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# Reforming Mandated Reporting Laws After Sandusky

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Part I. Introduction

The child sexual abuse case at Penn State University (University or Penn State) exposes numerous gaps in mandated reporting requirements of suspected child abuse.<sup>1</sup> Details of the allegations underlying the conviction of former Penn State football coach Gerald (Jerry) Sandusky are undeniably shocking;<sup>2</sup> however, the public is most outraged by charges that former high ranking University administrators failed to report accusations against Sandusky to child protection authorities.<sup>3</sup> Unfortunately, laws that require prompt disclosure of suspected child abuse, such as the disturbing eyewitness account of Jerry Sandusky molesting a boy in a Penn State campus locker room, frequently deter many professionals from reporting their suspicions.<sup>4</sup>

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<sup>1</sup> “Child abuse” is defined in Pennsylvania in section 6303 of the Child Protective Services Law (CPSL), 23 Pa. C.S. § 6301, *et seq.*:

- (i) Any recent act or failure to act by a perpetrator which causes nonaccidental serious physical injury to a child under 18 years of age.
- (ii) An act or failure to act by a perpetrator which causes nonaccidental serious mental injury to or sexual abuse or sexual exploitation of a child under 18 years of age.
- (iii) Any recent act, failure to act or series of such acts or failures to act by a perpetrator which creates an imminent risk of serious physical injury to or sexual abuse or sexual exploitation of a child under 18 years of age.
- (iv) Serious physical neglect by a perpetrator constituting prolonged or repeated lack of supervision or the failure to provide essentials of life, including adequate medical care, which endangers a child's life or development or impairs the child's functioning.

23 Pa. C.S. § 6303(b).

<sup>2</sup> On June 22, 2012, a jury convicted Sandusky on forty-five counts of child sexual abuse involving ten boys over a period of fifteen years. Kevin Johnson, *Sandusky Faces Life in Prison After Conviction on 45 Charges*, USA TODAY, June 22, 2012, available at <http://www.usatoday.com/news/nation/story/2012-06-22/sandusky-verdict/55768640/1>.

<sup>3</sup> On November 7, 2011, two former Penn State officials were arraigned in Harrisburg, Pennsylvania on charges of perjury and failure to report suspected child abuse. CENTRE DAILY TIMES, *Curley, Schultz Arraigned; Attorneys Say PSU Administrators are Innocent of Perjury*, Nov. 7, 2011, available at <http://www.centredaily.com/2011/11/07/2977668/curley-schultz-being-arraigned.html>. University officials' roles in failing to disclose child sexual abuse allegations against Sandusky are set forth in the Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky, June 12, 2012 [hereinafter, Freeh Report], available at [www.TheFreehReportPSU.com](http://www.TheFreehReportPSU.com).

<sup>4</sup> Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society's Response* 36 OHIO N.U. L. REV. 819, 829 (2010) (observing that even well-trained mandated reporters fail to disclose many cases of suspected child abuse due to, *inter alia*, frustration with the child protection system).

Despite the reluctance of some mandated reporters to disclose child maltreatment, the reports of suspected child abuse increased in the aftermath of the Penn State tragedy.<sup>5</sup> As publicity surrounding the Sandusky trial raises the public's awareness of child abuse,<sup>6</sup> descriptions of the victims as at-risk youth has called attention to the intersection of poverty, power, and privilege in child protection.<sup>7</sup> Affiliation of all of the victims with The Second Mile, which Sandusky formed as a group home for boys in foster care,<sup>8</sup> rendered them more vulnerable as victims of inequities within the child welfare system.<sup>9</sup>

The enhanced vulnerability of these young boys represents the “irony of inequity” that echoes throughout the nation for children living in poverty and children of color.<sup>10</sup> This irony presents itself in the form of systemic abandonment and neglect of children by the same laws, policies, and practices underlying the system designed to protect them.<sup>11</sup> The child sexual abuse scandal at Penn State typifies this irony. Flaws in Pennsylvania's mandated reporting law excluded Sandusky's “disadvantaged” victims from protection,<sup>12</sup>

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<sup>5</sup> Adam Brandolph, *Pennsylvania Child Abuse Reports Skyrocket After Penn State*, PGH. TRIBUNE-REVIEW, Nov. 18, 2011, available at <http://www.pittsburghlive.com/x/pittsburghtrib/news/region/s767938.html> (reporting that the Pennsylvania Department of Public Welfare received twice the number of calls it usually documents from its child abuse hotline in the week after Sandusky was indicted for child sexual abuse).

<sup>6</sup> Press Release, Commonwealth of Pennsylvania, Office of the Attorney General (June 22, 2012), available at <http://www.attorneygeneral.gov/press.aspx?id=6576> (on file with author) [hereinafter, Attorney General Press Release II].

<sup>7</sup> See Kimberly Kaplan and M. Alex Johnson, *Sandusky Convicted of 45 Counts, Plans to Appeal*, MSNBC, June 22, 2012, available at <http://usnews.msnbc.msn.com/news/2012/06/22/12363955-sandusky-convicted-of-45-counts-plans-to-appeal?lite> (indicating that Sandusky's crimes against children were facilitated by his affiliation with “one of the nation's premier college football programs”).

<sup>8</sup> The Second Mile proceeded towards dissolution on May 25, 2012 by seeking to transfer nearly \$2 million in assets and its programs to a related charity. Statement from The Second Mile, May 25, 2012, available at <http://www.thesecondmile.org/welcome.php>.

<sup>9</sup> Attorney General Press Release II, p.1 (characterizing Sandusky's ten child sexual abuse victims as “the most vulnerable members of our society”).

<sup>10</sup> In this article, inequity in child welfare refers to the disproportionate rate at which children living in poverty are identified in suspected child abuse reports. See *infra* Part II.B. There is evidence of inequity in the child welfare system based on racial and ethnic identity. The topic of racial disproportionality, *i.e.*, circumstances when racial or ethnic minorities appear in the child protection system at higher rates than they appear in the general population, is beyond the scope of this article. For a review of this latter form of inequity, see generally, Jessica Dixon, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 109 (2008) (proposing federal legislation to mandate racial equity in child protection). But see Elizabeth Barthelet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L REV. 871, 899 (2009) (challenging basic disproportionality analysis).

<sup>11</sup> Child abuse is typically studied at the micro level by examining acts or omissions by individuals; however, child maltreatment occurs at macro levels as well. JOAN SHIREMAN, CRITICAL ISSUES IN CHILD WELFARE, 28 (2003) (identifying community, societal, and institutional levels of child maltreatment).

<sup>12</sup> Joe Drape, *Sandusky Guilty of Sex Abuse of 10 Young Boys*, N.Y. TIMES, June 22, 2012, available at <http://www.nytimes.com/2012/06/23/sports/ncaafootball/jerry-sandusky-convicted-of-sexually-abusing-boys.html?pagewanted=all> (reporting all ten child sexual abuse victims were “from disadvantaged homes”).

contributed to the communications calamity among former Penn State administrators,<sup>13</sup> and encouraged an environment that eviscerated administrative accountability.<sup>14</sup>

It is, therefore, predictable that the reaction to Sandusky's conduct, and the failure of former University leaders to report him, have included calls for legislative reform.<sup>15</sup> Although child protection laws arose from critical concerns for impoverished children, many child welfare practices today "target" children living in poverty rather than promote safe and permanent environments where America's children, youth, and families thrive.<sup>16</sup> These unintended consequences have yielded a host of inequities in child protection,<sup>17</sup>

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<sup>13</sup> Penn State emails show that at least four high ranking leaders knew of Sandusky's conduct with a boy in a campus locker room shower and failed to notify child protection. Freeh Report, Exhibits 5-E – 5-H (email confirmation of meetings between Penn State leaders discussing allegations against Sandusky). See Jeremy Roebuck, *PSU Case: Schultz Wants Source Material*, PHILA. INQUIRER, July 31, 2012, available at [http://www.printthis.clickability.com/pt/cpt?expire=&title=PSU+Case%3A+Schultz+wants+source+materials+for+Freeh+report&urlID=485921281&action=cpt&partnerID=165761&cid=164449176&fb=Y&url=http%3A%2F%2Fwww.philly.com%2Fphilly%2Fnews%2F20120731\\_PSU\\_Case\\_Schultz\\_wants\\_source\\_materials\\_for\\_Freeh\\_report.html](http://www.printthis.clickability.com/pt/cpt?expire=&title=PSU+Case%3A+Schultz+wants+source+materials+for+Freeh+report&urlID=485921281&action=cpt&partnerID=165761&cid=164449176&fb=Y&url=http%3A%2F%2Fwww.philly.com%2Fphilly%2Fnews%2F20120731_PSU_Case_Schultz_wants_source_materials_for_Freeh_report.html) (counsel for former Penn State official filed motion seeking, *inter alia*, documents used in preparation of Freeh Report that reflect conversations between ex-Penn State leaders).

<sup>14</sup> Administrative aspects of the reporting obligation of institutional mandated reporters, such as hospitals, schools, and similar entities have become pivotal issues in the Penn State matter. See *infra* Part IV.B - C. See also Attorney General Press Release II (describing the "institutional issue" involving entities that "come into contact with children" as one of the lessons learned in aftermath of the Sandusky trial).

<sup>15</sup> Stephanie Rabiner, *Will Sex Abuse Laws Change After Penn State?*, FINDLAW, Jan. 30, 2012, available at <http://blogs.findlaw.com/blotter/2012/01/will-sex-abuse-laws-change-after-penn-state.html> (commenting on mandated reporting bills in a dozen states "to prevent another Penn State"); *Louisiana Bill Inspired by Jerry Sandusky Case Would Toughen Child Abuse-Reporting Law*, ASSOCIATED PRESS, Mar. 27, 2012, available at [http://www.pennlive.com/midstate/index.ssf/2012/03/louisiana\\_bill\\_inspired\\_by\\_jer.html](http://www.pennlive.com/midstate/index.ssf/2012/03/louisiana_bill_inspired_by_jer.html) (summarizing bill to broaden coverage of state mandated reporting statute); Susan Nielsen, *Mandated Reporting: Pass 'Penn State Bill' on Child Abuse, Then Keep Talking*, THE OREGONIAN, Feb. 12., 2012, available at [http://blog.oregonlive.com/nielsen\\_impact/print.html?entry=/2012/02/mandated\\_reporting](http://blog.oregonlive.com/nielsen_impact/print.html?entry=/2012/02/mandated_reporting) Heidi Voight, *Penn State Scandal May Inspire MA Law*, 22 NEWS WWLP.com, Nov. 10, 2011, available at <http://www.wwlp.com/dpp/news/Penn-State-scandal-may-inspire-MA-law> (commenting on sweeping plans to make all Massachusetts state employees mandated reporters due to alleged incidents at Penn State).

<sup>16</sup> DOROTHY E. ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 177 (2002) [hereinafter, SHATTERED BONDS] (explaining over- representation of poor families in child welfare). See also Dorothy Roberts, *The Racial Geography of Child Welfare: Towards a New Research Paradigm*, 87 Child Welfare 125, 126-29 (2008) (proposing research in locales where poverty and child welfare involvement correlate).

<sup>17</sup> Properly understood, child welfare encompasses an intricate system of state and local public agencies operating under a framework of statutes, regulations, and complex federal financing that support private non-profit and for-profit entities servicing children and families. See Rosemary Sarri and Janet Flynn, *Child Welfare Policy and Practice: Rethinking the History of Our Certainties*, 14 CHILD AND YOUTH SERV. REV. 219, 221 (1992) (identifying four different, yet overlapping, institutions that comprise the child welfare system, *viz.*, the state, the family, charity, and the market). *Child welfare* subsumes the narrower field of *child protection*. The scope of this article advocating reform of mandated reporting of suspected child abuse implicates both child welfare *and* child protection to the extent that they advance child safety, permanence, and well-being.

including the operation of mandated reporting laws that failed to ensure child safety for the disadvantaged youth ignored by former Penn State administrators.<sup>18</sup>

It is axiomatic that mandated reporters who abdicate their duty to report suspected child abuse run afoul of state law;<sup>19</sup> however, indicting former Penn State administrators for failure to report adds subtle irony to the cases relative to inequities in child protection. By failing to disclose initial allegations against Sandusky, University officials treated “children from disadvantaged homes” who are typically overly visible to child protection authorities as the invisible victims of Sandusky’s reprehensible crimes.<sup>20</sup>

Part I of this article introduces themes of poverty, power, and privilege in the child protection system that give rise to pervasive inequities in mandated reporting laws. Part II explains how these motifs converge at the center of unfortunate events at Penn State where child abuse victims became the invisible reflection of disadvantaged youth who are unusually overly visible in the child protection system. Part III explains the rationale for child protection laws that create institutional bias against children living in poverty as an unintended consequence of mandated reporting laws. Part IV examines shortfalls in Pennsylvania mandated reporting requirements that contributed directly to the Penn State tragedy and proposes legislative reform to remedy these specific shortfalls. Part V explores challenges to reform and Part VI concludes with a call to action to create equity and accountability mandated reporting requirements.

## Part II. The Penn State University Child Sexual Abuse Scandal

The child sexual abuse scandal involving former Penn State football coach Jerry Sandusky, and University administrators, presents a tragic case study in child protection. At the center of this controversy is the multi-count conviction of Sandusky who sexually molested boys he met through a charitable organization he formed, The Second Mile.<sup>21</sup> The specific identity of Sandusky’s victims was unknown to the public pending trial,<sup>22</sup>

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<sup>18</sup> A Task Force on Child Protection (Task Force) has reviewed child abuse laws, policies, and practices. S.R. 250, 195th Gen. Assemb., Reg. Sess. (Pa. 2011); H.R. 522 195th Gen. Assemb., Reg. Sess. (Pa. 2011).

