CHILD ABUSE DISCLOSURE BY LAWYERS: AN "AGENCY-CAPABILITY" APPROACH[1]

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ABSTRACT

Attorneys who suspect or discover an incident of child abuse in representing a client are governed by three conflicting guidelines: the attorney-client (evidentiary) privilege, ABA Model Rule 1.6, and mandatory child abuse reporting statutes. Although this dilemma is noted in law school curricula, this Article argues that its normative complexity is underestimated in legal ethics scholarship. In fact, this age-old dilemma is a symptom of deep philosophical disagreement, which is why (1) the debate is so wide-ranging and (2) policy-making bodies have yet to offer an agreeable resolution. Disagreement at the most abstract level, among philosophers and legal scholars, influences decisions regarding child abuse disclosure by attorneys at the most micro level: judicial proceedings.

This Article develops an "Agency-Capability" approach,[2] premised on Martha Nussbaum's Capability Theory, and applies it in four commonly raised dilemmas. MODEL 1: DOMESTIC VIOLENCE VICTIM entails the case of a battered woman whose child is also the victim of abuse at her partner's hands; MODEL 2: UNRELATED ISSUE involves a lawyer representing an abusive client in a matter unrelated to parental fitness, e.g., an employment dispute; MODEL 3: DEPENDENCY/ DIVORCE/ RELOCATION discusses the case of lawyers representing parent-clients in matters relating to parental fitness, i.e., custody, marital, and child welfare disputes; and MODEL 4: JUVENILE CLIENT-VICTIM examines the case of a teen victim of abuse in a delinquency proceeding. Rather than prematurely locking attorneys into one value system, this contextualist approach to legal ethics emphasizes a lawyer's discretion directed towards maximizing the capabilities of the various parties involved.

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1. This term comes from David Crocker's capability theory of deliberative democracy. David Crocker, *Ethics of Global Development: Agency, Capability, and Deliberative Democracy* (2008).

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2. Crocker, *Ethics of Global Development.*

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INTRODUCTION: THE CATCH-22 OF CHILD ABUSE DISCLOSURE

Child abuse is a well-documented social issue, but few who research this problem and seek to develop responsive policies realize the extent to which abuse is suspected and discovered by lawyers. For attorneys handling family or social welfare disputes, this reality rings especially true.[3] A reasonable assumption, then, is that the legal system would demand—in the name of protecting children—that any situation raising the specter of abuse be reported to appropriate authorities. Yet, in some circumstances, this is not so. Indeed, for those operating in these unusual settings, their experience is often a classic Catch-22: they're damned if they do, and they're damned if they don't. This uncomfortable situation is faced regularly by lawyers who find themselves trapped by their own ethical rules and principles.

The question is standardly expressed as follows: "*If a lawyer learns, while representing a client, that a child is a victim of abuse or neglect, must the lawyer make a report to the Department of Child Services or local law enforcement"* (emphasis added)?[4] If a lawyer decides to report the incident of child abuse revealed to her in conversation with her client, she will be praised by some and simultaneously condemned by others – both in the name of recognized social values. This issue, referred to from here onward as the "Conundrum" or "Catch-22," is generated by three conflicting guidelines: (1) the attorney-client (evidentiary) privilege, (2) ABA Model Rule 1.6 Confidentiality of Information, and (3) mandatory reporting statutes that are imposed on attorneys and, by extension, psychologists or social workers working under them.[5] Consider Mississippi as a gentle introduction:

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3. Indiana State Bar Ass'n, Ethics Op. 2, (2015), https://cdn.ymaws.com/www.inbar.org/resource/resmgr/2015-ethics-op-2.pdf [https://perma.cc/WKU6-9GWG].

4. *Id.* Related to this question is whether the abuse was serious or minor, witnessed directly, substantiated by a third-party, and/ or denied by the child. Can a lawyer predict future abuse from past incidents of abuse? If a lawyer is certain about the abuse, what can she do short of full disclosure? If a lawyer reports more than what is necessary to prevent the crime, will she face civil, criminal, or professional sanctions? Will she risk a mistrial or malpractice claim? *See generally* Jacqueline St. Joan, *Building Bridges, Building Walls: Collaboration Between Lawyers and Social Workers in a Domestic Violence Clinic and Issues of Client Confidentiality*, 7 CLINICAL L. REV. 403 (2000-2001); Bruce Boyer, *Ethical Issues in the Representation of Parents in Child Welfare Cases*, 64 FORDHAM L. REV. 1621 (1996); Gerard Glynn, "*Multidisciplinary Representation of Children: Conflicts Over Disclosures of Client Communications*, 27 J. MARSHALL L. REV. 617 (1994).

5. Mental health professionals or social workers solicited to consult with attorneys may be subject to the attorney-client privilege. If psychologists or social workers are working specifically in therapeutic capacities, however, any privilege will come from their respective professional codes. Craig R. Lareau, *Attorney Work Product Privilege Trumps Mandated Child Abuse Reporting Law: The Case of Elijah W. v. Superior Court*, 42 INT'L J. L. & PSYCHIATRY 45, 43–48 (2015).

> The "attorney-client privilege refers to a legal privilege that works to keep confidential communications between an attorney and his or her client secret. The privilege is asserted in the face of a legal demand for [] communications, such as a discovery request or a demand that the lawyer testify under oath."[6]
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> ABA Model Rule 1.6(b) states: "A lawyer *may reveal* information relating to the representation of a client to the extent the lawyer reasonably believes necessary. . . (1) to prevent reasonably certain death or substantial bodily harm" (emphasis added).[7]
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> MISS. CODE ANN. § 43-21-353(1) states: "Any attorney... having reasonable cause to suspect that a child is a neglected child or an abused child, shall cause an oral report to be made immediately by telephone or otherwise and followed as soon thereafter as possible by a report in writing to the Department of Human Services [8]

The mandatory reporting requirements of most jurisdictions, however, do not necessarily or clearly apply to attorneys, as they do in Mississippi: some statutes list certain professions[9] and "any other person [in addition to those

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6. *Attorney-Client Privilege*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/attorney-client_privilege, [https://perma.cc/SHB3-HALQ].

7. MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N *2019)*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.

8. MISS. CODE ANN. § 43-21-353(1).

9. ALA. CODE 1975 § 26-14-3 (West 2013); ALASKA STAT. § 47.17.020 (2013); ARIZ. REV. STAT. ANN. § 13-3620 (2013); CAL. PENAL CODE § 11165.7 (West 2013); COLO. REV. STAT. § 19-3-304 (2013); CONN. GEN. STAT. § 17a-101a (West 2013); DEL. CODE. ANN. tit. 16, § 903 (2013); FLA. STAT. ANN. § 39.201 (West 2013); GA. CODE ANN. § 19-7-5 (2013); HAW. REV. STAT. § 350-1.1 (2013); IDAHO CODE ANN. § 16-1605 (2013); 325 ILL. COMP. STAT. ANN. 5/4 (West 2013); IOWA CODE § 232.69; IOWA CODE § 728.14; 441 IAC 112.10; KAN. STAT. ANN. § 38-2223 (2013); KY. REV. STAT. ANN. § 620.030 (West 2013); LA. CH. C. ART. 609 (2013); MASS. GEN. LAWS ANN ch. 119, § 21; ME. REV. STAT. ANN. tit. 22 § 4011-A; MD. CODE ANN. FAM. LAW § 5-705 (West 2013); M.C.L.A § 722.623 (West 2013); MINN. STAT. ANN. § 626.556 (West 2013); MISS. CODE ANN. § 43-21-353 (West 2013); MO. REV. STAT. § 210.115 (West 2013); MONT. CODE ANN. § 41-3-201 (West 2013); NEB. REV. ST. § 28-711 (West 2013); NEV. REV. STAT. 432B.220 (West 2011); N.H. REV. STAT. ANN. § 169-C:29 (West 2013); N.M. STAT. § 32A-4-3 (West 2013); N.Y. SOC. SERV. § 413 (McKinney 2013); N.D. CENT. CODE § 50-25.1-03 (West 2013); OHIO REV. CODE ANN. § 5101.6 (West 2013); OR. REV. STAT. § 419B.010 (West 2013); 23 PA. CONS. STAT. ANN. § 6311 (West 2013); S.C. CODE ANN. § 63-7-310 (2013); S.D. CODIFIED LAWS § 26-8A-3 (West 2013); TEX. FAM. CODE ANN. § 261.101 (West 2013); VT. STAT. ANN. tit 33 § 4913 (West 2013); VA. CODE ANN. § 63.2-1509 (West 2013); WASH. REV. CODE ANN. § 26.44.030 (West 2013); WIS. STAT. ANN. § 48.981 (West 2013); W. VA. CODE ANN. § 49-2-803 (2013). The most common of these listed professions include: social workers, teachers (and other school personnel), physicians and nurses (and other health-care staff), counselors/ therapists (and other mental health professionals), child care providers, medical examiners or coroners, and law enforcement officials. *See generally* CHILD WELFARE INFORMATION GATEWAY State Statutes, (2019), http://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/manda/ [https://perma.cc/PB5Y-LZRA].

listed professions],"[10] or merely "any person"[11] as responsible for reporting. These statutes, however, often neglect to mention attorneys or the relevance of the attorney-client privilege. While mandatory reporting statutes exist in all fifty states, only in Mississippi[12] are attorneys and supporting professionals explicitly required to report. ABA Model Rule 1.6(b), quoted above, adds to the confusion. This rule seems to provide one instance—specifically, when the threat of "reasonably certain death or substantial bodily harm" exists—in which an attorney is permitted to reveal information.[13] Because Rule 1.6(b) permits reporting in one instance but does not explicitly prohibit it in others, it does not necessarily contradict the mandatory reporting statutes. And, as is well known, the attorney-client privilege mandates that a lawyer keep sealed lips, with narrow exceptions. The result: many "reasonable, conscientious lawyers" are left second guessing themselves.[14]

While this issue is unique to the legal profession, other professions can be drawn into it. Psychologists and psychiatrists are governed, on the one hand, by the psychotherapist (or physician)-patient privilege, which is abrogated for incidents of child abuse or *Tarasoff* threats:[15] patients who pose a serious risk of inflicting bodily harm upon an identifiable victim.[16]

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10. *See e.g.*, ALA. CODE 1975 § 26-14-3 (West 2013) states that "any other person [in addition to those members of the listed professions] who has reasonable cause to suspect that a child is being abused or neglected may report." *See* CHILD WELFARE INFORMATION GATEWAY, *supra* note 9.

11. N.J. STAT. ANN. § 9:6-8.10 (West 2013); N.C. GEN. STAT. § 7B-301 (West 2013); IND. CODE ANN. § 31-33-5-1 (West 2013); UTAH CODE ANN. 1953 § 62a-4a-403 (West 2013); WYO. STAT. ANN. § 14-3-205 (West 2013). CHILD WELFARE INFORMATION GATEWAY, *supra* note 9.

12. MISS. CODE ANN. § 43-21-353(1) (West 2013) states: "Any attorney . . . having reasonable cause to suspect that a child is a neglected child or an abused child, shall cause an oral report to be made immediately by telephone or otherwise and followed as soon thereafter as possible by a report in writing to the Department of Human Services…" Attorneys are *implicitly* required to report in Oklahoma and Vermont: 10A OKL. ST. § 1-2-101 states "Every person having reason to believe that a child under the age of eighteen years is a victim of abuse or neglect shall report" and that "no privilege shall relieve any person from the requirement to report"; VT. STAT. ANN. tit 33 § 4913 (West 2013) lists specific professions (not including attorneys) as mandated reporters, though states that "a person may not refuse to make a report required by this section on the grounds that making the report would violate a privilege or disclose a confidential communication, except that a member of the clergy is not required to report . . ." *See generally* CHILD WELFARE INFORMATION GATEWAY State Statutes, *supra* note 9.

13. The Kentucky Bar Association's 1993 Ethics Opinion E-360, for instance, states that the lawyer is permitted, but not required, "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." Two related questions remain: "Why shouldn't an attorney be *required* to disclose information where such disclosure can prevent imminent death or serious bodily harm? In what situations, if any, should an attorney be allowed to maintain confidentiality where such serious consequences are likely to occur?" Ellen Y. Suni, *Materials on Professional Responsibility, Ch. V: Confidentiality and Zeal* (2006), at 69, https://www1.law.umkc.edu/suni/Professional_Responsibility/Materials/CHAPTER%20V.pdf **[**https://perma.cc/W782-DTNS].

14. Indiana State Bar Ass'n, *supra* note 3.

15. Lareau, *supra* note 5, at 43.

16. Charles P. Ewing, *Tarasoff Reconsidered*, AM. PSYCHOL. ASS' N, 112, 112(2005),

On the other hand, most authorities conclude that when a psychologist performs a forensic evaluation for an attorney, for instance, he or she is subject to the reporting requirements of the legal profession.[17] In these situations, lawyers may not only face civil or criminal liability for their own intended disclosure, but also for the inadvertent disclosure of the supporting professional.[18] In reality, the confidentiality requirements of psychologists and attorneys unveil a bitter struggle between competing ethical-moral systems.

