

The Runaway Train of Mandated Reporting

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ABSTRACT

Mandated reporting was broadly enacted in the 1960s with good intentions and in a very different historical context regarding societal knowledge and recognition of child abuse. It has since expanded drastically regarding who must report and what must be reported. In the same sixty years, no research has demonstrated its efficacy. However, research does suggest that mandated reporting creates independent harms concentrated within low-income and minority communities. On top of the potential trauma of an investigation stemming from a report, mandated reporting also serves to isolate families, cutting them off from community support. Mandated reporters are most commonly those in helping professions. They have themselves protested the barriers these laws create to their work. In short, mandated reporting is a practice that does more harm than good.

Four million calls are made annually reporting suspected child neglect and abuse. Those four million calls, representing 7 million children, result in a 3.5% substantiation rate for abuse—the discovery of 240,000 children who are administratively deemed to be victims of abuse. An additional estimated 360,000 are deemed victims of neglect, a nebulous category often conflated with poverty. Meanwhile, another 2.5 million children are unnecessarily subject to intrusive and potentially traumatic child protective services investigations. A main driver of this harmful excess in reporting is statutorily mandated reporting of suspected child abuse or neglect in every state.

No one wants to leave those 240,000 children, or any children, without protection. But a practice that is not proven to effectively help them and that has been shown to harm ten times as many other children, as

well as persistently disproportionately negatively impact marginalized communities, defies common sense. Ending mandated reporting while leaving permissive reporting and training for professionals in its place will benefit every stakeholder involved in the system.

I. INTRODUCTION

Most would agree the child welfare system is not working well, though there are diverging opinions regarding what to do about it. Despite the heavily polarized current political climate that can lead to legislative gridlock, child welfare policies do not tend to fall neatly into “red” or “blue” categories.¹ The disagreement arises, then, not from political affiliation but rather from how to improve the current system—or whether to improve it at all. Child welfare reformers are united by the notion that the current system can and should be fixed. Abolitionists, on the other hand, seek to dismantle the current system, reimagining it from the ground up.

The decades of sweeping national legislation passed primarily in the latter half of the twentieth century is the result of efforts to reform the system—beginning with the Child Abuse Protection and Treatment Act in 1974, including the Adoption and Safe Families Act in 1997, and continuing through to the Fostering Connections to Success and Increasing Adoptions Act in 2008.² Through this federal legislation, an abundance of state legislation, and other advocacy efforts, reformers propose myriad ways to tweak, adjust, and thereby fix the problems with the current system. Reformers ultimately believe that the system that exists can be made into something that better achieves its stated goals.

In contrast, abolitionists advocate the end of the child welfare system as we know it, making space for something more effective, more holistic,

1. C. Taylor Brown, Maria G. Ocampo & Brett Drake, *The Politics of Child Welfare: Are Child Welfare Policies, Budgets and Functioning a Red/Blue Issue?*, 132 CHILD. & YOUTH SERVS. REV., Nov. 8, 2021, at 1, 5 (arguing that there is no clear red state vs. blue state political divide on child welfare issues but finding a rural vs. urban divide).

2. See Child Welfare Information Gateway, *Timeline of Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption*, U.S. DEP’T OF HEALTH & HUM. SERVS., <https://www.childwelfare.gov/pubs/otherpubs/majorfedlegisdlink/> [<https://perma.cc/4KRS-3DS9>] (listing twenty-eight pieces of major Federal legislation enacted over thirty-five years aimed at fixing the child welfare system); see also John Kelly, *Five Decades of Child Welfare, Juvenile Justice and Party Platforms*, IMPRINT NEWS (July 28, 2016, 9:00 AM), <https://imprintnews.org/child-welfare-2/five-decades-child-welfare-juvenile-justice-party-platforms/20013> [<https://perma.cc/3M37-7FTX>] (summarizing Republican and Democratic Party platforms regarding child welfare priorities since 1972).

and more just in its place. Contrary to what some believe, proponents of abolition seek to create, not just tear down. They have seen decades of efforts to reform a system with rotten roots and are ready for a different approach that prioritizes children's well-being over family surveillance and punishment, recognizes the centrality of integrity to children's well-being, and breaks free from centuries of white supremacy which undergirds the current system.³

This Article does not seek to weigh the merits of the reformer versus abolitionist debate. Rather, this Article will highlight a broad policy change that would improve the well-being of children and communities, would benefit multiple other stakeholders, and which both sides of the debate can and should support.

The legal requirement that certain categories of individuals report known or suspected child abuse or neglect is called mandatory reporting.⁴ The call to end mandatory reporting, despite increasing national political divides, has the possibility of broad appeal—to both Republicans and Democrats, yes, but importantly, to both reformers and abolitionists as well.

For all the reasons outlined in this Article, ending mandatory reporting is a change that reformers can and should support. It is a change that will not reduce child safety. There is no research to support the notion that mandatory reporting increases child safety.⁵ In the wake of the COVID-19 lockdowns, public outcry emerged over concerns that children were at gravely increased risk of abuse, trapped at home without the watchful eyes of mandated reporters.⁶ However, the data overwhelmingly indicate that

3. See Nancy D. Polikoff & Jane M. Spinak, *Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well Being*, 11 COLUM. J. RACE & L. 427, 430 (2021); Dorothy Roberts, *How I Became a Family Policing Abolitionist*, 11 COLUM. J. RACE & L. 455, 468 (2021).

4. See CHILD WELFARE INFO. GATEWAY, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 1 (2019), <https://www.childwelfare.gov/resources/mandatory-reporting-child-abuse-and-neglect/> [<https://perma.cc/E97W-DJBD>].

5. Indeed, research indicates the opposite. See, e.g., Jill R. McTavish et al., *Mandated Reporters' Experiences with Reporting Child Maltreatment: A Meta-Synthesis of Qualitative Studies*, 7 BMJ OPEN, Oct. 16, 2017, at 1, 12; MICAL RAZ, ABUSIVE POLICIES: HOW THE AMERICAN CHILD WELFARE SYSTEM LOST ITS WAY 69–72 (2020); Gary B. Melton, *Mandated Reporting: A Policy Without Reason*, 29 CHILD ABUSE & NEGLECT 9, 15 (2005) (“Both common sense and empirical research lead naturally to the conclusion that mandated reporting is a bankrupt policy. . . . [T]he current system appears to have paradoxical effects . . . adversely affect[ing] children’s safety.”).

6. See Garrett Therolf, Daniel Lempres & Aksaule Alzhan, *They’re Children at Risk of Abuse, and Their Caseworkers Are Stuck Home*, N.Y. TIMES (Aug. 7, 2020), <https://www.nytimes.com/2020/08/07/us/virus-child-abuse.html> [<https://perma.cc/23B5-C2FU>].

children did not face a greater risk of abuse.⁷ There is ample evidence that mandatory reporting overburdens the system in a way that puts the small percentage of children in need at greater risk⁸ and additionally creates its own long list of harms, primarily in preventing families from seeking or receiving the support they need. Many have already highlighted the harm these laws cause, including those in the legal field⁹ as well as those in other affected fields, including medicine¹⁰ and social work.¹¹ Ending mandated reporting would minimize the social harms created by an overreaching system and improve the welfare of children and families. The financial resources saved from narrowing our overbroad approach could be used more effectively for those children who are actual victims of abuse and for those families living in poverty who are now swept up in a system designed to punish them as opposed to meet their needs.¹²

For abolitionists, this is a non-reformist reform¹³—a way to shrink the current system and make space for other, more humane and more effective

7. Despite public outcry that children were at greater risk of abuse, trapped at home without the watchful eyes of mandated reporters, the data overall did not bear out that fear. See Anna Arons, *An Unintended Abolition: Family Regulation During the COVID-19 Crisis*, 12 COLUM. J. RACE & L. F. 1, 3 (2022); Kele Stewart & Robert Latham, *COVID-19 Reflections on Resilience and Reform in the Child Welfare System*, 48 FORDHAM URB. L.J. 95, 126 (2021).

8. See RAZ, *supra* note 5, at 72 (citing to fatalities and near fatalities that almost doubled following expanded mandated reporting laws in Pennsylvania between 2012 and 2016).

9. E.g., Josh Gupta-Kagan, *Toward a Public Health Legal Structure for Child Welfare*, 92 NEB. L. REV. 897, 899–900 (2014).

10. E.g., Mical Raz, *Unintended Consequences of Expanded Mandatory Reporting Laws*, 139 PEDIATRICS PERSPECTIVES, Apr. 1, 2017, at 1, 3; Carrie Lippy et al., *The Impact of Mandatory Reporting Laws on Survivors of Intimate Partner Violence: Intersectionality, Help-Seeking and the Need for Change*, 35 J. FAM. VIOLENCE 255, 256 (2020).

11. E.g., Miriam Itzkowitz & Katie Olson, *Closing the Front Door of Child Protection: Rethinking Mandated Reporting*, 100 CHILD WELFARE 77, 78 (2022); G. Inguanta & Catharine Sciolla, *Time Doesn't Heal All Wounds: A Call to End Mandated Reporting Laws*, 19 COLUM. SOC. WORK REV. 116, 116 (2021).

12. See Andy Newman, *Is N.Y.'s Child Welfare System Racist? Some of Its Own Workers Say Yes*, N.Y. TIMES (June 20, 2023), <https://www.nytimes.com/2022/11/22/nyregion/nyc-acs-racism-abuse-neglect.html> [<https://perma.cc/2HTD-R2DB>] (noting CPS workers' frustration with broad neglect allegations being used to "sweep poor families into the system"); Richard Wexler, *In Child Welfare, If the Solution Is Money, the Problem Is Poverty*, YOUTH TODAY (Mar. 3, 2022), <https://youthtoday.org/2022/03/in-child-welfare-if-the-solution-is-money-the-problem-is-poverty/> [<https://perma.cc/LH8Z-PQXM>].

13. See Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 102 (2020) ("The non-reformist reform does not aim to create policy

approaches to emerge. We saw in some jurisdictions during the height of the COVID-19 pandemic that as the reach of the current mandatory-reporting system receded, it left the necessary space for creative, community-based solutions to take its place.¹⁴ Many abolitionists, like those behind the upEND Movement,¹⁵ are already specifically calling for an end to mandated reporting. Though it is not an end to the entire system, it is a start at dismantling it and a reform that divests us from the current system.¹⁶

Critiques of the current system can be grouped into these two categories, but the critics share the same stated goal of child well-being. If reform can, in fact, increase child well-being and satisfy both camps, even if for different reasons, that broad support could lead to real legislative change, a rarity in these deeply polarized times. This Article proposes an end to mandatory reporting laws as a viable reform that would improve child well-being, as well as gain support from or benefit other stakeholders.

This Article will begin by explaining the broad strokes of the child welfare system and mandated reporting's role within it, including providing historical context. Next, it will highlight some of the problems with mandated reporting and how decades of state reforms have yet to fix them. The following part will describe how an end to mandated reporting would benefit each of the primary stakeholders with regard to these laws—child protective services (CPS), mandated reporters, and the children and families impacted by the system. This Article will go on to describe three practical ways that an end to mandated reporting could be achieved. The final part addresses potential pitfalls and points to the visions of some of those who have dared to imagine what truly promoting child well-being could look like.

solutions to discrete problems; rather it aims to unleash people power against the prevailing political, economic, and social arrangements and toward new possibilities.”).

14. See Dorothy Roberts, *How Covid Revealed the Folly of Our Child Protection System*, THE NATION (Apr. 29, 2022), <https://www.thenation.com/article/society/child-foster-care-coronavirus/> [https://perma.cc/5TRG-C3C4]; Arons, *supra* note 7.

15. *End Surveillance of Families*, UPEND, <https://upendmovement.org/end-surveillance-families/> [https://perma.cc/MY6N-U4RG]; see also Angela O. Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being*, 11 COLUM. J. RACE & L. 639, 676–77 (2021).

16. See Burton & Montauban, *supra* note 15.

II. THE STATE OF CHILD WELFARE: WHERE WE ARE AND HOW WE GOT HERE

The child welfare system, sometimes called the family regulation or family policing system,¹⁷ refers to a web of state and federal laws, state and local administrative bodies, and deputized organizations and individuals with the purpose of promoting child safety and well-being.¹⁸ At the highest level, the federal government, through the Children's Bureau within the U.S. Department of Health and Human Services, implements policies with the aim of supporting "state and tribal child welfare programs through funding, research, monitoring and special initiatives to promote positive outcomes for children and families involved in child welfare."¹⁹ Congress has also enacted federal laws regulating, through financial incentives, how each state organizes and runs its own child welfare system.²⁰ Each state, then, has its own set of laws and policies, as well as agencies and organizations whose purpose is to implement the mechanics of the system.

Though each state has control over its own child welfare functions, the separate state systems all have some components in common. For example, each state has a statewide or local administrative body that oversees the system.²¹ These state systems all share a similar specified goal—to support the well-being of the children within all states.²² Finally, all states also have

17. *Why We're Using the Term 'Family Policing System,'* RISE MAG. (May 7, 2021), <https://www.risemagazine.org/2021/05/why-were-using-the-term-family-policing-system/> [<https://perma.cc/PE5T-V9ZE>].

18. Child Welfare Information Gateway, *How the Child Welfare System Works*, U.S. DEP'T OF HEALTH & HUM. SERVS. 1, 2 (2020), <https://www.childwelfare.gov/pubpdfs/cpswork.pdf> [<https://perma.cc/4X8U-JBR9>] ("The child welfare system is a group of services designed to promote the well-being of children by ensuring safety, achieving permanency, and strengthening families.").

19. *Child Welfare Services*, U.S. DEP'T OF HEALTH & HUM. SERVS. (June 28, 2022), <https://www.acf.hhs.gov/cb/focus-areas/child-welfare-services> [<https://perma.cc/HC2R-BXJY>].

20. Child welfare policies, as they relate to children of Native American descent, are governed separately by the Indian Child Welfare Act. *See Indian Child Welfare Act*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/systemwide/diverse-populations/americanindian/icwa/> [<https://perma.cc/8GBE-5NK5>]. This Article will not delve into the complexities of that federal statute.

21. *See* CHILD WELFARE INFO. GATEWAY, STATE VS. COUNTY ADMINISTRATION OF CHILD WELFARE SERVICES 1–2 (2018), <https://www.childwelfare.gov/pubs/factsheets/services/> [<https://perma.cc/56AD-WUA9>].