<sup>19</sup> See *infra* Part IV (identifying persons designated as mandated reporting under state law).

<sup>20</sup> See *supra* note 12 and accompanying text.

<sup>21</sup> Findings of Fact and Recommendation of Charges, Thirty-Third Statewide Investigation Grand Jury, p. 1 [hereinafter, Grand Jury Presentment I].

<sup>22</sup> The trial judge denied victims’ confidentiality requests. Mindy Szkaradnik, *Four Who Said Sandusky Abused Them Ask for Confidentiality During Trial*, DAILY COLLEGIAN, May 29, 2012, available at [http://www.collegian.psu.edu/archive/2012/05/29/sandusky\\_alleged\\_victims\\_ask\\_for\\_confidentiality\\_during\\_trial.aspx](http://www.collegian.psu.edu/archive/2012/05/29/sandusky_alleged_victims_ask_for_confidentiality_during_trial.aspx).

but their known association with an entity devoted to serving underprivileged children raises concern that their socio-economic status prompted decisions to conceal the abuse.<sup>23</sup>

#### A. The Indictments: Curley and Schultz

The incongruity of a child serving organization established by a child molester is paralleled by cover up of his conduct by former University officials indicted for failing to report suspected child sexual abuse and lying about knowledge of those allegations.<sup>24</sup>

The case is more egregious in light of details that former legendary head football coach Joseph (Joe) V. Paterno told superiors on Penn State's campus of Sandusky's conduct,<sup>25</sup> but they withheld knowledge of the accusations from local child protection authorities.<sup>26</sup> Public fury led to the controversial firing of Joe Paterno and the forced resignation of Penn State University President Graham Spanier.<sup>27</sup>

According to his grand jury testimony, Paterno received an eyewitness account from a Penn State graduate assistant who described seeing sexual contact between Sandusky and a minor boy in the shower of a campus locker room in March 2002.<sup>28</sup> Paterno testified that he notified his direct supervisor, then-Penn State University Athletic Director Tim Curley (Curley), of this allegation the next day.<sup>29</sup> The eyewitness testified that he recounted the same incident approximately ten days later to Curley and then-Penn State University Senior Vice President Gary Schultz (Schultz).<sup>30</sup> The graduate assistant maintains that he specifically related to them that he saw what appeared to be Sandusky

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<sup>23</sup> Earl Ofari Hutchinson, *Does Race Explain Penn State's Blind Eye to Sex Scandal?*, NEW AMERICA MEDIA, Nov. 12, 2011, available at <http://www.newamericamedia.org/news/gender-sexuality/2011/11/index.php> (positing that officials failed to report Sandusky since all of his victims were "poor, at risk" youth with troubled backgrounds).

<sup>24</sup> Transcripts of the preliminary hearings of the two former Penn State officials who were charged with failure to report suspected child abuse and perjury are available at <http://www.dauphincounty.org/court-departments/media-information>.

<sup>25</sup> Joe Paterno died on January 22, 2012. Jack Carey, *Penn State Coaching Legend Joe Paterno dies at 85*, USA TODAY, Jan. 23, 2012, available at <http://www.usatoday.com/sports/college/football/story/2012-01-21/former-penn-state-coach-joe-paterno-dead/52737230/1>.

<sup>26</sup> Grand Jury Presentment I, p. 12-13.

<sup>27</sup> Moriah Balingit, *Allegheny DA to work with Schools on Sex-abuse Reporting*, PGH POST-GAZETTE, Dec. 1, 2011, available at <http://www.post-gazette.com/pg/11335/1193907-100.stm>.

<sup>28</sup> Grand Jury Presentment I, p. 7. Investigations revealed that this incident occurred in 2001, rather than 2002 as stated in Grand Jury Presentment I. Freeh Report, p. 14.

<sup>29</sup> Grand Jury Presentment I, p. 7.

<sup>30</sup> *Id.*

engaging in anal sex with a boy in the Penn State locker room shower;<sup>31</sup> Paterno did not attend the meeting when the eyewitness reported sexual abuse to Curley and Schultz.<sup>32</sup>

Curley and Schultz denied that the graduate assistant informed them of sexual misconduct by Sandusky.<sup>33</sup> In fact, the grand jury heard conflicting testimony from Schultz, who testified that neither he nor Curley received reports from Paterno or from the graduate assistant concerning any child sexual abuse by Sandusky.<sup>34</sup> Consequently, the grand jury found that the version of events told by Curley and Schultz were not entirely credible,<sup>35</sup> that they never reported suspected child sexual abuse involving Sandusky,<sup>36</sup> and that they violated mandated reporting requirements.<sup>37</sup>

#### B. The Irony of Inequity: Poverty, Power, & Privilege

As stories of child abuse, nondisclosure, and false testimony continue to unfold,<sup>38</sup> a narrative of apathy, indifference, and unresponsiveness towards children is unveiled.<sup>39</sup> Failure to report suspected abuse involving any child is indeed unconscionable,<sup>40</sup> but common characteristics of the boys at the center of the Penn State scandal may explain

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<sup>31</sup> The graduate assistant's name, Michael McQueary, was not revealed as in Grand Jury Presentment. Sara Ganin, *Former Coach Jerry Sandusky Used Charity to Molest Kids*, PATRIOT-NEWS, Nov. 9, 2011, available at [http://www.pennlive.com/midstate/index.ssf/2011/11/report\\_former\\_coach\\_jerry\\_sand.html](http://www.pennlive.com/midstate/index.ssf/2011/11/report_former_coach_jerry_sand.html).

<sup>32</sup> Grand Jury Presentment I, p. 7. This incident involved an individual designated as Victim 2 of eight victims in the initial investigation. *Id.* at 6. A later presentment identified Victims 9 and 10. Findings of Fact and Recommendation of Charges, Thirty-Third Statewide Investigation Grand Jury, pp. 1-3 [hereinafter, Grand Jury Presentment II].

<sup>33</sup> *Id.* at 8.

<sup>34</sup> *Id.* at 9.

<sup>35</sup> *Id.* at 12.

<sup>36</sup> *Id.* at 11.

<sup>37</sup> *Id.*

<sup>38</sup> Charges of further wrongdoing in connection with this case are expected as a result of investigations by state and federal authorities. Freeh Press Release, p. 3. For example, federal investigation of the University and its Board of Trustees into allegations against Sandusky that surfaced as early as 1998 raises questions concerning institutional liability for individual misconduct. While the scope of the federal probe remains unknown, the United States Attorney for the Middle District of Pennsylvania has requested, *inter alia*, record of payments "to Penn State University or to third parties on behalf of Penn State University" by members of the Board of Trustees. U.S. DEP'T OF JUSTICE, OFFICE OF THE U.S. ATTORNEY, Subpoena to Penn State University Vice President and General Counsel (Feb. 2, 2012). One journalist had placed "bribes, fraud, or misuse of federal funds" at the center of the federal inquiry. Sara Ganin, *Sandusky Federal Investigation May Have Different Focus*, CNN, Mar. 2, 2012, available at [http://www.cnn.com/2012/03/02/justice/pennsylvania-sandusky-investigation/?hpt=ju\\_c2](http://www.cnn.com/2012/03/02/justice/pennsylvania-sandusky-investigation/?hpt=ju_c2).

<sup>39</sup> None of the University administrators who received the eyewitness report of suspected child abuse from McQueary tried to locate or identify Victim 2. Grand Jury Presentment I, p. 12. According to investigators, University leaders demonstrated "total disregard for the safety and welfare of Sandusky's child victims." Freeh Press Release, p. 4.

<sup>40</sup> One scholar describes child abuse as a "valence issue" insofar as it garners unquestionable disdain. Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1, 7 (2010). Likewise, nondisclosure of child abuse merits universal contempt.

the unresponsiveness of University officials.<sup>41</sup> Each of the victims met Sandusky while participating in programs for underprivileged youth sponsored by The Second Mile,<sup>42</sup> which focused on assistance to children, youth, and families in need of social services.<sup>43</sup> Each victim was susceptible to the attention, hand-outs, and trips that Sandusky gave as inducements for his pattern of sexual abuse.<sup>44</sup>

The perilous conditions of underprivileged youth exploited in exclusive environments and concealed by closed cultures, exemplified by ex-Penn State leaders,<sup>45</sup> replicate various forms of inequity within the child welfare system.<sup>46</sup> Class bias besieging social workers causes the authentic needs of children living in poverty to remain unmet.<sup>47</sup> Disguising the needs of poor people as the indicia of child abuse is not, however, new.<sup>48</sup> Poverty continues to attract social workers to economically distressed children and youth who become overly-visible in the child protection system.<sup>49</sup>

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<sup>41</sup> Attorney General Press Release II, p 2. (observing that the Sandusky victims were “underprivileged kids, some from broken homes, foster homes, one-parent families, and many having other issues”)

<sup>42</sup> The state mission of The Second Mile reads: “The Second Mile challenges young people to achieve their potential as individuals and community members by providing opportunities for them to develop positive life skills and self-esteem as well as by providing education and support for parents and professionals addressing the needs of youth.” THE SECOND MILE ANNUAL REPORT 2010 at 1.

<sup>43</sup> All of Sandusky’s known victims met him as a result of affiliation with this child-serving organization. Victim 1 testified that he met Sandusky through The Second Mile when he was 11 or 12 years old. Grand Jury Presentment I, p. 2. Victim 3 testified that he met Sandusky when he was approximately 13 years old during his second year of participation at The Second Mile. *Id.* at 13. Victim 4 also testified that he was 12 or 13 years old in his second year of involvement with The Second Mile when he Sandusky. *Id.* at 14. Sandusky met Victim 5 at the Second Mile camp when the boy was only 7 or 8 years old. *Id.* at 16. Victim 6, referred by a school counselor to The Second Mile, also met Sandusky when he was 7 or 8. *Id.* at 18. Victim 7 testified that he, too, was referred to The Second Mile program where he met Sandusky at the age of 10. *Id.* at 20. Victim 9 testified that he met Sandusky at the age of 11 or 12 when he participated in several programs of The Second Mile. Grand Jury Presentment II, pp. 1-2. Victim 10, a self-described “troubled child” with problems at home at the age of 10, testified that he was also referred to The Second Mile by a school counselor where met Sandusky. *Id.* at 3-4.

<sup>44</sup> The Grand Jury details the gifts and vacations that Sandusky used as leverage to control his victims. Grand Jury Presentment I, pp. 2-17; Grand Jury Presentment II, pp. 2, 4.

<sup>45</sup> Investigators conclude that the University’s “culture” permitted former top administrators to “repeatedly conceal critical facts relating to Sandusky’s child abuse” and “directly contributed to the failure of Penn State’s most powerful leaders to adequately report and respond to the actions of a serial sexual predator.” Freeh Report, p. 16-18

<sup>46</sup> Sarri and Flynn, *supra* note 17, at 225 (explaining that “dominant values of white and male middle-class society.... blind practitioners to questions of gender, race and class inequity”).

<sup>47</sup> See Comment, Candra Bullock, *Low-Income Parents Victimized by Child Protective Services*, AM. U. J. GENDER SOC. POL’Y & L. 1023, 1041 (2003) (identifying basic needs denied to children of low-income parents after removal by child welfare agencies due to “reporting bias based on their economic situation”).

<sup>48</sup> Hafemeister, *supra* note 4, at 830-31 (observing that “the abuse of children was more frequently noted” in the 18th century when “distressed families became more visible in an increasingly urbanized society”).

<sup>49</sup> Dorothy E. Roberts, *The Community Dimension of State Child Protection*, 35 HOFSTA L. REV. 23, 35 (2003) (noting child welfare inequities in areas of “extreme concentration of poverty and unemployment).

This “visibility hypothesis” accounts for the disproportionate representation of underprivileged children with in child welfare in comparison to privileged children.<sup>50</sup> The theory holds that suspected child abuse reports for children in poverty are greater than those for children of means because the poor are more noticeable to child protection authorities and, thereby, become subject to higher rates of removal from their families.<sup>51</sup> The inequity of over-reporting poor families for child abuse investigations confirms the over-visibility of disadvantaged children in the child welfare system.<sup>52</sup>

On the surface, it may appear entirely inconsistent that children living in poverty, routinely denied support services, garner disproportionate attention from child welfare.<sup>53</sup> Critical review shows that ignorance, indifference, or intolerance toward conditions of “social and economic disadvantage in urban neighborhoods” leads to over-visibility.<sup>54</sup> The visibility hypothesis in child welfare, based upon the conspicuous or perceptible attributes of the poor, is buttressed by a premise of bias and prejudice towards them.<sup>55</sup> Hence, overlooking child sexual abuse victims by former Penn State administrators simply because they were underprivileged children parallels the unjust patterns and practices of disinterested decision making in child welfare.<sup>56</sup>

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<sup>50</sup> Khiara M. Bridges, *Towards a Theory of State Visibility: Race, Poverty, and Equal Protection*, 19 COLUM. J. GENDER & L. 965, 968 (2010) (offering “state visibility” to “explain why the poor are more likely than the wealthy to come within the regulatory and punitive arm of the state” through child services); See also ROBERTS, SHATTERED BONDS, *supra* note 16, at 9 (advancing a “visibility hypothesis” as a theory to explain higher removal rates for African-American children in areas where they “are a tiny minority”).