The lawyers and supporting professionals in these situations also suffer from legislative or ethics proposals too simple or vague to be meaningful. Some who attempt to cut through the weeds of this issue emerge from the thicket with a cure-all: a clear statement rule[19] or provision that pre-selects a lawyer's course of action.[20] These proposals are misleading and ultimately jeopardize an accurate understanding of the disagreement at stake. They misunderstand the debate as a decision between "right" and "wrong," which neglects the moral and legal depth of the issue. This dilemma is multi-layered: it is a difficult policy issue with an ethical dimension. As such, it entails weighing competing social goods, rather than adopting one right answer. A universal maxim, which fails to appreciate the contextual differences of each case, not only makes decisions distressing in real time, when responses by lawyers or psychologists must be made quickly, but it also, counterintuitively, generates diverse and inconsistent outcomes.

This Article argues that child abuse disclosure by lawyers fits into the broader discussion on theoretical approaches to legal ethics. As an academic discipline, legal ethics has evolved as a dialectic among three competing

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https://www.apa.org/monitor/julaug05/jn [https://perma.cc/897J-QWBF**]**.

17. Lareau, *supra* note 5, at 45.

18. Ellen Y. Suni, *supra* note 13, at 67.

19. Rebecca Aviel, *When the State Demands Disclosure*, 33 CARDOZO L. REV. 675 (2011). Aviel provides the first analysis of the confidentiality conundrum through the lens of legislative authority and intent. She notes that "The Supreme Court applies a clear statement requirement where the natural and probable reading of statutory text would threaten values identified by the Court as being particularly deserving of solicitude." She clarifies, however, that the Supreme Court has not "limited itself to the protection of constitutionally derived values in applying clear statement rules" and argues that confidentiality has a "claim to clear statements." Specifically, she asserts that the clear statement mentality can be applied to the present issue - the court, that is, may excuse a "lawyer from compliance unless and until the legislature makes plain its intent to trump confidentiality." Aviel's constitutional analysis in this context is novel, and her clear statement rule is compelling, especially given that the tangle of legislative language often deters lawyers and scholars alike from thoroughly addressing the issue. Nonetheless, her clear statement rule is merely a rule *clarification*. It does not resolve the issue of *why* lawyers ought to act in a certain way.

20. Kirsten Dick, *Between a Rock and an Ethical Duty: Attorney Obligations Under the Reporting Requirement of New Mexico's Abuse and Neglect Act*, 47 N.M. L. REV. 341 (2017). Dick suggests a mechanical procedure to determine when attorneys ought to disclose child abuse. By means of a consistency test, she concludes with a true classical liberal solution: "Court rules of practice and procedure, such as the evidentiary rule of attorney-client privilege and the rules of professional conduct governing client confidences, supersede state statutes when the court rules and state laws come into conflict."

concerns: autonomy, community, and morality.[21] From the traditional to the more progressive ideals of legal ethics, the spectrum of thought commonly considers and responds to the professional virtue of confidentiality.[22] This Article roots the main adversarial approaches to child abuse disclosure in these political strains of thought. In doing so, it demonstrates the danger when practitioners aim "to fit solutions into preordained patterns of thought...too easily [compromising important case differences] to achieve symmetry with such patterns."[23] Approaches to legal ethics grounded in political convictions may quickly turn into intellectual straightjackets.[24] In contrast, this Article proposes and defends a contextualist approach to child abuse disclosure by lawyers.

This Article proceeds with two specific aims: (1) to explain why the disagreements on this topic of reporting child abuse are so wide and intractable; and (2) to nevertheless offer the "Agency-Capability" approach, premised on Martha Nussbaum's Capability Theory, that appreciates the complexity and diversity of the cases in which child abuse emerges during the legal representation of a client. The problem of child abuse reporting by lawyers, difficult as it is, deserves continuous attention from new perspectives. The basic analytical problem, and the reason why proposals for reporting diverge so widely, is that debate manifests at every level of the issue—from the philosophically abstract to the individual decision-making on whether to report abuse in specific cases. This Article proceeds in four parts:

Part I (*Mandatory Reporting Statutes, The Attorney-Client Privilege, and the ABA Model Rules of Professional Conduct)* outlines the current state of rules and regulations that generate the confusion over child abuse disclosure by lawyers.

Part II (*The Macro-Level*) analyzes the disagreement along a spectrum of philosophers—from the classical liberalism of Anita Bernstein ("attorney as hired gun,"[25] or, the preservation of the attorney-client privilege under "zealous advocacy"[26]) to the communitarianism of Martha Fineman (the attorney as "martyr," or, the abrogation of the attorney-client privilege

21. Edward J. Eberle, *Three Foundations of Legal Ethics: Autonomy, Community, Morality*, 7 GEO. J. LEGAL ETHICS 89, 91.

22. *See id.* at 9–13 (illustrating now three models of legal ethics—the Autonomy Model, Community Model, and Deontological Model—respond to the classic virtue of attorney-client confidentiality).

23. *Id.* at 95.

24. *Id.*

25. Timothy P. Terrell, *Turmoil at the Normative Core of Lawyering: Uncomfortable Lessons from the "Metaethics" of Legal Ethics*, 49 EMORY L. J. 115, 87–133 (WINTER 2000).

26. Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1170, 1165–1205 (2006).

under the "vulnerability thesis"[27]). The essential philosophical debate focuses on whether our social institutions ought to be structured to protect vulnerable third parties or to insulate the lawyer-client relationship. As a middle ground, this section argues that political liberalism, represented here by the thought of Ronald Dworkin, best preserves our democratic ideals in tough moments of indecision.

Part III (*The Micro-Level*) traces the philosophical disagreement in Part II (*The Macro-Level*) to our trial courts. Here, lawyers must decide whether personal morality trumps adherence to the evidentiary privilege or standards of professional ethics. This section demonstrates how four adversarial approaches, influenced by the spectrum of thought from classical liberalism to communitarianism, emerge in response to this Conundrum. These four approaches form the fundamental basis of the disagreement on how lawyers can approach disclosure of child abuse or neglect by their clients.

Part IV (*"Agency-Capability" Approach*) first emphasizes why the fusion of political liberalism and Martha Nussbaum's Capability Theory is so important[28] and, for risk of exaggeration, transformative in contexts where lawyers contemplate child abuse disclosure. This section applies this approach in four models, which remain inadequately resolved in the current environment:

MODEL 1: DOMESTIC VIOLENCE VICTIM concerns a battered woman seeking legal separation from her husband and full custody of her daughter, also a victim of abuse by her partner. MODEL 2: UNRELATED ISSUE (*disclosure does not have direct bearing on issue of parental fitness*) concerns a single father, in an employment dispute, who the lawyer suspects is abusing his son. MODEL 3: DEPENDENCY/ DIVORCE/ RELOCATION (*disclosure has direct bearing on issue of parental fitness)* concerns attorneys representing clients, who reveal an incident of child abuse, in custody, divorce, and child welfare disputes. MODEL 4: JUVENILE CLIENT-VICTIM (*issues of rational competency and social services*) involves a teen victim of abuse in a delinquency proceeding for a criminal offense.

In proposing the "Agency-Capability" approach, this section concludes that a lawyer's discretion should be *directed* towards maximizing the capabilities of the various parties involved. This approach resists the temptation to pigeonhole lawyers into one standard action. The "Agency-Capability" approach values professional discretion without regressing to

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27. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1, 8 (2008).

28. Richard Arneson, *The Capabilities Approach and Political Liberalism*, MOZZAFAR QIZILBASH ET AL, ED., HANDBOOK OF THE CAPABILITY APPROACH 2 (CAMBRIDGE 2019) (noting "the capabilities approach is thought to be a good match with political liberalism, because all reasonable citizens can endorse, from their diverse and conflicting perspectives, the list of basic capabilities and the principle that justice demands that all citizens be enabled continuous access to them."

the ad hoc decision-making characteristic of the current environment. Recognizing that it is difficult to propose a new approach to a longstanding dilemma in lawyering without questioning the premises of legal ethics, this Article argues that the "Agency-Capability" approach is a movement on the path towards a contextual ethics.

PART I: MANDATORY REPORTING STATUTES, THE ATTORNEY-CLIENT PRIVILEGE, AND THE ABA MODEL RULES OF PROFESSIONAL CONDUCT

A. Mandatory Reporting Statutes

Under the Federal Child Abuse Prevention and Treatment Act (CAPTA), all fifty states currently have some version of mandatory child abuse reporting statutes.[29] Many of these statutes list certain professionals as mandatory reporters, such as social workers, mental health professionals, childcare providers, educators, etc.[30] Even in states that mandate certain professionals report, however, other persons are generally allowed to make a good-faith report of known or suspected child abuse.[31] Child abuse reporting laws prescribe an obligation by third parties to report any known or suspected incident of child abuse "with the expectation that the state, through a child protective mechanism, will investigate and take corrective action when needed."[32] These statutes, which differ in language and structure, can be divided into three subsets:

(1) List Specific Professions (not including attorneys) and Other Persons: approximately 35 states, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands list specific professions, *not including attorneys*, whose members are mandated by law to report child abuse and neglect. These lists commonly include social workers, law enforcement personnel, psychologists and physicians, teachers, and other professions who commonly encounter or care for children, as well as "any other person." States with these statutes are: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New

29. *See generally* CHILD WELFARE INFORMATION GATEWAY, *supra* note 9.

30. *See generally* LexisNexis 50-State Surveys, Statutes & Regulations (2014), https://www.prearesourcecenter.org/sites/default/files/library/50statesurvey-mandatoryreporting2014updates_0.pdf [https://perma.cc/4Q9Y-K45E].

31. *Id.*

32. Adrienne Jennings Lockie, *Salt in the Wounds: Why Attorneys Should Not be Mandated Reporters of Child Abuse*, *36* N. M. L. Rev. 126, 125–59 (2006).

Mexico, New York, North Dakota, South Carolina, South Dakota, Rhode Island, Tennessee, Vermont, Virginia, Washington, and West Virginia.[33]

- ARIZ. REV. STAT. ANN. § 13-3620 lists "physicians...psychologists...social workers, peace officers, members of the clergy, parents or guardians, school personnel...or any other person who has responsibility for the care of treatment of minors" to report child abuse. ***The attorney-client privilege is recognized as grounds for failure to report.***[34]

(2) Attorneys Mentioned: some state statutes specifically mention attorneys as mandated reporters in all or certain situations. States with these statutes are: Alaska, Arkansas, Mississippi, Nevada, Ohio, Oregon, Pennsylvania, Texas, and Wisconsin.[35]

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33. ALA. CODE 1975 § 26-14-3 (West 2013); ALASKA STAT. § 47.17.020 (2013); ARIZ. REV. STAT. ANN. § 13-3620 (2013); CAL. PENAL CODE § 11165.7 (West 2013); COLO. REV. STAT. § 19-3-304 (2013); CONN. GEN. STAT. § 17a-101a (West 2013); DEL. CODE. ANN. tit. 16, § 903 (2013); FLA. STAT. ANN. § 39.201 (West 2013); GA. CODE ANN. § 19-7-5 (2013); HAW. REV. STAT. § 350-1.1 (2013); IDAHO CODE ANN. § 16-1605 (2013); 325 ILL. COMP. STAT. ANN. 5/4 (West 2013); IOWA CODE § 232.69; IOWA CODE § 728.14; 441 IAC 112.10; KAN. STAT. ANN. § 38-2223 (2013); KY. REV. STAT. ANN. § 620.030 (West 2013); LA. CH. C. ART. 609 (2013); ME. REV. STAT. ANN. tit. 22 § 4011-A; MD. CODE ANN. FAM. LAW § 5-705 (West 2013); MASS. GEN. LAWS ANN ch. 119, § 21; M.C.L.A § 722.623 (West 2013); MINN. STAT. ANN. § 626.556 (West 2013); MO. REV. STAT. § 210.115 (West 2013); MONT. CODE ANN. § 41-3-201 (West 2013); NEB. REV. ST. § 28-711 (West 2013); N.H. REV. STAT. ANN. § 169-C:29 (West 2013); N.M. STAT. § 32A-4-3 (West 2013); N.Y. SOC. SERV. § 413 (McKinney 2013); N.D. CENT. CODE § 50-25.1-03 (West 2013); S.C. CODE ANN. § 63-7-310 (2013); S.D. CODIFIED LAWS § 26-8A-3 (West 2013); R.I. GEN. LAWS § 40-11-3; TENN. CODE ANN. § 37-1-403; VT. STAT. ANN. tit 33 § 4913 (West 2013); VA. CODE ANN. § 63.2-1509 (West 2013); WASH. REV. CODE ANN. § 26.44.030 (West 2013); W. VA. CODE ANN. § 49-2-803 (2013).