22. *See generally Well-Being*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/systemwide/well-being/> [<https://perma.cc/43US-H23K>] (describing the

systems in place for reporting suspected child abuse or neglect and laws that identify who is required to report such suspicions and when and how to do so.²³ These laws are mandatory reporting laws, and the *who* identified within them are mandated reporters.

A. *The Rapid Rise of Mandatory Reporting Laws*

Today, knowledge of the existence of child abuse is ubiquitous. However, prior to the mid-1900s, this knowledge was not so widespread. Rather, the use of corporal punishment was generally considered a private family affair, one that the public had no legitimate interest in.²⁴ Though there were moments when egregious cases reached the national consciousness, they passed without broad societal change.²⁵

This changed drastically in 1962 when pediatrician Dr. C. Henry Kempe published an article coining the term “battered child syndrome,” which quickly attracted the attention of the public.²⁶ Kempe noted patterns of injuries common to children who had “received serious physical abuse.”²⁷ In these, he included ailments such as broken bones, head injuries, and failure to thrive, among others.²⁸ He also highlighted that a caregiver’s inadequate or inconsistent explanation for the injury heightens the concern.²⁹ Kempe lamented that when presented with these sorts of injuries in children, doctors either failed to recognize them as a red flag for abuse or intentionally

importance of child well-being and calling for its “integrat[ion] into all aspects of child welfare services”).

23. CHILD WELFARE INFO. GATEWAY, *supra* note 4, at 2.

24. NAT’L CTR. ON CHILD ABUSE & NEGLECT, CHILD ABUSE CASE IDENTIFICATION AND REPORTING 4 (1977), <https://www.ojp.gov/pdffiles1/Digitization/49475NCJRS.pdf> [<https://perma.cc/MTD3-PGSM>] (“Our society has traditionally condoned the use of corporal punishment on children. Further, a high value has always been placed on parents’ rights and discretion in raising their children.”).

25. See Albert J. Solnit, *Too Much Reporting, Too Little Service: Roots and Prevention of Child Abuse*, in CHILD ABUSE: AN AGENDA FOR ACTION 135, 136 (George Gerbner, Catherine J. Ross & Edward Zigler eds., 1980) (referencing growing concern with child abuse in the late 1800s and early 1900s, but without profound social change).

26. C. Henry Kempe et al., *The Battered-Child Syndrome*, 9 CHILD ABUSE & NEGLECT 143, 143 (1985); RAZ, *supra* note 5, at 3.

27. Kempe et al., *supra* note 26.

28. *Id.* at 147 (“A physician needs to have a high initial level of suspicion of the diagnosis of the battered-child syndrome in instances of subdural hematoma, multiple unexplained fractures at different stages of healing, failure to thrive, when soft tissue swellings or skin bruising are present, or in any other situation where the degree and type of injury is at variance with the history given regarding its occurrence or in any child who dies suddenly.”).

29. *Id.*

chose to ignore them and failed to follow up on the source of the injuries.³⁰ He argued that when faced with a child with these patterns of serious bodily injuries caused by a caregiver, a physician had a duty to their patient to take steps to avoid continued abuse.³¹ Thus, Kempe's primary goals were to ensure that doctors recognized when serious injuries were likely intentionally inflicted and that they subsequently alerted the "proper authorities."³²

With this medical publication and the extensive national media attention it received,³³ preventing child abuse rapidly became an issue of national and bipartisan concern.³⁴ In 1963, the Children's Bureau published model legislation regarding mandated reporting. The legislation hewed closely to Kempe's main goals, contemplating a reporting requirement for a physician presented with a child with a serious bodily injury who has reasonable cause to suspect that the injury was inflicted by a parent or caregiver.³⁵ The recommended language immunizes a good faith reporter from civil or criminal liability, nullifies the patient–doctor and spousal privileges in a proceeding subsequent to a report, and imposes criminal liability for failing to obey the reporting mandate.³⁶

Notably, the specter of harm raised by Kempe was both narrow in scope and relatively unambiguous. His publication concerned serious bodily harm, the type which it is hard to imagine going unnoticed or ignored by a physician today. The two case examples Kempe chose to include in his publication were ones with head trauma and multiple broken bones, all with explanations that defied any logic.³⁷ For example, he highlighted a newborn who presented to the hospital with serious physical injuries for the second time in his young life. The first, at one month old, was with a

30. *Id.* at 143 ("Unfortunately, it is frequently not recognized or, if diagnosed, is inadequately handled by the physician because of hesitation to bring the case to the attention of the proper authorities.").

31. *Id.* ("Physicians have a duty and responsibility to the child to require a full evaluation of the problem and to guarantee that no expected repetition of trauma will be permitted to occur.").

32. *See id.* at 153–54.

33. *See, e.g.,* RAZ, *supra* note 5, at 3.

34. *Id.* at 5 ("Policy makers came together for bipartisan support of child abuse prevention measures, as Democratic senator Walter Mondale quipped, 'Not even Richard Nixon is in favor of child abuse.'").

35. U.S. DEP'T OF HEALTH, EDUC., & WELFARE, *THE ABUSED CHILD: PRINCIPLES AND SUGGESTED LANGUAGE FOR LEGISLATION ON REPORTING OF THE PHYSICALLY ABUSED CHILD* 11–12 (1963).

36. *Id.* at 12–13.

37. Kempe et al., *supra* note 26, at 146–47.

broken femur, supposedly caused by the infant when he rolled over in his crib.³⁸ The second presentation at three months was for bilateral subdural hematomas (brain bleeds) without any explanation.³⁹ These cases exemplified the alarm that Kempe was sounding. These were the types of cases that, according to Kempe, were going unrecognized and unreported at that time. The scope of the mandate in the Children's Bureau's model legislation was also narrow regarding both who must report and what must be reported. Its focus was strategically on physicians and required reporting presentations of serious physical harm suspicious due to a parent's inadequate or inconsistent explanation.⁴⁰ In other words, the model legislation encouraged states to enact reporting requirements for the types of cases that Kempe highlighted in his article.

Within five years of Kempe's publication, forty-nine of the fifty U.S. states had enacted reporting laws.⁴¹ Many of these laws borrowed from the model legislation, but some were broader in scope. Forty-three states mandated reporting, while the other six encouraged permissive reporting.⁴² All of the laws contemplated reporting cases of bodily injury only, some specifying serious physical injury.⁴³ Some states explicitly included physical injuries due to inaction, in addition to action, by a caregiver, such as cases of severe malnutrition or failure to thrive.⁴⁴ Similarly, some states' statutes used the term neglect to describe these omissions that led to physical injury.⁴⁵ However, none included the term neglect as broadly as it is used today.⁴⁶

Fewer than half of the states at the time followed the model promulgated by the Children's Bureau and limited reporting to doctors.⁴⁷ Most, however, did limit reporting to those providing some sort of healthcare.⁴⁸ A minority

38. *Id.* at 146.

39. *Id.*

40. See U.S. DEP'T OF HEALTH, EDUC., & WELFARE, *supra* note 35, at 11.

41. Monrad G. Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1, 1 (1967).

42. See *id.* at 2 & n.3.

43. *Id.* at 11–12.

44. *Id.* at 12–13.

45. *Id.* at 12.

46. Compare *id.* (“A few states . . . direct the reporting of an injury caused by ‘neglect.’ . . . However, ‘neglect’ is a concept which extends to wide areas of emotional and social behavior. . . . [T]aken literally it could sow confusion.”), with Child Abuse Prevention & Treatment Act, Pub. L. No. 93-247, § 3, 72 Stat. 4, 5 (1974) (codified as amended at 42 U.S.C. §§ 5101–5106, 5108, 5116 (2012)) (“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 . . .”).

47. Paulsen, *supra* note 41, at 6.

48. *Id.*

of the states included others, such as school personnel and social workers, within their categories of reporters.⁴⁹ Finally, three states made reporting universal.⁵⁰

In 1974, the first major federal child welfare law was passed, titled the Child Abuse Prevention and Treatment Act (CAPTA). CAPTA, in both its original iteration and current form, calls for mandated reporting laws.⁵¹ Because family law is left primarily to the states, CAPTA cannot require states to adhere to its contents but rather incentivizes them to do so through the provision of federal funds to states that enact compliant laws. In 1974 and today, to be eligible for these federal funds, states were required, among other things, to implement a system of mandated reporting of both neglect and abuse.⁵² Further, CAPTA defined “neglect and abuse” broadly to include “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 circumstance which indicate that the child’s health or welfare is harmed or threatened thereby.”⁵³ This definition of what one was required to report, including *mental* injury in circumstances where there is a *threat* of harm to the *welfare* of a child, was substantially broader than the “serious bodily injury” encompassed in the 1963 model legislation. The federal government held states to this broad definition.⁵⁴ For example, in 1975, South Dakota was found ineligible for CAPTA’s funding until it expressly included that reporting of mental injury was mandated by its statute.⁵⁵

49. *Id.* at 7.

50. *Id.* at n.26. Three states (Nebraska, Tennessee, and Utah) have imposed universal reporting by requiring reporting by “any person” having reason to believe a child has been abused. *Id.* In contrast, Alabama has not imposed universal reporting by requiring reporting only by those “called upon to render aid or medical assistance.” *Id.* This phrase imposes a “limited duty on non-professionals.” *Id.*

51. U.S. DEP’T OF HEALTH & HUM. SERVS., CHILDS. BUREAU, THE CHILD ABUSE PREVENTION AND TREATMENT ACT: 40 YEARS OF SAFEGUARDING AMERICA’S CHILDREN 8–9, 84–86 (2014), https://www.acf.hhs.gov/sites/default/files/documents/cb/capta_40yrs.pdf [<https://perma.cc/M7JH-LK5C>].

52. *Id.* at 8.

53. Child Abuse Prevention & Treatment Act, Pub. L. No. 93-247, § 3, 72 Stat. 4, 5 (1974) (codified as amended at 42 U.S.C. §§ 5101–5106, 5108, 5116 (2012)).

54. RAZ, *supra* note 5, at 64 (“Although the federal government could not legislate states’ reporting requirements, they could incentivize them with federal grants and funds. They did so actively, while choosing to consistently push for broader requirements.”).

55. *Id.* at 63–64.

This broad definition of *who* should report *what* was contrary to expert opinion at the time.⁵⁶ Experts raised concerns that the funding allocated would be vastly insufficient with such a broad reporting requirement.⁵⁷ They further argued for a recognition that societal ills, most specifically poverty, had a role in creating the conditions that led to child abuse and, therefore, must also be addressed in the legislation if there was hope that it would be effective.⁵⁸ These concerns were raised even at the 1973 CAPTA Senate hearings prior to its passage. David Gil, a respected professor of social policy, spoke of the “massive abuse and neglect of children due to malnutrition and hunger, inadequate medical care, inadequate education and substandard living conditions” that he called “public forms of abuse and neglect,” labeling these as more serious and more pervasive than that attributable to any individual.⁵⁹ He called for the bill to include a provision for a minimum standard of living for all children in the country, lest we permit “socially sanctioned abuse and neglect.”⁶⁰ However, addressing poverty was not politically popular, and policymakers chose to focus the legislation on reporting mandates, ignoring societal ills and instead centering the blame on individual parents.⁶¹

In the years that followed, the critics of this overbroad approach to reporting continued to raise the alarm about its detrimental effects, most directly impacting low-income, minority, and otherwise marginalized individuals, families, and communities. In 1980, renowned Yale professor of psychiatry Albert Solnit highlighted the same concerns raised years earlier regarding the broad mandate to report. He wrote, “In most, if not all states, this epidemic of reporting has thrown out a wide net bringing in, along with the reports of serious life-threatening cases of physical abuse, instances of suspected neglect and false reports that are harmful or at least not helpful.”⁶² In 1981, the first national statistical study was published

56. *Id.* at 64 (noting that a broad mandatory reporting requirement was “the opposite of the professional recommendation of most child welfare researchers and legal scholars”).

57. *See id.* at 48 (“[I]n the late 1970s, Edward Zigler, Yale psychologist and former head of the Office of Child Development, quipped that CAPTA funding was like ‘putting a band-aid on a cancer,’ and suggested that CAPTA might even prove to be counter productive.”).

58. *Id.* at 54 (“While child welfare researchers argued that poverty and its consequent stressors had a causal role in child abuse, policy makers preferred to adopt seemingly neutral measures In particular . . . their policies focused on developing mandatory reporting laws . . . a political choice, as anti-poverty measures had become profoundly unpopular.”).

59. *Child Abuse Prevention Act, 1973: Hearings Before the Subcomm. on Child. & Youth of the Comm. on Labor & Pub. Welfare*, 93d Cong. 17 (1973) [hereinafter *Hearings*] (statement of David Gil, Prof. of Soc. Pol’y, Brandeis Univ.).

60. *Id.* at 20.

61. RAZ, *supra* note 5, at 54.

62. Solnit, *supra* note 25, at 143.

demonstrating racial disproportionality in reporting—Black families were overreported, and White families were underreported.⁶³ It also found disproportionality based on the age of the child, family income, and parental marital status, among others.⁶⁴ The authors called for “a critical review of the *system* as well as the *process* of reporting.”⁶⁵ However, the study did not gain traction or encourage a reversal of course.⁶⁶

Since then, the trend of broad reporting mandates has only continued. Today, per CAPTA’s requirement, all fifty states have mandated reporting laws.⁶⁷ These laws tend to be broad both in terms of what must be reported and who must report. Every state defines neglect differently, but all states require the reporting of neglect in a broad sense.⁶⁸ State definitions of neglect include but are not limited to, the following: inadequate supervision, clothing, food, shelter, affection, medical or mental health treatment; and exposure to parental substance abuse, domestic violence, criminal activity, prenatal substances, or pornography.⁶⁹ Some states include educational neglect.⁷⁰ In thirty-four states, a threat of harm, without actual harm, is sufficient to meet the statutory definition of neglect, and therefore falls within the reporting mandate.⁷¹ Most if not all of these are much more vague than the “serious bodily harm” that was initially proposed as the target of mandated reports.