<sup>51</sup> LEROY H. PELTON, FOR REASONS OF POVERTY 111 (1987) (arguing that “child removal has survived as a major strategy in regard to child welfare problems among poor people”); Bridges, *supra* note 50, at 968-69 (describing “state intervention into poor women’s lives--in the form of removal of children from the home, the regulation of the home by child protective agencies, and the initiation of criminal or other legal proceedings” solely on the basis of “defining characteristics that can be seen on their bodies”). See also ROBERTS, SHATTERED BONDS, *supra* note 16, at 10 (commenting that child welfare practitioners, lawyers, and judges “routinely see nothing but Black parents and children in child welfare agencies and courts”).

<sup>52</sup> Douglas J. Besharov, *Child Abuse Realities: Over-Reporting and Poverty*, 8 VA. SOC. POL’Y & L. 165, 175 (2000) (noting “the poverty connection” between over-reporting and poor children subject to reports).

<sup>53</sup> Bruce A. Boyer and Amy E. Halbrook, *Advocating For Children in Care in a Climate of Economic Recession: The Relationship Between Poverty and Child Maltreatment*, 6 NW J. L. & SOC. POL’Y 300, 301 (2011) (explaining that “children living in poverty are at a higher risk of reported abuse or neglect”).

<sup>54</sup> See Roberts, *supra* note 49, at 26 (describing study of “poverty, joblessness, and residential stability” upon delivery of child protective services as a new branch of “community-based child welfare research”).

<sup>55</sup> See Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 588 (1997) (describing class bias against mothers on public assistance by child protection case workers who disregard their privacy rights during intake procedures). See also Bridges, *supra* note 50, at 968 (citing “a profound distrust of poor people” as the core motive of “state surveillance” resulting in the disproportionate rate of child removal from families living in poverty). Cf. PELTON, *supra* note 51 at 140 (noting parental “suspicion, fear, and distrust” of child welfare workers).

<sup>56</sup> While former Penn State officials under indictment are presumed innocent until proven guilty, the testimony of Curley and Schultz all but verifies their knowledge of McQueary’s eyewitness account of

Even if the victims ignored by Curley and Schultz were not living in poverty,<sup>57</sup> the irony of their indictments is based on the power they used to conceal the abuse of children who have a greater likelihood of drawing attention from child welfare services.<sup>58</sup> The privilege afforded these disadvantaged boys access to Penn State as visitors to the prestigious school actually excluded them from the safety of mandated reporting laws.<sup>59</sup> Power, prominence, and position undoubtedly played a role in the questionable contact between Sandusky and his victims.<sup>60</sup> Rather than use their power and position to disclose allegations against Sandusky, the former Penn State officials allowed him to continue asserting power, position, and prestige to victimize visitors to the Penn State campus.<sup>61</sup>

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child sexual abuse that they failed to report. Grand Jury Presentment I, p. 9-12. The indictment of Curley and Schultz arose from failure to report the incident involving Victim 2; however, evidence shows Schultz knew of at least one other alleged victim. He testified before the Grand Jury that he knew of 1998 sexual abuse allegations against Sandusky that also involved a boy in a Penn State locker room shower, but took no action until a later ban prohibiting Sandusky from taking boys in Penn State football lock rooms. *Id.*

<sup>57</sup> An estimated twenty-two percent of all American children live in poverty. U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, available at <http://www.census.gov/hhes/www/poverty/about/overview/index.html> (last visited July 15, 2012). Under federal guidelines, the annual income for a family of four living in poverty is less than \$23,050. *See* U.S. DEP'T OF HEALTH AND HUMAN SERV., 2012 POVERTY GUIDELINES, available at <http://aspe.hhs.gov/poverty/12poverty.shtml/12fedreg.shtml>.

<sup>58</sup> Besharov, *supra* note 52, at 176

<sup>59</sup> All of Sandusky's victims visited Penn State with him. Victim 1 testified that he attended a camp operated by The Second Mile on campus and attended pre-season football practices on campus with Sandusky. Grand Jury Presentment I, p. 2. Victim 2 was alleged sexually assaulted in a Penn State locker room shower. *Id.* at 6. Victim 3 testified that he acquiesced to Sandusky's invitations to accompany him to many locations on campus, including football games and a campus gym where sexual contact occurred in a shower. *Id.* at 13. Victim 4 testified to numerous sexual assaults in a locker room shower in a building near the football team's practice facility. He traveled to bowl games with team members and coaching staff. *Id.* at 14. Sandusky met Victim 5 at the Second Mile camp on campus and attended home and away games with Sandusky who exposed himself to the boy in a campus locker room shower. *Id.* at 16-18. Victim 6, subject of the 1998 allegations known to Schultz, testified that he attended Penn State football games with Sandusky who touched him sexually in a campus locker room shower. *Id.* at 18-19. Victim 7 testified that he attended football games and coaches' meetings with Sandusky, and ate in a campus dining room with Penn State athletes. He, too, testified to sexual contact initiated by Sandusky in a campus locker room shower. *Id.* at 20-21. Victim 8, not appearing before the Grand Jury, was seen in 2001 by a Penn State janitor in a locker room shower with Sandusky who performed oral sex on the boy who was described by the eyewitness as between 11 and 13 years old. *Id.* at 21-23. A later grand jury presentment identified Victim 9, who testified that he met Sandusky through the Second Mile camp, received money and gifts from Sandusky, went to Penn State football games with him, and was sexually assaulted by Sandusky from the age of 12 – 15. Grand Jury Presentment II, pp. 1-4. This presentment also identified Victim 10, who also testified that he met Sandusky through the Second Mile camp, received gifts of clothing from Sandusky who took him to Penn State football games and repeatedly performed oral sex on him. *Id.* at 3-4.

<sup>60</sup> *See* Press Release, Commonwealth of Pennsylvania, Office of the Attorney General (Nov. 5, 2011) at 4-5 (on file with author) [hereinafter, Attorney General Press Release I] (describing the Sandusky indictment as "a case about a sexual predator who used his position within the university and community to repeatedly prey on young boys").

<sup>61</sup> Schultz's alleged failure to report suspicions in 1998 and 2002 illustrates an *individual* pattern and practice of jeopardizing known victims of suspected abuse, while the purported failure to report also indicates an *institutional* policy and procedure of endangering potential future victims.

### Part III. Mandated Reporting of Suspected Child Abuse

The rationale for reporting suspected child abuse enlightens current debate on the roles and responsibilities of mandated reporters, such as former University administrators who were indicted for failure to disclose suspected child sexual abuse at Penn State.<sup>62</sup> Historical perspectives contextualize the convergence of poverty, power, and privilege in child protection that underlie the Penn State scandal.<sup>63</sup> Moreover, review of selected state mandated reporting laws provides a platform to compare statutes containing provisions that are absent from Pennsylvania law.<sup>64</sup> This comparison highlights specific statutory shortfalls that contributed to the Penn State tragedy and, thus, opens the door to reform.<sup>65</sup>

#### A. Rationale for Mandated Reporting Laws

Despite notions that the history of the child protection system lacks continuity,<sup>66</sup> consistent themes emerge that explain the function of modern mandated reporting laws.<sup>67</sup> While many other themes co-exist in the development of the child protection system,<sup>68</sup> the moral, economic, and social visions of the dominant culture have fashioned the rules, regulations, and regiment that guiding child protection practitioners today in our nation. These three threads - the moral material, the economic element, and the social strand - appear in distinctive patterns in the growth of child protectionism in the United States. Although these concepts are discrete, they are fluid notions that mutate over time to create compelling rationale for a flawed system demanding reform to avert other reporting fiascos of the same magnitude as the Penn State debacle.<sup>69</sup>

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<sup>62</sup> The Oregon legislature recently passed a divisive bill enumerating employees of colleges and universities as mandated reporters of suspected child abuse. H.B. 4016, 76th Leg. Assemb., Reg. Sess. (Or. 2012).

<sup>63</sup> See Drape, *supra* note 12, at 1 (describing Penn State as a “prominent” institution in higher education).

<sup>64</sup> See *infra* Part III.A.1-4.

<sup>65</sup> Deficiencies in the present statutory framework do not justify “total and consistent disregard by the most senior leaders at Penn State for the safety and welfare of Sandusky’s child victims.” Freeh Report, p. 14.

<sup>66</sup> See Sarri and Flynn, *supra* note 17, at 220 (depicting the history of policies, programs, and practices within the child welfare system as “fragmented, ad hoc [and] reactive” to the detriment of viable reform).

<sup>67</sup> Much of the literature tracing the rise of child protection embraced the perspective of child advocates.

See, e.g., SHIREMAN, *supra* note 11, at 14 (promoting a child-centered, family-focused model of services).

<sup>68</sup> See, e.g., Sarri and Flynn, *supra* note 17, at 220 (identifying a thematic approach to the history of child welfare as “three certainties that inform the field of child welfare: the dichotomy of public and private domains; the primacy of autonomous individualism; and the capacity for corrective intervention”).

<sup>69</sup> One scholar observes a “fundamental flaw” in the state’s dual role in child welfare and child protection, *i.e.*, agencies don’t “promote children’s welfare,” but “protect children from the effects society’s colossal failure to care enough about children’s welfare.” ROBERTS, SHATTERED BONDS, *supra* note 16, at 72. Likewise, one expert notes that the dual roles of a system removing children from parents while touting family preservation invariably renders the system “fundamentally flawed.” PELTON, *supra* note 51, at 139.

## 1. The Moral Material of Child Protection

First, child protectionists generally presume a moral deficiency in parents or in their children to justify the government's involvement in the parent-child relationship.<sup>70</sup> Early child removal law embodied character-building values of colonial communities.<sup>71</sup> *Parens patriae*, the common law doctrine that vests the state with the power to intervene on behalf of children in the absence of proper parental authority,<sup>72</sup> elevated officials in government to a position of moral primacy over families in the 17th and 18th centuries.<sup>73</sup> Some scholars decry the early use of moral codes to address the plight of children,<sup>74</sup> yet others embrace the moral basis of decisions to remove children from parental custody.<sup>75</sup>

As the nation advanced in the Industrial Revolution, the moral fitness of children remained critical to child protectionists creating a formidable infrastructure to inculcate values and virtues into 19th century children.<sup>76</sup> The theme of morality in child advocacy is entwined throughout history to the degree that some theorists attribute the origins of the entire body of jurisprudence governing families to ideologies of moral decency.<sup>77</sup> They argue that morality is so inextricably woven into the development of family law that the system requires radical re-shaping to reflect the realities of modern American life.<sup>78</sup>

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<sup>70</sup> Appell, *supra* note 55, at 608-09 (condemning misuse of the morally subjective “best interests standard” by child protective services that “disproportionately impacts poor families and families of color”).

<sup>71</sup> JOSEPH M. HAWES, *THE CHILDREN'S RIGHTS MOVEMENT: A HISTORY OF ADVOCACY AND PROTECTION* 5 (1991) (depicting New England stubborn child laws, the first code of child protection, as the evidence of “two seemingly contradictory” concepts of moral degeneracy in children and moral decadence in parents).

<sup>72</sup> Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 544 ST. LOUIS U. L.J. 113, 120-123 (explaining *parens patriae* as a source of authority for the government to remove incorrigible children and youth from unsuitable homes or to divest unfit parents of custody of their children); Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 63-65 (2006) (illustrating use of *parens patriae* to ensure the best interests of children when parents, guardians, or other custodians fail to do so).

<sup>73</sup> HAWES, *supra* note 71, at 7 (observing that *parens patriae* was invoked when the “the state claimed moral and religious authority” over colonial family life); Hafemeister, *supra* note 4, at 830-31 (noting early 1800 reform efforts to re-direct wayward youth through out-of-home placement in “houses of refuge”).

<sup>74</sup> Hamilton, *supra* note 72, at 31 (disparaging the moral foundations of American family law). *See also* Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775, 784 n.60 (1997) (criticizing “moral decisionmaking” as an obsolete paradigm in progressive models of family law adjudications).

<sup>75</sup> *See generally* David S. Tanenhaus, *Between Dependency and Liberty: The Conundrum of Children's Rights in the Gilded Age*, 23 LAW & HIST. REV. 351 (heralding the expansion of substantive due process under the Fourteenth Amendment in Illinois Supreme Court dependency proceedings in the late 1800s).

<sup>76</sup> HAWES, *supra* note 71, at 11-24 (detailing the rise of public schools, reform homes, and agencies erected to instill discipline, advance literacy, and promote principles among American boys and girls).

<sup>77</sup> Hamilton, *supra* note 72, at 67 (ascribing the moral foundations of family law to Judeo-Christian beliefs); Babb, *supra* note 74, at 775-76 (asserting that family law adjudication reflects judicial moral determinism).

<sup>78</sup> Hamilton, *supra* note 72, at 71 (advocating a new framework in family law to supplant moralism); Babb, *supra* note 74, at 776 (advancing interdisciplinary methods to replace the former family law moral agenda).

In the child protection area, it is predictable that the state would leverage its moral weight most often under the auspices of child safety against disadvantaged families.<sup>79</sup> Popular culture ignites a sense of moral superiority that rationalizes a disproportionate rate at which children living in poverty are removed from their homes and communities.<sup>80</sup> According to some researchers, rectifying the apparent moral turpitude of poor parents is a powerful force perpetuating pervasive inequities within the child protection system.<sup>81</sup> Even opponents of equity in child welfare evoke moralism to refute evidence that social status, income level, and racial identity impact investigations of suspected child abuse.<sup>82</sup> Thus, despite the divergent perspectives on equity in modern day child welfare practices, it is undeniable that morality played a role in the development of child protection laws.