34. A. R.S. § 13-3620 (1964).

35. MISS. CODE ANN. § 43-21-353 (West 2013) lists "attorneys, ministers, or law enforcement officers, etc"; NEV. REV. STAT. § 432B.220 (West 2011) lists "attorneys" as mandatory reporters *unless* "the attorney acquired knowledge of the abuse or neglect from a client" who "has been or may be accused of committing the abuse or neglect." OHIO REV. CODE ANN. § 5101.61 (West 2013) lists "attorneys" as mandatory reporters *unless* he or she cannot "testify with respect to that communication in a civil or criminal proceeding." This testimonial privilege is waived if "the attorney... has reasonable cause to suspect based on facts that would cause a reasonable person in similar position to suspect... that the client...has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the person." OR. REV. STAT. § 419B.010 (West 2013) lists "attorneys or court-appointed special advocates" *unless* "the information would be detrimental to the client." 23 PA. CONS. STAT. ANN. § 6311 (West 2013) states that "an attorney affiliated with an agency, institution, or other entity, including a school or established religious organization that is responsible for the care, supervision, guidance, or control of children" must report, but that confidential communications made to an attorney are protected so long as they are within the scope of title 42, 5916 and 5928, the attorney work product doctrine, or the rules of professional conduct for attorneys." TEX. FAM. CODE ANN. § 261.101 (West 2013) states "the requirement to report applies without exception to an individual whose personal communications may otherwise be privileged, including attorneys..." but "in a proceeding regarding the abuse or neglect of a child, evidence may not be excluded on the ground of privileged communication except in the case of communication between an attorney and a client." WIS. STAT. ANN. § 48.981 (West 2013) states "any person not specified [in the list of mandated professions], including an attorney...may report." *See generally* CHILD WELFARE INFORMATION GATEWAY State Statutes, *supra* note 9.

- OHIO REV. CODE ANN. § 2151.421 lists "attorneys, physicians, psychologists...school employees, persons engaged in social work...peace officers, etc..." ** An attorney, physician, or cleric is not required to make a report concerning any communication the attorney, physician, or cleric receives from a client, patient, or penitent in a professional relationship, if, in accordance with § 2317.02, the attorney, physician, or cleric could not testify with respect to that communication in a civil or criminal proceeding.[36]

(3) Any/All Persons (No Listed Professions): these statutes list "all persons" or "everyone" as mandatory reporters of child abuse. These statutes are: Indiana, New Jersey, North Carolina, Oklahoma, Utah and Wyoming.[37]

- N.J. ANN. STAT. § 9:6-8.10 (West 2013) states "all persons are required to report."

While these three subsets capture the general organization of mandatory reporters under state legislation, mandatory reporting statutes may explicitly specify what type of communications are privileged, and when. For instance, a statute that lists "all persons" as mandatory reporters may, ironically, cite the attorney-client privilege as a legitimate ground for failure to report abuse and neglect.[38] Or a statute that lists specific professions and other persons who suspect or know of an incident of child abuse may fail to specify how its provision interacts with the attorney-client privilege.[39] All

36. *See generally* CHILD WELFARE INFORMATION GATEWAY State Statutes, *supra* note 9.

37. N.J. STAT. ANN. § 9:6-8.10 (West 2013) states "any person having reasonable cause to believe that a child has been subjected to child abuse, including sexual abuse, or acts of child abuse shall report" (does not mention attorney-client privilege). N.C. GEN. STAT. § 7B-301 (West 2013) lists "any person or institution that has cause to suspect abuse or neglect shall report" (attorney-client privilege is legitimate ground for failure to report). IND. CODE ANN. § 31-33-5-1 (West 2013) states "any person who has reason to believe that a child is a victim of abuse or neglect must report" (does not mention attorney-client privilege). 10A OKL. ST. § 1-2-101 states "Every person having reason to believe that a child under the age of eighteen years is a victim of abuse or neglect shall report" and that "no privilege shall relieve any person from the requirement to report." UTAH CODE ANN. 1953 § 62a-4a-403 (West 2013) states "any person who has reason to believe that a child has been subjected to abuse or neglect must report" (does not mention attorney-client privilege). WYO. STAT. ANN. § 14-3-205 (West 2013) states "all persons must report" (attorney-client privilege is legitimate ground for failure to report). *See generally* CHILD WELFARE INFORMATION GATEWAY State Statutes, *supra* note 9.

38. N.C. GEN. STAT. § 7B-301 (West 2013); WYO. STAT. ANN. § 14-3-205 (West 2013).

39. ALA. CODE 1975 § 26-14-3 (West 2013); CAL. PENAL CODE § 11165.7 (West 2013); COLO. REV. STAT. § 19-3-304 (2013); CONN. GEN. STAT. § 17a-101a (West 2013); GA. CODE ANN. § 19-7-5 (2013); HAW. REV. STAT. § 350-1.1 (2013); IOWA CODE § 728.14; 441 IAC 112.10; KAN. STAT. ANN. § 38-2223 (2013); ME. REV. STAT. ANN. tit. 22 § 4011-A; MASS. GEN. LAWS ANN ch. 119, § 21; MINN. STAT. ANN. § 626.556 (West 2013); MONT. CODE ANN. § 41-3-201 (West 2013); NEB. REV. ST. § 28-711 (West 2013); N.M. STAT. § 32A-4-3 (West 2013); N.Y. SOC. SERV. § 413 (McKinney 2013); S.D. CODIFIED LAWS § 26-8A-3 (West 2013); TENN. CODE ANN. § 37-1-403; VA. CODE ANN. § 63.2-1509

but three states and Puerto Rico currently address the issue of privileged communications within the reporting law, either affirming it as a legitimate ground for failure to report or denying it. Thus, the statutes can be further divided into two groupings:

(1) Attorney-Client Privilege is a Legitimate Ground for Failure to Report: The state statutes that explicitly cite the attorney-client privilege as a legitimate ground for failure to report child abuse and neglect include: Alabama, Arizona, Arkansas, Delaware, Florida, Idaho, Illinois, Kentucky, Maryland, Michigan, Missouri, Nevada (only if the client has been or may be accused of committing the abuse or neglect), New Hampshire, North Carolina, North Dakota, Ohio (only if the attorney could not testify with respect to that communication in a civil or criminal proceeding), Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, West Virginia, and Wyoming.[40]

(2) Attorney-Client Privilege is Not Mentioned *or* is Not a Legitimate Ground for Failure to Report: Alaska, California, Colorado, Connecticut, Georgia, Hawaii, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada (qualified above), New Jersey, New Mexico, New York, Ohio (qualified above), Oklahoma, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wisconsin.[41]

(West 2013); WASH. REV. CODE ANN. § 26.44.030 (West 2013).

40. *See generally* CHILD WELFARE INFORMATION GATEWAY State Statutes, *supra* note 9.

41. *Id.*

STATE MANDATORY REPORTING STATUTES REFERENCE CHART[42]

All Attorneys Must Report*	**Certain Attorneys Must Report**	**Attorneys Not Required to Report** *(Attorney-Client Privilege is Legitimate Ground for Failure to Report)*	**Uncertain** (*Neither Attorneys nor Attorney-Client Privilege Mentioned*)
• Mississippi[1] • Oklahoma[2] • Vermont[3]	• Arkansas (prosecuting attorneys and attorneys ad litem) • Nevada (qualified) • Ohio (qualified) • Oregon (qualified) • Pennsylvania (qualified) • Texas (except attorneys whose clients have been accused of child abuse or neglect)	• Alabama • Arizona • Delaware • Florida • Idaho • Illinois • Kentucky • Louisiana • Maryland • Michigan • Missouri • New Hampshire • North Carolina • North Dakota • Rhode Island • South Carolina • West Virginia • Wyoming	• Alaska • California • Colorado • Connecticut • Georgia • Hawaii • Indiana • Iowa • Kansas • Maine • Massachusetts • Minnesota • Montana • Nebraska • New Jersey • New Mexico • New York • South Dakota • Tennessee • Utah • Virginia • Washington • Wisconsin

* This may be explicitly stated, or merely implied.

42. *Id.*

1. MISS. CODE ANN. § 43-21-353 (West 2013) *explicitly* names attorneys as mandatory reporters.
2. 10A OKL. ST. § 1-2-101 states that "every person" is a mandatory reporter and that no privilege is a legitimate ground for failure to report.
3. VT. STAT. ANN. tit 33 § 4913 (West 2013) lists specific professions, not including attorneys, as mandatory reporters, but states that no privilege (except the clergy-penitent privilege) is a legitimate ground for failure to report.

B. Attorney-Client Privilege

The attorney-client privilege is an evidentiary privilege that prohibits attorneys from disclosing matters discussed in confidence with their client during representation. Narrowly defined by statute and common law, it is historically constrained to the litigation process.[43] In other words, it is limited to situations in which a lawyer may be required to testify or produce documents related to the representation.[44] Dating back to the reign of Elizabeth I of England, the privilege has two primary motivating principles: (1) "the fundamental societal need to have all evidence having rational probative value placed before the trier of facts in a lawsuit"[45] and (2) the societal need for full and effective assistance of counsel.[46] Some have even claimed that "the relationship and the continued existence of the giving of legal advice by persons accurately and effectively trained in the law is of greater societal value . . . than the admissibility of a given piece of evidence in a particular lawsuit."[47] As mentioned, while the privilege ordinarily applies to confidential communications made between a lawyer and client, it can also extend to mental health professionals or social workers solicited to work with the attorney. The underlying claim is that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client."[48]

C. The ABA Model Rules of Professional Responsibility

The origins of legal ethics chart back to the ecclesiastical courts of

43. Ellen Y. Suni, *supra* note 13, at 58.
44. *Id.* at 63.
45. *Id.* at 59.
46. *Id.* These practitioners believe that "anything that anything that materially interferes with the lawyer-client relationship must be restricted or eliminated."
47. *Id.*
48. ALISON BEYEA, COMPETING LIABILITIES, 280 (1999).

thirteenth century England.[49] These medieval courts first set standards of conduct for lawyers through oaths that included "obligations 'to avoid artifice and circumlocution,' to 'only speak that which [they] believed true,' and to not use 'injurious language or malicious declamations against adversary'[their] [s] or 'any trick to prolong the cause.'"[50] By the turn of the fourteenth century, the legal advocates of ecclesiastical England followed a broad range of professional standards including, most prominently, "litigation fairness and candor, diligence, reasonable fees and service to the poor."[51] The outgrowth of professional standards, both regulatory and aspirational, derived authority from oaths of office, statutes, court cases, and academic dialogue.[52] Ethical standards for lawyers blanketed England and other parts of Europe by the time of the American colonization in the seventeenth and eighteenth century.[53] American lawyers trained in the English tradition inherited the core values of litigation fairness, competency, and reasonable fees.[54] Following their ecclesiastical predecessors, the American colonies and early states used oaths, statutes, judicial oversight, and procedural rules to regulate conduct.[55] Procedural law continued to develop throughout the nineteenth century as evidence law and modern business guidelines for lawyers took shape.[56] Notably, George Sharswood, author of "An Essay on Professional Ethics" (1854), and fellow scholar David Hoffman, took dominant positions on a lawyer's role and responsibility in litigation when personal morals conflicted with professional standards.[57]

By the end of the nineteenth century, the Alabama State Bar Association and the American Bar Association (ABA) emerged and, in 1887, the former made Alabama the first state with a comprehensive code of ethics.[58] This was a pivotal moment in the rapidly developing landscape of legal ethics. The 1887 Alabama Code of Ethics served as the model for several states' codes and the "foundation for the American Bar Association's 1908 Canons of Ethics."[59] Following this milestone, the ABA formulated the 1969 Model Code of Professional Responsibility, the 1983 Model Rules of Professional

49. Carol Rice Andrew, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV 1385, 1390 (2004).
50. *Id*. at 1393.
51. *Id.* at 1394.
52. *Id.* at 1389.
53. *Id.* at 1420.
54. Andrew, *supra* note 49, at 1422.
55. *Id.* at 1414.
56. *Id.* at 1424.
57. *See generally Id.* at 1426–31.
58. *Id.* at 1435.
59. Andrew, *supra* note 49, at 1435.

Conduct, and the Ethics 2000 "overhaul" of the Model Rules.[60] Today, all fifty states possess a *binding* matrix of court rules, statutes, judicial decisions, and, harkening back to the thirteenth century, oaths which govern lawyers.[61] Indeed, the core duties of the medieval standards—fairness in litigation, competence, loyalty, confidentiality, reasonable fees, and public service—survived the ecclesiastical courts and continue to hold sway in modern legal ethics.[62]

For the present purpose, the ABA Model Rules of Professional Responsibility issue guidance on private matters discussed between an attorney and his or her client(s). Legal ethics scholars note that "the basic tenor of the Model Rules is nondisclosure."[63] Of course, there are exceptions to this general sentiment of confidentiality, but they are limited. Model Rule 1.6(a): Confidentiality of Information states that "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation" or the information falls under one of a few exceptions. Under paragraph (b), a lawyer *may* reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to (1) prevent reasonably certain death or substantial bodily harm; (2) prevent a client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another[64]; or (3) "establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.[65] It is important to note that none of these exceptions, by themselves, render disclosure mandatory.[66]

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60. *Id.* at 1435.

61. *Id.* at 1434.

62. *Id.* at 1388.

63. Suni, *supra* note 13, at 63. ABA Formal Op. 94-380 (1994): "The range of protected info is extremely broad, covering info received from the client or any other source, even public sources, and even information that is not itself protected but may lead to the discovery of protected info by a third party."

64. An important question in this context is whether "crimes that have future consequences," such as child abuse and neglect, fall under this exception to confidentiality. Or "is the lawyer precluded from disclosing as long as no further *conduct* of the client is expected?" Suni, *supra* note 13, at 69.

65. *Rule 1.6: Confidentiality of Information*, *supra* note 7.