In terms of who must report, states have similarly vastly broadened requirements since the first wave of mandated reporting laws, and more so in comparison to the initial model legislation. As of 2019, eighteen states had moved to universal mandated reporting, requiring any individual to report suspected child abuse or neglect.⁷² Most states, including most with universal mandated reporting, provide a list of professionals required to report.⁷³ The most common categories include social workers, teachers

63. RAZ, *supra* note 5, at 62 (citing Robert L. Hampton & Eli H. Newberger, *Child Abuse Incidence and Reporting by Hospitals: Significance of Severity, Class, and Race*, 75 AM. J. PUB. HEALTH 56, 56 (1985)).

64. See Hampton & Newberger, *supra* note 63, at 58.

65. *Id.*

66. RAZ, *supra* note 5, at 62.

67. CHILD WELFARE INFO. GATEWAY, *supra* note 4 (citing 42 U.S.C. § 5106a(b)(2)(B)(i)).

68. Rebecca Rebbe, *What Is Neglect? State Legal Definitions in the United States*, 23 CHILD MALTREATMENT 303, 305 (2018).

69. *Id.* at 306.

70. *Id.*

71. *Id.* at 308.

72. CHILD WELFARE INFO. GATEWAY, *supra* note 4, at 3.

73. *Id.* at 2.

and school personnel, health care workers, mental health professionals, childcare providers, coroners, and law enforcement.⁷⁴ Some less common categories include probation and parole officers, substance abuse counselors, and animal control officers.⁷⁵ The result is an estimated annual 4 million calls to state child abuse hotlines.

B. What Happens After a Hotline Call?: From Report to Screening, Investigation to Substantiation

Across states, a hotline call is the primary referral mechanism to the child welfare system. That call is the entryway to an elaborate decision tree whose outcomes can have long-lasting and far-reaching impacts on a child and family. Though this Article focuses on mandated reporting laws, those legal mandates are best evaluated with an understanding of what is set into motion when those calls are made.

Every state has specific protocols for how to report suspected abuse or neglect.⁷⁶ In most of these states, there is a statewide number that anyone can call, toll-free, to make a report, which is received either by the state CPS agency or by a law enforcement agency.⁷⁷ Some states have additional requirements for mandated reporters when making reports.⁷⁸ Upon receiving the report, each state has delineated procedures for how the receiving agency should make an initial assessment. This stage of the process is referred to as screening, and a report is either screened in or out. A report will be screened out if there is insufficient information to investigate the report or if the report does not state a concern that would meet the state definition of abuse or neglect.⁷⁹

If a report is screened out, no further action is taken. If it is screened in, it gets sent to the local CPS agency for investigation. States have the authority to determine how a screened-in report must be handled. Many include timeframes by which an investigation must be initiated.⁸⁰ Most classify reports by risk level, and some use that risk level to determine the

74. *Id.*

75. *Id.*

76. See *State Child Abuse and Neglect Reporting Numbers*, CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS. (2019), https://www.childwelfare.gov/organizations/?CWIGFunctionsaction=rols:main.dspList&rolType=custom&rs_id=5 [https://perma.cc/8RVT-WRR4].

77. CHILD WELFARE INFO. GATEWAY, MAKING AND SCREENING REPORTS OF CHILD ABUSE AND NEGLECT 3 (2022), <https://www.childwelfare.gov/resources/making-and-screening-reports-child-abuse-and-neglect/> [https://perma.cc/8CQX-PTBN].

78. See *id.* at 2 (noting that eighteen states require a mandated reporter to submit a subsequent written report after orally reporting the concern to the appropriate entity).

79. *Id.* at 3.

80. *Id.* at 3–4.

required response time for initiating an investigation.⁸¹ Some states also require that the investigation conclude within a set period. For example, in Illinois, an investigation must begin immediately, night or day, if there is a determination of an immediate risk to the child's safety or well-being.⁸² All other investigations must begin within twenty-four hours.⁸³ Then, within sixty days, CPS must determine whether to substantiate the allegation.⁸⁴ This deadline, however, can be extended for good cause.⁸⁵

The investigation itself might entail an initial assessment of the family by a CPS worker, which will often take the form of an unannounced home visit and interview with the family. Interview questions might include deeply personal topics to continue such removal.⁸⁶ Next steps could include something as drastic as an immediate removal of the children from their home, after which CPS will seek after-the-fact permission from a court to continue such removal. Depending on the state, the time of day, and the day of the week, a state might not permit a family to get a judicial review of that decision until days later, during which time the children might be placed in the care of unfamiliar foster parents.⁸⁷ Further, despite the statutory timeframe, in practice, families could have to wait even longer, up to weeks.⁸⁸

81. *Id.*

82. 325 ILL. COMP. STAT. ANN. 5/7.4(b)(2) (West 2024) (“If, during a family assessment . . . it appears that the immediate safety or well-being of a child is endangered, that the family may flee or the child disappear, or that the facts otherwise so warrant, the Child Protective Service Unit shall commence an investigation immediately, regardless of the time of day or night.”).

83. *Id.*

84. 325 ILL. COMP. STAT. ANN. 5/7.12 (West 2010).

85. *Id.*

86. Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610, 623 (2020) (“[I]nvestigators ask parents about deeply personal experiences, such as substance use triggers, unfaithful partners, family relationships, and childhood traumas.”).

87. See, e.g., MASS. GEN. LAWS. ANN. ch. 119, § 24 (2008) (providing that a hearing for the return of a child must commence within seventy-two hours of a petition being filed).

88. See Jonaki Mehta, Matt Ozug & Ailsa Chang, *There’s a Family Separation Crisis in Massachusetts, and Hearings Are Being Delayed*, NPR (Oct. 19, 2022, 4:37 PM), <https://www.npr.org/2022/10/19/1130026644/theres-a-family-separation-crisis-in-massachusetts-and-hearings-are-being-delayed> [<https://perma.cc/2YY3-EAST>] (“[O]f the 2,400 72-hour hearings that happened in Massachusetts last year, just a third of them had those hearings within three business days, and a fifth didn’t occur for more than a month.”).

Where, as in most investigations, CPS does not choose to remove the children from the home, its investigation over the succeeding weeks or months might include additional unannounced home visits, further questioning, and contact with collaterals such as friends, neighbors, and service providers. For example, researcher Kelly Fong recounts that in Connecticut:

[I]nvestigations involve multiple home visits, typically three; assessments of the physical condition of the home, including children's bedrooms; individual interviews with children, parents, and other household members; questioning about topics such as income, employment, domestic violence, substance use, physical and mental health, and discipline practices; criminal background checks of household members; and requests to communicate with service providers involved with families, such as schools and pediatricians.⁸⁹

The investigation into your family life can be invasive, time-consuming, and stress-inducing.⁹⁰ An innocuous-sounding “visit” from CPS can be traumatic.⁹¹ From the perspective of the family, it might start with an unexpected knock on the door at any hour of the day or night,⁹² followed by invasive questioning.⁹³ In some cases, it involves a “body check” of a child, or, in other words, a strip search without a parent’s consent.⁹⁴ Even in a case that does not result in the removal of the children, the threat of

89. Fong, *supra* note 86.

90. See *id.* at 618 (“This process generates surveillance that is expansive, extending beyond families deemed serious threats to their children’s safety; stratified, reaching marginalized families in particular; and distressing for investigated mothers, even when investigations ultimately close.”).

91. Talia Gruber, *Beyond Mandated Reporting: Debunking Assumptions to Support Children and Families*, ABOLITIONIST PERSPS. SOC. WORK 1, 8 (2023) (“Trauma from these investigations can have long-lasting psychological impacts on both caregivers and children.”).

92. Larissa MacFarquhar, *When Should a Child Be Taken From His Parents?*, NEW YORKER (July 31, 2017), <https://www.newyorker.com/magazine/2017/08/07/when-should-a-child-be-taken-from-his-parents> [<https://perma.cc/ZT67-YS8M>]; see also Gruber, *supra* note 91 (“CPS uses a myriad of abusive means to investigate reports, including arriving to a family’s home without warning at any time of day or night, probing through personal belongings, performing strip searches of children, and demanding parents provide legal consent to obtain information from medical providers.”).

93. Fong, *supra* note 86.

94. See N.Y. STATE BAR ASS’N, REPORT AND RECOMMENDATIONS OF THE COMMITTEE ON FAMILIES AND THE LAW: RACIAL JUSTICE AND CHILD WELFARE 15 (2022) (citing Lenore Skenazy & Diane Redleaf, *How Dare She Dash in for Muffins?*, WASH. POST (May 22, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/05/22/how-dare-she-dash-muffins/> [<https://perma.cc/C26J-6YP3>]) (“During a CPS investigation, it is common for CPS investigators to strip search children, even when there has been no allegation of abuse.”); *Curry v. Ky. Cabinet for Health & Fam. Servs.*, No. 3:17-CV-00730-JRW-CHL, 2020 WL 4820718, at *5 (W.D. Ky. Aug. 19, 2020) (detailing the strip search of six children under seven years old by CPS where there was no allegation of abuse or harm to the children).

removal looms over families.⁹⁵ None of this assumes animus by any individual caseworker. Rather, these are the natural results of the system.

The people harmed by needless investigation are disproportionately Black, Hispanic, and Native American children and caregivers living in poverty.⁹⁶ One study found that over half of Black children nationally experience a CPS investigation in their lifetime.⁹⁷ Another publication notes the overwhelming correlation between poverty and CPS involvement, particularly for allegations of neglect, with 85% of families investigated for neglect living below 200% of the poverty line.⁹⁸ Additional research supports the notion that the overrepresentation of racial minorities cannot be explained solely by disproportionate poverty.⁹⁹ Further, this disproportionality has existed since the implementation of CAPTA, and evidence of it was apparent, though ignored by policymakers, by at least the late 1970s.¹⁰⁰ Importantly, this disproportionality is a direct result of the wide net cast

95. See Vivek S. Sankaran, *When Child Protective Services Comes Knocking*, FAM. ADVOC., Winter 2009, at 8, 8–9 (describing a hypothetical situation in which CPS threatens court proceedings or child removal if a mother does not cooperate with an investigation).

96. See ABA Comm. on Youth at Risk, Resol. 606 (2022), <https://www.americanbar.org/content/dam/aba/administrative/news/2022/08/hod-resolutions/606.pdf> (last visited Nov. 21, 2023); Rebecca Rebbe, Kierra MP Sattler & Joseph A. Mienko, *The Association of Race, Ethnicity, and Poverty with Child Maltreatment Reporting*, 150 PEDIATRICS 24, 28–31 (2022).

97. Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274, 278 (2017).

98. Josh Gupta-Kagan, *Distinguishing Family Poverty from Child Neglect*, 109 IOWA L. REV. 1541, 1548 n.11 (2024).

99. Gruber, *supra* note 91, at 6 (“Regional research demonstrates that when controlling for the effects of poverty, neighborhoods with Black and Latinx residents remain overrepresented in reports and in subsequent CPS investigations and interventions.”).

100. RAZ, *supra* note 5, at 62 (“By the late 1970s, it was abundantly clear that expanded reporting requirements and outreach led to significant increases in reporting of low-income and minority families, and that only a fraction of the reports involved physical harm to children.”).

by broad mandated reporting laws,¹⁰¹ and professional reporters are more likely to add to the racial¹⁰² and economic¹⁰³ disparity in reporting.

The result of this overwhelming presence of CPS in marginalized communities is that families in these neighborhoods are all too aware of the ever-present surveillance of CPS and its accompanying threat of child removal.¹⁰⁴ Parents in these communities, particularly mothers, live daily with the weight of that perpetual threat.¹⁰⁵ Thus, the harm caused by overbroad reporting mandates is not limited to the 2.5 million children investigated without a substantiated allegation each year. Rather, the harm extends to entire communities living in the shadow of this system.

Though professionally mandated reporters may receive training on what, when, and how to report, that training rarely, if ever, includes what happens after a call is made.¹⁰⁶ Similarly, public materials about what happens after making a hotline call rarely signal the extent to which a family's life can be turned upside-down by that call. For example, Colorado's hotline's

101. *Id.* at 54 (“Yet as child welfare researchers would point out repeatedly, these seemingly neutral policies disproportionately affected low-income and African American families without providing any clear benefit, often leading to the extreme step of child removal. However, as the evidence and criticism mounted, there was little change in the policy approach to child abuse.”).

102. Gruber, *supra* note 91, at 6 (“[D]ata from 2013 shows that reports by professionals are more racially disproportionate than those made by non-professionals, and that reports from social service personnel have the highest rate of racial disproportionality.”).

103. Newman, *supra* note 12 (“[S]ymptoms of poverty are frequently punished as signs of neglect.”).

104. Fong, *supra* note 86, at 615 (“Poor families, Black families, and Native American families disproportionately come into contact with CPS . . . such that system contact is commonplace in marginalized communities.”); U.S. DEP’T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2018, at 146 (2020), <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2018.pdf> [<https://perma.cc/SZ4W-JRJQ>]; Claudia J. Coulton et al., *How Neighborhoods Influence Child Maltreatment: A Review of the Literature and Alternative Pathways*, 31 CHILD ABUSE & NEGLECT 1117, 1121–22 (2007); Dorothy E. Roberts, *The Racial Geography of Child Welfare: Toward a New Research Paradigm*, 87 CHILD WELFARE 125, 126 (2008).

105. Fong, *supra* note 86, at 623.

106. See Itzkowitz & Olson, *supra* note 11, at 85 (noting that mandated reporter training presupposes that reporting is the safest route, even absent imminent danger, and “typically omits themes of trauma, increased risk experienced by families in the child welfare system, cultural parenting norms, or alternative responses available for families experiencing the effects of poverty”); HUM. RTS. WATCH, “If I WASN’T POOR, I WOULDN’T BE UNFIT:” THE FAMILY SEPARATION CRISIS IN THE US CHILD WELFARE SYSTEM 55 (2022), https://www.hrw.org/sites/default/files/media_2022/11/us_crd1122web_3.pdf [<https://perma.cc/C3MK-76B3>] (quoting parent advocate Evelyn Perez: “This is not in the trainings. . . . They don’t understand the ripple effect once they make that call. They don’t understand that they have now invited these strangers to intrude and invade on the population, on our communities’ privacy, and do with them what they will and take their children and have the power to do all of this for years to come.”).

website promotes itself with the tagline, “If not you, then who?”¹⁰⁷ A link on the website navigates to a page entitled “What Happens When You Call.”¹⁰⁸ Here, with text and a promotional video, the website reassures would-be reporters that they need not be sure of neglect or abuse to make a call,¹⁰⁹ a common “better safe than sorry” approach to reporting, which assumes that an investigation is benign.¹¹⁰ The page goes on to discuss the “help” and “resources” that making a call can provide a family in need.¹¹¹

Ultimately, at the close of an investigation, CPS makes an administrative, internal determination about whether there is sufficient evidence to substantiate an allegation of neglect or abuse. This standard varies from state to state and is wholly separate from court or other adversarial proceedings.