## 2. The Economic Element of Child Protection

Poverty relief parallels the morality movement in the history of child protection. Just as the moral texture of child protection laws emerged in 17th century New England, a social movement to rescue children from indigence united the early child advocates.<sup>83</sup> Maintaining property for economic viability resulted in widespread labor exploitation of children without parents in both mercantile and agrarian sectors of colonial America.<sup>84</sup> The motive for establishing orphanages was not, however, altruistic as confirmed by reports of severe child beatings commonly administered in these early group homes.<sup>85</sup> Forming orphanages was designed solely to preserve public funds and class structure.<sup>86</sup>

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<sup>79</sup> Sarri and Flynn, *supra* note 17, at 222 (explaining that “[c]oercive state intervention under the guise of child protection would not be tolerated in middle-class two-parent families” who live beyond the reach of “public scrutiny and moralism” waged against single-headed households).

<sup>80</sup> Appell, *supra* note 55, at 608 (observing that government involvement in the parent-child relationship of “middle class families of the dominant culture” is less popular than intrusion in the lives of poor families); Fraidin, *supra* note 40, at 50-53 (interpreting “the master narrative” of child welfare that stereotypes poor families through “media storytelling” to justify a disproportional number of child abuse investigations).

<sup>81</sup> Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 627 (noting the stereotype of mothers on public assistance that depicts them living a “deviant lifestyle” that warrants “state intervention as a means of protecting their children”); Leroy H. Pelton, *Welfare Discrimination and Child Welfare*, 60 OHIO ST. L.J. 1479, 1479 (describing perceptions of parents of children in need as “lazy, ignorant, unintelligent, impulsive, prone to gambling and drinking, irresponsible, and immoral”).

<sup>82</sup> Bartholet, *supra* note 10, at 877 (commending literature purportedly making “impassioned moral case” for eradicating poverty resting at the center of disproportionality debate among child welfare scholars).

<sup>83</sup> CYNTHIA CROSSON-TOWER, UNDERSTANDING CHILD ABUSE AND NEGLECT 10 (2010) (describing 17th and 18th century social services undertaken by religious groups that benefitted poor children in America).

<sup>84</sup> HAWES, *supra* note 71, at 7-8 (explaining economic motives in early child placement practices).

<sup>85</sup> *Id.* at 8-9 (documenting evidence of child maltreatment frequently ignored by public officials as proof of common misunderstandings of “the nature of child abuse” during the 17th and 18 centuries).

<sup>86</sup> *Id.* at 9.

The Industrial Age steered the nation into a time of goodwill toward children.<sup>87</sup> Relieving children from urban destitution accompanied the perception of their moral degeneracy as social reformers emerged in the inner-city with a child-serving agenda.<sup>88</sup> Benevolence bonded to morality as the rationale for child protection in this new era.<sup>89</sup> During this time of urbanization and industrialization, Mary Ellen McCormack came to public attention as the first real “case” of child abuse and neglect in the United States.<sup>90</sup> The 1874 story of an eight-year old New York City girl exposed to physical brutality and economic deprivation prompted the nation’s first child protective services organization.<sup>91</sup> Child advocates formed the New York Society for the Prevention of Cruelty to Children (SPCC) as a private agency imbued with the power to investigate child maltreatment.<sup>92</sup> Thus, the “social protest” evolved with the economic motive for protecting children.<sup>93</sup>

### 3. The Social Strand of Child Protection

While Progressives initiated reform in various dimensions of American culture,<sup>94</sup> children and youth took center stage in the movement toward liberal social policies.<sup>95</sup> Similar to tireless efforts in colonial times to abolish oppressive child labor practices,

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<sup>87</sup> CROSSON-TOWER, *supra* note 83, at 10 (citing altruism among spiritual and secular segments of society).

<sup>88</sup> HAWES, *supra* note 71, at 13-24 (recounting mid-19th century reform addressing lack of moral guidance and physical sustenance for children); Kate Hollenbeck, *Between a Rock and a Hard Place: Child Abuse Registries at the Intersection of Child Protection, Due Process, and Equal Protection*, 11 TEX. J. WOMEN & L. 1, 5 (2002) (regarding 92,000 urban youth relocations as providing “wholesome” lifestyles in rural area).

<sup>89</sup> CROSSON-TOWER, *supra* note 83, at 10 (stating Charles Dickens’ tale of *Oliver Twist* generated mass interests and concerted attempts to tackle the social and economic hardships of children here and abroad).

<sup>90</sup> While history records countless incidents of child maltreatment, this matter featured testimony of the abused child, a criminal indictment of the abuser, and a court-ordered removal and out-of-home placement. Howard Markel, M.D., *Case Shined First Light on Child Abuse*, N.Y. TIMES, Dec. 15, 2009, available at [http://www.nytimes.com/2009/12/15/health/15abus.html?\\_r=1&pagewanted=print](http://www.nytimes.com/2009/12/15/health/15abus.html?_r=1&pagewanted=print). Frequently, accounts identify the young girl as Mary Ellen Wilson whose neighbor intervened on her behalf. *See, e.g.*, Hafemeister, *supra* note 4, at 832 (detailing Mary Ellen Wilson’s deplorable living conditions). *See also* CROSSON-TOWER, *supra* note 83, at 10 (noting Mary Ellen Wilson’s severe physical abuse); Hollenbeck, *supra* note 89, at 6 (writing that Mary Ellen Wilson was nine years old when maltreatment was detected).

<sup>91</sup> Hafemeister, *supra* note 4, at 833-34; CROSSON-TOWER, *supra* note 83, at 11.

<sup>92</sup> HAWES, *supra* note 71, at 20-22 (contrasting this particular group of reformers from similar organizations operating during this era based on the SPCC’s focus on eliminating child physical abuse and neglect); Hafemeister, *supra* note 4, at 833-34 (explaining authority delegated to SPCC from New York legislators); CROSSON-TOWER, *supra* note 83, at 11 (ascribing landmarks in child protection to the advocacy of SPCC).

<sup>93</sup> The 1853 rise of the Children’s Aid Society (CAS) was a similar movement assisting children and youth, albeit through employment and vocational instruction rather than advocacy. HAWES, *supra* note 71, at 18.

<sup>94</sup> *Id.* at 26 (noting “an age of reform” in American society that brought attention to America’s values).

<sup>95</sup> *Id.* (crediting the Progressive Era as “a great watershed so far as social policy toward children”). *But see* CROSSON-TOWER, *supra* note 83, at 11 (observing that the first World War “temporarily diverted attention from child protection” in the U.S.); Hafemeister, *supra* note 4, at 835 (critiquing the nation’s minimal focus on child abuse despite many White House conferences that “addressed a range of child welfare issues”). *See also* ROBERTS, SHATTERED BONDS, *supra* note 16, at 175 (assessing Progressive era public welfare as flawed due to its “social control of poor immigrant families and the total neglect of Black women”).

Progressives chose the harsh working conditions of children to address child poverty.<sup>96</sup> While new child labor laws began to alter the nation's old order of trade and industry,<sup>97</sup> the economic element and the social strand of the child protection movement merged to inspire forces seeking to resolve children's problems through New Deal legislation.<sup>98</sup>

Child advocates perceive the New Deal aid package as a form of child "safety."<sup>99</sup> Unfortunately, liberal plans to create security for children and families living in poverty through administrative agencies, progressive programs, and social services failed to provide legal remedies for children and youth.<sup>100</sup> Despite decades of discontent among child advocates after the New Deal,<sup>101</sup> federal financing eventually channeled society's child protection efforts into an operation that launched mandated reporting laws.

#### 4. Synthesizing Child Protection Themes: The Advent of Mandated Reporting

The federal government blended the moral, economic, and social threads of child protection seamlessly in the creation of the United States Children's Bureau in 1912.<sup>102</sup> The cords of morality, economic vitality, and social consciousness secured the agenda of an agency devoted to salient issues impacting children and youth in need of protection.<sup>103</sup> Moreover, it signaled a fresh course for child safety insofar as previous safeguards were state and local concerns driven by the prevailing moral, economic, and social climates.<sup>104</sup> This federal body dedicated to child welfare synergized state children's initiatives,<sup>105</sup> while it foreshadowed a permanent federal presence on the child protection landscape.

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<sup>96</sup> HAWES, *supra* note 71, at 44-53 (describing the 1904 formation of the National Child Labor Committee).

<sup>97</sup> See Sarri and Flynn, *supra* note 17, at 229 (exposing "rhetoric" of Progressives during the 1900s when "social control on children of color" tarnished reformists' reputation for improving child labor conditions).

<sup>98</sup> HAWES, *supra* note 71, at 72 (estimating that youth received forty percent of all New Deal entitlements).

<sup>99</sup> ROBERTS, SHATTERED BONDS, *supra* note 16, at 173 (characterizing the public welfare system created during the New Deal as "the federal safety net for poor children" later withdrawn by federal adoption law).

<sup>100</sup> HAWES, *supra* note 71, at 76 (contrasting social and legal advances for children under the New Deal).

<sup>101</sup> Hafemeister, *supra* note 4, at 836-37 (discounting the efficacy of social welfare to protect all children).

<sup>102</sup> SHIREMAN, *supra* note 11, at 92 (describing the Children's Bureau as "the first federal agency with a social policy agenda").

<sup>103</sup> HAWES, *supra* note 71, at 47; Hafemeister, *supra* note 4, at 834. The mission of the Children's Bureau was to investigate and report "upon all matters pertaining to the welfare of children and child life among all classes of our people." *Social Security Online History*, available at <http://www.ssa.gov/history/childb1.html> (last visited Apr. 16, 2012).

<sup>104</sup> See ROBERTS, SHATTERED BONDS, *supra* note 16, at 175 (noting "remarkable transformation" in public opinion as federal intervention replaced local charitable efforts, while Progressives remained cautious of "state dependency, moral degeneracy, and family breakup" in addressing issues of children and youth).

<sup>105</sup> Robert J. Lukens, *The Impact of Mandated Reporting Requirements on the Child Welfare System*, 5 RUTGERS J. L. & PUB. POL'Y 177, 188 (2007) (ascribing to the Children's Bureau a primary objective that "coordinated efforts by the states to protect children and prevent their abandonment").

Federal financing by the Children's Bureau sponsored research published in 1962 by Dr. C. Henry Kempe in *The Journal of the American Medical Association* entitled,<sup>106</sup> "The Battered Child Syndrome."<sup>107</sup> Dr. Kempe and his associates issued clinical findings that children presenting severe physical injuries were frequently harmed by caretakers, including parents.<sup>108</sup> As a result, the federal government sponsored a national round-table among the medical and social work communities to examine Kempe's pioneer study.<sup>109</sup> This interdisciplinary dialogue on the nature, diagnosis, and treatment of child abuse led the Children's Bureau to draft a model code that became a forerunner of contemporary mandated reporting laws.<sup>110</sup>

### B. State Mandated Reporting Laws

Mandated reporting laws were passed in all fifty states, as well as the District of Columbia, within the first few years of the release of Kempe's article on child abuse.<sup>111</sup> Unfortunately, these statutes failed to ensure child safety and subsequent revisions to state mandated reporting laws failed to meet growing demands for clinical treatment, support services, and out-of-home placement for victims of suspected child abuse.<sup>112</sup> Thus, similar to the influence of the Children's Bureau in coordinating state initiatives to address children's issues in the early 1900s, federal action shaped state practices that standardized mandated reporting laws to improve child protection laws in the 1970s.<sup>113</sup>

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<sup>106</sup> In the mid-1950s, the *Journal of the American Medical Association* featured a study of child abuse that was not as widely acclaimed as Dr. Kempe's article due to the fallacy that child abuse was restricted to "disadvantaged families." Hafemeister, *supra* note 4, at 837-38.

<sup>107</sup> Bruce and Halbrook, *supra* note 15, at 300 (describing Kempe's research as "groundbreaking" work); Hafemeister, *supra* note 4, at 838 (commenting on the significant effects of Kempe's recommendation that doctors report suspected intentional child maltreatment to law enforcement or child protective services); Hollenbeck, *supra* note 89, at 6-7 (noting that Kempe's work spawned a scientific approach to child abuse). *See also* Gary B. Melton, *Mandated Reporting: A Policy Without Reason*, 29 *CHILD ABUSE & NEGLECT* 9 (2005) (acknowledging Kempe's "remarkable legacy: a worldwide movement of professionals concerned with the safety of children" as one of the most significant contributions to child protection in America).

<sup>108</sup> Fraidin, *supra* note 40, at 9-10 (suggesting that Kempe overdramatized harm inflicted by child abusers).

<sup>109</sup> Hafemeister, *supra* note 4, at 839 (crediting this forum as the first national debate on mandated reporting).

<sup>110</sup> Hollenbeck, *supra* note 89, at 7. Various model statutes surfaced in the wake of heightened concern on the lack of protocol for medical professionals who detected child abuse. Hafemeister, *supra* note 4, at 840.

<sup>111</sup> Hafemeister, *supra* note 4, at 840; Hollenbeck, *supra* note 89, at 7; Melton, *supra* note 107, at 10.

<sup>112</sup> Hafemeister, *supra* note 4, at 840-41 (determining state mandated reporting laws of the 1960s as insufficient to evaluate reports of suspected child abuse and, thus, provide protection to at-risk children); Hollenbeck, *supra* note 89, at 8 (concluding that the influx of suspected child abuse reports resulting from early mandated reporting statutes proved futile to intervention needed on behalf of children and families).