66. Suni, *supra* note 13, at 63. An attorney also has an explicit duty of candor toward the tribunal under Model Rule 3.3(a)(1), which provides that "a lawyer shall not knowingly...make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." This becomes interesting in child welfare or dependency disputes when the court performs its own investigation of the child's best interests. *Rule 3.3(a)(1): Candor Toward the Tribunal*, ABA, *https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribunal/.*

PART II: MACRO-LEVEL CONUNDRUM: DIVISIONS WITHIN POLITICAL PHILOSOPHY AND THE LAWYER ETHOS

This section begins by examining the "competing nomos,"[67] or law, of the American Bar and the state. This includes the different "normative worlds" that result and form the root of the Conundrum. At this level, three factors animate the debate about reporting child abuse: legal history, political philosophy, and the ever-advancing standards of moral philosophy. This section briefly surveys the origins (and competing responsibilities) of the lawyer's role. It compares common morality to the ethics "law" of the Bar to demonstrate how a lawyer's sense of personal and professional integrity may conflict. The range of perspectives on disclosure is then traced to deeply held convictions of political philosophy.

Without an understanding of each of these factors, a fully developed image of the issue and a pragmatic resolution prove elusive. This Article argues that, since the founding of the American Bar, two distinct social philosophies have accepted, rejected, or modified central narratives of the lawyer-client relationship and the lawyer role:[68]

(1) *Classical Liberalism*, represented by Professor Anita Bernstein;
(2) *Communitarianism*, represented by Professor Martha Fineman

Classical liberalism and communitarianism are useful anchoring points because each pre-weighs the scale in favor of autonomy (the right of individual clients to protected confidences and full representation against external parties) or equality (the shared responsibility to protect the welfare of third parties). These approaches create environments, which, in political terms, may be analogized to "social end-state[s]": states in which a

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67. Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1398, 1391 (JUNE 1992).

68. Eberle, *supra* note 21, at 99-100. Eberle describe two central models of legal ethics—the "Autonomy Model" and the "Community Model"—relevant to the discussion here. The "Autonomy Model" is the traditional, client-centered approach to legal ethics commonly seen in the ethics provisions related to "competence, confidentiality, diligence, zealousness of representation in pursuit of client objectives, and loyalty to clients." This model is synonymous with what Joseph Allegretti terms the "bottom line approach" in which lawyers should be zealous partisans in strict pursuit of their clients' ends. *See generally* Joseph Allegretti, *Have Briefcase Will Travel: An Essay on the Lawyer as Hired Gun*, 24 CREIGHTON L. REV. 747, 758 n.56 (1991). The "Community Model," on the other hand, affords space for both a lawyer's "obligations to the legal system as officer of the court and... obligations to society at large." Eberle, *supra* note 21, 109-110. The intent of the Article is not merely to rehash these models, but to draw an *explicit link* between these approaches and their roots in classical liberalism and communitarianism, respectively.

particular conception of the good—or, in this case, the *ethical*—is imposed on citizens.[69] Both the classical liberal and communitarian frameworks, as applied to child abuse disclosure, emphasize certain end-values which trump the process of *discovering* values.[70] These *a priori* values then function as intellectual straightjackets that limit the ways in which lawyers may act in context-sensitive cases.

Each philosophy is developed below, along with the conclusion that a third approach: *Political Liberalism*, provides the most compelling conception of decision-making in moments of indecision. In promoting the principles of process, neutrality and agency, liberalism preserves a lawyer's discretion and, thus, the most rigorous conception of democracy.[71] The normative struggle inherent in this Conundrum is both necessary and productive. It is a mechanism through which we generate and reevaluate our moral and political values.

A. The Competing "Nomos"72 of Bar & State Law

The discrepancy between the positivist ethics rules governing lawyers and state law has not been overlooked. Professor Susan P. Koniak has written extensively on this divide, which she terms the "competing nomos" of Bar and state law."[73] Legal scholars—among them, notably, Professors Maura Strassberg, Nancy J. Moore, and Edward J. Eberle—employ philosophy to examine and reconcile an attorney's competing responsibilities. The field of philosophy, in the present context, provides guidance as to where a lawyer's obligation ought to be directed when his or her sense of personal morality confronts the demands of his or her profession. When various textual sources of law provide insufficient guidance, philosophy becomes particularly relevant. Professor Randy Barnett notes the importance of an interdisciplinary approach: "The legal analyst must operate, often simultaneously, on the level of legal theory, legal doctrine, and legal practice."[74]

This section focuses on understanding the philosophical underpinnings

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69. W.G. Runciman describes the difference between process doctrines and end-state doctrines as follows: "Process principles are principles which yield a criterion of the way in which, or procedure by which, a given distribution of social goods comes about; end-state principles are principles which yield a criterion of the justice of a given distribution, irrespective of how it may have been arrived at." *See* W.G. Runciman, *Processes, End-States, and Social Justice*, 28 PHILOSOPHICAL QUARTERLY 37, 37 (1978).

70. *Id.* at 37.

71. *See* RONALD DWORKIN, SOVEREIGN VIRTUE (2000).

72. Koniak, *supra* note 67, at 1402.

73. *Id.* at 1402, n. 151.

74. Randy E. Barnett, *Foreword: Why We Need Legal Philosophy,"* 8 HARV. J. L. PUB. POL'Y 1, 9 (1985).

of a lawyer's competing responsibilities toward the legal system, the individual client, and society. The analysis begins with the founding of the American Bar, transitions to the friction between the Bar's ethics rules and state law, and ultimately explores the conflict between personal and role morality for lawyers.

The conflict of Bar rules and state law requires a historical dive back in time to the American Revolution. In fact, a hint of the conflict between professional ethics and public morality can be found decades before the Revolution when Cotton Mather "urged lawyers to think of their broader reputation and duty to society and to refute the 'old [c]omplaint, [t]hat a [g]ood [l]awyer seldom is a [g]ood [n]eighbor.'"[75] For present purposes, nonetheless, the American Revolution is an apt starting point as it represented a "transformation in *social* relations."[76] According to Gordon Wood, the American Revolution "encouraged ordinary people in America to think of themselves, and of one another, across the whole of their lives."[77] In 2002, Justice Cruz Reynoso presented a pertinent speech called *The Lawyer as Public Citizen* at the Eleventh Annual Frank M. Coffin Lecture, tracing the lawyer's professional ethics to the ideals of American democracy.[78] At its inception, legal ethics directed a lawyer's responsibility to "(I) [t]hose duties which the lawyer owes to the public or commonwealth" and (II) "those ethical obligations 'due from him to the court, his professional brethren, and his client.'"[79] The original Code of Ethics thus held lawyers responsible for "the quality of justice" in a public context; lawyers were to be arbiters for "the betterment of society."[80]

And yet, the mismatch between the Bar's ethics and mandatory reporting legislation opens a space for lawyers to diverge from their role as public citizens - just take the common example of the lawyer who buries his client's abuse while representing him in a divorce suit. Koniak describes the competing narratives that animate the function and larger social role of the Bar versus the state:

> The independence of the bar presages the American Revolution . . . stories, like the [John Peter] Zenger tale and the many speeches in which lawyer's take credit for opposing the Stamp Act and signing

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75. Andrew, *supra* note 49, at 1422.

76. *Political Liberalism* at 11, http://assets.press.princeton.edu/chapters/s7088.pdf [https://perma.cc/5JN9-9H2K].

77. *Id.*

78. *See generally* Cruz Reynoso, *The Lawyer as a Public Citizen,* 55 ME. L. REV. 336, 336 (2003).

79. *Id.* at 338.

80. *Id.* at 337, 341.

> the Constitution, emphasize the bar's leading role in the state's birth, portraying the process as one of normative challenge and normative reconstruction. These stories carry an implicit threat: we created you and we can destroy you . . . [t]hrough these creation motifs, the bar explains why both the state, which it can destroy, and the people, whose will to rebel it can thwart, are often hostile to the bar and its nomos.[81]

The friction between Bar and state law stems from competing historical narratives. The moral precept of confidentiality forms the basis of the "[B]ar's constitutional norm."[82] In describing the sacred relationship that confidentiality imposes on lawyer and client, Koniak states, "confidentiality aids in creating a mini-community between lawyer and client—an island of immunity in which the client is sovereign and the lawyer is, so to speak, grand vizier."[83] The nature of this relationship—as an insulated social entity—is morally fraught. Fleming describes the lawyer-client relationship in the history of the Bar as both "alienating and anesthetizing":[84] alienating in that it dissociates personhood from the lawyer role, attributing the actions of the legal professional, and their consequences to the role itself rather than to the individual; anesthetizing in that it mandates that the lawyer occupy a secluded moral universe, effectually "numbing the moral sense of ordinary personal responsibility."[85] This fissure between the lawyer as professional and the lawyer as person, as well as the combative motif of "fearless advocate versus government oppression," creates a hierarchy of norms.[86] Koniak observes: "The Zenger story [1735] celebrates ethical obligation over state law and, among ethical obligations, devotion to client over obedience to law or court order – precisely the hierarchy we found exists in the bar's nomos."[87] The conflict between ethical and legal duties defines our present Conundrum: may the lawyer abrogate the attorney-client privilege when necessary in order to comply with state legislation that mandates such disclosure, even if only tacitly? Noting that this question is historical in nature, Rebecca Aviel demands a deeper survey of the "paradigmatic feature of the lawyer's role"—confidentiality.[88]

Aviel contemplates the boundary claim that classical liberals use to shield themselves against claims of unethical zealotry. These lawyers assert

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81. Koniak, *supra* note 67, at 1450–52.
82. *Id.* at 1456.
83. *Id.*
84. James E. Fleming, *The Lawyer as Citizen*, 70 FORDHAM L. REV. 1699, 1699 (2002).
85. *Id.* at 1699.
86. Koniak, *supra* note 67, at 1456.
87. *Id.* at 1451.
88. Rebecca Aviel, *The Boundary Claim's Caveat: Lawyers and Confidentiality Exceptionalism* 86 TUL. L. REV. 1055, 1064 (2011-2012).

that their adversarial conduct, no matter how belligerent, is ethical so long as it remains within the bounds of the law. Indeed, in many instances, this is so. Lawyers, for example, are required to "blow the whistle on clients" to prevent crimes and "exclude objectives" they regard as "repugnant or imprudent."[89] Less known is what Professor Aviel terms the "boundary claim caveat":[90] the notion that "lawyers have to obey the law—except when that law treads on attorney-client confidentiality, the value we have deemed preeminent and subordinating."[91] That lawyers possess discretion over disclosure pursuant to Model Rule 1.6(b)(6) seems to betray the boundary claim: if lawyers oblige mandatory reporting laws on a whim, does the legislation actually hold authority over the profession? As Aviel states: "The idea that rules of professional conduct might define a space in which a lawyer's ethical obligation was not coextensive with legal obligation does a lot to unsettle the traditional boundary claim's premise that lawyers are bound by the constraints of law."[92]

The potential conflict between ethical and legal obligations for lawyers indicates a tension between "role morality," the morality of the legal profession, and "common," or community, morality.[93] Aviel proposes that the Model Rules derive authority from the longstanding effectiveness of the adversarial legal system as the ultimate arbiter of dispute.[94] The texts of the American Bar Association "show that it is confidentiality and particularly the duty to keep client confidences from the state, more often than any other norm, that triggers the obligations to resist competing state norms, and that justifies the passage of ethics rules to 'undo' state pronouncements."[95]

In the Bar's nomos, the ethics rules of confidentiality may trump other sources of law, and the norm of confidentiality captured in the evidentiary privilege may trump other ethics rules. This is likely why role morality is so empowered over common morality when in conflict: a lawyer can be morally required to take seemingly dissolute actions because of her professional status and, as Koniak so aptly reminds us, because loyalty to one's client remains "the moral of the bar's sacred tales."[96]

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89. Ted Schneyer, *Some Sympathy for the Hired Gun*, 41 J. LEGAL. EDUCATION 11, 17 (1991).
90. Aviel, *supra* note 88, at 1064.
91. *Id*. at 1057.
92. *Id*. at 1080.
93. Louis Fisher, *Civil Disobedience as Legal Ethics: The Cause-Lawyer and the Tension between Morality and "Lawyering Law,"* 51 HARV. C.R.-C.L. L. REV. 4851, 4855 (2016).
94. *See* Aviel, *supra* note 88, at 1088.
95. Koniak, *supra* note 67, at 1427.
96. *Id*. at 1456.

B. Distinctions of Political Philosophy

The competing nomos that Koniak describes creates a gap between the ethics standards governing lawyers and the law.[97] This gap invites a wide range of political philosophies that lawyers use in deciding whether to abrogate or preserve attorney-client privilege. The mischaracterization of this gap as a debate best had within legal ethics makes a coherent solution difficult. Fundamental disagreement over disclosure at the micro-level of our trial courts is not a mystery, but instead reflects profound ideological divisions at the macro-level of dispute.