In theory, when neglect or abuse is substantiated, the system’s initial goal is to provide rehabilitative services to the family, which will permit them to remain together.¹¹² These services might include referrals for counseling, parenting skills classes, or substance abuse treatment.¹¹³ The services might also be more concrete, such as providing a childcare voucher, housing assistance, or support from a homemaker.¹¹⁴ Interestingly, whether the case is substantiated or not does not always correlate with whether the family ends up in court or even whether the family is provided services.¹¹⁵

107. *Child Abuse and Neglect*, CO4KIDS, <https://co4kids.org/child-abuse-neglect/> [https://perma.cc/JD45-DMMG].

108. *What Happens When You Call?*, CO4KIDS, <https://co4kids.org/child-abuse-neglect/the-reporting-process/> [https://perma.cc/W8CF-FC29].

109. *Id.*

110. *See, e.g., New York State Office of Children and Family Services Launches Updated Mandated Reporter Training*, OFF. OF CHILD. & FAM. SERVS. (Feb. 15, 2023) [hereinafter *Updated MR Reporting*], <https://ocfs.ny.gov/main/news/article.php?idx=2456#> (last visited Nov. 21, 2023) (“For years, the message to mandated reporters has been ‘when in doubt, call’”). *See generally* Gruber, *supra* note 91, at 3 (discussing the general trend of expansion toward Universal Mandated Reporting Laws).

111. *What Happens When You Call?*, *supra* note 108.

112. *See* CHILD WELFARE INFO. GATEWAY, *HOW THE CHILD WELFARE SYSTEM WORKS* 5–6 (2020), <https://www.childwelfare.gov/resources/how-child-welfare-system-works/> [https://perma.cc/GE6C-D3AQ].

113. *See, e.g.,* VA. DEP’T OF SOC. SERVS., *CHILD AND FAMILY SERVICES MANUAL: SECTION 06: SERVICES* § 6.9.7.3.1–2, at 28–29 (2020), https://www.dss.virginia.gov/files/division/dfs/cps/intro_page/manuals/08-2020/section_6_services_August_2020.pdf [https://perma.cc/R3H6-D89M] (listing examples of service referrals for parents and children).

114. *See, e.g.,* 110 MASS. CODE REGS. §§ 7.020, 7.050, 7.090 (2011).

115. U.S. DEP’T OF HEALTH & HUM. SERVS., *CHILD MALTREATMENT 2021*, at xiv (2022), <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2021.pdf> [https://perma.cc/7C3X-E2L6] (noting that, of the 3 million children that had CPS contact after a call was made, 720,000 non-victims received post-response services along with 330,000 victims,

When services are provided, there is great debate about whether they are effective at meeting the family's needs, given, among other things, the coercive and surveilled context in which those services are provided.¹¹⁶

When a case is substantiated, a parent or caregiver's name is added to a central registry in accordance with CAPTA requirements.¹¹⁷ These registries can create additional financial hardships for families already struggling by adding barriers to employment,¹¹⁸ and a parent's name might stay on the registry for decades.¹¹⁹ In at least one state, names were being kept on these registries improperly.¹²⁰ Again, because of the concentration and wide reach of CPS within already marginalized communities, the financial impact of these registries can be felt across entire communities.

C. A Harmful and Inefficient System

Of the roughly 4 million calls made annually (by mandated and voluntary reporters) to state child abuse hotlines, only approximately 50% are screened in.¹²¹ Of those calls screened in for investigation in 2021, about 2 million reports reflected about 3 million children who were investigated or had some contact with CPS.¹²² Of those 3 million children, an estimated 600,000—or 18%—were deemed to be substantiated victims of neglect or abuse.¹²³ Said differently, 80% of the over 3 million children who were investigated by CPS were needlessly subjected to that investigation. CPS contact is not benign, and so those 2.4 million children who unnecessarily were

just over half of those children deemed to be victims of a substantiated claim of neglect or abuse).

116. Gruber, *supra* note 91, at 10 (“As a result, the services that families receive as a result of MR are connected to coercive government control and intervention under the threat of removal of children.”).

117. *Id.* at 8.

118. *Id.* at 8–9 (“Information from central registries is used for background checks by some employers and licensing bodies, with registered individuals routinely barred from employment in a range of fields that interact with children or other vulnerable groups. . . . The culmination of reports into central registry listings—in some cases, even when maltreatment is not proven in an investigation—exacerbates harm to families, barring caregivers from certain employment sectors, perpetuating financial insecurity, and increasing the likelihood of family separation.”).

119. See Fong, *supra* note 86, at 623 (finding that extensive and deeply personal information stays in the Connecticut statewide database for a minimum of five years, and if the case is substantiated, indefinitely).

120. See Jonathan Bergmueller, *Child Abuse Registry in Pa. Is Unconstitutional, Names Innocent People: Lawsuit*, PENN LIVE (Aug. 12, 2022, 6:19 PM), <https://www.pennlive.com/news/2022/08/child-abuse-registry-in-pa-is-unconstitutional-names-innocent-people-lawsuit.html> [<https://perma.cc/34ZE-59RA>].

121. U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 115.

122. *Id.*

123. *Id.*

funneled into the system cannot so easily be discounted as the cost of doing business.

Even that 18% greatly overstates the system's accuracy. If 18% of children directly touched by the system¹²⁴ resulted in discovering a child who was, to a high degree of certainty, an actual victim of physical or sexual abuse, an error rate of over 80% might be easier to stomach. However, for several reasons, that is not what the 18% substantiation rate represents.

First, most substantiated cases are not of children who have been physically abused. Rather, 60% of substantiated cases are based on neglect alone, without concurrent abuse.¹²⁵ Neglect is a particularly nebulous category. While some more extreme cases of neglect might be unambiguous, many will turn on a subjective standard of what constitutes "inadequate" parenting or inappropriate exposure.¹²⁶ Additionally, neglect is often conflated with poverty, especially when including children *at risk* of neglect. Though some state statutes explicitly exclude poverty as a basis of neglect,¹²⁷ the reality is that they are not so easily separated in practice.¹²⁸ There are better ways to address poverty and the harm it does to children than the current punitive investigatory system.¹²⁹ None of this is to say that neglect is always benign, whether the blame for that neglect lies with an individual parent or a

124. This figure excludes calls that are screened out, as those children do not have direct CPS contact.

125. TONI HERD ET AL., *DISENTANGLING NEGLECT FROM POVERTY 1* (Taylor Scott ed., 2022), <https://research2policy.org/wp-content/uploads/2022/06/RPC-Disentangling-Neglect-from-Poverty.pdf> [<https://perma.cc/HRT6-YV2Z>].

126. See Solnit, *supra* note 25, at 143 ("The negative aspects have been that family privacy has frequently been coercively invaded following false reports based on lifestyle differences and on prejudice against minorities, single-parent families, and low-income families. The concept of emotional neglect has been used as a basis for coercive inquiry when there is no consensus of how to define emotional neglect . . ."); ABA Comm. on Youth at Risk, *supra* note 96, at 8 ("[S]everal CAPTA provisions revived themes of saving children from poor families based on expansive definitions of abuse and neglect that continued to invite subjective assessments about parental fitness . . .").

127. See, e.g., N.Y. FAM. CT. ACT § 1012(f)(i)(A) (McKinney 2021) (criminalizing the failure to provide "adequate food, clothing, shelter or education" to a child only where the parent or person legally responsible for their care is "financially able to do so or offered financial or other reasonable means to do so").

128. See N.Y. STATE BAR ASS'N, *supra* note 94, at 4, 7, 9–10.

129. See Fong, *supra* note 86, at 624 ("Material hardship creates conditions that make child maltreatment more likely, but CPS is structured around addressing parents' abusive and neglectful behaviors, not meeting families' persistent needs."); Jessica Pac et al., *The Effects of Child Poverty Reductions on Child Protective Services Involvement*, 97 SOC. SERVS. REV. 43, 76–77 (2023).

pervasive societal ill. However, the inclusion of the ambiguous category of neglect within what mandated reporters must report opens the door to a vast array of parenting behavior, some potentially harmful and some not, that could require reporting and lead to a substantiation.¹³⁰

When people hear “child protective services,” the most common association is with children who have been physically abused. After all, the most horrific instances of abuse are usually those that make a media splash. “Abuse” alone is often the shorthand used to discuss both neglect and abuse, which is, as it turns out, mostly neglect. For example, the U.S. Department of Health & Human Resources Administration for Children & Families sponsors a National Child Abuse Prevention Month every April designed to recognize “the importance of families and communities working together to prevent child abuse and neglect.”¹³¹ The result is that CPS deals relatively infrequently with physical abuse. As noted above, the 4 million calls made annually regarding about 7 million children result in a substantiated finding with respect to 600,000 children.¹³² If only 40% of substantiations are for abuse¹³³—about 240,000 children—the total percentage of substantiated abuse drops to only 3.5% of the children included in those 4 million calls that come in.

Second, these numbers are based on administrative findings of substantiated maltreatment rather than through a court proceeding—an adversarial process with a neutral arbiter, which might carry a higher indicium of credibility. Further, however well-intentioned, there is bias baked into the system where the agency or administration who assesses the cases requires a continued influx of substantiated cases for self-preservation.¹³⁴ Third, some state administrative child protection agencies have extremely low burdens of proof to substantiate a report. Six states permit a substantiation based on “credible” evidence.¹³⁵ Others have a higher standard, most commonly a preponderance

130. See Gruber, *supra* note 91, at 4 (“[L]ess than half of [state-sponsored online MR] trainings differentiated child neglect from poverty.”).

131. *National Child Abuse Prevention Month*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/preventing/preventionmonth/> [<https://perma.cc/WL2B-ECUC>].

132. U.S. DEP’T OF HEALTH & HUM. SERVS., *supra* note 115.

133. This number is reached by subtracting the 60% of substantiations that are for neglect alone from total substantiations. HERD ET AL., *supra* note 125.

134. Richard Wexler, *You Get What You Pay For: The Federal Government Should Stop Paying for Foster Care*, 1 FAM. INTEGRITY & JUST. Q. 56, 56–59 (2022) (discussing the financial and non-financial incentives for CPS agencies to place children in foster care).

135. U.S. DEP’T OF HEALTH & HUM. SERVS., *supra* note 115, at 129. Note that New York amended its statute, changing the total from seven states to six. Kenya Franklin & Sara Werner, *New Law Reforming NY State Central Registry Will Provide Justice and Relief to Families*, RISE (Apr. 16, 2020), <https://www.risemagazine.org/2020/04/scr-reforms/> [<https://perma.cc/734T-DBC9>] (“There were four changes included in this legislation: One

of the evidence.¹³⁶ But even those with that higher standard do not use an adversarial process or impartial arbiter. Additionally, though some states offer a process through which these administrative findings can be challenged, it is lengthy and bureaucratic.¹³⁷ Therefore, it is likely that these numbers include cases where the administrative process does ultimately vindicate a caregiver and rescinds the substantiation. For some states, this substantiation rate may also capture cases that are not “substantiated,” but merely “indicated,” a similarly low burden to the six states with the low substantiation standard of “credible” evidence.¹³⁸ Finally, some states include not only substantiated victims of *actual* abuse and neglect but also children *at risk of* abuse or neglect.¹³⁹ Including children who are at risk, a potentially highly subjective standard, likely increases the rate of false positives, decreasing the actual accuracy rate even more.

Any inefficiencies in a system result in wasted financial resources. This system began formally in 1974 with 86 million dollars of federal funding to be spent over three years. Today, by contrast, 31.4 billion dollars are spent annually between state and federal sources.¹⁴⁰ At the initial CAPTA hearings, David Gil predicted this, sharing his “uncomfortable sense that . . . at the end of five years, after spending \$90 million, and after creating and supporting numerous service programs, nothing really significant will have happened in terms of prevention.”¹⁴¹ If the system could improve its accuracy rate at identifying children in need of intervention, that could lead to direct dollar savings from the extensive unnecessary screening and investigation of cases that result in no finding of maltreatment. States, on

is the change from requiring that the child welfare agency show ‘some credible evidence’ to requiring a ‘preponderance of evidence’ . . .”).

136. U.S. DEP’T OF HEALTH & HUM. SERVS., *supra* note 115, at 129 (listing thirty-seven states that use a preponderance standard for substantiation).

137. See Bergmueller, *supra* note 120.

138. See, e.g., 23 PA. STAT. AND CONS. STAT. ANN. § 6303 (West 2018) (categorizing reports as founded, unfounded, or indicated; both indicated and founded reports would appear in this count).

139. U.S. DEP’T OF HEALTH & HUM. SERVS., *supra* note 115, at 23 (indicating that some states include threatened abuse or neglect as forms of maltreatment); Rebbe, *supra* note 68, at 308 (finding that thirty-four states include the threat of harm in their definition of neglect).

140. KRISTINA ROSINSKY, MEGAN FISCHER & MAGGIE HAAS, EXECUTIVE SUMMARY: CHILD WELFARE FINANCING SFY 2020, at 1 (2023), https://cms.childtrends.org/wp-content/uploads/2023/04/ChildWelfareFinancingExecutiveSummary_ChildTrends_May2023.pdf [<https://perma.cc/4YL9-FML3>].

141. *Hearings*, *supra* note 59, at 20.

average, spend 18% of their entire child welfare budget directly on these front-end “child protective services” of screening, investigation, and assessment,¹⁴² totaling a national direct cost of roughly 5.65 billion state and federal dollars. This, of course, does not include the indirect financial costs resulting from the social harms examined above. This similarly does not include the costs of overburdening at other stages of the process, for example, the cost of foster care for children who were unnecessarily removed from their parents or court involvement for those children and others under court-ordered supervision of CPS. As described above, an overburdened system is more likely to make errors, which remains true at each stage.