<sup>113</sup> One of the most significant improvements to child protection was the rise of the state child abuse registry system in the early 1970s, which serves as a clearinghouse for states to record reports of suspected child abuse and track suspected perpetrators of child maltreatment in a jurisdiction. *See generally*,

Passage of the Child Abuse Treatment and Prevention Act of 1974 (CAPTA)<sup>114</sup> signaled the nation’s first major attempt to enact child protection legislation and, thus, symbolized the first comprehensive effort to regulate child safety in the United States.<sup>115</sup> Similar to the threads of morality and goodwill that bonded early child protectionists, the chords of morality materialized after the social consciousness of the 1960s to provide persuasive reasoning for the new federal law seeking to safeguard children and youth.<sup>116</sup> It was, however, economics that motivated lawmakers to support CAPTA due to its fiscal incentives to states that rallied around the law’s robust child abuse reporting standards.<sup>117</sup> Eligibility for the CAPTA lucrative funding stream was conditioned upon the states erecting extensive systems to track, investigate, and address suspected child abuse.<sup>118</sup>

One scholar explains that architects of CAPTA prevailed upon states, and society, to embrace moral, economic and social themes prevalent in the rise of child protection.<sup>119</sup> Observing that child abuse “was understood by some advocates as a social problem rooted in poverty and other societal inequities became widely interpreted as a symptom of individual parents’ mental depravity,” Professor Roberts describes CAPTA as the codification of a thematic transformation of child protection into a “medical model.”<sup>120</sup> Notwithstanding the shifting rationale of morality, economics, and social awareness,<sup>121</sup> the convergence of poverty, power, and privilege in contemporary child protection has produced a faulty scheme of mandated reporting requirements, such as those in Pennsylvania that failed to ensure safety for child sexual abuse victims at Penn State.

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Hollenbeck, *supra* note 89 (addressing divisive aspects of child abuse registries, *viz.*, constitutional issues of family privacy, children’s liberty interests, and gender, class, and racial discrimination in investigations).

<sup>114</sup> Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (Supp. IV 1974) (current version at 42 U.S.C.S. §§ 5101-5107 (LexisNexis 2010)).

<sup>115</sup> See Boyer and Halbrook, *supra* note 53, at 303-05 (describing CAPTA as “one of the most important legislative responses to the developing concept of child maltreatment”). See also Hafemeister, *supra* note 4, at 842-43 (recognizing that CAPTA initiated much needed uniformity in state child protection statutes).

<sup>116</sup> Melton, *supra* note 107, at 10 (confirming that Kempe’s followers “justly asserted society’s moral responsibility to ensure the safety of dependent children” in erecting formidable child protection measures).

<sup>117</sup> See Hafemeister, *supra* note 4, at 842-43 (detailing child protection measures, including new mandated reporting requirements, that states implemented to ensure the CAPTA funding stream); Hollenbeck, *supra* note 89, at 9-10 (enumerating administrative actions that states undertook to secure CAPTA dollars).

<sup>118</sup> In addition to funding for child abuse prevention and treatment, CAPTA introduced new child advocates to child protection, notably, guardians *ad litem*. Martin Guggenheim, *How Children’s Lawyers Serve State Interest*, 6 Nev. LJ. 805, 812 (noting the impact of CAPTA in increasing practitioners devoted to children).

<sup>119</sup> See *supra* Part III.A.

<sup>120</sup> ROBERTS, SHATTERED BONDS, *supra* note 16, at 14-15.

<sup>121</sup> Sarri and Flynn, *supra* note 17, at 230 (accepting an altered child welfare agenda in “the medical model approach of C. Henry Kempe, articulated as the ‘battered child syndrome,’ [which] captured the attention of child welfare advocates and diverted attention from structural issues of poverty, sexism, and racism.”)

#### IV. Mandated Reporting in Pennsylvania

The Child Protective Services Law (CPSL) sets forth specific requirements for mandated reporting of suspected child abuse in the Commonwealth of Pennsylvania.<sup>122</sup> Although there are three shortfalls within this statute that arguably contributed directly to the exclusion, concealment, and cover up in the child sexual abuse scandal at Penn State, the public expects numerous statutory reforms in the aftermath of the Sandusky trial.<sup>123</sup> The following are striking statutory flaws that dilute the strength of mandated reporting: (1) the exclusion of certain children from the scope of reporting under section 6311(a),<sup>124</sup> such as Sandusky's child sexual abuse victims; (2) the limited reporting duty of staff members of institutions required to report under section 6311(c),<sup>125</sup> including personnel like ex-Penn State leaders under indictment; (3) the lack of reporting accountability for any "person in charge" of an entity employing personnel who come in with children.<sup>126</sup>

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<sup>122</sup> Pennsylvania Child Protective Services Law (CPSL), 23 Pa. C.S. § 6301, *et seq.*

<sup>123</sup> The Task Force will recommend various reforms. Jan Murphy, *Beef Up Reporting of Abuse, Pennsylvania's Task Force on Child Protection is Told*, PATRIOT-NEWS, May 14, 2012, available at [http://www.pennlive.com/midstate/index.ssf/2012/05/beef\\_up\\_reporting\\_of\\_abuse\\_pen.html](http://www.pennlive.com/midstate/index.ssf/2012/05/beef_up_reporting_of_abuse_pen.html)

<sup>124</sup> Section 6311(a) provides, in pertinent part, as follows:

**§ 6311. Persons required to report suspected child abuse.**

(a) **General rule.**—A person who, in the course of employment, occupation or practice of a profession, comes into contact with children shall report or cause a report to be made in accordance with section 6313 (relating to reporting procedure) when the person has reasonable cause to suspect, on the basis of medical, professional or other training and experience, that a *child under the care, supervision, guidance or training of that person or of an agency, institution, organization or other entity with which that person is affiliated is a victim of child abuse*, including child abuse by an individual who is not a perpetrator. (Emphasis added.)

<sup>125</sup> Section 6311(b) designated mandated reporters in the following manner:

(b) **Enumeration of persons required to report.** -- Persons required to report under subsection (a) include, but are not limited to, any licensed physician, osteopath, medical examiner, coroner, funeral director, dentist, optometrist, chiropractor, podiatrist, intern, registered nurse, licensed practical nurse, hospital personnel engaged in the admission, examination, care or treatment of persons, Christian Science practitioner, member of the clergy, school administrator, school teacher, school nurse, social services worker, day-care center worker or any other child-care or foster-care worker, mental health professional, peace officer or law enforcement official.

<sup>126</sup> Section 6311(b) provides as follows:

(c) **Staff members of institutions, etc.**--Whenever a person is required to report under subsection (b) in the capacity as a member of the staff of a medical or other public or private institution, school, facility or agency, that person shall immediately notify *the person in charge of the institution, school, facility or agency or the designated agent of the person in charge*. Upon notification, the person in charge or the designated agent, if any, shall assume the responsibility and have the legal obligation to report or cause a report to be made in accordance with section 6313. This chapter does *not require more than one report from any such institution, school, facility or agency*. (Emphasis added.)

While deficiencies in Pennsylvania’s mandated reporting requirements abound, this analysis of statutory shortfalls is relevant to examine anticipated defenses of former Penn State leaders who failed to report child sexual abuse charges against Sandusky.<sup>127</sup> Review of the statutory “gaps” holds promise for legislative reform that deters mandated reporters from avoiding their statutory duty to protect potential child abuse victims.<sup>128</sup> Furthermore, revealing these inadequacies in the CPSL exposes systemic flaws within child protective services in the United States that produce intolerable social inequity.<sup>129</sup>

#### A. Nexus with the Victim: Visiting Child Exclusion

Statutory requirements for mandated reporters under the CPSL are triggered only for a narrow class of children who are suspected victims of child abuse in Pennsylvania. This restriction on the statutory obligations of mandated reporters is counter-intuitive to the aim of child protection laws, namely, the detection of possible child maltreatment.<sup>130</sup> More germane, limiting a classification of children subject to mandated reporting shows *how* child sexual abuse victims at Penn State may fall outside the purview of the CPSL and *why* ex-University officials may avoid statutory reporting obligations by saying, "They're not our student."<sup>131</sup>

Pursuant to section 6311(a), the subject of suspected child abuse reports must be “a child under the care, supervision, guidance or training of that person or of an agency, institution, organization or other entity with which that person is affiliated is a victim of child abuse.” This provision is arduous insofar as it requires examining the relationship of

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<sup>127</sup> The basis of the statutory analysis set forth in Part IV.A-C has been the subject of continuing legal education and webinar courses presented to the Dauphin County (Pennsylvania) Bar Association and the Pennsylvania Bar Association by the author who was accompanied by Ron and Julia L. Tilley, co-founders of Justice4victim2. Material was modified for use in this article with the permission of the co-presenters.

<sup>128</sup> Ex-Penn State officials Curley and Schultz were indicted for violating the following CPSL provision:

**§ 6319. Penalties for failure to report or to refer.**

A person or official required by this chapter to report a case of suspected child abuse or to make a referral to the appropriate authorities who willfully fails to do so commits a misdemeanor of the third degree for the first violation and a misdemeanor of the second degree for a second or subsequent violation.

<sup>129</sup> See Bridges, *supra* note 50, at 979-80 (exploring one of the inequities perpetuated by child protective services as violating privacy rights of poor mothers in contrast to “wealthier, privately-insured women”).

<sup>130</sup> Lukens, *supra* note 105, at 219 (clarifying that “[t]he principal function of the reporting requirements is to identify children at risk”).

<sup>131</sup> An attorney for Schultz has stated that mandated reporting laws did not apply to his client in this case because the victims were not under “the care and supervision of the organization for which he work[ed].” Sara Ganin and Jan Murphy, *Penn State Athletic Director Tim Curley, VP Gary Schultz Step Down in Wake of Jerry Sandusky Scandal*, PATRIOT-NEWS, Nov. 7, 2011, available at [http://www.pennlive.com/midstate/index.ssf/2011/11/penn\\_states\\_curley\\_schultz\\_are.html](http://www.pennlive.com/midstate/index.ssf/2011/11/penn_states_curley_schultz_are.html).

a child to an entity before the suspected child abuse must be reported, while the statute should encourage the immediate reporting of suspected abuse *before* any investigation.<sup>132</sup> Excluding “visiting children” as an exempt class within mandated reporting laws restricts child safety to the detriment of children and professionals charged to protect them.<sup>133</sup>

First, the condition that a relationship or “nexus” exist between a person or an entity and a child *before* the statutory reporting duty applies excludes a classification of children who may be subject to abuse, such as sexual abuse victims visiting Penn State.<sup>134</sup> Under section 6311(a), a child who visits an entity without confirmation that he or she is “under the care, supervision, guidance or training” of a mandated reporter, or an entity where the reporter is affiliated, falls outside of safety afforded to a child with the nexus. This exclusionary provision delays detection of suspected child abuse, disqualifies a class of vulnerable victims from state intervention, and jeopardizes other potential victims.<sup>135</sup>

Second, the nexus required by section 6311(a) places an onerous obligation upon mandated reporters to inquire into a child’s relationship with an entity to ascertain if he is “under the care, supervision, guidance or training” of the reporter who suspects the abuse. This statutory shortfall shifts responsibility for investigating suspected child abuse to the mandated reporter, rather than leaving investigative duties with a child protection agency that is imbued with power, expertise, and resources to conduct thorough investigations.<sup>136</sup> While a preliminary probe to determine the relationship between a victim of suspected child abuse and a mandated reporter does not foreclose child safety, the additional inquiry necessary to satisfy the statutory nexus detracts from the urgency warranted by credible reports of suspected child abuse, such as those implicating Sandusky in 1998 and 2001.<sup>137</sup>

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<sup>132</sup> SHIREMAN, *supra* note 11, at 53 (exploring child welfare’s goal to provide “short-term, crisis-oriented” services that suggests unfettered notice of known child safety risks to any child in harm’s way).

<sup>133</sup> The term “visiting children” is defined herein as children who are unaffiliated with an entity that has any employee, independent contractor, or volunteer who comes into contact with children as a result of association with the entity. The author did not encounter the term “visiting children” in her research.

<sup>134</sup> A class of children who are likely to be poor and categorically excluded from state protection raises equal protection issues if that classification bears no rational relationship to a legitimate state interest. Bridges, *supra* note 50, at 1001 (noting rational basis review of laws that “adversely impacts the poor”).

<sup>135</sup> Two of Sandusky’s victim testified that they met him after McQueary stated that he had informed former Penn State officials that he witnessed sexual contact between Sandusky and Victim 2 in 2001. Victim 1 testified that he met Sandusky in 2004 or 2006. Grand Jury Presentment I, p. 2. Victim 9 testified that he met Sandusky in 2005. Grand Jury Presentment II, p. 1.

<sup>136</sup> Relevant portions of Chapter 3490 of Title 55 of the Pennsylvania Code, 55 Pa. Code § 3490 (2012), set forth responsibilities of the Department of Public Welfare upon receipt of a report of suspected child abuse.

<sup>137</sup> See Freeh Report, p. 39 (concluding that child sexual abuse acts that Sandusky committed after 1998 could have been protected if Penn State leaders took action when they learned of the 1998 investigation).

Similar to the unsavory consequences for Sandusky’s child sexual abuse victims, failure to report suspected abuse involving visiting children polarizes them as outsiders. The exclusion of visiting children from mandated reporting under section 6311(a) reflects a separatist stance towards children *because* they are visitors “who don’t belong here,”<sup>138</sup> while the statutory exclusion further reinforces “the differential impact that child welfare policies and practices have had on those with limited access to rights and resources.”<sup>139</sup> Predictably, the selective protection of section 6311(a) excludes vulnerable visiting children who lack the mandated reporter’s “care, supervision, guidance or training.”<sup>140</sup>

Reforming section 6311(a) to eliminate the nexus requirement will correct the statutory shortfall that excludes visiting children who become victims of suspected abuse. Interestingly, one of the legal criteria for determining continued protective custody at the informal hearing phase of proceedings requires child protective services to file a formal petition of dependency when, *inter alia*, a child lacks “proper parental care or control.”<sup>141</sup> If the conditions of a child who lacks sufficient “care and control” would warrant formal attention through a dependency petition, then it stands to reason that the conditions of a child who is a victim of suspected child abuse and similarly lacks a mandated reporter’s “care, supervision, guidance or training” should also warrant formal attention.

