* Chai Rachel Feldblum, *The Art of Legislative Lawyering and the Six Circles of Legislative Advocacy*, 34 MCGEORGE L. REV. 785, 817–19 (2003).
[186] *Id.*
[187] *See* Barry & Karin, *supra* note 181, at 987–88.
[188] Karin & Runge, *supra* note 183, at 605.
[189] *See id.*

opportunity for law schools to work on high-profile projects and can play a role in improving employment numbers by helping increase students' chances of securing both legal and quasi-legal jobs.[190]

This subsection looks first at the types of legislative efforts related to the mandated reporting obligations of attorneys that law school clinics may be particularly well-situated to take on. It then considers the unique supervision challenges that legislative advocacy in this arena might present. Ultimately, legislative work in this area may create an opportunity for clinical students to reflect not just on the ethical complexities lawyers face when mandated to report, but also on the role of attorneys in working to shape their own professional obligations.

1. Legislative solutions

Mandated reporting obligations place attorneys in a particularly difficult position because of the threat to the attorney's relationship with clients. Judge Noti notes that when attorneys are required to report child abuse and neglect it "tramples upon the value of confidentiality, which is fundamental to the attorney-client relationship. It harms that relationship by preventing open communication and leads to the inability of clients to be fully candid with their attorneys."[191] Clients who have had information reported by an attorney may lose all trust in that attorney's ability to provide effective representation.[192] Legislative work focused on addressing the mandated reporting requirements of attorneys might also serve as a first step toward reconsidering the role of privilege for other mandated reporters who may also face parallel concerns about confidentiality and trust, such as mental health professionals. It may also open the door to broader conversations about the ethics of mandated reporting more generally.

One possible area for legislative change is working to ensure attorneys are not mandated to report in the first place. In the eighteen states and one territory with universal mandated reporting requirements,[193] this could mean including language specifying that attorneys are exempted from the universal requirement are not mandated to report. In the three states where attorneys are mandated to report, or the additional states where only certain

[190] *See* Barry & Karin, *supra* note 181, at 987–88.
[191] Lockie, *supra* note 10, at 140.
[192] *See id.*
[193] *See supra* note 73.

types of attorneys are mandated to report,[194] it might mean amending the statute to remove attorneys from the list of mandated professions. Finally, in the states in which postsecondary educators are mandated to report,[195] it might mean adding clarifying language to address situations in which postsecondary educators are also attorneys.

Language like that used in Virginia's mandated reporting statute, which specifically exempts attorneys who work for postsecondary institutions from the mandated reporting requirements placed on postsecondary personnel,[196] can help to clarify that postsecondary educators who are also attorneys are not mandated reporters. Virginia's statute specifies that "[a]ny person employed by a public or private institution of higher education other than an attorney who is employed by a public or private institution of higher education as it relates to information gained in the course of providing legal representation to a client" is mandated to report.[197] Because attorneys at postsecondary institutions may also work with children on community education or policy projects,[198] advocates could also consider exempting attorneys who work for postsecondary institutions from reporting requirements altogether, rather than only when an attorney learns information in the course of representation.

Additionally, advocates should consider working to ensure that individuals collaborating with attorneys to assist in representation are also exempt from reporting requirements. This would help ensure that in states with universal reporting requirements, clinic students are clearly exempt from the mandate. It would also help avoid complicated situations in which social workers or other professionals who collaborate closely with law school clinics are mandated to report.[199] Some jurisdictions already include related language. For example, the mandated reporting statute in DC exempts any professional from reporting "when employed by a lawyer who is providing representation in a criminal, civil, including family law, or delinquency matter and the basis for the suspicion arises solely in the course of that representation."[200]

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[194] *See supra* Figure 2.
[195] *See supra* Figure 1.
[196] VA. CODE ANN. § 63.2-1509(A)(18) (2022).
[197] *Id.*
[198] *See supra* Part II.A.1.
[199] For further discussion of ethical complications related to mandated reporting in interdisciplinary clinical collaborations, *see* Alexis Anderson et al., *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism and Mandated Reporting,* 13 CLINICAL L. REV. 659 (2007).
[200] D.C. CODE § 4-1321.02(b) (2023).