An analysis of three competing ideologies (classical liberalism, communitarianism, and liberalism) will illustrate precisely where debate over the rules indicates a deeper underlying conflict. Classical liberal thought is one of the loudest ideologies that approaches the question of confidentiality for attorneys: eighteen states have explicitly chosen to preserve the attorney-client privilege in light of revelations of child abuse, and twenty-three other states fail to mention how their mandatory reporting legislation impacts attorneys (some argue that this implies support for confidentiality).[98] Thus, most states protect what Koniak describes as "a mini-community between lawyer and client—an island of immunity."[99] Whether explicitly or implicitly preserving the attorney-client privilege, these states prioritize our adversarial legal system, which some claim has faltered in the years after the first American Bar Association published the ABA Canons of Professional Ethics.[100]

1. Anita Bernstein and the Classical Liberal Response

In a recent New York Law Journal article—"Whatever Happened to 'Zealous Advocacy'?"—Paul C. Sanders of Cravath, Swaine & Moore traces the dismal genealogy of lawyerly zeal within the New York Code of Professional Responsibility.[101] Sanders recounts that for almost forty years, the Code encouraged lawyers to practice "zealous advocacy" until it departed from that ideal in 2008, and the word "zeal" was removed from the last spot it appeared, the Comment to Rule 1.3.[102] The removal of "zeal" came at a time when the word was associated with combative adversarial

97. *Id.* at 1391.
98. *See generally* CHILD WELFARE INFORMATION GATEWAY State Statutes, *supra* note 9.
99. Koniak, *supra* note 67, at 1456.
100. Bernstein, *supra* note 26, at 1166.
101. *See generally* Paul Sanders, Whatever Happened to Zealous Advocacy? 245 N.Y. LAW. J. 1 (2011).
102. *Id.* at 1–2.

tactics beyond the bounds of the law.[103] It is this pronounced "zeal shortage" to which Professor Anita Bernstein responds with great urgency.[104] In doing so, she distinguishes adversarial zeal from the ethically sleazy tactics that exceed the bounds of the law.[105] The image of militant adversaries, Bernstein cautions, likens to impermissible "zealotry," or flagrant rule-breaking, rather than the "bias, interest, partiality, favoritism, and lack of neutrality," that characterizes ethical and zealous advocacy.[106] Bernstein further clarifies that a zeal shortage may occur when a lawyer is detached from, indifferent to, or even bored by a client's questions and needs.[107] To remedy this kind of apathetic advocacy, Bernstein posits a solution that moves beyond the "agency approach" to one that encourages lawyers to internalize their client's goals as their own, toward a fervent commitment to client representation.[108] Bernstein's defense of zeal speaks to her deeper allegiance to an ideal of classical liberalism: the notion that there is a "zone of sovereignty" within which individuals are entitled to make choices without interference by others.[109] Two core principles of classical liberalism ground the concept of a "zone of sovereignty": (1) an individual's freedom should not be sacrificed for the collective benefit and, relatedly, (2) the morally permissible actions government may take to interfere with the lives of the governed should be limited.[110] Classical liberalism is not one fixed ideology but "a spectrum of views on social, economic, and political issues" that emphasizes personal freedom and thus objects to the coercion of one

103. *Id.* at 2.

104. *See* Bernstein, *supra* note 26, at 1169.

105. *See id.* at 1169.

106. *Id.* at 1172. An example of "impermissible zealotry" can be seen in *Beiny v. Wynyard.* In this case, lawyers at Sullivan & Cromwell blatantly flaunted the rules to their advantage:

> Desiring privileged information in the hands of a nonparty, the liquidator of a defunct law firm that previously represented the trust then being disputed, the lawyers subpoenaed the liquidator for the information with notice of a deposition, but no notice was rendered to the other parties in the dispute. Upon request, the lawyers also assured the liquidator that the files requested would be made available to opposing counsel in the dispute, but this also was not done. Sullivan & Cromwell's cover letter requesting the documents also misrepresented that they represented the executor of the will when, in fact, the will had not yet been offered for probate. Once the materials were turned over, Sullivan & Cromwell cancelled the deposition. With the deposition cancelled, the lawyers argued that it no longer was necessary to comply with notice requirements. They then used information obtained from the subpoenaed documents to surprise the opposing party, the trustee of the estate, at her deposition. The court concluded that the lawyers cleverly abused the system, 'chart[ing] a course which [they] knew to be at variance with acceptable discovery practice so as to obtain by stealth that which could not be readily obtained through proper channels (quoting Eberle, *supra* note 21, at 95).

107. *See* Bernstein, *supra* note 26, at 1173.

108. *Id.* at 1176.

109. John C. Goodman, *What is Classical Liberalism?,* GOODMAN INST. PUB. POL'Y. RESEARCH, available at https://www.goodmaninstitute.org/how-we-think/what-is-classical-liberalism/ **[**https://perma.cc/3EYY-M9GM].

110. EAMONN BUTLER, *Classical Liberalism - A Primer.* 4–5 (2015).

individual by another.[111] Classical liberal thought first emerged in the seventeenth and eighteenth centuries in the core values of "religious liberty, freedom of thought and speech, the division of governmental powers, an independent civil society, and rights of private property and economic freedom."[112] It was John Locke who drew together its rudimentary principles into the "recognisably modern body of classical liberal thinking" that persists today.[113] His natural rights theory—the notion that human beings possess rights that exist prior to government and cannot be sacrificed to it—is a central nerve of classical liberal thought.[114] Importantly, Locke maintained that people do not just have rights to physical, private property but also to "their own lives, bodies, and labour," something he called "self-ownership."[115] Strains of classical liberal thought are thus evident in the traditional approach to legal ethics, which assumes that the client has a right to zealous advocacy without interference by government or other third parties. As Edward J. Eberle states: "even if the 'other side' is not represented by a definable partisan attorney, nevertheless the adversary paradigm is appropriate because the 'other side' is always society, with its overwhelming resources and power. The client's attorney is presumably the client's equalizer in this otherwise unfair battle."[116]

Classical liberal thought emphasizing a "zone of sovereignty"[117] parallels Koniak's notion of "an island of immunity in which the client is sovereign, and the lawyer is, so to speak, grand vizier."[118] The insulated, or sovereign, entity of the lawyer-client relationship facilitates zealous advocacy—a classical liberal value that limits interference with the client's privilege of confidentiality. Classical liberals prescribe that the individual rights of person and possession are protected against state interference by an autonomous legal system.

Strict boundaries protecting legal rights enable the secluded moral universe[119] of the attorney-client relationship. Classical liberals believe that fundamental liberties do not derive authority from government but are self-evident and natural entities. Legitimate governments for the people are thus instituted to create an inviolable space—or "self-contained universe of action"—for the protection of individual rights against intervention by other

111. *Id.* at xx.
112. Paul Starr, *Why Liberalism Works*, THE AMERICAN PROSPECT (Mar. 19, 2007), https://prospect.org/features/liberalism-works/ [https://perma.cc/9N79-H33N].
113. BUTLER, *supra* note 110, at 20.
114. *Id.*
115. *Id.*
116. Eberle, *supra* note 21, at 3.
117. BUTLER, *supra* note 110.
118. Koniak, *supra* note 67, at 1456.
119. *See* Fleming, *supra* note 84, at 1699.

individuals or state institutions.[120] The classical liberalism of Anita Bernstein—with its roots in zealous advocacy—embodies the dominant strain of reasoning in our contemporary moment. Classical liberalism, generally defined, provides a compelling line of reasoning in support of strict protection of attorney-client privilege, rather than discretionary or wholesale disclosure.

Lawyers, under this conception, are appointed guardians of the "zone of sovereignty."[121] Lawyers serve as a buffer between the state and their individual client(s), acting in their official capacity to ensure that legislation does not encroach on their client's rights. In a society that settles rights disputes through an adversarial legal system, part and parcel of that right to autonomy is the right to confer with one's attorney without government interference. This "bottom-line" approach conceptualizes the lawyer as a zealous partisan who "bracket[s]" his or her own "moral concerns or scruples."[122] This approach often comes under attack as the so-called "accepted dogma," "traditional professional position," the "Dominant View," or, plainly, as "technocratic lawyering."[123] Here, adversarial ethics—and the lawyer-client relationship, generally—is a closed moral circuit; keeping a client's confidences is an inherent part of keeping it so.

2. Martha Fineman and the Communitarian Response

On the opposite end of the ideological spectrum are those who abrogate the attorney-client privilege when an instance of child abuse is suspected or discovered. These communitarians would likely justify disclosure with concern for childhood, the phase of life when "our shared vulnerability is most evident."[124] These communitarians argue that the state cannot focus solely on securing autonomous choice for citizens.[125] Instead, they value our most natural social attachments, which are crucial to our sense of dignity

120. Rakesh K. Anand, *Legal Ethics, Jurisprudence, and the Cultural Study of the Lawyer*, 81 Temple TEMP. L. Rev. 737, 767 (2008).

121. A Model Rule that "load[s]" the hired gun, for instance, is the lawyer's immunity from malpractice liability to third parties. Schneyer, *supra* note 89, at 17.

122. Joseph Allegretti, *Have Briefcase Will Travel: An Essay on the Lawyer as Hired Gun*, 24 CREIGHTON L. REV 747, 753 (1991).

123. Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation*, 37 IND. L. REV. 21, 23 (2003).

124. Martha Albertson Fineman, *Fineman on Vulnerability and Law*, NEW LEGAL REALISM (Nov. https://newlegalrealism.org/2015/11/30)/fineman-on-vulnerability-and-law/ [https://perma.cc/6YE4-GD8X**]** (Last visited May 11, 2020).

125. *See generally* Amitai Etzioni, *The Common Good and Rights: A Neo-Communitarian Approach*, 10 GEO. J. INT'L AFF. 113 (2009).

and welfare.[126]

Often, fundamental questions about a good society, the nature of the state, the nature of authority, etc., guide the thought of communitarians. To what extent, for instance, should the state intervene when individual rights seem to threaten communal values?[127] In this case, what role should the state play in protecting those most vulnerable among us—our children—when the attorney-client privilege threatens this value? One responsive communitarian, Martha Fineman, offers a new approach to these inquiries. In her "vulnerability thesis," Fineman re-envisions the traditional liberal subject and the requisites of a more attentive state.[128]

Fineman contends that the liberal subject, as presented by classical liberal thinkers, inhabits a vacuum, restricted to adulthood and immune to the diverse vulnerabilities that characterize the human subject throughout his or her lifetime.[129] She echoes the sentiment that "liberalism fails in its understanding of the role that 'the other' plays in human life."[130] It focuses on the independent, rational, and self-interested individual.[131] She argues instead for a new subject that internalizes "a universal, inevitable, enduring aspect of the human condition": vulnerability.[132] Fineman's vulnerable legal subject speaks to the subtle relationship between the human condition and our social institutions.[133] She claims that inequities of "privilege and power" are principally shaped by the institutions and relationships that confer them. Fineman thus argues for a more responsive state.[134]

Fineman's vulnerability thesis reflects her broader conviction about democracy and the role of the state when our shared vulnerabilities are exposed. The defining question for Fineman is how, if at all, the state monitors institutions in a way that is attentive to human vulnerabilities:[135] "[w]hile sometimes a lack of resilience can be deemed an individual failing, often it is a function of unequal access to certain societal structures or the result of unequal allocations of privilege and power within those structures."[136] Beyond broad questions of equity and access, communitarians pose a deeper question of association – whether our

126. *See id*. at 117.
127. *Communitarianism*, STAN. ENCYCLOPEDIA OF PHIL., (2001), https://plato.stanford.edu/entries/communitarianism/. **[**https://perma.cc/8BHA-HB46**].**
128. Fineman, *supra* note 27, at 10.
129. *See id.* at 2.
130. Anand, *supra* note 120, at 756.
131. *Id.*
132. *Id.* at 8.
133. *See id.* at 13.
134. Fineman, *supra* note 124.
135. *See* Martha Albertson Fineman, *Vulnerability and Inevitable Inequality.* 4 OSLO L. REV. 11, 22 (2017).
136. *Id*. at 19.

allegiance to individual autonomy necessarily prevails over our loyalty to shared value.[137] Should our interest in preserving the autonomy of the adversarial legal system necessarily override our interest in protecting those most vulnerable to abuse and neglect? Fineman proposes a new political subject that embodies a central characteristic of human life at every stage: vulnerability. Responsive communitarians are particularly sensitive to the fact that "no society can exist beyond one generation unless its youngest dependents survive and mature into adulthood, and no decent society can neglect those who become dependent during the years that intervene between birth and death."[138] Through this lens, feminist philosopher Eva Kittay helps bring to light an inconsistency:

> Any society that is morally decent, assuming it has resources sufficient for maintaining nonproductive individuals, understands that fully dependent persons must be cared for irrespective of their productive potential . . . it is a categorical imperative . . . The dignity of persons as ends-in-themselves mandates this moral imperative. It is an imperative derivable from universalizing our own understanding that were we in such a situation, helpless and unable to fend for ourselves, we would need care to survive and thrive.[139]

Communitarians may similarly contemplate why, within our democratic society, we feel categorically impelled to care for those terminally ill, or permanently disabled, yet waver in the face of child abuse disclosure. Martha Fineman's vulnerability thesis is particularly relevant to questions like this. If we organize politically around the notion of shared, inevitable and life-long vulnerability, Fineman contends, we may begin to address the needs of those who have not benefited from a social ethos centered on the capable liberal subject.[140] Fineman recognizes the mistaken belief that Moore presaged years ago—"that the [attorney-client] privilege represents a legal tradition in which the value of confidentiality outweighs almost all other interests, including the interests of innocent victims of a rectifiable crime or fraud."[141]

Fineman asks whether our institutional arrangements are equally

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137. *See* Etzioni, *supra* note 125, at 117.

138. *Id.* at 10.

139 Eva Feder Kittay, *A Feminist Public Ethic of Care Meets the New Communitarian Family Policy*, 111 ETHICS 523, 534 (2001).