Omitting language that excludes a class of children who may be subjects of suspected child abuse reports, namely, “a child under the care, supervision, guidance or training of that person or of an agency, institution, organization or other entity with which that person is affiliated,” would provide statutory coverage to all visiting children.<sup>142</sup> Moreover, providing statutory protection for a child who lacks a mandated reporter’s “care, supervision, guidance or training” provides parallel interpretation under the CPSL to eliminate disparate treatment of visiting children.<sup>143</sup>

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<sup>138</sup> See ROBERTS, SHATTERED BONDS, *supra* note 16, at 10 (observing that separation of children within specific sectors of the child protection system is akin to apartheid); Dixon, *supra* note 10, at 109 (depicting dependency court proceedings as exemplifying the separatist practices in the child protection system).

<sup>139</sup> Sarri and Flynn, *supra* note 17, at 228 (identifying “the poor, immigrants, and people of color” as stakeholders in child welfare who have been historical excluded from fair participation the system).

<sup>140</sup> 23 Pa. C.S. § 6311 (a).

<sup>141</sup> 23 Pa. C.S. § 6315 (d).

<sup>142</sup> This language creating a nexus requirement in section 6311(a) was enacted in 2006 as a part of omnibus amendments amendment to the Pennsylvania Consolidated Statutes. Act of Nov. 29, 2006, P.L. 1581, No. 179 (Sess. of 2006, No. 2006-179).

<sup>143</sup> While not all “visiting children” are poor, this classification renders them disadvantaged under the law. Bridges, *supra* note 50, at 1010 (considering poverty as a suspect classification under visibility theory).

Among the thirty-two states with mandated reporting laws that designate specific professionals who must report,<sup>144</sup> sixteen states and the District of Columbia require a nexus or relationship that includes visiting children.<sup>145</sup> Even though these states statutes require a connection with a child who is the subject of a suspected child abuse report, these mandated reporting laws protect the children who visit entities such as Sandusky's child sexual abuse victims who visited the Penn State campus with him.

The nexus requirement generally appears in language stating that a mandated reporter is only required to notify the authorities of child abuse suspicions of when acting “in an official capacity or within the scope of employment.”<sup>146</sup> Three mandated reporting statutes with a nexus requirement have an additional restriction that a mandated reporter must encounter or come in contact with a child before reporting suspected child abuse. For example, the New York law imposes a duty to report child abuse suspicions only if a “child comes before them in their professional or official capacity.”<sup>147</sup> Likewise, Oregon and Wisconsin have laws that require contact between a child and a mandated reporter.<sup>148</sup> The remaining sixteen state statutes with no nexus requirement provide broad protection for all children who may become the victims of suspected child abuse.<sup>149</sup>

Pennsylvania is only state with a nexus requirement excluding visiting children, such as the Sandusky child sexual abuse victims, due to the restrictive language in section 6311(a). Pennsylvania lawmakers should reform this mandated reporting anomaly.

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<sup>144</sup> All states have mandated reporting statutes, but only thirty-two states and the District of Columbia specify certain professions who are required to report. The eighteen states that require anyone who suspects child abuse to report it also enumerate certain professionals with reporting obligations, except New Jersey and Wyoming. The following states require anyone who suspects child abuse to report: Delaware, Florida, Idaho, Indiana, Kentucky, Maryland, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Utah, and Wyoming. *See* CHILD WELFARE INFORMATION GATEWAY, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, 2010, available at [www.childwelfare.gov/systemwide/laws\\_policies/statutes/manda.cfm](http://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.cfm).

<sup>145</sup> Along with the District of Columbia, Alaska, California, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachusetts, Montana, Nevada, New York, North Dakota, Ohio, South Carolina, Virginia, and Wisconsin require a nexus between the child-subject of a suspected child abuse report and a reporter.

<sup>146</sup> For example, California law requires a report “whenever the mandated reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect.” CAL. PENAL CODE § 11166 (2010).

<sup>147</sup> N.Y. SOC. SERV. LAW § 413 (2010). In addition, the mandated reporter must have “personal knowledge of facts, conditions or circumstances” that forms the basis of the suspicions of child maltreatment. *Id.*

<sup>148</sup> Wisconsin law requires a strict nexus insofar as the child be “seen” a mandated reporter “in the course of professional duties” before an obligation to report will apply. WIS. STAT. § 48.981 (2) (a) (2010).

<sup>149</sup> Alabama, Arizona, Arkansas, Colorado, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, South Dakota, Vermont, Washington, and West Virginia require no nexus or relationship between a child who is the subject of a suspected child abuse report and a reporter.

### B. Staff Members of Institutions: Multi-level Reporting

In addition to eliminating protection for visiting children who may become victims of suspected child abuse, the CPSL limits the duties of mandated reporters. Specifically, mandated reporters who are also employees of certain institutions are not required to report suspected child abuse directly to the state child protection authorities; rather, these staff members are required to hand over reporting duties to their supervisors. This pass-the-buck conduct of the CPSL condones the culture of concealment, collusion, and complicity that may offer Curley and Schultz the defense, “Well, I told my boss.”<sup>150</sup>

Section 6311(c) provides that when a mandated reporter is “a member of the staff of a medical or other public or private institution, school, facility or agency, that person shall immediately notify the person in charge of the institution, school, facility or agency or the designated agent of the person in charge.” Although the current statute states that “the person in charge or the designated agent of the person in charge” will acquire both “the responsibility and...the legal obligation” to notify child protection authorities of the suspected abuse,<sup>151</sup> this provision postpones notification of possible child maltreatment.

Just as the initial inquiry required to comply with the nexus of section 6311(a) delays mandated reporting, notifying “the person in charge or the designated agent” before reporting suspected abuse defers both detection and treatment of child abuse. Moreover, an additional reporting layer to “the person in charge or the designated agent” increases the likelihood that inaccurate reports will be filed with child protective services while the person who first suspected the child abuse remains silent under the law.<sup>152</sup> Thus, the staff member notification provision of section 6311(c) fails to ensure adequate accountability for mandated reporters employed by institutions on two fronts.

First, a mandated reporter with first-hand knowledge of suspected child abuse abdicates statutory responsibility by hiding behind the cloak of supervisory personnel. Institutions identified in section 6311(c), such as hospitals and schools, typically have administrative levels between staff members and “the person in charge of the institution.” These layers of administration frequently pose communication hurdles for frontline staff

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<sup>150</sup> Despite questions on the statutory duty of former Penn State officials to report suspected child sexual abuse against Sandusky, most would agree on a “moral or ethical” obligation of each individual with knowledge of the allegations to disclose the accusations. *See, e.g.*, Attorney General Press Release II.

<sup>151</sup> 23 Pa. C.S. § 6311(c).

<sup>152</sup> At Penn State, McQueary was identified as one of the staff members who discovered Sandusky’s child abuse that ignited the scandal involving former University administrators. Grand Jury Presentment I, p. 7.

members who are most likely to encounter the victims of suspected child maltreatment. Once again, this shortfall opens the door to a plausible defense for the former Penn State administrators who do not typically have contact with children during their work.<sup>153</sup>

The Penn State case illustrates the dangers of this multi-level reporting model.<sup>154</sup> The grand jury investigating Sandusky heard testimony from four administrators who received suspected child sexual abuse reports, including former Penn State President Spanier who was “the person in charge of the institution”<sup>155</sup> when he received a report. Any four of these former Penn State officials could have informed child protection authorities of McQueary’s eyewitness account of Sandusky molesting a young boy in the Penn State locker room shower, but none of them reported or tried to identify the boy.<sup>156</sup> Notifying “the person in charge or the designated agent of the person in charge,” rather than child protection services, impeded detection of Sandusky’s child sexual abuse.<sup>157</sup>

Second, as further evidence of multi-level mandated reporting gone wrong, inaccurate reports of Sandusky’s child sexual abuse confirms the dire need for reform. According to the eyewitness account, Sandusky was discovered naked in a Penn State locker room shower performing anal sex on a boy “estimated to be ten years old.”<sup>158</sup> Descriptions of this encounter were reported directly to Paterno who, in turn, informed his immediate supervisor Curley that Sandusky was seen “fondling or doing something of a sexual nature to a young boy.”<sup>159</sup>

The eyewitness repeated what he saw to Curley and Schultz, but Curley testified that he merely received a report of “inappropriate conduct” and emphatically denied that he was informed of any “sexual conduct” or “anal sex” involving Sandusky and a boy.<sup>160</sup> Schultz testified to a similar watered down version of what the eyewitness recounted,

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<sup>153</sup> The attorney for Schultz interprets the statute as limiting his client’s reporting obligation by stating that “the mandated reporting rules only apply to people who come into direct contact with children.” Ganin and Murphy, *supra* note 131.

<sup>154</sup> One observer describes the lack of administrative accountability in the multi-level reporting model as “putting the fox in charge of the henhouse.” David Crary, *PSU Scandal Stirs Debate Over Abuse Reporting Laws*, ASSOCIATED PRESS, Nov. 10, 2011 (quoting licensed clinical social worker Julia Tilley), available at [http://www.syracuse.com/news/index.ssf/2011/11/penn\\_state\\_scandal\\_stirs\\_debat.html](http://www.syracuse.com/news/index.ssf/2011/11/penn_state_scandal_stirs_debat.html).

<sup>155</sup> Grand Jury Presentment I, p. 10.

<sup>156</sup> *Id.* at 11. See also Freeh Report, p. 14

<sup>157</sup> Freeh Report, p. 14 (condemning Spanier, Schultz, Curley, and Paterno who all “failed to protect against a child sexual predator harming children for over a decade”).

<sup>158</sup> *Id.* at 6.

<sup>159</sup> *Id.* at 7.

<sup>160</sup> *Id.* at 8.

while Spanier denied that the incident reported to him involved sexual misconduct and that he was not even aware of the identity of the person who reported the child abuse.<sup>161</sup> The initial account of suspected child sexual abuse was distorted on multiple reporting levels at Penn State due to statutory silencing of a staff member under section 6311(c).<sup>162</sup>

At its worse, this multi-level mandated reporting compromises child safety by condoning concealment (broken assurances to probe a credible child abuse report),<sup>163</sup> communicating chaos (who heard what),<sup>164</sup> and carrying confusion (unknown identity of the staff member who witnessed child sexual abuse on the premises of the institution).<sup>165</sup> At its best, the staff member notification provision promotes interrupted, inaccurate, and ineffective reporting of suspected child abuse by state mandated institutional reporters.<sup>166</sup> Society vests child welfare agencies with responsibility for protecting all children.<sup>167</sup> States have an undeniable interest in operating mandated reporting systems that restore the rightful role and responsibility to mandated reporters of suspected child abuse.<sup>168</sup> Consequently, eliminating multi-level mandated reporting meets that state interest.<sup>169</sup>

Direct notification of suspected child abuse to child protective services by staff members of institutions can avoid the snares of a multi-level mandated reporting system. First, adding language to section 6311(c) for reports to child protection authorities *and* “the person in charge or the designated agent of the person in charge” restores statutory reporting duties to the mandated reporters best suited to file instant and accurate reports, namely, institutional staff members with first-hand knowledge of suspected child abuse.

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<sup>161</sup> *Id.* at 10.

<sup>162</sup> Once again, no shortcoming in the CPSL excuses the “striking lack of empathy for Sandusky’s victims by failing to inquire as to their safety and well-being.” Freeh Report, p. 14. Moreover, there is no statutory provision that prevented the eyewitness from circumventing the multi-level reporting protocol by reporting his suspicions directly to child protective services. The present analysis is designed to reveal the most glaring “gaps” in Pennsylvania mandated reporting requirements that the Penn State case study illustrates.

<sup>163</sup> *Id.* at 8 (Curley and Schultz told the eyewitness “they would look into” his allegation).

<sup>164</sup> *Id.* (Curley and Schultz denied that the eyewitness reported any form of suspected child sexual abuse).

<sup>165</sup> *Id.* at 10 (the “person in charge” of Penn State claims he never knew who initially reported the abuse).

<sup>166</sup> Lukens, *supra* note 105, at 180-81 (describing inefficiencies resulting from over-reporting and underreporting suspected child abuse and neglect by mandated reporters).

<sup>167</sup> SHIREMAN, *supra* note 11, at 56 (explaining that “[t]he community has, to a large extent, delegated the responsibility for protecting children’s rights to child welfare agencies and juvenile (or family) courts”).

<sup>168</sup> See Lukens, *supra* note 105, at XX n.136 (citing *Croft v. Westmoreland County Child. & Youth Servs.*, 103 F.3d 1123, 1125 (3d Cir. 1997) for the proposition that unhindered child abuse investigations further “the compelling governmental interest in the protection of children”).

<sup>169</sup> Questions arise as to the level of state interest afforded to child safety in the field of child protection. See e.g., James G. Dwyer, *Parents’ Self-Determination and Children’s Custody: A New Analytical Framework For State Structuring of Children’s Family Life*, 45 ARIZ. L. REV. 79, 113 (arguing that there is “a compelling state interest” in the welfare of children limiting parental authority in custody disputes).