Clinics could also work to add or clarify language related to the attorney-client privilege and confidentiality. Because all states allow for permissive reporting of child abuse by anyone who is not a mandated reporter,[201] clarifications about attorney-client privilege and the duty of confidentiality are important even in states where attorneys and postsecondary educators are not mandated to report. Attorney-client privilege exists "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[202] It is grounded in the principle that "sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." Likewise, confidentiality "contributes to the trust that is the hallmark of the client – lawyer relationship."[203] Clearer protections for privilege and confidentiality in the face of mandated reporting laws are critical to ensuring this trust is not eroded.

Because the duty of confidentiality casts a broader net than attorney-client privilege, advocates may wish to consider focusing on all confidential communications rather than, as most states do,[204] solely privileged communications. Oregon's approach, which goes beyond protecting just attorney-client privilege, and appears to protect most confidential communications, provides one potentially useful model. Under Oregon's mandated reporting statute "[a]n attorney is not required to make a report under this section by reason of information communicated to the attorney in the course of representing a client if disclosure of the information would be detrimental to the client."[205] Similarly, Maryland's statute also includes language that goes beyond just privileged communication and protects a broader set of confidential information. Under Maryland's statute, there is no requirement to report "if the notice would disclose matter communicated in confidence by a client to the client's attorney or other information relating to the representation of the client."[206]

Because definitions of confidentiality and privilege can be complicated, it may be useful to directly reference statutory language and language from rules of professional conduct when drafting legislation designed to ensure

[201] *See supra* Part II.
[202] *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).
[203] MODEL CODE OF PRO. CONDUCT r. 1.6 cmt. (AM. BAR ASS'N 1983).
[204] *See supra* Part II.
[205] OR. REV. STAT. § 419B.010(1) (2013).
[206] MD CODE ANN., FAM. LAW § 5-705(a)(2)(i)–(iii) (2011).

privileged or confidential communications are clearly protected. Doing so helps minimize any risk of creating a conflict between mandated reporting statutes and legislation and rules on privilege and confidentiality. For example, Pennsylvania provides a useful model by directly referencing state statutes on attorney-client communication and rules of professional conduct.[207] Under Pennsylvania's statute, "[c]onfidential communications made to an attorney are protected so long as they are within the scope of 42 Pa.C.S. §§ 5916 (relating to confidential communications to attorney) and 5928 (relating to confidential communications to attorney), the attorney work product doctrine or the rules of professional conduct for attorneys."[208]

In cases where removing attorneys from the list of mandated reporters does not seem politically feasible, clinics may want to explore additional protections to clarify reporting requirements in complicated cases. One such change is adding language clarifying the required relationship to a child. Currently, in the states that require professionals to report child abuse and neglect only when they know a child in a professional or official capacity, statutory language is often unclear as to what it means to know a child professionally. [209] This can place attorneys in difficult positions. For example, if a client communicated that her spouse was engaged in abusive behavior toward their child, and the attorney had never met that child, questions could arise as to whether the attorney knows that child in a professional capacity. Students in the Legislation & Policy Clinic at Loyola University Chicago School of Law addressed this ambiguity by drafting legislation that amended Illinois's mandated reporting statute to clarify what it means to know a child professionally. The law in Illinois specifies that the phrase "a child known to them in their professional or official capacities" includes any situation when

> a person makes a specific disclosure to the mandated reporter that an identifiable child is the victim of child abuse or child neglect, and the disclosure happens while the mandated reporter is engaged in his or her employment or practice of a profession, or in a regularly scheduled program, activity, or service.[210]

While the clarifying language in Illinois means that a client's identifiable child likely would count as a child known in a professional capacity, statutory language could also take the opposite approach in clarifying the

[207] 23 PA. CONS. STAT. § 6311.1(b)(2) (2015).
[208] *Id.*
[209] *See supra* Part II.B.
[210] 325 ILL. COMP. STAT. 5/4(c)(1) (2022).

phrase by making clear that a reporter must have actually met a child in order to count as knowing that child in a professional capacity.

Finally, clinics may wish to explore adding language to clarify institutional reporting responsibilities when multiple actors in the same institution are aware of the same instance of abuse or neglect. In states in which both students and faculty are mandated reporters, such as every state that includes a universal reporting requirement,[211] clinical students may face questions about who is responsible for making a report.