Many would argue that they would pay any amount of money to help a child in need of protection. But that position does not merit continuing to feed a ballooning system that has not shown itself to be effective. Instead, those resources would better achieve the goal of protecting children if they were put toward any number of interventions that do have data to support them.

D. State Attempts at Reform

How narrowly or broadly to define neglect and abuse was hotly debated even before CAPTA’s passage.¹⁴³ CAPTA’s authors ultimately chose a broad definition, and therefore, a broad range of concerns were within the confines of mandated reporting.¹⁴⁴ The resulting wide net of children and families swept into the system had its critics very early on.¹⁴⁵ Additionally, a recognition of the disparate impact of mandated reporting on marginalized communities has been apparent nearly from the outset of the practice.¹⁴⁶

Despite the recognition and persistence of these problems, legislative trends have proceeded in the opposite direction from what researchers have been saying for decades. While the first wave of mandated reporting

142. See ROSINSKY, FISCHER & HAAS, *supra* note 140, at 3.

143. See *generally* *Hearings*, *supra* note 59, at 13 (“Child abuse may be defined in a variety of ways, depending on the purpose for which the definition will be used.”).

144. Child Abuse Prevention & Treatment Act, Pub. L. No. 93-247, § 3, 72 Stat. 4, 5 (1974) (codified as amended at 42 U.S.C. §§ 5101–5106, 5108, 5116 (2012)).

145. See Richard Wexler, *CAPTA Law Codifies Everything Wrong With How We ‘Fight’ Child Abuse*, YOUTH TODAY (Aug. 31, 2018), <https://youthtoday.org/2018/08/capta-law-codifies-everything-wrong-with-how-we-fight-child-abuse/> [<https://perma.cc/RTE6-ZZ26>].

146. RAZ, *supra* note 5, at 62 (“By the late 1970s, it was abundantly clear that expanded reporting requirements and outreach led to significant increases in reporting of low-income and minority families, and that only a fraction of the reports involved physical harm to children.”).

laws included three states with universal mandated reporting (UMR),¹⁴⁷ as of 2019, eighteen states now have enacted UMR.¹⁴⁸ This expansion is particularly misguided, given the research demonstrating that UMR does not correlate to the discovery of more victims of abuse.¹⁴⁹ Among states that have not had quite as vast an expansion, the trend is still toward broader reporting requirements.¹⁵⁰

In addition to this national trend, there have been highly publicized and egregious cases of abuse, after which the knee-jerk reaction has been to pass legislation increasing reporting mandates.¹⁵¹ For example, after the discovery of decades of rampant sexual abuse committed by prominent football coach Jerry Sandusky at Pennsylvania State University, the state's policymakers acted swiftly to expand reporting requirements.¹⁵² The year following, over thirty other states introduced legislation with the same aim, many directly in response to the horror of the Sandusky scandal.¹⁵³ While the outrage and desire to take action is entirely understandable in the face of such a tragedy, these legislative changes were undertaken hastily, without supporting evidence that they would make the intended difference. Arguably, "[t]hey were designed mainly to safeguard the conscience of our adult society," as an early critic of mandatory reporting laws explained it.¹⁵⁴

147. Paulsen, *supra* note 41, at 7 n.26.

148. CHILD WELFARE INFO. GATEWAY, *supra* note 4, at 3.

149. See, e.g., Grace W.K. Ho, Deborah A. Gross & Amie Bettencourt, *Universal Mandatory Reporting Policies and the Odds of Identifying Child Physical Abuse*, 107 AM. J. PUB. HEALTH 709, 709–715 (2017) (finding that universal mandatory reporting requirements vastly increase the number of calls to state hotlines without a corresponding increase in the number of identified and substantiated cases of abuse).

150. See Mike Hixenbaugh, Suzy Khimm & Agnel Philip, *Mandatory Reporting Was Supposed to Stop Severe Child Abuse. It Punishes Poor Families Instead*, PROPUBLICA (Oct. 12, 2022, 8:00 AM), <https://www.propublica.org/article/mandatory-reporting-strains-systems-punishes-poor-families> [<https://perma.cc/EG7T-N245>] ("Over the past decade, at least 36 states have enacted laws expanding the list of professionals required by law to report suspicions of child abuse or imposed new reporting requirements and penalties for failing to report.").

151. Leonard G. Brown, III & Kevin Gallagher, *Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States' Current Mandatory Reporting Laws with a Review of the Laws in the Commonwealth of Pennsylvania*, 59 VILL. L. REV. TOLLE LEGE 37, 47 (2013).

152. *Id.* at 50.

153. *Id.* at 51 (citing Joann Loviglo, *Sandusky Child Sex Abuse Scandal Raises Questions About State Laws*, CHRISTIAN SCI. MONITOR (June 9, 2012), <https://www.csmonitor.com/USA/Latest-News-Wires/2012/0609/Sandusky-child-sex-abuse-scandal-raises-questions-about-state-laws> [<https://perma.cc/6CTF-N4SU>]).

154. Solnit, *supra* note 25, at 143.

More recent efforts at reform have sought to consider the efficacy of mandatory reporting laws and attempted to address the persistent bias and disproportionality in the system. In 2019, Massachusetts established a Mandated Reporter Commission to consider how mandated reporting might be improved to better prevent child abuse and neglect.¹⁵⁵ Though the commission was expected to study and report on how to expand mandated reporting,¹⁵⁶ it was unable to come to any consensus, and therefore made no specific policy recommendations in its final June 2021 report.¹⁵⁷ In 2022, Colorado enacted a law creating a state task force on mandatory reporting.¹⁵⁸ The task force is specifically charged with considering, among other things, the effectiveness of mandatory reporting laws and the disproportionate impact on marginalized communities.¹⁵⁹ A final report from the task force is expected in January 2025.¹⁶⁰ Other jurisdictions have focused on better training for mandated reporters. For example, New York, a state that mandates training for its mandated reporters through its Office of Children and Family Services (OCFS), updated that training in 2023 to include guidance on implicit biases.¹⁶¹ In doing so, the OCFS commissioner acknowledged the step as “necessary to put an end to the practice of punishing race and poverty.”¹⁶²

III. BENEFITS FOR ALL

The impetus behind mandated reporting laws is to create safety for children, most specifically by making CPS aware of those potentially in need of state intervention for their protection. As stated above, there is no research that confirms the efficacy of mandated reporting. Yet, these laws continue to proliferate, widening the entryway into the system. Moreover, there is research that affirmatively demonstrates the harm these laws create, some harm of the very nature the laws are intended to prevent. The

155. OFF. OF THE CHILD ADVOC., *THE MANDATED REPORTER COMMISSION 4* (2021), <https://www.mass.gov/doc/mandated-reporter-commission-final-report-63021/download> [https://perma.cc/L6WZ-F8JS].

156. Shira Schoenberg, *State Considering Major Expansion of Child Abuse Reporting Laws*, COMMONWEALTH (Mar. 29, 2021), <https://commonwealthmagazine.org/courts/state-considering-major-expansion-of-child-abuse-reporting-laws/> [https://perma.cc/2YSZ-TZVW].

157. OFF. OF THE CHILD ADVOC., *supra* note 155, at 9 (“In light of the complexity of the issues involved in this discussion, no consensus could be reached by this Commission and therefore no votes were taken on any issue.”).

158. COLO. REV. STAT. ANN. § 19-3-302 (West 2022).

159. *Mandatory Reporting Task Force*, COLO. CPO, <https://coloradocpo.org/special-initiative/mandatory-reporting-task-force/> [https://perma.cc/P2QC-ZYBN].

160. *Id.*

161. *Updated MR Reporting*, *supra* note 110.

162. *Id.*

benefits of ending these harms to various stakeholders support an end to mandated reporting laws.

A. Benefits to CPS: Mandated Reporting Laws Reduce the Efficacy of Child Protective Services

Mandated reporting laws overburden an already overtaxed system, making the job of CPS workers and agencies harder in two ways. First, they make it harder to provide resources to families who are disproportionately living in poverty and, therefore, in need of a range of material support. Already scarce resources are spread thinner across the system when the front end uses more of them.¹⁶³ Second, they make it harder to find the children in need of protection. A sorting system that is stretched thin is likely to make more errors, including false negatives, where a child is mistakenly not recognized as a victim. One attorney called mandatory reporting counter-productive, explaining: “[T]he way I think of it is looking for the needle in the haystack is hard enough. Doubling or tripling the size of a haystack in the hopes that you’ll find maybe two needles or three needles simply doesn’t make sense.”¹⁶⁴

Mandated reporting specifically and intentionally incentivizes overreporting, sometimes doling out penalties (from monetary to professional to criminal) for failing to report.¹⁶⁵ Of the millions of annual calls made to child abuse hotlines across the country,¹⁶⁶ roughly two-thirds of those screened in come from mandated reporters.¹⁶⁷ At this stage, this difference does not necessarily point to a higher indicium of actual accuracy among mandated reporters compared to permissive reporters. Rather, it may reflect the screener’s impression of a professional reporter as inherently more credible than a

163. Fong, *supra* note 86, at 630 (“First, from the agency’s perspective, the high volume of cases closed following investigation strains investigators’ caseloads, diverting staff resources from higher-need cases.”).

164. Anjana Samant, *Mandatory Reporting Is Destroying Families*, ACLU, at 12:00 (Mar. 23, 2023), <https://www.aclu.org/podcast/mandatory-reporting-is-destroying-families> [https://perma.cc/5Q3K-2LYL].

165. See CHILD WELFARE INFO. GATEWAY, PENALTIES FOR FAILURE TO REPORT AND FALSE REPORTING OF CHILD ABUSE AND NEGLECT 1–3 (2019), <https://www.childwelfare.gov/resources/penalties-failure-report-and-false-reporting-child-abuse-and-neglect/> [https://perma.cc/6PR6-K3F5].

166. U.S. DEP’T OF HEALTH & HUM. SERVS., *supra* note 115, at 8.

167. *Id.* at 9.

permissive one.¹⁶⁸ Thus, we know that mandated reporters' calls account for a majority of cases that are screened in and, therefore, result in an investigation. In addition, we know that the mandatory reporting system necessarily leads to at least some reports that otherwise would not be called in, and at least some of those because the reporter doubts whether the concern is warranted.¹⁶⁹ If that were not the case, the laws would be superfluous. Thus, mandatory reporting laws directly create at least some portion of the excess in reporting.

In turn, this excess demands vastly more resources than those available and, therefore, harms children and frustrates the aims of CPS. As early as 1980, Yale psychiatrist Albert Solnit warned that "[i]ndiscriminate, mandated reporting leads to over-reporting which, in turn, demands more services than states are willing or able to provide."¹⁷⁰ More recent research has supported the notion that CPS itself worries about the wasted resources in investigating unnecessary reports.¹⁷¹ In New York City, CPS workers have themselves specifically lamented that "they spent so much time chasing unfounded neglect claims that it became harder for them to protect children from abuse."¹⁷² This viewpoint was tragically proven correct in the wake of the rash legislation passed in the years following the discovery of the Sandusky abuse and the ensuing trial. As described above, the legislature in Pennsylvania reflexively expanded reporting requirements, including who must report and what must be reported. They also increased penalties for failing to report. After these reforms passed, roughly double the number of calls came in, but the percentage of substantiated cases dropped by half.¹⁷³ Pennsylvania could not keep up with the incoming calls, leaving almost one in four unanswered, let alone investigated.¹⁷⁴ Though these

168. See Brianna Harvey, Josh Gupta-Kagan & Christopher Church, *Reimagining Schools' Role Outside the Family Regulation System*, 11 COLUM. J. RACE & L. 575, 586–87 (2021) (finding that teachers' reports are no more likely to be substantiated than those of families or friends).

169. See Hixenbaugh, Khimm & Philip, *supra* note 150 ("Some ChildLine workers reported an uptick in calls from mandated reporters who openly acknowledged they did not really believe that a child was in danger. . . . 'They just wanted to, for lack of a better word, cover their butt.'").

170. Solnit, *supra* note 25, at 145.

171. Fong, *supra* note 86, at 630 ("[F]rom the agency's perspective, the high volume of cases closed following investigation strains investigators' caseloads, diverting staff resources from higher-need cases.").

172. Newman, *supra* note 12.

173. Rachel Berger & Cindy Christian, Testimony to the Pennsylvania House of Representatives 5–6 (Dec. 16, 2022), <https://www.documentcloud.org/documents/23118216-final-bergerchristiantestimony-12-16-finalamended12-22-20> [https://perma.cc/4HLLV-2SJ2] (noting that calls increased from 23,000–25,000 to 44,000–47,000, while in the same time period the substantiation rate dropped from 19% to 10% or 11%).

174. *Id.* at 7.

laws were passed to keep children safer, the rate of child fatalities in the proceeding five years increased.¹⁷⁵ More recently, and recognizing the senselessness of the vast expansion of mandated reporting, Philadelphia City Councilman David Oh likened mandated reporting to a “system where everyone pulls a fire alarm anytime they feel like there’s a potential for fire, and theoretically it’s great because we’re going to catch every fire before it begins. . . . But how it’s worked out is all our firefighters are running around to false alarms, and now buildings are burning, and people are dying.”¹⁷⁶

The excessively wide net cast by the current system is, in fact, detrimental to its aims. Ending mandated reporting laws would narrow the mouth of the funnel through which cases enter the system. This would reduce the burden on the investigation end of the system. Because we can safely assume there are some false positives at every decision point along the way, we can assume that this would also reduce the burden at every subsequent level of the system. A burden reduction on the front end would permit redistribution of resources throughout to better serve those children pulled in.¹⁷⁷ For example, in Missouri in fiscal year 2017, the 72,904 child abuse and neglect reports investigated cost \$89,334,825, roughly \$1,225 per report investigated).¹⁷⁸ That number represents just under 20% of the \$472 million that the state spends on child welfare annually.¹⁷⁹ It is inarguably a substantial sum of money and is the second highest child welfare expenditure for the state when broken down by type of program, outspent only by foster care.¹⁸⁰ In a system where we estimate that, at a minimum, 80% of those investigations were not substantiated maltreatment, we can assume that most of that money could have been better used.

175. *Id.* at 6.