Second, statutory language explicitly stating that any staff member notification to “the person in charge or the designated agent of the person in charge” would never “relieve the mandated reporter of the obligation to make a report” to state authorities resolves problematic aspects of multi-level mandated reporting in section 6311(c).<sup>170</sup> Pennsylvania is now among fifteen states with specific reporting protocol for staff members of institutions.<sup>171</sup>

There are several different types of staff member mandated reporting provisions. The most common relieves a staff member of the reporting obligation, which transfers to the person in charge, or a designee, who becomes responsible for reporting the suspected child abuse to child protective services or to law enforcement authorities. Approximately half of all states with specific staff member mandated reporting protocol are this type.<sup>172</sup>

Next, there are five staff member statutes that do not transfer the reporting duty, but the staff member is required to report directly to child protection or law enforcement and must also notify the person in charge, or a designee, of the suspected child abuse.<sup>173</sup> In other words, five of the fourteen states with staff member provisions require staff to report to state authorities in addition to reporting to a person in charge and or designee.

Finally, there are two remaining states with staff member notification procedures whereby the staff member has an option to report suspected child abuse to the person in charge, or a designee, who becomes responsible for reporting suspected child abuse.<sup>174</sup> In these states, the mandated reporting duty is not transferred unless the staff member exercises the option to report to the person in charge, or a designee.

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<sup>170</sup> Alaska and Michigan statutes contains similar language specifying that reporting suspected child abuse to a supervisor does not release a mandated reporter of any duty to report to child protective services.

<sup>171</sup> Connecticut, Georgia, Hawaii, Idaho, Indiana, Maine, Maryland, Massachusetts, Michigan, Missouri, New York, Virginia, West Virginia, and Wyoming have mandated reporting provisions for staff members. Although Alaska, Illinois, Kentucky, and Texas refer to staff members in their mandated reporting statutes, they are not included as states with staff member reporting because they do not require reports to the person in charge of an institution, or a designee; rather, the statutes specifically provide that a staff member must report directly to authorities even if they notify supervisory personnel at the institution where employed. See Alaska Stat. § 47.17.020(g) (2010) (report to supervisor does not suspend obligation to report to child protection agency); Ky. Rev. Stat. Ann. § 620.030(2) (West 2010) (individual is not relieved of duty to report suspected child abuse even if supervisor receives report); Tex. Fam. Code Ann. § 261.101 (b) (West 2010) (professional may not delegate reporting duty or rely on another to report suspected child abuse).

<sup>172</sup> The statutes in Georgia, Idaho, Indiana, Maine, Missouri, New York, South Dakota and West Virginia require the staff member to report suspected child abuse only to the person in charge who report suspected child abuse to child protection or law enforcement authorities instead of the staff member.

<sup>173</sup> Connecticut, Hawaii, Maryland, Michigan, Wyoming are states with statutes that require staff member to report suspected child abuse to officials both outside and inside of the institution where employed.

<sup>174</sup> Massachusetts and Virginia have these optional reporting provisions for staff members.

### C. Institutional Accountability: Reciprocal Reporting

There is no provision under the CPSL that requires child protective services to notify an institution specified in section 6311(c) if a suspected child abuse report involves “a child under the care, supervision, guidance or training” of that particular institution. There is neither a statutory requirement to notify an institution if “a member of the staff” reports suspected child abuse, nor a provision that requires notification to an institution if “a member of the staff” is documented as a suspect in a report of possible child abuse.<sup>175</sup> Entities, such as hospitals and schools, may never receive notification of suspected child abuse even if a report discloses possible child maltreatment that occurred on its premises.

In other words, an institution specified in section 6311(c) must report suspected child abuse to child protective services, but there is no reciprocal reporting provision that requires child protective services to notify that institution whenever any report involves “a child under the care, supervision, guidance or training” or “a member of the staff” affiliated with that entity. This statutory gap dilutes the strength of mandated reporting laws by isolating, and insulating, institutions identified in section 6311(c) from reports of suspected child abuse involving potential victims and suspects affiliated with that entity.

The absence of reciprocal reporting requirements between institutional mandated reporters and child protective services agencies is another communication conundrum.<sup>176</sup> The nonexistence of a statutory notice requirement to institutional mandated reporters is similar to the pitfalls of multi-layer mandated reporting in section 6311(c) because it invariably inhibits information, instigates inaccuracies and, hence, impedes investigation. Failure to inform institutional reporters of suspected child abuse reports involving that entity when child protective services receives a report further alleviates administrative accountability that allows “the person in charge or the designated agent” to easily say, “That's not what I heard.”<sup>177</sup>

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<sup>175</sup> If available to the mandated reporter, suspected child abuse reports are required to contain the name of the child and the name of “the person responsible for causing the suspected abuse.” 23 Pa. C.S. § 6311(c).

<sup>176</sup> “Reciprocal reporting” as used in this article means mutual reporting between institutional mandated reporters and child protective services or law enforcement. The author does not claim to have coined the term in this analysis of mandated reporting; the term “reciprocal reporting” is recognized in the field of juvenile justice in reference to shared information between public school districts and law enforcement. *See, e.g.*, Illinois Community Unity School District Policy 410.01 (implementing reciprocal reporting).

<sup>177</sup> Despite graphic details of the shower incident that McQueary testified that he witnessed, the grand jury heard conflicting testimony from four former Penn State administrators as to the exact nature of what McQueary reported to Paterno, Curley, and Schultz. Grand Jury Presentment I, pp. 7-8, 10.

There are limited circumstances when an institution specified in section 6311(c) may obtain details of a suspected child abuse report even if the entity is not the reporter, but these provisions are insufficient to establish a “reporting loop” under the CPSL.<sup>178</sup> The reporting loop or reciprocal reporting necessary to fill the statutory gap would require institutions to receive notice from child protective services or law enforcement whenever a suspected child abuse report involves any child affiliated with the institution, a staff member of the institution files a report, or a staff member is a suspect in a report. Notice to entities set forth in section 6311(c) creates institutional accountability for child safety by notifying institutional mandated reporters capable of taking precautions to protect potential victims and assist authorities in the appropriate investigation.

In the Penn State matter, reciprocal reporting could have instilled institutional accountability in former University administrators who failed to follow through on an investigation of Sandusky in 1998 involving Victim 6 and failed to report the eyewitness account of the locker room shower incident of child sexual abuse involving Victim 2.<sup>179</sup> A reporting loop in form of official notification of allegations of suspected child abuse to “the person in charge” of the institution, the former University president, would have made concealment of Sandusky’s decade-long child sexual abuse virtually impossible.<sup>180</sup>

The Connecticut reporting statute serves as a prototype for reciprocal reporting. This law contains the only provision that requires notification of “the person in charge” of an institution, or a designee, if a mandated reporter identifies “a member of the staff” as a suspect in a report of possible child abuse. In turn, the person in charge must notify the parent or child who is suspected of having been abused.<sup>181</sup>

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<sup>178</sup> Under the CPSL, child protective services agency must “immediately commence an appropriate investigation and see the child immediately if emergency protective custody is required or has been or shall be taken or if it cannot be determined from the report whether emergency protective custody is needed.” 23 Pa. C.S. § 6368(a). Although investigations include “an interview with those persons who are known to have or may reasonably be expected to have, information related to the incident of suspected child abuse,” 55 Pa. Code § 3490.55, the scope of investigation is discretionary. *See* Subsection 3490.55(d)(7) (suspected child abuse investigation involving student may include school staff mandated reporters). Thus there is no requirement that an institution receive notice if a child affiliated with it has been the subject of a report).

<sup>179</sup> Although Curley and Schultz knew that University police and child protective services investigated the 1998 sexual assault of Victim 6 in a locker room shower, neither of them reported the 2002 shower incident even though Schultz “acknowledged that there were similarities between the 1998 and 2002 allegations.” Grand Jury Presentment I, p.9.

<sup>180</sup> In the same vein, thorough oversight and leadership of the University police investigation of Sandusky in 1998 “may have elicited candid responses [from Sandusky] such as the identification of other victims.” Freeh Report, p. 46.

<sup>181</sup> CONN. GEN STAT. § 17A-101B (2010).

## Part V. Challenging Reform to Mandated Reporting Laws

Despite pressure to tightened child protection laws in the aftermath of the Penn State scandal,<sup>182</sup> reforming mandated reporting law would not remain unchallenged.<sup>183</sup> Adversaries of proposed reform extending coverage to visiting children,<sup>184</sup> eliminating multi-level reporting,<sup>185</sup> and increasing accountability for mandated reporters<sup>186</sup> resist expanding *any* measures that mandate professionals to report suspected child abuse.<sup>187</sup> Others opponents of reform assert that mandated reporting is grossly inefficient and, thus, any reform should restrict, rather than increase, mandated reporting requirements.<sup>188</sup>

Exploring the views of legal scholars, social commentators, and child advocates reveals the philosophical, cultural, and political tension surrounding mandated reporting. Critical examination of resistance to reform uncovers a larger vision of those who favor the status quo perpetuating the pervasive social inequities of child protective services.<sup>189</sup> Confronting these forces that remain hostile to equity for all children and families will support policy makers, social workers, and child advocates who promote child safety.

### A. Philosophical Position: Over-Reporting

Legislative reform extending coverage of mandated reporting laws and increasing accountability for mandated reported will first face resistance by those who are opposed to mandated reporting on philosophical grounds. These opponents of contend that the mandated reporting system is simply an ineffective means of protecting most children.<sup>190</sup> First, they posit that mandated reporting detract from the proper role of child welfare agencies to ensure child safety, rather than to investigate suspicions of maltreatment.<sup>191</sup>

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<sup>182</sup> See *supra* note 15 and accompanying text (noting recent efforts to reform mandated reporting).

<sup>183</sup> See, e.g., Marci A. Hamilton, *The Catholic Bishops Lobby Against Legislation to Protect Children*, Verdict, April 19, 2012 <http://verdict.justia.com/2012/04/19/the-catholic-bishops-lobby-against-legislation-to-protect-children> (citing California bill as example of child protection reform attracting opposition).

<sup>184</sup> See *supra* notes 130-149 and accompanying text.

<sup>185</sup> See *supra* notes 150-174 and accompanying text.

<sup>186</sup> See *supra* notes 175-181 and accompanying text.

<sup>187</sup> See Melton, *supra* note 107, at 13 (contending that the fundamental flaw in American child protection is developing a structure that “mak[es] mandated reporting and investigation the centerpiece of the system”).

<sup>188</sup> Lukens, *supra* note 105, at 184-85 (criticizing the range of professionals designated as mandated reporters, lamenting the lack of discretion in reporting suspected cases of neglect, and characterizing statutory definitions of child maltreatment as “vague standards for what constitutes a reportable incident”).

<sup>189</sup> Some advocates of social equity contend that mandated reporting is not a panacea for child abuse which should be investigated only by law enforcement. DUNCAN LINDSEY, *THE WELFARE OF CHILDREN*, 6 (Oxford Univ. Press, 2d ed. 2004).

<sup>190</sup> Melton, *supra* note 107, at 13 (describing beliefs among the general public and trained professionals that compromise child safety, namely, that child protection is the sum total of “reporting and investigation”).

<sup>191</sup> *Id.* (noting that child welfare has been “diverted from the task of increasing the safety of children”).

Second, critics of robust mandated reporting cite data indicating that nearly two-thirds of reported cases of child maltreatment lack a legal basis for remediation or prosecution to support their position that the current paradigm of state mandated reporting is futile.<sup>192</sup> According to these cynics, a discrepancy between the number of *reported* cases and *substantiated* cases of child maltreatment illustrates the failure of mandated reporting.<sup>193</sup> As the argument continues, mandated reporting sacrifices child safety when mandated “over-reporting” directs scarce resources away from the detection of child maltreatment, particularly neglect as opposed to abuse.<sup>194</sup>

Inherent fallacies in this line of reasoning are apparent through closer scrutiny. Presuming that mandated reporting is ineffective or unsuccessful because most reports are unsubstantiated patently disregards the primary purpose of mandated reporting.<sup>195</sup> Systems of mandated reporting were never designed to be *the* absolute in risk assessment, but simply a reliable means to identify and investigate possible child maltreatment.<sup>196</sup> The human variables associated with exercising judgment, developing expertise, and acquiring experience in recognizing child abuse means that professionals will err.<sup>197</sup> Given the gravity of failure to report suspected child abuse or neglect, society prefers that professionals err on the side of caution which will invariably yield “over-reporting.”<sup>198</sup>

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<sup>192</sup> Lukens, *supra* note 105, at 178-79 (estimating that two-thirds of three million child abuse reports received full investigation, while one-third of those case resulted in determination that abuse occurred); Melton, *supra* note 107, at 14 (noting that even among the one-third of cases in which maltreatment was detected, child protection failed to provide services to ameliorate conditions that prompted investigation).

<sup>193</sup> In Pennsylvania, substantiated child abuse is classified as “founded” or “indicated.” 23 Pa. C.S. § 6303. The distinction rests on whether a judicial or administrative proceeding renders the determination of abuse. A report is “founded” whenever there is judicial ruling “based on a finding that a child who is a subject of the report has been abused, including the entry of a plea of guilty or *nolo contendere* or a finding of guilt to a criminal charge involving the same factual circumstances involved in the allegation of child abuse.” *Id.* A report is “indicated” whenever the Department of Public Welfare “determines that substantial evidence of the alleged abuse exists” on the basis of medical evidence, an investigation by child protective services, or an admission to the abusive acts. *Id.* All other reports of suspected abuse are deemed “unfounded.” *Id.*

<sup>194</sup> Lukens, *supra* note 105, at 210 (noting that “[o]ver-reporting abuse or neglect means that some reports are made when there is no actual maltreatment”); Melton, *supra* note 88, at 14 (observing that emphasis on “required reporting procedures” in the training of medical professionals prevents their education on abuse).