2. Supervising work

Supervising legislative work on mandated reporting laws entails working with students on a multistage, politically complex process. Chai Feldblum defines "legislative lawyers" as "individuals who practice law in a political, advocacy context,"[212] and breaks the process of legislative lawyering into five main stages: "assess the problem/issue; research the problem/issue; propose solutions and approaches; draft materials; and engage in oral presentations and negotiations."[213] Each of these stages presents a unique set of challenges in the context of advocacy related to mandated reporting.

In the first stage of the process, assessing the problem, a student acting as a legislative lawyer must "be able to identify, and accurately assess, both the political landscape and the legal landscape that will govern his client's desired policy outcome."[214] In working with students on legislative advocacy related to mandated reporting, assessing the problem may involve initial expectation setting with students about the potential to face a challenging political environment. Political pressures can often make it particularly difficult for legislators to loosen reporting requirements.[215] Students may also benefit from initial expectation setting to prepare them for the idea that passing legislation is often a multi-year process. Students, particularly those enrolled in a clinic for only one semester, are unlikely to see the full arc of the legislative process from initial conception of a bill through to implementation. Rather, students are likely to experience only certain phases of a legislative project. Adjusting to that timeframe can, at times, be frustrating for students. Presenting case studies of past legislative

[211] *See supra* note 73.
[212] Feldblum, *supra* note 185, at 786.
[213] *Id.* at 805.
[214] *Id.* at 806.
[215] Expand explanation and cite.

projects to students can help contextualize how the work they contribute will fit into a longer-term project.

In the second stage, researching the problem, students "must meticulously find and understand every piece of text relevant to the policy goal being sought."[216] This often requires that students "read the relevant text with a keen understanding of the political dynamics surrounding the pending legislation or regulation."[217] In the context of mandated reporting laws, this stage presents an opportunity for students to deepen skills related to researching legislative history and understanding the political context behind the passage of a bill. Changes to mandated reporting laws often stem from individual high-profile incidents of child abuse or neglect going unreported.[218] Similarly, a high-profile incident involving child abuse or neglect can drastically alter the political landscape for legislation related to mandated reporting after it has been introduced. Students may not have received much training on researching legislative history and media coverage in their required 1L legal research and writing curriculum, and may benefit from additional support in researching the political context surrounding mandated reporting legislation. Librarians and support staff from Lexis and Westlaw may be particularly helpful in providing trainings on legislative history research and researching media coverage. The research stage may also provide students with the opportunity to learn about creative research tactics used less frequently in law school such as familiarizing themselves with resources available on state legislature websites, reaching out to staff at statehouses, speaking to sponsors of relatively recent bills, reviewing social media for content discussing legislation, or connecting with organizations that played a role in advancing or stopping a legislative effort.

In the third stage, proposing solutions and approaches, clinics working on legislative lawyering projects "will discern the range of possible solutions by engaging equally with players in the traditional legal, academic, and think-tank worlds, and with players in the political world."[219] Legislative lawyers strive to build trust and to find solutions that meet a diverse range of stakeholder needs.[220] Here, in working on projects related to the mandated reporting responsibilities of attorneys, clinics may face

[216] Feldblum, *supra* note 185, at 808.
[217] *Id.*
[218] *See, e.g.,* Mike Hixenbaugh et al., *Mandatory Reporting Was Supposed to Stop Severe Child Abuse. It Punishes Poor Families Instead*, PROPUBLICA (Oct. 12, 2022) (discussing changes to Pennsylvania's mandated reporting statute following the Sandusky scandal).
[219] Feldblum, *supra* note 185*,* at 810.
[220] *Id.*

important questions about whether small reforms to mandated reporting laws will help or hinder movements to abolish mandated reporting requirements. In her article discussing teaching abolition in a criminal justice clinic, Nicole Smith Futrell argues that "[s]tudents should be allowed to see firsthand the difficult tensions that can arise when engaging in reform work with an abolitionist agenda"[221] and points out that "[t]here will inevitably be moments when, for example, a course of action that might bring immediate relief to individuals currently experiencing the weight of the system conflicts with a longer-term abolitionist goal."[222] Working with students on projects related to mandated reporting raises similar questions. While altering the mandated reporting requirements of attorneys might serve as a first step in reconsidering mandated reporting requirements more broadly, rhetoric focused on why attorneys are a unique case might also hinder efforts in other fields to move away from reporting mandates, or might distract from broader conversations about larger concerns with mandated reporting and removal more generally. In the criminal context, Futrell suggests that clinicians may want to ask questions such as:

> Is the outcome sought going to ultimately endorse and affirm the legal-penal system by enhancing its functioning, or will it diminish the procedures and institutions by which state violence is administered and distributed? Will the outcome increase access to liberty, or will it increase punitiveness? Is this an initiative that creates more space for abolitionist possibilities? Will the effort contribute to "illuminating the system's inability to solve the crises it creates? Who is motivating and spearheading the objectives being undertaken? Are we informed and led by people most directly impacted? "Who benefits from this campaign, initiative, reform, form of resistance? Who doesn't, and why?" "Who is working on this initiative? Who is not? Why us? Why now?" "Is this something that we, or others, will be organizing to undo" in the near future."[223]

Clinical teams working on advocacy efforts related to mandated reporting may benefit from grappling with a similar set of questions.

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[221] Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 N.Y.U. REV. L. & SOC. CHANGE 159, 190 (2021).
[222] *Id.*
[223] *Id.*

In the next stage, drafting materials, students may work not only on drafting legislation itself, but also on creating materials to aid in advocacy efforts. Feldblum points out that the responsibilities of a legislative lawyer involve drafting documents for readers with differing levels of expertise, and that drafting materials may involve creating a broad range of different sorts of documents such as "an options memo for a client, a piece of testimony for a hearing, a set of talking points for staff people, a background memo for coalition members, an alert for grassroots activists, an offer of proposed legislative language and committee report language, and comments on proposed regulations."[224] Teams working on changes to mandated reporting requirements face the particularly challenging task of confronting assumptions that reporting abuse will always be helpful to the child in question. This may involve presenting data on disparate racial impact in accessible ways. Students may also need to explain complex ideas related to privilege and confidentiality mandates in accessible terms to nonlegal audiences. Drafting testimony and legislative fact sheets provides an opportunity to work with students on translating these complicated concepts into language that a wide range of audience members will understand. In doing so, students may play an important role in educating decisionmakers about some of the broader ethical complexities of mandated reporting.

Finally, in the last stage, legislative lawyers engage in oral presentations and negotiations.[225] Feldblum divides this category into explanatory communications, which are "explanations to a client or a coalition of how a proposed bill changes existing law or why existing law must be rectified by legislation"[226] and persuasive communications aimed at creating consensus on a path forward such as communications "persuading a staff person that a proposed legal provision does meet all the political concerns of her boss, or convincing an agency official that an existing legal provision would already achieve a particular policy goal if the agency simply issued appropriate implementing regulations."[227] Negotiations and collaboration with partners may be particularly complicated when working on mandated reporting laws. Each stakeholder may bring a different set of nuanced perspectives on what constitutes acting in the best interest of children. Students working on projects related to mandated reporting laws may benefit from training and supervision related to interest-based negotiation. Because so many stakeholders ultimately share a concern for ensuring the

[224] Feldblum, *supra* note 185, at 812.
[225] *Id.* at 814.
[226] *Id.*
[227] *Id.*

safety and wellbeing of children, and disagreement often stems from diverging opinions on what it means to protect the best interests of the child and the family, projects related to mandated reporting may provide a particularly useful perspective into what it means to negotiate effectively.

CONCLUSION

Lawyers have a unique responsibility to engage in questions of law reform and social change. This is especially true when it comes to addressing legislation that undermines attorneys' obligations to clients in a system rife with injustice. Mandates to report child maltreatment are rooted in admirable aspirations, but harness the apparatus of a punitive justice system to achieve a social goal. Unfortunately, lawyers have been largely absent from the conversations regarding mandatory reporting legislation and have generally paid inadequate attention to laws that implicate their professional obligations and responsibilities toward the development of a more just society. Lawyers have a duty to educate themselves and others about what is required of them under current mandated reporting laws and to advocate for a more just mandated reporting legislative scheme. Legal educators, particularly faculty engaged in experiential education, are uniquely positioned to take on both tasks. By exposing law students to the implications of mandated reporting, legal educators can apply student learning to enhance justice for individual clients, families, while improving family welfare systems.