176. Hixenbaugh, Khimm & Philip, *supra* note 150.

177. See Sandra Knispel, *Child Services Targets Poor Families for Biased Reasons*, FUTURITY (Dec. 16, 2020) (statement of Mical Raz), <https://www.futurity.org/child-protective-services-welfare-parents-poverty-2488042-2/> [<https://perma.cc/FA6E-HM88>] (“[W]e know that most reports to child protective services are not about physical or sexual child abuse, but are, in fact, about poverty. And having social workers sort through all of these reported cases is a huge drain on the system: it doesn’t keep families safer, and it doesn’t provide services for families. It actually obscures the problem and makes it harder for social workers to identify the children who are in need of intervention.”).

178. MO. BUDGET PROJECT, BUDGET BASICS: CHILD WELFARE (2017), <https://www.mobudget.org/wp-content/uploads/2017/02/Budget-Basics-Child-Welfare.pdf> [<https://perma.cc/J2UD-AYMG>].

179. *Id.*

180. *Id.*

CPS agencies and workers across the country are notoriously overburdened.¹⁸¹ A quick internet search returns a bevy of news articles lamenting the same and pointing to the number of children who die each year from abuse and neglect despite already being known to their local CPS agency.¹⁸² The reason for this, these articles argue, is the high caseloads and insufficient staffing of these agencies.¹⁸³ In a world with limited financial resources, the goal of child welfare policies from the perspective of CPS should be aimed at creating efficiencies that do not increase risk to children. An end to mandated reporting would do just that.

B. Benefits to Mandated Reporters: Mandatory Reporting Laws Create Barriers to Helping Professionals Providing Help

Mandated reporters across multiple fields have spoken out about the harmful and counterproductive effects that mandated reporting laws have on children and families. They have raised this concern by speaking out against the policy of mandated reporting.

1. Mandated Reporting Laws Erode Trust Between Helping Professionals and the Community

Mandated reporters are most often categories of professionals that are likely to encounter children through their work—teachers, doctors, nurses, social workers, mental health professionals, and law enforcement personnel, among many others. These mandated reporter categories are also helping professionals, people whose express professional purposes entail providing various types of support and social services to community members. The result, in practice, is that in communities where most child welfare investigations are concentrated, these mandated reporting laws create barriers between providers and those they intend to serve.¹⁸⁴ The families most in need of support are possibly the least likely to seek it for fear of getting caught up in a punitive and intrusive system.

On a broader community-to-institution level, mandated reporting laws also create unnecessary and harmful barriers. The individual professionals who are mandated reporters also staff the community institutions meant

181. See Larrison Campbell, *CPS Requests Additional \$26 Million to Comply with Olivia Y Settlement*, MISS. TODAY (Jan. 25, 2019), <https://mississippitoday.org/2019/01/25/cps-requests-additional-26-million-to-comply-with-olivia-y-settlement/> [https://perma.cc/H48Y-K4XF].

182. See, e.g., *The Disturbing, Heartbreaking Reality of Child Protective Services Caseworkers*, CBS NEWS (June 14, 2019, 7:37 AM), <https://www.cbsnews.com/news/child-protective-services-workers-disturbing-heartbreaking-reality/> [https://perma.cc/AUL9-ADK7].

183. See *id.*

184. See Gupta-Kagan, *supra* note 9, at 933–34.

explicitly to support and service community members—schools, hospitals, clinics, etc. Where those buildings are filled with professionals who cannot be trusted—who are required to make a hotline call, possibly leading to drastic ramifications—those buildings are not places of support, fellowship, and refuge, but unwelcome intrusions and additional obstacles to lives often already burdened with poverty, racism, and inequity.

Mandated reporters across multiple fields have spoken up about their opposition to these laws. Social workers have, perhaps, most frequently raised the alarm regarding the “ethical conundrum of mandated reporting as it relates to evidence-based practice.”¹⁸⁵ For example, one article co-authored by a social worker and child welfare expert criticizes most reporting statutes in that they do not permit mandated reporters to consider cultural differences in their decision to report.¹⁸⁶ The same article notes that the lack of a clear definition of when and what to report leads professionals to err on the side of reporting, lest they face the clearly identified consequences of failure to report.¹⁸⁷ Finally, the article goes on to decry that mandated reporting laws encourage social workers and other mandated professionals to report instead of responding to the needs of the family in front of them.¹⁸⁸

Another social work article delineates the harms of mandated reporting and its concentrated application, and therefore negative impact, on marginalized communities.¹⁸⁹ That article’s authors argue that injecting mandated reporting into therapeutic relationships, or other relationships that require trust, inhibits the ability of the clinician to build the necessary context for vulnerable engagement with services, and therefore successful treatment.¹⁹⁰ As the above social work article does, this article questions the ability of a social worker to follow their professional code of ethics while also following mandated reporting laws.¹⁹¹ A third article echoes many of the same issues raised in the first two, citing the “barriers for families to access

185. Itzkowitz & Olson, *supra* note 11, at 77.

186. *Id.* at 83.

187. *Id.* at 84.

188. *Id.* at 92 (“[C]urrent mandated reporting culture requires that we pass the concerns we have about families and children from those with whom they may have the strongest relationship—their educators, coaches, health care providers, and clergy—to those with whom they have none, namely child welfare professionals and courts.”).

189. Inguanta & Sciolla, *supra* note 11.

190. *Id.* at 124 (“Mandated reporting and the possibility of a report being made diminishes the strength of the therapeutic alliance and the clinical benefits of work between clinicians and their clients (and trust between doctors and medical staff and their patients).”).

191. *Id.*

holistic support free from surveillance and punishment, hindering them from receiving the kinds of services that would truly prevent and treat harm.”¹⁹²

One area where mandated reporting raises particularly acute concerns is with survivors of intimate partner violence. Domestic or intimate partner violence (IPV) is a common gateway to the child welfare system, with both the perpetrator of the abuse as well as the surviving parent often being blamed.¹⁹³ For example, CPS might bring a neglect case against the survivor of IPV for either permitting the children to be exposed to domestic violence or for failing to protect the children from the abuser directly. A thorough qualitative and quantitative 2016 study looked at various factors at the intersection of IPV and mandated reporting. One such factor was the effect of a warning by someone the survivor approached for help that certain disclosures could trigger a mandated report.¹⁹⁴ Sixty percent of the survivors warned in this way said that this warning affected what and whether they chose to disclose.¹⁹⁵ The authors of the study found, “Ultimately, the warning curtailed the ability of survivors to fully disclose and receive help based on the entirety of their experience.”¹⁹⁶ Further, 83% of survivors that were in fact reported said that the report either made things worse or had no impact at all.¹⁹⁷ This study demonstrated the powerful chilling effect that mandated reporting has on the help-seeking behavior of survivors, therefore preventing helping professionals from providing the help they are trained to provide.

Each of these articles concludes that the harm that mandated reporting causes is too great to ignore, with the authors suggesting potential solutions. Some push explicitly for an end to mandated reporting.¹⁹⁸ Others suggest directions for future research and make policy recommendations short of an end to the practice. One author argues that “[w]e must seek alternative responses that allow families to remain in connection with those with whom they have a supportive relationship.”¹⁹⁹ This contrasts with the current system that requires mandated reporters, potentially trusted individuals in a position to help the family, to pass the case off to an unknown CPS

192. Gruber, *supra* note 91, at 9.

193. UCLA PRITZKER CTR., CHILD WELFARE AND DOMESTIC VIOLENCE: THE REPORT ON INTERSECTION AND ACTION 14 (2021), https://pritzkercenter.ucla.edu/wp-content/uploads/2021/05/Pritzker-Domestic-Violence-Report-Endnotes_final.pdf [<https://perma.cc/MQ59-U8HP>].

194. Lippy et al., *supra* note 10, at 255.

195. *Id.* at 261.

196. *Id.* at 262.

197. *Id.*

198. See, e.g., Gruber, *supra* note 91, at 16; Inguanta & Sciolla, *supra* note 11, at 130.

199. Itzkowitz & Olson, *supra* note 11, at 92.

entity, a stranger. Another author urges us to recognize “a need for identifying alternative strategies and solutions to protect and support vulnerable populations.”²⁰⁰ Finally, another sums up the counterproductive result of these mandated reporting laws on the clinical relationships that presumably could otherwise promote safety and stability: “Without mandated reporting laws, we believe that clients would disclose more openly and productively in clinical work, at the doctor, and with teachers. In doing so, folks can actually get the adequate mental and physical health care they need and deserve.”²⁰¹

Ending mandated reporting would let these helping professionals become the trusted sources of support that they have endorsed wanting to be. For individual patients or clients, true confidentiality with a helping professional would be possible. For communities, institutions full of mandated reporters could serve as sources of care and hope. Instead of isolating families in need, those families would know where to turn for help.

2. Mandated Reporting Laws Remove Discretion from Helping Professionals

The underlying assumption of mandated reporting laws, as well as the sometimes hefty civil and criminal penalties attached to them, is that absent the pressure or coercion they apply, those mandated to report would not do so. This may have made more sense within the historical context in which these laws first arose when physicians were routinely looking the other way from even the most egregious physical abuse of small children. However, even then, there was consideration for the fact that the laws would remove discretion from professionals, specifically physicians.²⁰² Some physicians at the time raised the same objections.²⁰³ There might be times, they argued, when reasons existed for deciding not to report.²⁰⁴ Some also felt that the suggestion of the law—that they would not otherwise do what was within their duty—degraded them and their profession.²⁰⁵

200. Lippy et al., *supra* note 10, at 266.

201. Inguanta & Sciolla, *supra* note 11, at 130.

202. Paulsen, *supra* note 41, at 8.

203. *Id.* (“Some physicians have objected to mandatory reporting on the ground that it would deprive them of making the judgment not to report in a given case where sound medical reasons exist for that decision.”).

204. *Id.*

205. *Id.* at 9 (“Some physicians have raised objection to the establishment of these penal sanctions. The integrity of professional people, it has been felt, ought not to be

Recent grappling with this type of harm caused by mandated reporting has included a recognition that the laws prevent mandated reporters from exercising common sense, let alone their professional judgment.²⁰⁶ Further, the social context that led to the need for a *mandate* for even the most extreme cases has vastly changed. Today, the existence of child abuse and the fact that it can be reported to relevant authorities is common knowledge across the country. Professionals who are typically included as mandated reporters are even more likely to be aware of this, as many undergo training to that effect. Ending mandated reporting would permit helping professionals to exercise the full extent of their ethical, professional, and common-sense judgment to the benefit of the people and communities they serve.

3. *Mandated Reporting Laws Limit the Help that Helping Professionals Provide*

Beyond this social cost of mandated reporting laws, there is also research indicating that those mandated to report concerns of abuse or neglect are more likely to stop short of doing anything more once they decide to report or not.²⁰⁷ Where absent these reporting mandates, they might intervene more directly, personally, and effectively, with the imposition of a mandate their vision of their role is limited to assessing the need to report.²⁰⁸ In addition, many of these reporters may mistakenly believe that by calling in a report, they have, in fact, provided a family with help, as opposed to simply initiating an intrusive investigation process that may or may not lead to an offer for supportive services,²⁰⁹ which may or may not meet the needs of the family.²¹⁰ As one advocate of ending mandated reporting expressed, “[O]ne of the biggest harms these systems [of mandated reporting] do—

impugned by the suggestion that criminal measures are required to ensure that they do their duty.”).

206. See SPECIAL COMM. ON CHILD SEPARATIONS IN PHILA., REPORT AND RECOMMENDATIONS 5 (2022), https://phlcouncil.com/wp-content/uploads/2022/05/SpecialCommitteeonChildSeparationsinPhiladelphia_REPORT_3.pdf [<https://perma.cc/NXW8-LW9Q>] (“The ‘mandated reporter’ cannot take into consideration ‘common sense’ when deciding whether or not to report for fear of running afoul of the law.”).

207. See, e.g., Melton, *supra* note 5, at 13–14 (collecting research showing many mandatory reporters consider whether to call a CPS hotline but do not offer additional services to a family); Gupta-Kagan, *supra* note 9, at 933–34.

208. See Melton, *supra* note 5, at 14.

209. U.S. DEP’T OF HEALTH & HUM. SERVS., *supra* note 115 (citing national data that 55% (330,881 of 600,000) of estimated victims in 2021 received services; and 30% (720,937 of 2,416,000) of non-victims).

210. Gruber, *supra* note 91, at 9 (“[I]n cases where families are kept together after they are reported, the FPS provides services that are often ineffective, incongruent with families’ needs, and/or harmful to families.”).

they atrophy the muscle of walking with people. We have created a hotline culture. The hotline culture then means you feel like you can walk away.”²¹¹ Others have similarly expressed the notion that reporters feel their job is done, and should be done, once they have made a report. In 2015, psychologist, child welfare expert, pediatrics professor, and champion of children’s mental health Gary Melton published an article criticizing the policy of mandated reporting.²¹² Among other critiques, he noted that, because of mandated reporting, both the general public and professionals hand over the work of child protection wholesale to CPS.²¹³ They view CPS as having a monopoly on child protection, and therefore, the role of anyone else is to ensure the case is made known to CPS and then consider their job done.²¹⁴ The result is a “probable reduction in direct action by the general public and by professionals.”²¹⁵ In other words, it is more likely a person will call a hotline without considering whether they might be able to help.

Even where a professional does serve some role to support a struggling family, they may reach a point where the family requires services the professional cannot provide.²¹⁶ Some research supports that professionals then are also quick to turn to CPS, seeing them as an all-encompassing gateway to an array of supportive services.²¹⁷ This is instead of, for example, referring the family to other community resources that might fill the gap. The result is that, instead of receiving support, these families become the subject of an investigation, the aim of which is to determine whether the parent should be labeled as neglectful or abusive. In the same study, CPS expressed frustration with overreporting, noting that some of the reports they received could have been better handled without CPS involvement and with follow-up by the reporting professional.²¹⁸

211. Dean Spade et al., *Abolish Mandatory Reporting and Family Policing*, BARNARD CTR. FOR RSCH. ON WOMEN, at 1:25:30 (Nov. 10, 2022, 4:00 PM), <https://bcrw.barnard.edu/event/abolish-mandatory-reporting-and-family-policing/> [<https://perma.cc/J6H3-BJPQ>].

212. Melton, *supra* note 5, at 10 (“[I]t is important to recognize that experience has shown that the assumptions that guided the enactment of mandated reporting laws were largely erroneous.” (emphasis omitted)).