140. Fineman, *supra* note 27, at 11. As this Article will show, Martha Nussbaum also rejects the notion of a capable and fully autonomous liberal subject. She focuses instead on how our capabilities differ throughout a lifetime and how, if need be, we may re-claim a sense of dignity at all stages of life.

141. Nancy J. Moore, *Limits to Attorney-Client Confidentiality: A "Philosophically Informed" and Comparative Approach to Legal and Medical Ethics*, 36 CASE WESTERN RESERVE LAW REVIEW 177, 247 (1985).

responsive to individuals and groups with different degrees of vulnerability, and whether assets are distributed accordingly so. Fineman uses Kittay's notion of a categorical imperative in stating "what matters is whether or not these institutions are structured so as to respond unequally to the reality of our shared vulnerability."[142] If so, the critical issue becomes "whether the balance of power struck by the law is warranted."[143] On the other end of the spectrum from classical liberalism, then, unimpeded revelation of child abuse has strong roots in the responsive communitarianism of Martha Fineman. If the "myth of autonomy" continues to swindle our legal system, Fineman cautions, those most vulnerable will continue to suffer at its cunning hands.[144]

3. Ronald Dworkin and Political Liberalism: Process, Neutrality, Agency

The communitarian approach is compelling because it recognizes the child amidst an otherwise obsessive focus on the competent adult in liberal jurisprudence.[145] In doing so, however, it unrealistically stifles a lawyer's agency in moments of discretion. Still, a general political theory of justification is necessary in approaching any legal ethics dilemma. As one scholar puts it: "for legal ethics to adequately deal with the issues that face lawyers in their daily practice, the field must turn from its moral orientation toward a political one."[146] Political liberalism is attractive because it does not presuppose the superiority of one conception of the good life. In this way, political liberalism is a process-based ideology that affords space for democratic decision-making and agency.[147] Here, the thought of Ronald Dworkin is a helpful guide. Dworkin's liberalism respects the underlying principles of justice, fairness, and due process within a particular community.[148] But to appreciate the significance of Dworkin's approach, one must first understand the two fundamental principles of his political community: equal concern and special/ individual responsibility.[149]

Dworkin first lays the foundation of mutual concern and responsibility that our political processes must express to justify the title of community.

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142. Fineman, *supra* note 27, at 18.
143. Fineman, *supra* note 124, at 12.
144. Fineman, *supra* note 27, at 19.
145. *See e.g.*, Annette Ruth Appell, *Accommodating Childhood*, 19 CARDOZO J. OF L. & GENDER 715, 723 (2013).
146. Anand, *supra* note 120, at 741.
147. *See generally* DWORKIN, *supra* note 71.
148. *Id.*
149. Dragica Vujadinović, *Ethics and Morality in Dworkin's Political Philosophy*, 25th IVR World Congress: Law, Science and Technology Paper Series No. 098 (2011), https://d-nb.info/105404399X/34 [https://perma.cc/FKA3-QPHE].

The model of "a community of principle" empowers the citizen to assume direct responsibility in discovering and respecting the shared principles of justice and fairness innate to the standing political scheme of his or her particular community.[150] The model of principle *personalizes* an individual's responsibility in maintaining a particular moral tradition.[151] Not only does an individual have responsibility for his or her own life choices, but also for collectively shaping the resources and opportunities open to the entire community.[152] The principle of special or individual responsibility internalizes "the opportunity costs which our choices place on others."[153] It mandates that no one in the body politic be marginalized, or "be sacrificed . . . to the crusade for justice overall."[154] This is not, Dworkin cautions, to say that a community model of principle will achieve a just outcome for each citizen due to its intrinsic character, but rather that its superior promise rests in its underlying commitment to political morality.[155]

Indeed, Dworkin rejects Rawls' consensus-based liberalism, understanding that a consensus is largely unattainable.[156] Instead, Dworkin aims to achieve "a sufficient popularity of justice inside a democratic order."[157] Dworkin's strategy is to identify the central values of humanity, those values shared among "enough of us," despite our more concrete disagreements, and to foster "an increasing popularity of these ideals."[158] Disagreement is natural and celebrated in this model because "we share these [ideals] not in virtue of sharing rules about the criteria for their correct application, but in virtue of agreeing that they name a real or supposed value. . ."[159] Foreshadowing Nussbaum's approach, Dworkin's model of ethics supports individuals "doing their best to successfully meet challenges" and to secure the highest fulfillment of their capabilities.[160]

While classical liberalism and communitarianism provide two rather extreme solutions, political liberalism embraces the process of discovering values. Liberalism does not value, a priori, disclosure or non-disclosure but affords space for a community to examine and deliberate their competing perspectives. As discussed, both classical liberalism and communitarianism place an a priori value on either the privilege of the client to confidentiality

150. *Id*. at 213.
151. *Id*.
152. Vujadinović, *supra* note 149.
153. *Id*. at 6.
154. DWORKIN, *supra* note 71.
155. *Id*. at 214.
156. Vujadinović, *supra* note 149.
157. *Id*. at 8.
158. *Id*. at 3.
159. *Id*. at 8.
160. *Id*. at 2.

or the right of the child to be free from abuse. In most aspects, however, our political system rejects this kind of pigeonholing; our democratic processes exist to protect the kind of disagreement inherent in tough policy issues. Our competing values are meant to surface in our democratic deliberations so they may be assessed by a political community of equal agents.[161] Indeed, Dworkin explains that there is not one conviction so fundamental that it cannot be detached and scrutinized through the democratic process.[162] His liberal tolerance ensures moral pluralism, or "ethical heterogeneity," when the law does not point to one clear course of action.[163]

Dworkin's liberalism dictates, at the outset, that neither the right of the client nor the right of the child be favored. As such, Dworkin's liberalism preserves a lawyer's sphere of choice, which supports democracy premised on public deliberation.[164] Dworkin's conception of democracy has broader implications beyond the conundrum at hand. For individual citizens to identify with the political community, they must first understand themselves as its "moral agents" by preserving independent judgment about the virtues that will govern their individual lives.[165] To have a community of independent and equal moral agents, the government must remain neutral on the question of the good life.[166] In other words:

> a community's government is prohibited from dictating what its members think about matters of political or moral or ethical judgment, whilst it has an obligation to encourage its members to form their own views on these matters through their own reflective and individual conviction.[167]

Dworkin's principle of neutrality thus ensures that the government does not muzzle the individual voices of its citizens. When individuals are first granted the liberty to develop personalities and convictions (private autonomy), they are incentivized to participate in democratic procedure (public autonomy) and, by default, create a sound democracy.[168]

The lawyer, under Dworkin's liberal conception of democracy, is

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161. *See generally* DWORKIN, *supra* note 71.
162. *Id.* at 214.
163. *Id.*
164. A deliberative approach to legal ethics can be seen in Samuel Levine, *supra* note 123, at 60. Levine proposes a "Deliberative Model" to legal ethics that "impos[es] on lawyers an obligation to exercise their discretion through ethical decisions that are the product of articulable and justifiable ethical deliberation."
165. *Id.* at 214.
166. Michael J. Perry, *A Critique of the "Liberal" Political-Philosophical Project*, 28 WM. & MARY L. REV. 205, 219 (1987).
167. Cornelia Schneider, *The Constitutional Protection of Rights in Dworkin's and Habermas' Theories of Democracy*, 2000 UCL JURIS. REV. 108, 101–20 (2000).
168. *Id.* at 109.

permitted—by the virtues of political participation and neutrality—to make value judgments on the question of child abuse disclosure.[169] In making these value judgments, lawyers subsequently advocate competing rankings of core principles:

> Each of the rival views about justice in society [...] is already a view about how competing principles such as autonomy and mutual concern should be ranked and weighed within a single conception. In that sense, each does contradict the other's weighting and ranking.[170]

The competing visions of justice in the conundrum before us demonstrate not only the expansive nature of the dilemma, but why the debate is so intractable—any plausible solution threatens to compromise an individual's sense of justice.

PART III: MICRO-LEVEL CONUNDRUM: THE FOUR ADVERSARIAL ROLES

Classical liberalism, communitarianism, and political liberalism represent competing approaches to child abuse disclosure by lawyers. The point of the next two sections is to look at the issue through the eyes of a trial attorney. Lawyers, and litigators in particular, inhabit specified roles as members of the legal system. Lawyers are not licensed to draft policy or issue policy recommendations. And litigators certainly do not speculate on academic matters in court. When a lawyer is confronted with a suspicion of child abuse in representing a client, however, policy considerations come to the fore. The lawyer, already hit with a tough ethical decision, finds herself entangled in a policy web.

Whether representing a parent-client in a domestic violence, divorce, or child welfare proceeding, the lawyer will likely be part of a multidisciplinary team.[171] The lawyer (and oftentimes judge) must decide the degree to which the child and other third parties (e.g., school, child welfare agency, guardian(s) ad litem, etc.) will participate in the representation. If social workers or mental health professionals are part of this team, the lawyer must remember their different obligations under the mandatory reporting statutes.[172] The lawyer might consider whether a

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169. DWORKIN, *supra* note 71, at 214.

170. Tom Bishop, *A Critique of Dworkin's Right Answer Theory: The Very Hard Cases* 10 (ResearchGate, Working Paper, June 2017), DOI: 10.13140/RG.2.2.22098.86722.

171. ABA Center on Children and the Law, *Legal Representation in Child Welfare Proceedings*. 1, 2 (2018), https://www.americanbar.org/content/dam/aba/administrative/child_law/cwrepinfographic.pdf.

172. *See generally* Jacqueline St. Joan, *Building Bridges, Building Walls: Collaboration*

"confidentiality wall," a metaphorical curtain blocking the flow of information, should be placed at sensitive points in the representation where revelation of child abuse might trigger the reporting obligation of the supporting professionals.[173] If the lawyer decides to impose a confidentiality wall, she might then consider the intermediary steps she could take, short of full disclosure, to help both her client and the child.[174] For instance, if child neglect is linked to poverty, the lawyer might advocate for housing, employment, healthcare, or other public benefits that would remedy the underlying issue.[175] Or the lawyer may argue that the *Tarasoff* standard ought to be extended to lawyers. If the abuse is revealed in the natural course of the proceeding, the lawyer must tailor her advocacy efforts accordingly: she may strive for custody, but, if unattainable, for substitute care of the child with a relative and visitation rights.[176]

If representing a child-client, e.g., in a juvenile delinquency proceeding, the lawyer must be sensitive to his or her wishes and goals during representation. The legal system recognizes that "when children participate, judges receive evidence that may not otherwise be available to help them understand children's views about a variety of issues that directly affect their lives."[177] If the lawyer decides to disclose the abuse, she must contemplate whether to present all of the information as a "neutral investigator," or strongly advocate a certain outcome.[178] She must consider the impact on a child's emotional and physical development when involuntarily removed from his or her home.[179] In this regard, it is often worthwhile to involve "collateral contacts," such as schoolteachers and social service providers, in safety and permanency planning.[180] Or the lawyer might consider the benefits of trying the case in a "problem-solving court," one specializing in substance abuse, mental health issues, or family

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Between Lawyers and Social Workers in a Domestic Violence Clinic and Issues of Client Confidentiality, 7 CLINICAL L. REV. 403, 426-430 (2000-2001).

173. *See generally* Bruce Boyer, *Ethical Issues in the Representation of Parents in Child Welfare Cases,* 64 FORDHAM. L. REV. 1621 (1996).

174. *Id.* at 1645–6.

175. *Id.* at 1647.

176. U.S. DEP'T OF HEALTH AND HUMAN SERVS.: ADMIN. ON CHILD., YOUTH, AND FAMS., *High Quality Legal Representation*. 1, 6 (2017), https://www.acf.hhs.gov/sites/default/files/documents/cb/im1702.pdf [https://perma.cc/9UJR-XWQ9].

177. National Council of Juvenile and Family Court Judges, *Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*. 1, 72 (2016), https://www.ncjfcj.org/wp-content/uploads/2016/05/NCJFCJ-Enhanced-Resource-Guidelines-05-2016.pdf **[**https://perma.cc/8634-KZ8Q].

178. Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency,* 11 GEO. J. LEGAL ETHICS 509, 532 (2014).

179. *See supra* note 177, at 74.

180. *Legal Representation in Child Welfare Proceedings,* ABA CENTER ON CHILDREN AND THE LAW. *See supra* note 171, at 2.

violence, for instance.[181] These courts "take a non-adversarial team approach . . . one that . . . aims to address the 'revolving door' that keeps families coming back into the system by attempting to remediate their underlying problems." This option often makes sense when acts of juvenile delinquency stem from emotional or physical abuse at home. Alternative dispute resolution, family conferencing, and collaboration with outside professionals present different challenges but also increase the chance of sustainable outcomes.

Before diving deeply into these policy issues in Part IV, this section gives a broad overview of the four adversarial roles that lawyers fall into when representing parent- and child-clients in the contexts discussed above. These four typologies show that lawyers often make decisions during representation that have ripple effects beyond the immediate case outcome; decisions to disclose or withhold child abuse impact their professional reputation, especially when their choices risk civil or criminal repercussions.