<sup>195</sup> See *supra* text accompanying note 130 (stating that restrictions on mandated reporting are antithetical to its chief objective of detecting possible maltreatment.) *Contra* Melton, *supra* note 107, at 10 (underscoring that mandated reporting policies are faulty because “the primary problem is no longer case-finding”).

<sup>196</sup> Hafemeister, *supra* note 4, at 851 (defending the rising number of professionals designated as mandated reporters as states sought to “promote wider and earlier identification of child abuse” during the 1970s).

<sup>197</sup> Rebecca Aviel, *Restoring Equipose to Child Welfare*, 62 HASTINGS L.J. 401, 434-35 (2010) (favoring social worker immunity for judgment errs causing improper removal during child abuse investigations).

<sup>198</sup> Hafemeister, *supra* note 4, at 829 (confirming that professionals and laypersons encountering children are “encouraged to err on the side of over-reporting to protect a child’s safety” when they suspect abuse).

Moreover, the number of unsubstantiated reports of abuse fails to confirm that mandated reporting is unproductive due to the standards of proof required to support child abuse allegations in judicial proceedings and administrative determinations.<sup>199</sup> Proving child abuse is relatively complex,<sup>200</sup> especially if victims are young, nonverbal, disabled, intimidated, afraid, or otherwise challenged in their communication skills. Moreover, whenever a child has sustained injuries or suffered harm that fails to satisfy the statutory definition of abuse or neglect,<sup>201</sup> there is no reason to believe that events did not occur that somehow damaged that child physically, emotionally, or psychologically. It simply means that authorities failed to meet the requisite burden of proof given the best evidence available at the conclusion of the investigation. Thus, despite the volume of unsubstantiated reports, investigating child maltreatment based on mandated reporting remains critical if child protective agencies are to provide thorough services.<sup>202</sup>

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<sup>199</sup> The burden of proof required to substantiate allegations of child abuse vary. *See, e.g., supra* note 134. In indicated reports, DPW need only determine that “substantial evidence of the alleged abuse exists,” that is, “[e]vidence which outweighs inconsistent evidence and which a reasonable person would accept as adequate to support a conclusion.” 23 Pa. C.S. § 6303. Court rulings on child abuse in Pennsylvania are compounded because neither the Juvenile Act, 42 Pa. C.S. § 6301 *et seq.*, authorizing child removal, state custody, and court supervision, nor the CPSL, setting forth reporting requirements, contemplates court determinations of child abuse. *See* CHILD ABUSE AND THE LAW 12 (7th ed. 2007) (detailing Pennsylvania legal framework of child abuse). While not all issues of dependency include child abuse, such allegations in dependency court are heard as “juvenile matters” under a standard of clear and convincing evidence. 42 Pa. C.S. § 6341(c). Thus, a court does not adjudicate allegations of abuse *per se*, but renders an adjudication of dependency when it finds a child lacks “proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals.” 42 Pa. C.S. § 6302. In criminal proceedings, such as the Sandusky case, acts of child abuse are prosecuted under various sections of the crimes code under a “beyond a reasonable doubt” standard unless a plea is entered.

<sup>200</sup> Hafemeister, *supra* note 4, at 829 (describing difficulties in gathering evidence to prove child abuse).

<sup>201</sup> In Pennsylvania, the CPSL defines child abuse in section 6301 in the following manner:

**(b) Child abuse.--**

(1) The term "child abuse" shall mean any of the following:

- (i) Any recent act or failure to act by a perpetrator which causes nonaccidental serious physical injury to a child under 18 years of age.
- (ii) An act or failure to act by a perpetrator which causes nonaccidental serious mental injury to or sexual abuse or sexual exploitation of a child under 18 years of age.
- (iii) Any recent act, failure to act or series of such acts or failures to act by a perpetrator which creates an imminent risk of serious physical injury to or sexual abuse or sexual exploitation of a child under 18 years of age.
- (iv) Serious physical neglect by a perpetrator constituting prolonged or repeated lack of supervision or the failure to provide essentials of life, including adequate medical care, which endangers a child's life or development or impairs the child's functioning.

<sup>202</sup> Benjamin P. Mathews and Donald C. Bross, *Mandated Reporting is Still a Policy with Reason: Empirical Evidence and Philosophical Grounds*, 32 CHILD ABUSE AND NEGLECT 511, xxx (2008) (contending that “substantiation rates alone should not be used to claim the failure of mandated reporting”).

Rejection of mandated reporting solely on the basis of over-reporting fails to weigh the impact of bias in over-reporting in calculating reported rates of child abuse.<sup>203</sup> Over-reporting by mandated reporters is extremely difficult to calculate with accuracy,<sup>204</sup> however, the reporting patterns of health professionals confirm “tendency to over-report” suspected child abuse among children living in poverty and racial or ethnic minorities.<sup>205</sup> Over-reporting, therefore, fails to denigrate mandated reporting to the degree that some scholars contend when one considers social bias in over-reporting that skews the data.<sup>206</sup> The untenable position that over-reporting of child abuse deteriorates the effectiveness of mandated reporting over-simplifies multi-faceted questions arising in child protection.<sup>207</sup> These opponents of mandated reporting would undermine efforts to create equity in child protection and, thereby, derail child safety by thwarting reform that expands coverage to all potential child abuse victims and increases the accountability of mandated reporters.<sup>208</sup>

#### B. Cultural Constraints: Family Autonomy

The next source of opposition to reform extending protection to children through mandated reporting will derive from cultural quarters that constrain family autonomy.<sup>209</sup>

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<sup>203</sup> For example, racial over-reporting is documented as a form of social inequity in child protection that occurs if “identically situated abused or neglected children of different races are reported at different rates to child protective services by mandated professionals.” Sheila D. Ards, *et al. Racial Reporting Bias and Child Maltreatment*, Presentation at the International Society for the Prevention of Child Abuse and Neglect, (Aug. 2001) (unpublished manuscript) (on file with author); Sheila D. Ards, *et al. The Effects of Sample Selection Bias on Racial Differences in Child Abuse Reporting*, 22 *Child Abuse and Neglect* 103, 103-04 (1998) (supplementing statistical analysis of U.S. Dep’t Health & Human Servs., Third National Incidence Study of Child Abuse & Neglect (NIS-3) (1993).

<sup>204</sup> Calculating suspected child maltreatment is imprecise and, thus, researchers vary in their conclusions based on their methods of interpreting the data. Besharov, *supra* note 52, at 176.

<sup>205</sup> Natalie A. Cort, *et al., Investigating Health Disparities and Disproportionality in Child Maltreatment Reporting: 2002-2006*, 16 *J PUBLIC HEALTH MANAG PRACT.* 329, 329-xxx (2010) (verifying specifically that hospital employees “were significantly more likely to report maltreatment when the children involved were young, African American, and from urban areas” in comparison to other mandated reporters).

<sup>206</sup> Many calculations of suspected child maltreatment are erroneous and, thus, lead researcher to varying conclusions in analysis of the data based on their interpretation methods. Besharov, *supra* note 52, at 176.

<sup>207</sup> Most scholars who condemn over-reporting exclude the direct causal connections between poverty and over-reporting of suspected child abuse. *Compare, e.g.,* Lukens, *supra* note 105 (omitting poverty-based over-reporting from analysis that recommends increased reporting discretion for mandated reporters), and Melton, *supra* note 107 (ignoring poverty in concluding that mandated reporting is an obsolete policy).

<sup>208</sup> Mathews and Bross, *supra* note 202, at xxx (arguing that Melton’s proposal of voluntary support systems without enhancing mandated reporting “compromises child protection”).

<sup>209</sup> Professor Roberts contextualizes the role of family autonomy in communities of color by explaining that “racial bias in state intervention in the family clarifies the reasons for safeguarding family autonomy.” Roberts, *supra* note 16, at 178. In the larger realm of family autonomy and parental privacy, scholars note conflict between constitutional guarantees of family autonomy and state interests in protecting children. Lukens, *supra* note 105, at 190, 196 (discussing a “balancing act” to preserve the integrity of family privacy and satisfy the state’s role in child safety); Hollenbeck, *supra* note 89, at 20-24 (comparing parents’

Stated another way, the prevailing culture of bias toward families living in poverty would oppose reform of mandated reporting laws that would create equity in child protection.<sup>210</sup> The culture of child welfare, dominated by social workers and clinical psychologists,<sup>211</sup> often suppresses parenting styles of families living in poverty through “coercive control” that perpetuates disproportionate reporting of child maltreatment and child removal.<sup>212</sup> Cultural inequity in the child protection system compels reform of mandated reporting laws to enhance privacy and individuality that skeptics of mandated reporting extol.<sup>213</sup>

According to one prominent child welfare scholar, “[d]ominant American culture has always revered the genetic connection between parents and children” evidenced by customary concepts and idealized images of family.<sup>214</sup> Unsurprisingly, this cultural premium on family autonomy is an illusive, and exclusive, model under the child protection paradigm infiltrating poor families under the pretext of child safety.<sup>215</sup> In an ideal world, authentic family autonomy would cede to diverse child-rearing practices and yield to culturally responsive support services,<sup>216</sup> rather than misuse mandated reporting to impose “corrective intervention” that constrains the unique character of families.<sup>217</sup>

Values of the dominant child welfare culture are, therefore, incompatible with the reform of mandated reporting laws that extend the scope of protection to all vulnerable children, including those presently excluded as visitors to mandated reporting entities, and create greater depth in the accountability of institutional reporters for their safety. First, extending statutory protection to visiting children accepts their safety as equal the

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claims of familial privacy and autonomy in federal cases challenging state child abuse registry processes); Sarri and Flynn, *supra* note 17, at 222 (casting parent-state conflict as “polarity [that] assumes the inherent value of the family’s right to non-interference and the child’s right to treatment” to address child abuse).

<sup>210</sup> See e.g., Pelton, *supra* note 31, at 1491 (criticizing current policies in the child welfare system that reflect “approaches to social problems that are coercive, paternalistic, and discriminatory”).

<sup>211</sup> SHIREMAN, *supra* note 11, at 26 (noting bias in “the largely white and middle-class culture of child welfare agencies”).

<sup>212</sup> Sarri and Flynn, *supra* note 17, at 224 (asserting that the child welfare system’s juxtaposition of family privacy rights and state interests in child safety produces penalties for nonconformity that, in turn, results in “[c]oercive control [that] is disproportionately imposed on members of minority groups and the poor”); Pelton, *supra* note 31, at 1490 (predicting higher removal rates of poor children under welfare reform by “the coercion-oriented child welfare system”).

<sup>213</sup> See, e.g., Melton, *supra* note 107, at 16 (positing that use of voluntary child protection measures that are “less intrusive than mandated reporting” preserves the dignity and privacy of all members of the family).

<sup>214</sup> ROBERTS, SHATTERED BONDS, *supra* note 17, at 118 (explaining cultural and social stigma of adoption).

<sup>215</sup> Lukens, *supra* note 105, at 199 (describing the “daunting task” of “maintaining family autonomy” for low-income families).

<sup>216</sup> Roberts, *supra* note 16, at 178 (explaining that the liberty interest in raising children consistent with one’s heritage is inextricably tied to the well-being and “survival of ethnic, cultural, and religious groups”).

<sup>217</sup> Sarri and Flynn, *supra* note 17, at 226 (viewing corrective measures as “embedded in a cultural script”).

safety of children “under the care, supervision, guidance or training” of an institution.<sup>218</sup>

This notion of equality runs counter to the culture of constraint among child welfare practitioners who frequently resist the legitimacy and autonomy of poor families.<sup>219</sup>

Second, reforming mandated reporting laws to eliminate multi-level reporting and to implement reciprocal reporting threatens the status quo of the child protection culture that would undergo a paradigm shift with increased accountability for mandated reporters.<sup>220</sup>

Thus, cultural clashes constricting the capacity of professionals to acknowledge and appreciate full autonomy for *all* families will pose daunting obstacles to reform.<sup>221</sup>

## VI. Conclusion/Recommendations/ Call to Action

The irony of inequity evokes images of vulnerable visiting children, mishaps in multi-level mandated reporting, and invidious isolationist reporting practices that resulted in the Penn State University cover-up of child sexual abuse acts committed by Sandusky. Moreover, this irony now resonates clearly with Curley and Schultz who were handed indictments of iniquity for their failure to disclose credible child sexual abuse accusations. Consequently, statutory gaps that encourage exclusionary environments and condone cultures of concealment that led to the Penn State scandal reflect systemic flaws in the child protection system of reporting and investigating suspected child abuse that perpetuate inequity, bias, and injustice. Accordingly, reforming mandated reporting laws after Penn State has broad implications for ensuring safety for all children and youth.

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<sup>218</sup> 23 Pa. C.S. § 6311(a).

<sup>219</sup> Sarri and Flynn, *supra* note 17, at 225 (suggesting that equity for children treated as outsiders, *viz.*, those who visit an institutional mandated reporter, would be rejected by a culture in which “[t]hose who have been labeled dependent or deviant are not viewed as full citizens with equal rights to social participation”).

<sup>220</sup> *Id.* (drawing attention to practitioners preoccupied with values preserving “their own social positions”).

<sup>221</sup> *Id.* (noting “a limited range of socially sanctioned child rearing practices” as a cultural bias codified by child protection laws).