213. *Id.* at 13.

214. *See id.*

215. *Id.*

216. *See* Fong, *supra* note 86, at 621 (describing a therapist’s hope that CPS would provide additional resources to their client that the therapist alone was unable to provide because of “her own constraints” and lack of additional resources).

217. *Id.* at 620 (“Reporting professionals envisioned CPS as a sort of all-purpose agency, compensating for what they could not provide.”).

218. *Id.* at 623.

Whether as a first instinct or after determining a family needs more services than a professional can provide, the commonality is that CPS is often seen as the gatekeeper of abundant resources. This theme was recognized early on, with pediatrician and Harvard professor Eli Newberger identifying as early as 1983 a “vexing and cruel dilemma” that to receive many services that a family needs, they must first become the subject of a report of neglect or abuse, which inherently places blame on struggling parents before any help can be offered.²¹⁹ This limitation on the access to supportive services that a family may need is solidified through federal funding schemes, where the funding provided to states for preventive, as opposed to reactive, services is a small drop in the bucket.

Rather than outsourcing “help” to CPS through mandatory reporting, many have suggested encouraging helping professionals to provide access to that help more directly.²²⁰ This notion has become known as “mandatory supporting” among abolitionists²²¹ and reformers²²² alike. In 2022, a California bill aimed at transforming medical mandated reporters into mandated supporters was proposed, though the efforts failed.²²³ The bill specifically sought to permit healthcare personnel to refer a suspected victim of domestic or sexual violence to a supportive community service in lieu of making a CPS report and was supported by advocates for victims of domestic violence and sex trafficking, as well as professional organizations of mandated reporters including the California Nurses Association.²²⁴ The bill explicitly did not revoke a reporter’s ability to choose to report to CPS. In a similar, though extra-legal effort, in Illinois, social workers created a document available to the public and, importantly, to other mandated reporters, compiling alternatives to contacting CPS.²²⁵

219. Eli H. Newberger, *The Helping Hand Strikes Again: Unintended Consequences of Child Abuse Reporting*, 12 J. CLINICAL CHILD PSYCH. 307, 308 (1983) (“[I]n order to help a family, a physician must, in effect, condemn the parents with a diagnosis that implicitly means they are bad parents.”).

220. See, e.g., Harvey, Gupta-Kagan & Church, *supra* note 168, at 576.

221. *Mandated Supporting*, JUST MAKING A CHANGE FOR FAMS., <https://jmacforfamilies.org/mandated-supporting> [<https://perma.cc/D8XZ-AM2N>].

222. Alexandria Ware, *Mandated Supporter, Not Mandated Reporter*, CHILDS. RTS. (Feb. 9, 2023), <https://www.childrensrights.org/news-voices/mandated-supporter-not-mandated-reporter> [<https://perma.cc/KE2K-2UQN>].

223. Assemb. B. 2790, 2022 Leg., Reg. Sess. (Cal. 2022).

224. *Id.* See generally FUTURES WITHOUT VIOLENCE, ASSEMBLY BILL 2790, https://www.futureswithoutviolence.org/wp-content/uploads/AB-2790-Wicks-Fact-Sheet_7.8-1.pdf [<https://perma.cc/MVB6-MER6>] (describing the circumstances leading up to, and the proposed solution of, Assembly Bill 2790).

225. ELENA GORMLEY ET AL., ALTERNATIVES TO CALLING DCFS, https://www.povertylaw.org/wp-content/uploads/2020/12/Before-you-call-DCFS_FINAL-2.pdf [<https://perma.cc/HS3E-T467>].

Thriving Families, Safer Children is another effort toward focusing resources and support within a community, as opposed to within CPS.²²⁶ A partnership between the U.S. Children’s Bureau, Casey Family Programs, and Prevention Child Abuse America, Thriving Families expressly aims to center the voices of community members, specifically impacted families.²²⁷ They “seek to demonstrate that intentional, coordinated investment in a full continuum of prevention and robust community-based networks of support will promote overall child and family well-being, equity and other positive outcomes for children and families.”²²⁸

These efforts, large and small, are a first step toward reversing the harm created by mandated reporting laws that encourage trained professionals with the capacity to help families to instead turn to CPS as the “experts” in family supportive services. However, while mandatory reporting laws in these varied jurisdictions remain, the message to helping professionals is mixed, and the legal penalties for failing to report also remain.

C. Benefits to Impacted Communities: Mandated Reporting Laws Harm the Communities and Families of the Children They Are Aimed at Protecting

In communities that bear the brunt of CPS investigation and surveillance, the possibility of CPS involvement is ingrained into parents. David Oh, a Philadelphia City Council Member who in 2018 found himself at the wrong end of a CPS investigation after his child’s accidental injury, became a voice for more marginalized Philadelphia parents who had experienced the same. He explained what he had learned from these parents, that “[i]n those [heavily surveilled] neighborhoods, everyone knows about mandated reporters.’ . . . ‘So when your child falls off a bike, you’ve got to think, “Do we take him to the hospital or not?”’”²²⁹ Councilman Oh pushed for a committee to review mandatory reporting policies, among others.²³⁰ The report authored by the committee included the voices of impacted parents. One mother explained: “I feel like I can’t tell anybody anything because

226. See *National Partnership to Reinvent Child Welfare Expands*, ANNIE E. CASEY FOUND. (Apr. 22, 2021), <https://www.aecf.org/blog/national-partnership-to-reinvent-child-welfare-expands> [<https://perma.cc/M3AL-UPMN>].

227. See *id.*

228. *Id.*

229. Hixenbaugh, Khimm & Philip, *supra* note 150.

230. *Id.*

oops, I might have said too much. I might have a knock on my door, and somebody might be here to take my kids. That's one of my biggest fears.”²³¹

Social science research supports this widespread occurrence, with an expert and researcher concluding that the “system[] strains relationships between families and the service providers reporting them.”²³² More than not seeking help, they proactively reject it because they fear any contact with the system. A study by the same expert of eighty-two mothers who had CPS contact found that these “women would proactively decline welfare, shelter, school, and medical services to avoid contact with reporters and the [C]PS; when they did seek out these services, they would withhold information about their needs, stresses, and parenting practices to avoid being reported.”²³³ Individual accounts of this fear becoming reality are tragically easy to come by, where parents seeking help for themselves, and thereby their children, are traumatized instead of supported.²³⁴

The fear within these communities cultivated by the current hotline culture created by mandated reporting leaves these parents and families without anywhere to turn.²³⁵ Any institution or individual that might be able to provide help might also be the source of unthinkable suffering. In a jurisdiction with universal mandated reporting, even seeking help from a neighbor could lead to CPS involvement. The vague definition of neglect exacerbates the issue. It leaves vast room for subjective interpretation by mandated reporters and CPS workers, meaning that even the most diligent, attentive, and well-meaning parent living in one of these communities must fear that their outreach for help could lead to a knock at the door. All of this creates a context in which struggling families must struggle alone, making children in these families and communities less safe and certainly less well.

Further, the overbroad net cast by encouraging excessive reporting means that children who do not need protection are pulled into the system in an effort to find those who do. The system disrupts the lives and inflicts harm on these children who were previously and otherwise unharmed. The inefficacies at the front end of the system create harm in an attempt to prevent it.²³⁶ This harm comes on several levels. Separating children from their parents undoubtedly causes harm. According to Colleen Kraft, a prior president of the American Academy of Pediatrics

231. SPECIAL COMM. ON CHILD SEPARATIONS IN PHILA., *supra* note 206, at 15.

232. Fong, *supra* note 86, at 611.

233. Gruber, *supra* note 91, at 10–11.

234. *See, e.g.*, Samant, *supra* note 164.

235. *See* SPECIAL COMM. ON CHILD SEPARATIONS IN PHILA., *supra* note 206.

236. *Id.* (noting that faulty reporting leads to unwarranted removals).

Separating children from their parents contradicts everything we stand for as pediatricians – protecting and promoting children’s health. In fact, highly stressful experiences, like family separation, can cause irreparable harm, disrupting a child’s brain architecture and affecting his or her short- and long-term health. This type of prolonged exposure to serious stress - known as toxic stress - can carry lifelong consequences for children.²³⁷

This statement was made in 2018 in the context of the family separation policy enacted by the Trump Administration at the U.S.–Mexico border. However, the trauma of separation, regardless of proximity to the border, is well-known²³⁸ and underlies CPS and state policies,²³⁹ making removal a last resort, only intended for use where its certainty of harm is outweighed by the risk of harm posed to a child if not removed.²⁴⁰ Where a child needs actual protection from abuse, one might argue that the harm prevented outweighs the harm caused. But where no protection is needed, as with most cases investigated, no such balancing can be said to justify the harm inflicted. Unfortunately, when an overburdened system is faced with specific allegations of harm or risk to a child, the balancing of those harms—a difficult task in the best circumstances—is less likely to be done well.

Unnecessarily removing children from their parents itself has been likened to an act of child abuse.²⁴¹ Further, the outcomes on a variety of

237. Colleen Kraft, *AAP Statement Opposing Separation of Children and Parents at the Border*, AM. ACAD. OF PEDIATRICS (May 8, 2018), <https://www.aap.org/en/news-room/news-releases/aap/2018/aap-statement-opposing-separation-of-children-and-parents-at-the-border/> [https://perma.cc/3R5Y-EYLW].

238. See Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 523 (2019); see also CHILDS. RTS. LITIG. COMM., TRAUMA CAUSED BY SEPARATION OF CHILDREN FROM PARENTS: A TOOL TO HELP LAWYERS 3 (2019), https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf (last visited Nov. 21, 2023).

239. See, e.g., OFF. OF CHILD & FAM. SERVS., N.Y. STATE CHILD PROTECTIVE SERVICES MANUAL ch. 9, § F, at F-1 (2023), <https://ocfs.ny.gov/programs/cps/manual/2023/2023-CPS-Manual-Ch09-2023Oct.pdf> [https://perma.cc/8NL3-ZSNV] (“New York’s laws and policies generally aim to keep children with their families.”).

240. See, e.g., N.Y. FAM. CT. ACT § 1024(a) (McKinney 2009) (permitting an emergency removal by CPS only when, among other conditions, there is an imminent danger to the child’s life or health); see also *Nicholson v. Scopetta*, 820 N.E.2d 840, 852 (2004) (requiring that courts balance any imminent risk with the harm of removal).

241. Steve Turnham, *Experts Say Psychological Impact of Family Separation on Par with Abuse*, ABC NEWS (June 18, 2018, 4:45 PM), <https://abcnews.go.com/Politics/experts-psychological-impact-family-separation-par-abuse/story?id=55981817> [https://perma.cc/T7DW-QKY4]; see also Mical Raz, *Calling Child Protective Services is a Form of Community Policing That Should Be Used Appropriately: Time to Engage Mandatory Reporters as to*

metrics for youth who spend time in foster care are abysmal, only adding to the certain harm of removal.²⁴² Foster care is not a place any child should spend time if avoidable. However, discerning when it is avoidable becomes all the more difficult in an overburdened system.

For children who are not removed from their homes but only investigated (or provided services without removal), that investigation process itself can be traumatic, as discussed above.²⁴³ Some advocates are calling for contact with CPS itself to be included as an “adverse childhood experience,” a category that comes with known mental, emotional, and physical negative consequences later in life.²⁴⁴ Even if a child is not ultimately removed, they might be woken up in the middle of the night by a knock at the door from a stranger who they know has the power to remove children. Those children might be questioned, strip-searched, and forced to watch as their parent is questioned. One study estimates that roughly 37% of children in the United States (and 53% of Black children) are the subject of child protection investigations in their lifetimes.²⁴⁵ Finally, this harm exists even for some children who never become the subject of a CPS investigation. Because child protection agency activity is heavily concentrated in certain neighborhoods and certain zip codes, their presence and their power are well-known in those communities. Even children who are (properly) never the subject of an investigation but live in communities with ever-present CPS intrusion can be affected by the threat that CPS represents—the possibility of removal and separation from family.²⁴⁶

the Harmful Effects of Unnecessary Reports, 110 CHILD. & YOUTH SERVS. REV., Mar. 2020, at 1, 1.

242. See ERIN SUGRUE, ALIA, EVIDENCE BASE FOR AVOIDING FAMILY SEPARATION IN CHILD WELFARE PRACTICE 8 (2019), https://www.ncsc.org/_data/assets/pdf_file/0031/18985/alia-research-brief.pdf [<https://perma.cc/S4SV-UGAU>]; see also WILLIAM NIELSEN & TIMOTHY ROMAN, ALIA, THE UNSEEN COSTS OF FOSTER CARE: A SOCIAL RETURN ON INVESTMENT STUDY 8, 16 (2019), <https://www.thetcj.org/wp-content/uploads/2019/10/Alia-unseen-costs-of-FC.pdf> [<https://perma.cc/SC5R-Q9PB>].

243. See Fong, *supra* note 86, at 630–31 (“[E]ven if investigators are confident children will not be removed, investigations stoke anxiety in families who may disengage from systems intended to assist them, undermining efforts to support child and family well-being.”).

244. *Fast Facts: Preventing Adverse Childhood Experiences*, CDC, <https://www.cdc.gov/violenceprevention/aces/index.html> [<https://perma.cc/FAN3-LW5M>] (defining “adverse childhood experiences” as “potentially traumatic events that occur in childhood”).

245. Kim et al., *supra* note 97, at 274.

246. Itzkowitz & Olson, *supra* note 11, at 91–92 (“Generations of family separation and the ongoing fear of governmental intrusion into parenting certainly qualifies as trauma for communities most impacted by child welfare.”).

IV. ENDING MANDATORY REPORTING TO IMPROVE CHILD WELL-BEING AND SAFETY

Mandatory reporting laws, as described above, are state laws that are incentivized with federal funds through CAPTA. Given their structure, there are three ways to end state mandatory reporting laws, opting instead for systems of permissive reporting only. Each, of course, comes with its own benefits and downsides, as well as its own level of feasibility. Some are broad and sweeping, and others are piecemeal. However, given the practicality of this policy proposal, any of the methods could arguably garner the necessary support.