A. Diagnosis of a Legal Ethicist

Charles Lundberg, previously President of the Association of Professional Responsibility Lawyers, once confessed trepidation in the face of this Catch-22.[182] In his legal ethics blog post, *Mandatory Reporting of Child Abuse by Lawyers*, Lundberg states "I almost stopped writing this column mid-stream because the topic is so difficult and the resolution so unclear—and probably controversial."[183] Alas, even those most experienced in counseling lawyers, those most knowledgeable about the competing standards and the cruel conundrum before us, find themselves daunted by its complex nature. It is a dilemma of punishing choices that forces a lawyer to prioritize one social good over another. It is, more significantly, a litmus test of moral resilience and leadership amongst a profession charged with obtaining justice, no matter how elusive that word may be. It places the standards of a profession in direct competition with personal morality and asks a lawyer to choose between the two.

As this article demonstrates, however, this conundrum does not just affect lawyers, nor is current scholarship on this matter limited to legal ethicists. It is impossibly broad spanning a range of professions and

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181. *Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES. *See supra* note 178, at 81.

182. *Mandatory Reporting of Child Abuse by Lawyers*, Vol. 55, No.5 RES GESTAE (2011), https://lundberglegal.com/mandatory-reporting-child-abuse-lawyers-vol-55-no-5-res-gestae-31-december-2011/ [https://perma.cc/9W6P-RXRY].

183. *Id.*

ensnaring both philosophers and legal theorists who influence our ethics opinions and outcomes at our trial courts. To understand this conundrum as three-dimensional—defined by political philosophy, personal morality, and legal history—is to understand the fundamental roots of our disagreement. So long as this normative struggle is present in three tiers of society—amongst philosophers, jurists, and lawyers—this conflict will remain inevitable and predictable. In the interim, it seems attorneys are left to grapple with the disheartening moral and professional conflict that inevitably elicits, within the professional lawyer, either a sense of institutional betrayal or moral relapse.

At the time of writing, twenty-three states neglect to mention the impact of their mandatory reporting statutes on attorneys and the attorney-client privilege, specifically.[184] As a reminder for legislatures that fail to specifically address the issue, Professor Alice Woolley cautions that "moral[] questions left to lawyers' discretion or that the law does not address, and the point at which a lawyer may simply be unwilling to violate moral norms even if her role requires it, are things which positivist legal ethics cannot illuminate."[185] It is, as Strassberg states, a "moral-formal dilemma" that positions the lawyer's intuitions of personal morality against the competing ethical, or formal, rules of the American Bar.[186] Here is the bottom line of the conundrum; this is why it generates internal angst among individuals and institutional angst among a profession.

It is, furthermore, an angst that spans the lifespan of a profession. Legal scholars such as Woolley, Strassberg, LaRue T. Hosmer, and Daniel C. Powell, amongst others, have sought to sketch the contours of this dilemma, highlighting its various nuances. Unfortunately, no viable solution will be achieved by looking to precedent nor even to the very history of the profession. Certainly, these sources illuminate why the conundrum has stirred so much controversy, but they do not offer a meaningful resolution with the creative thrust to reform positive ethics. Below, this Article specifically links the positions among philosophers to their adversarial adaptations at the level of trial courts. It demonstrates how lawyers, consciously or not, internalize the arguments of their philosophical

184. *See generally* CHILD WELFARE INFORMATION GATE, *supra* note 9..

185. Alice Woolley, *Is Positivist Legal Ethics an Oxymoron?* 32 GEO. J. LEGAL ETHICS 77, 77 (2019).

186. Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901, 904 (1994–5).

predecessors in disclosing or keeping client confidences.

B. Adversarial Roles

The preceding discussion of philosophical differences now evolves into four conflicting professional roles that lawyers have adopted in real time. At the highest level of abstraction, considerations of deontology and teleology come to the forefront to illuminate various adversarial roles. Deontology values a right or duty, in and of itself, over a particular end outcome or consequence.[187] In contrast, teleology values the result or consequence, often irrespective of the individual means used to secure it.[188] How these fundamental approaches are implemented creates different lawyering typologies. For example, the "hired gun" focuses relentlessly on the client's interests and rights, to the exclusion of larger social concerns outside the context of the legal system. On the other hand, the "martyr" is the lawyer who is willing to subvert his or her professional reputation to defend the vulnerable, possibly abused, child. And there are variations in between.

A lawyer faced with these choices must contemplate the individual rights in question: the right of the client to partisan and protected representation, including the evidentiary privilege of confidentiality, and the right of the child, a powerless individual overlooked by an adversarial system devoted to the sanctity of the lawyer-client relationship, to be free from harm. In deciding between these competing perspectives, the lawyer is confronted with a choice between duties: to uphold the institutional standards of the profession of which he or she is a member, or to obey inclinations of personal (and probably community) morality to mitigate the emotional and physical harm to those most vulnerable.

These considerations are clearly attached to largely public consequences. On the one hand, lawyers must contemplate the effect of full disclosure on the reputation of the legal profession, including the willingness of clients to confide in attorneys and the ability of attorneys to provide the best possible counsel. On the other hand, lawyers must consider the tragic effects of continued abuse on a child's emotional and physical development, as well as the anomaly of attorney exemption from mandated reporting in a society otherwise committed to the welfare of its citizens. As a result of this struggle, four adversarial approaches emerge:

187. Terrell, *supra* note 25, at 102.
188. *Id.* at 103.

Classical Liberal	Constrained Liberal
The Hired Gun *Strongest Deontological Focus*: The lawyer-client relationship is insulated; the attorney prioritizesthe individual right of the client to protected confidences; strong focus on autonomous and adversarial legal system.	*Deontological/ Teleological Mix*: The lawyer's duty is divided between the client and the legal system. The lawyer aims to protect the accuracy and efficiency of the legal system from unreasonable client demands:[189] *Wary of frivolous lawsuits that occur from lack offull candor between oneself and client* *Wary of "failure to protect" liability attached toclients from lawyer's disclosure* *Wary of civil and/ or criminal liability againstoneself for his or her own intended disclosure and theinadvertent disclosure of supporting professionals* *Protective of client's Fifth Amendment right against self-incrimination* *Protective of client's Sixth Amendment right to full and effective counsel* *Protective of client's Fourteenth Amendment right to due process* *Cannot bend the rules or assist clients in thecommission of crimes*
***Preserve Privilege**	**Discretionary**

189. These concerns come from the following: *See generally* Marrus, *supra* note 178; Boyer, *supra* note 173; Lewis Becker, *Ethical Responsibilities of a Lawyer for a Parent in Custody and Relocation Cases: Duties Respecting the Child and Other Conundrums*, 15 J. AMERICAN ACADEMY MATRIMONIAL LAWYERS 33 (1998); Gerard F. Glynn, *Multidisciplinary Representation of Children: Conflicts over Disclosures of Client Communications*, 27 J. MARSHALL L. REV. 617 (1994) ; Brooke Albrandt, *Turning in the Client: Mandatory Child Abuse Reporting Requirements and the Criminal Defense of Battered Women*, 81 TEX. L. REV. 655 (2002); and Megan M. Smith, *Causing Conflict: Indiana's Mandatory Reporting Laws in the Context of Juvenile Defense*, 11 INDIANA HEALTH L. REV. (2013).

Constrained Communitarian	Classical Communitarian
Teleological/ Deontological Mix: The lawyer's duty is divided between the client and adversariallegal system. The lawyer aimstoprotect society from unreasonable client demands:[190] *Inclined to reveal abuse on behalf ofdiminished capacity clients* *Inclined to extend Tarasoff standard to lawyers* *Wary of frivolous claims toattorney-client privilege* *Recognize that medical costs andchild agency resources can be saved by early intervention in abusive situations* *Model Rule 1.4(b): must advise client of the best interests of the child aspart of broader role of informing the client of the most likely outcome of the litigation* **Discretionary**	*The Martyr* *Strongest Teleological Focus*: The lawyer's sole focus is devoted to the higher good of the community. The attorney-client privilege is abrogated in order to mitigate the harms of child abuse. ***Abrogate Privilege**[191]

***The "Hired Gun"*:** guards the lawyer-client relationship, or what Koniak describes as "an island of immunity in which the client is sovereign, and the lawyer is, so to speak, grand vizier." [192] This adversarial position prioritizes the right of the client to assured confidences and the fundamental precept of candor in conversation.[193] This position has its strongest roots in the classical liberal tradition, which limits government interference in an individual's sphere of autonomy and choice.[194] In our legal system, this tradition sanctifies the lawyer-client relationship and protects client confidences in order to facilitate "zealous advocacy."[195] In this framework,

190. *Id.*
191. This table is inspired by that in Terrell, *supra* note 25, at 231.
192. Koniak, *supra* note 67, at 1456.
193. Aviel, *supra* note 88, at 1056.
194. Goodman, *supra* note 109.
195. Bernstein, *supra* note 88, at 1165.

the professional standards for lawyers trump personal morality and the attorney-client privilege is always preserved.

The "Martyr" *(e.g., Mississippi):*[196] prioritizes the physical, emotional, and mental welfare of children over protected client confidences. This adversarial position subverts the lawyer-client relationship to the idea of "institutional responsiveness" – that is, ensuring that our legal system is inherently structured to respond equitably to harms against those without voices or representation.[197] This position has strongest roots in the communitarian tradition, which understands individuals as part of a broader societal fabric of social institutions, associations, and, oftentimes, discordant home life. In our legal system, this tradition trades our conception of the traditional legal subject – one who is autonomous and competent – for a new proposition: the "vulnerable legal subject" (a more flexible notion in that it recognizes that humans face distinct vulnerabilities across a lifetime).[198] Greater attention is paid to the distinct vulnerabilities faced by different groups over the course of a lifetime and how the legal system ought to respond to situations of power imbalance.[199] In this framework, personal morality trumps the professional standards for lawyers, and the attorney-client privilege is always abrogated.

Discretionary (Emphasis on Legal System)/ Discretionary (Emphasis on Children)**:** most states fall into this obstinately ambiguous category. The reporting statutes in these states list specific professions or "any person" as mandated reporter, neglecting to mention attorneys or the attorney-client privilege specifically.[200] Model Rule 1.6 *permits* them to report, but the attorney-client privilege seems to require secrecy. The lawyers in these situations must think through three steps: (1) does the scope of the mandatory reporting statute encompass them? (2) if it does not invoke them as reporters, but does not explicitly preserve the privilege, does this make disclosure permissible? (3) does the abuse suspected or discovered rise to the level of "substantial bodily harm," or suggest that death is immanent under Model Rule 1.6(b)?[201] In addition to these factors, lawyers must confront several others. They must consider, on the one hand, that a lack of full candor in conversation with their clients can lead to ill advice or frivolous lawsuits, that disclosure can attach additional liability to their clients, that they may face civil, criminal, or professional sanctions for disclosure, and that the client has a right against self-incrimination, a right

196. MISS. CODE ANN. § 43-21-353.
197. Fineman, *supra* note 124, at 37.
198. *See generally Id.*
199. Fineman, *supra* note 135, at 2.
200. *See generally* CHILD WELFARE INFORMATION GATEWAY, *supra* note 9.
201. *See generally* Boyer, *supra* note 173, at 1628–31.

to full and effective assistance of counsel, and to all of the privileges contained in the Due Process clause of the Fourteenth Amendment.[202] On the other hand, lawyers must consider their responsibility to disclose abuseon behalf of diminished capacity clients, their obligation to advise the clientof the child's best interests pursuant to Model Rule 1.4(b), frivolous claims to the attorney-client privilege, the potential for the *Tarasoff* standard to extend to lawyers, and the medical and agency costs avoided by early intervention in abusive situations.[203]

PART IV: THE "AGENCY-CAPABILITY" APPROACH TO CHILD ABUSE DISCLOSURE

A. Capability Theory

Although rooted in the scholarship of Aristotle, Adam Smith, and Karl Marx, Capability Theory has been most fully and coherently developed into praxis by Amartya Sen and Martha Nussbaum.[204] The capability approach blossomed after Sen noticed that global issues could not be solved by traditional economic models, such as utilitarianism and resourcism.[205] Rather than focus on utility, measured by aggregate happiness, or resources, measured by total capital or wealth, the capability approach focuses on the activities we can undertake ("doings") and the kinds of people we can become ("beings").[206] Together, "doings" and "beings" constitute our "functionings": the various activities we may pursue and the states of being we may embody.[207] "Capabilities" are the real opportunities that an individual has to achieve her particular functionings.[208] For instance, a single mother of two young children might have the function, or ability, to vote, but does not have the capability, or opportunity, to do so because the

202. *See generally* Marrus, *supra* note 178*;* Boyer, *supra* note 173; Lewis Becker, *Ethical Responsibilities of a Lawyer for a Parent in Custody and Relocation Cases: Duties Respecting the Child and Other Conundrums*, 15 J. AMERICAN ACADEMY MATRIMONIAL LAWYERS 33 (1998); Gerard F. Glynn, *Multidisciplinary Representation of Children: Conflicts over Disclosures of Client Communications*, 27 J. MARSHALL L. REV. 617 (1994) ; Brooke Albrandt, *Turning in the Client: Mandatory Child Abuse Reporting Requirements and the Criminal Defense of Battered Women*, 81 TEX. L. REV. 655 (2002); and Megan M. Smith, *Causing Conflict: Indiana's Mandatory Reporting Laws in the Context of Juvenile Defense*, 11 INDIANA HEALTH L. REV. (2013).

203. *Id.*

204. *The Capability Approach*, STAN. ENCYCLOPEDIA PHIL., https://plato.stanford.edu/entries/capability-approach/ **[**https://perma.cc/QV3M-U4DJ**]** (last modified Dec. 10, 2020).