A. A Federal Solution

One possibility is to repeal, at the federal level, the specific provision of CAPTA, which requires states to have some system of mandated reporting. This would not directly end any individual mandated reporting laws, which are enacted at the state level. However, it would remove the financial incentive for mandated reporting laws that CAPTA creates, in turn permitting states to repeal their own mandatory reporting laws while still receiving the federal funding CAPTA offers. Further, making this change at the federal level, especially through a bipartisan effort, would provide a national stage for this conversation and send a clear message to individual states about the noncontroversial nature of this shift. Despite the hyperpolarization of our current political climate, child welfare issues have often crossed the aisle or at least defied any clear trends between red and blue state policies.²⁴⁷ So, despite what is generally seen as legislative gridlock at the federal level, this narrow change to CAPTA holds some possibility of garnering sufficient political support, at least at first glance.

B. State Non-Compliance

Another possibility is for any given state to cease compliance with this provision of CAPTA, choosing to forego the federal funding that compliance ensures. This would have to occur piecemeal, state by state. Some states could do this more easily than others, depending on what percentage of their child welfare expenditures comes from state versus federal funds. However, arguably, for all states, the cost of doing business under CAPTA

247. Brown, Ocampo & Drake, *supra* note 1, at 5.

outweighs the benefits, given the system’s inefficiencies and the harm it creates. On average, 56% of a state’s expenditures on child welfare are from state and local funds, with the remaining percentage coming from several sources of federal funding.²⁴⁸ However, that number varies widely among states.

The funds the federal government provides to states come from a variety of sources, including Titles IV-E and IV-B of the Social Security Act, Medicaid, and Temporary Assistance for Needy Families.²⁴⁹ By far the largest sum of federal funds comes from Title IV-E, totaling an estimated \$10.7 billion in 2023.²⁵⁰ Funding from CAPTA, on the other hand, is dwarfed by this amount, coming in at only \$214 million split among the states.²⁵¹ With total federal dollars coming in around \$12 billion,²⁵² CAPTA is a mere 1.78% of that amount. While the actual dollar amount that each state receives from CAPTA might vary, it seems highly likely that any state could forego this tiny percentage of federal financing, particularly given that there would also be cost-savings associated with ending mandated reporting discussed above.

A Philadelphia City Council Special Committee on Child Separations published in their findings in April 2022 a recommendation that the state legislature abolish mandatory reporting. In their report, they pointed to the trivial level of funding that CAPTA provides, stating that “the amount of money involved is so negligible that it would be more than offset by the savings when workers don’t have to investigate so many false reports, and place fewer children needlessly in foster care.”²⁵³

C. Define Away Mandated Reporters

Finally, given the leeway that CAPTA provides states to choose how they comply with the mandated reporter requirement in CAPTA, it is possible that states could essentially define away the category of who is a mandated reporter. Specifically, CAPTA requires states to have a “State plan” that includes “provisions or procedures for an individual to report known and suspected instances of child abuse and neglect, including a State law for mandatory reporting by individuals required to report such

248. Ron Haskins, *Child Welfare Financing: What Do We Fund, How, and What Could Be Improved?*, 692 ANNALS AM. ACAD. POL. & SOC. SCI. 50, 53 (2020).

249. *Id.* at 52.

250. EMILIE STOLTZFUS, CONG. RSCH. SERV., IF10590, CHILD WELFARE: PURPOSES, FEDERAL PROGRAMS, AND FUNDING (2023).

251. *Id.*

252. *Id.* at 1.

253. SPECIAL COMM. ON CHILD SEPARATIONS IN PHILA., *supra* note 206, at 15.

instances.”²⁵⁴ With this self-reflective definition, it is possible that a law could write a statute that defines “those individuals required to report such instances” of abuse as an empty category. As required by CAPTA, the law could also include any procedures for reporting by mandatory reporters, but there would be no one in the state who would actually be required to follow those procedures. Whether or not this would be a successful interpretation of the requirements of the law might depend on the policy agenda of any given federal administration and how interested they were in picking a fight to pursue the strict enforcement of CAPTA’s demands. However, CAPTA also provides for states to remedy any defects in their state plan and accompanying laws before losing federal funding.²⁵⁵ Therefore, depending on the support in the state legislature for attempting this bold move, as well as repealing it if the state was not prepared to lose funding, this might be worth trying.

D. Overcoming Potential Pitfalls

One feature of CAPTA’s mandated reporting requirement for states that choose to accept its attached federal funding is that mandated reporting laws must carve out immunity from both civil and criminal liability for mandated reporters making good faith reports.²⁵⁶ In compliance with this, all fifty states have some provision for such liability in their state statutes.²⁵⁷ In seventeen states, there is a presumption of good faith.²⁵⁸ In at least twenty-three states, reporters are explicitly exempt from the protection of the immunity statute where they make a report in bad faith, with malice, or knowing it is false.²⁵⁹

Though mandated reporters may understandably feel a greater sense of protection in making a report knowing that explicit liability exists, it is

254. 42 U.S.C. § 5106a(b)(2)(B)(i) (2019).

255. See U.S. DEP’T OF HEALTH & HUM. SERVS., ACYF-CB-PI-19-02, SUMMARY OF THE ACTIONS REQUIRED IN COMPLETION AND SUBMISSION OF (1) THE CHILD AND FAMILY SERVICES PLAN (CFSP) FINAL REPORT AND CAPTA UPDATE FYs 2015-2019, (2) THE CFSP FOR FYs 2020-2024, AND (3) THE CFS-101, PARTS I, II, AND III, at 2, 5 (2019), <https://www.acf.hhs.gov/sites/default/files/documents/cb/pi1902.pdf> [<https://perma.cc/E58P-8YQR>].

256. 42 U.S.C. § 5106a(b)(2)(B)(vii) (2019).

257. CHILD WELFARE INFO. GATEWAY, IMMUNITY FOR PERSONS WHO REPORT CHILD ABUSE AND NEGLECT 1–2 (2023), <https://www.childwelfare.gov/resources/immunity-persons-who-report-child-abuse-and-neglect/> [<https://perma.cc/4HE3-L6S7>].

258. *Id.* at 2.

259. *Id.* at 3 & n12.

unclear that the majority of good faith immunity provisions are doing much work.²⁶⁰ These laws would still require a reporter to demonstrate that they reported in good faith, which would, by definition, defeat any tort suit (e.g., slander, libel) that the subject of a report might bring.²⁶¹ Those states that provide a presumption of good faith, on the other hand, may protect a mandated reporter from a would-be claimant to some increased degree. However, this presumption exists in a minority of states. Further, those states could, of course, enact a stand-alone law providing professional permissive reporters a presumption of good faith and achieve the same end.

Another concern for reporting professionals relates to privileges and confidentiality. All states currently address privileged communications within their mandatory reporting laws, clarifying for a given category of mandated reporters whether a privilege stands or is overridden by the reporting mandate.²⁶² This is helpful given that many mandated reporters also have privileged relationships with the subjects of a report, such as between a doctor and patient. Additionally, the existence of mandated reporting laws may, for some professionals, permit them to violate their professional code of ethics in order to comply with the laws. Where that is the only carve out, it is possible that either the state legislature or those responsible for the professional code of ethics will need to be responsive to a change in state law related to mandated reporters. Some ethical codes, however, already permit breaching confidentiality to prevent “serious, foreseeable, and imminent harm to the client or others,”²⁶³ which might cover the circumstances under which we would want a professional to be able to exercise their discretion in the context of permissive reporting. If not, again, state legislation or professional ethical codes could adjust accordingly. There is no reason that these reassurances for professionals cannot be possible in a system of permissive, as opposed to mandated reporting.

Finally, for some professions, there might be a concern about violating other laws by reporting, absent a reporting mandate. However, at least

260. See generally Paulsen, *supra* note 41, at 31 (“It is ironic that legal immunity, a factor so important in the discussions about the need for child abuse reporting legislation, is probably unnecessary. No liability, in fact, does exist for good faith reporting of the sort which the reporting laws now mandate or permit.”).

261. *Id.*

262. CHILD WELFARE INFO. GATEWAY, *supra* note 4, at 4 & n.21 (“All but three States and Puerto Rico currently address the issue of privileged communications within their reporting laws, either affirming the privilege or denying it (i.e., not allowing privilege to be grounds for failing to report).”).

263. *Social Workers’ Ethical Responsibilities to Clients*, NAT’L ASS’N OF SOC. WORKERS, <https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English/Social-Workers-Ethical-Responsibilities-to-Clients> [<https://perma.cc/49TF-LDEL>].

some of those laws already create a carveout that is not tied to mandated reporting but rather reporting more generally. For example, healthcare professionals need not worry about violating HIPAA, which permits disclosure to a “public health authority or other appropriate government authority authorized by law to receive reports of child abuse or neglect.”²⁶⁴

The change from mandated reporting to permissive reporting alone could require a close eye on other places where the law may need to be responsive to ensure that the pendulum does not swing the other way, returning us to the days of Kempe and a complete lack of reporting. However, by bringing the necessary players to the table, for example, those versed in the ethical codes of the professionals currently covered by mandated reporting laws, as well as those professionals themselves, these pitfalls can be avoided.

E. What Would Be Left?: Permissive Reporting, Training, and Space for Better Practices

The call to end mandated reporting may seem daunting to many. It has been a central facet of our child protection system since its inception. However, ending *mandated* reporting does not end *all* reporting. Both professionals and the general public would still have access to child abuse hotlines to report their concerns. With permissive reporting alone, the hope would be a move away from the excess in reporting that currently causes so much unnecessary harm. This, in connection with other suggested reforms, might move the current system away from mere reactive child protection and toward proactive promotion of child well-being. Those other changes could take the form of ones highlighted in this Article, for example, genuinely supportive resources to which to refer families in need.

Additionally, while solely improving training failures would not be sufficient to curb the harmful excess caused by mandatory reporting laws, a move away from mandatory reporting coupled with better training could ensure that professionals in a position to witness families in need know all of their options—both the ability to report the family to CPS if warranted and the ability to refer them to supportive community alternatives.

Removing the excess caused in part by mandated reporting laws will shrink the current system, making space for alternatives, such as community mutual aid networks, to grow in its place. This could facilitate the work of partnerships like Thriving Families, enabling their preventive and

264. 45 C.F.R. § 164.512(b)(ii) (2004).

community-focused work to demonstrate what a difference this approach can make.

A move away from mandated reporting might also make space in our minds and our communities for other approaches to addressing the harms the policy seeks and fails to remedy. For example, as a result of the quasi-study that the COVID-19 pandemic afforded us, we have seen that providing financial resources directly to families living in poverty can reduce child welfare involvement.²⁶⁵ Another study found that providing childcare subsidies to low-income mothers decreased the likelihood of both neglect and physical abuse reports.²⁶⁶ Housing affordability has also been shown to reduce psychological and physical abuse.²⁶⁷ The Centers for Disease Control has published guidance on strategies demonstrated to reduce neglect and abuse.²⁶⁸ Their policy guide highlights the benefits of proactive preventive strategies.²⁶⁹ The implication is one recognized early on by some,²⁷⁰ and increasingly embraced by others,²⁷¹ that an ounce of prevention is worth a pound of cure.

V. CONCLUSION

Mandated reporting laws have been baked into our system for more than half a century now. Despite the research supporting their repeal, it will take brave politicians and an informed electorate to resist the knee-jerk reaction against this change and begin to turn this runaway train around. But the various benefits to the multiple stakeholders will be worth the effort.

Pushing for change that has broad support and, therefore, a chance to pass legislation and become law provides the best opportunity for some change in the right direction. But this proposal is not a cure-all. So long

265. Pac et al., *supra* note 129, at 72–74.

266. Mi-Youn Yang et al., *Child Care Subsidy and Child Maltreatment*, 24 CHILD & FAM. SOC. WORK 547, 552 (2019).

267. Katherine E. Marçal, *Domains of Housing Insecurity: Associations with Child Maltreatment Risk*, 131 CHILD ABUSE & NEGLECT, Sept. 2022, at 1, 6–8.

268. BEVERLY L. FORTSON ET AL., CDC, PREVENTING CHILD ABUSE AND NEGLECT: A TECHNICAL PACKAGE FOR POLICY, NORM, AND PROGRAMMATIC ACTIVITIES 9, 13 (2016), <https://www.cdc.gov/violenceprevention/pdf/can-prevention-technical-package.pdf> [<https://perma.cc/S2RX-CFYV>].

269. *Id.* at 10 (listing five suggested strategies, four of which are proactive as opposed to reactive).

270. Solnit, *supra* note 25, at 145 (“[T]hese children’s needs can best be served by bringing attractive voluntary services into action earlier. Such services include health care in the neighborhood, homemaker services, social service guidance, employment counselling, and, most often, assistance in finding sound day care that is affordable. Such services can often effectively prevent the conditions that later require coercive intervention to protect the child’s life and physical integrity.”).

271. See *National Partnership to Reinvent Child Welfare Expands*, *supra* note 226.

as our system still ignores our societal failings that do so much harm to children, any reform, even a non-reformist reform, will fall short of truly promoting child well-being. So long as the system is rooted in family surveillance and parental blame, the constitutionally protected familial integrity of those swept up into the system will be at risk.²⁷² So long as we fail to reckon with the problematic roots of the current system, the harmful fruits of those roots will continue to spread its poison. And yet, this policy change could prevent some of that harm and make space for a broader solution.

The above-mentioned failures will need to be addressed in order to truly protect all children. As reformers and abolitionists alike push to reduce the harm of the system as it stands, other advocates are already cautioning us against the next wave of ill-advised policies²⁷³ that threaten to both widen and deepen the net²⁷⁴ needlessly catching too many families in an injurious system.

272. This Article only scrapes the surface of the harm caused by the child welfare system, looking primarily at the impact of reporting and investigation. For an in-depth discussion of the harm specifically of child removal, see Trivedi, *supra* note 238, at 523; SUGRUE, *supra* note 242, at 3, 7.

273. See, e.g., J. Khadijah Abdurahman, Comment, *Calculating the Souls of Black Folk: Predictive Analytics in the New York City Administration for Children's Services*, 11 COLUM. J. RACE & L. F. 75, 104–05 (2021).

274. See CTR. ON JUV. & CRIM. JUST., WIDENING THE NET IN JUVENILE JUSTICE AND THE DANGERS OF PREVENTION AND EARLY INTERVENTION 1 (2001), <https://www.cjcj.org/media/import/documents/widening.pdf> [<https://perma.cc/52BF-5T4T>].