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

nearest polling station is fifty miles away and she cannot secure daycare after working hours.[209] Under this theory, "conversion factors," which may be social or environmental, affect whether an individual has the capability to fulfill one or more functions.[210] In the present context, for instance, although an attorney has the functioning to exercise professional discretion, he or she may not have the capability to do so in a particular moment because he or she is impeded by one or more social conversion factors: public policy, norms, etc.[211] Rather than one standard blueprint, the capability approach is a "flexible and multi-purpose framework" to evaluate people's doings and beings, and the substantive opportunities available to realize them.[212]

As a normative framework, the capability approach is most commonly used to: (1) evaluate the welfare of individuals, (2) critique established social arrangements, and (3) design policies to effect change.[213] In doing so, capability theory works within the primary conceptual domains of "development ethics, political philosophy, public health ethics, environmental ethics and climate justice, and philosophy of education."[214] Today, it has been widely adapted to various practice settings. Indeed, the Human Development and Capability Association was founded in 2004 and the United Nations Development Programme (UNDP) has published the Human Development Report each year since 1990.[215] At the time of writing, an all-encompassing capability theory of justice has not been developed, and it is beyond the scope of this Article to do so. Nonetheless, it is the intent of this section to define, sketch, and defend the "Agency-Capability" approach as applied in ambiguous moments where lawyers contemplate disclosing an incident of child abuse revealed to them in conversation with their client.

B. The "Agency-Capability Approach"

As noted, the issue before us is diverse and intractable under the current matrix of rules and regulations. The fundamental motive for developing an "Agency-Capability" approach here, premised on Martha Nussbaum's Capability Theory, is its dual emphasis on well-being *and* agency, rather than one or the other.[216] As discussed, the classical liberal, "hired gun,"

209. *The Capability Approach*, *supra* note 204.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *The Capability Approach*, *supra* note 204.
215. Ingrid Robeyns, *The Capability Approach in Practice*, 14 J. POL. PHIL. 351, 351 (2006).
216. *The Capability Approach*, *supra* note 204.

eliminates the opportunity for lawyers to break the attorney-client privilege—e.g., when following intuitions of personal morality—by asserting that the privilege ought to be upheld in every case. The communitarian, third-party champion, similarly eliminates space for professional discretion—e.g., in cases where it might make sense to keep client confidences—by asserting that no case of child abuse ought to go undisclosed. Both the classical liberal and communitarian approach champion "ex ante priority rules," which, in upholding the superiority of confidentiality over children's rights, or vice versa, "lock a group . . . into one specific system for 'weighting'. . . these competitive concerns."[217] Political liberalism, the foundation for Nussbaum's Capability Theory, on the other hand, recognizes that imposing a value system on capable and thinking citizens shrivels democratic processes and faith in the democratic system. As Stephen Rowntree states, "democracies testified to a certain coming of age of the citizens . . . they were no longer like children needing to be led, but could, in a broad sense, rule themselves."[218] Taking this into account, the core of Nussbaum's approach includes freedom of choice, pluralism, and human dignity.[219]

In the present context, political liberalism dictates that weighing competing concerns ought to remain within the purview of lawyers, who are closest to parties and evidence. An approach that inherently doubts the professional discretion of lawyers, by, for instance, mandating one standard blueprint for action in moments of ambiguity, risks undermining an attorney's faith in the system that depends on her full participation. And, as can be seen in Part II, a lawyer often has many ways to decide an ethical matter *without* trespassing institutional boundaries, such as those laid out in the Model Rules of Professional Responsibility.

For this very reason, however, professional liberalism is qualified by the Capability Theory in the present Conundrum. The fact that a lawyer could, hypothetically, decide to abrogate the attorney-client privilege in matters such as Model 1 below, in which it is likely best to uphold the privilege, means that something in addition to political liberalism's emphasis on agency is necessary here. Specifically, something is needed that ensures an attorney's discretion, or balancing process, is directed toward the most fruitful end. In this case, the "Agency-Capability" approach

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217. David A. Crocker, The Capabilities Approach and Deliberative Democracy 15 (Feb. 5, 2008), https://terpconnect.umd.edu/~dcrocker/Courses/Docs/DC-Ch9.pdf [https://perma.cc/63ZE-RYAW].

218. Stephen Rowntree, *Learning from Liberal Theory: Process, Procedure, and the Common Good*, 3 U. ST. THOMAS L. J. 92, 97 (2005).

219. *See generally* Jan Garrett, *Martha Nussbaum on Capabilities and Human Rights* (2008), https://people.wku.edu/jan.garrett/ethics/nussbaum.htm [https://perma.cc/68C3-6D82].

dictates that we evaluate competing outcomes "according to their impact on people's capabilities as well as their actual functionings."

Martha Nussbaum's "capability theory of justice" lists several functionings inherent to a life of human dignity.[220] Grouped under general headings (with some overlap), these central abilities are:

- **Physical Health:** being able to live to the end of a human life of normal length; being able to have good health, adequate nutrition, adequate shelter, opportunities for sexual satisfaction and choice in reproduction, and mobility.

- **(Bodily) Integrity/ Autonomy:** being able to live one's own life and no one else's; enjoying freedom of association and freedom from unwarranted search and seizure; being able to avoid unnecessary and non-beneficial pain and to have pleasurable experiences.

- **Social Association:** being able to live for and to others, to recognize and show concern for other human beings; being able to have attachments to things and persons outside ourselves.

- **Critical Reason:** being able to use the senses, imagine, think, and reason; and to have the educational opportunities necessary to realize these capacities; being able to form a conception of the good and to engage in critical reflection about the planning of one's own life.

- **Imagination/ Play:** being able to laugh, to play, to enjoy recreational activities; being able to live with concern for and in relation to animals and the world of nature.[221]

Nussbaum's capability theory focuses on the *active* potential of all individuals to create, change, and control matters of bodily health and integrity, politics, social affiliation, and education.[222] She does not characterize the disadvantaged or vulnerable, but instead offers the key tenets of a healthy, engaged, autonomous, and educated life. Nussbaum's theory thus centers around *agency*—she sees people as "striving agents."[223] Her approach, as a branch of political liberalism, envisions a standard of life

220. Chad Kleist, *Global Ethics: Capabilities Approach*, INTERNET ENCYCLOPEDIA PHILOSOPHY, https://iep.utm.edu/ge-capab/ **[**https://perma.cc/BHQ6-XZYZ].

221. Garrett, *supra* note 219.

222. *Id.*

223. Martha Craven Nussbaum & Rosalind Dixon, *Children's Rights and a Capabilities Approach: The Question of Special* Priority, UNIV. CHI. PUB. LAW & LEGAL THEORY WORKING PAPERS 549, 559 No. 384 (2012).

in which all citizens are fully participating members of democratic societies and lists the core capabilities necessary to achieve this end.

Underscoring Nussbaum's fundamental capabilities is the non-derogable notion of human dignity.[224] The idea of human welfare similarly encompasses the social, physical, and emotional requirements for the fulfillment of a decent, respected, autonomous life. This means a life in which *all* individuals have equal rights to their person and property and are permitted to cultivate their "truly human" capabilities.[225] Nussbaum often refers to this as the "principle of each person as an end," and children are no exception.[226] As Nussbaum and Rosalind Dixon state: "human beings come into the world with a variety of inchoate capacities that need development. The [Capability Approach] argues that these nascent abilities exert a moral claim that they should be developed up to the point at which they reach the threshold level of each capability . . ."[227] Children, if denied the proper resources (e.g., caring parents, spaces of play and learning, etc.) to cultivate practical reason, emotional maturity, and autonomy are denied full human dignity. Due to the sensitivity of youth, special scrutiny must be applied in cases where the capabilities of children are jeopardized. However, the "principle of each person as an end" also means that the requisites of human dignity cannot be denied to adults.[228] Thus, in rights contests between adults and children in which *both* parties face emotional harm, litigation is particularly ambiguous.[229] Another layer of complexity is added when we consider, as we will below, instances in which the natural urge to abrogate the attorney-client privilege harms the child. It may also be argued, in the context of this Article, that *institutional* capabilities must be considered—e.g., the limited resources of child protective agencies.

As such, Nussbaum's core capabilities are particularly helpful in deciphering just *how* to direct an attorney's discretion to the most beneficial end. The next section presents four specific dilemmas, which, at first glance, appear similar in structure—all four entail incidents of child abuse revealed in conversation between the client and his or her attorney. It soon becomes apparent, however, that the lawyers, all four of which are following the Agency-Capability approach, can and will exercise their discretion in different ways. The dilemmas, while informal anecdotes, represent four primary models that generate angst in the current environment: MODEL 1:

224. *Id.*
225. *Id.* at 558, n.4.
226. Nussbaum & Dixon, *supra* note 223, at 557.
227. *Id.* at 563–4.
228. *Id.* at 556 (emphasis omitted).
229. *Id.* at 557.

VICTIM OF DOMESTIC VIOLENCE concerns an attorney representing a battered woman, whose child is similarly a victim of abuse by the partner;[230] MODEL 2: UNRELATED MATTER entails an attorney representing a parent with sole custody of their child, a victim of abuse, in a legal dispute unrelated to determinations of parental fitness or custody, such as an employment dispute;[231] MODEL 3: DEPENDENCY/ DIVORCE/ RELOCATION discusses an attorney representing a parent in a custody dispute, in which the revelation of child abuse has *direct bearing* on the legal issue in dispute, i.e., parental fitness;[232] and MODEL 4: JUVENILE CLIENT-VICTIM involves a teen victim of abuse in a delinquency proceeding for a robbery.[233]

C. From Theory to Praxis: Four Models

Model 1: Victim of Domestic Violence

CONCERN: A non-abusive parent experiencing domestic violence seeks counsel for a divorce or legal separation, knowing that their child has also faced abuse at their partner's hands. If s/he knows that the attorney is mandated to report any incident or suspicion of child abuse, s/he may naturally withhold information relevant to her full and effective representation.[234] The client's reticence is particularly damaging here because "civil domestic violence attorneys typically rely on learning as much as possible about the client's situation to be effective advocates."[235] Disclosing an incident of child abuse in this instance may also convey "the message that the client's children are more deserving than she is of protection." The client may lose trust and request a different attorney, yet "given the shortage of domestic violence attorneys and generally under-funded legal services, the client may not be able to find replacement representation."[236] More generally, mandatory reporting of child abuse in these situations violates the autonomy of the brave individuals seeking help, "disempowering those who most need to be empowered, namely women of color or women with limited economic resources who are domestic violence victims."[237] The child in question may also face aggravated attacks from the partner, angered by the revelation, or be torn from their non-abusive parent

230. MODEL 1 is inspired by the concerns raised in Lockie, *supra* note 32 and Robert H. Aronson, *What About the Children? Are Family Lawyers the Same (Ethically) as Criminal Lawyers? A Morality Play.* 1 J. INST. FOR STUDY LEGAL ETHICS. 140, 141–53 (1996).

231. MODEL 2 is inspired by the concerns raised in Beyea, *supra* note 48.

232. MODEL 3 is inspired by the concerns raised in Boyer, *supra* note 173.

233. MODEL 4 is inspired by the concerns raised in Marrus, *supra* note 178.

234. Lockie, *supra* note 32, at 143.

235. *Id.* at 140.

236. *Id.*

237. *Id.* at 141.

and placed in the foster care system, subject to future abuse or neglect.[238]

Shannon, the mother of a four-year-old daughter, seeks legal separation from her husband Dan. After the birth of their daughter, Shannon and Dan struggled to make ends meet, barely able to afford basic necessities for their newborn. These financial troubles have strained their marriage and Shannon knows that her husband often turns to alcohol to cope. Under the influence of alcohol, Dan often becomes enraged and hits Shannon if the house isn't kept to his liking or if Shannon goes out with her friends. On multiple occasions, Dan has even bruised their daughter when he suspects Shannon is being unfaithful or fails to pay the month's rent on time. Although Shannon knows that she must remove herself and her daughter from the home, she also knows that she will likely face further financial insecurity and harassment from Dan. Weary of legal intervention and unfamiliar with the formal process of separation, Shannon is hesitant to seek counsel. When she finally musters the courage to speak to an attorney at the Legal Aid Clinic of a local law school, she is at first uninclined to disclose the full extent of her situation.

After Shannon's attorney familiarizes her with the process of legal separation and advises her on the full extent of her rights, Shannon feels more comfortable sharing the details of her living situation. She exposes her financial and marital troubles, as well as the extent of her husband's abuse against both her and her daughter. Hesitantly, because her goal is full custody, Shannon concedes that it has been difficult for her to provide a fully nurturing environment for her daughter. She has trouble affording clothes, school supplies, and daycare. Occasionally, she has left her daughter with her upset husband when she must work a night shift to meet the month's rent payment.

In this case, Shannon's attorney must consider the effect of possible revelation of child abuse on her client's preferred legal outcome. In this case, that is full custody. She must also consider consulting with a social worker who, although under the mandatory reporting obligation, could help Shannon secure food, clothing, housing, fare for public transit, gas vouchers, childcare, and public benefits, as well as explain victims' compensation and possible mental health treatment or educational options. Shannon's attorney knows that revelation of the abuse, in this case, will likely prevent her (or a social worker) from pursuing these beneficial options for

238. *Id.* at 148.

> *her client and daughter.*[239] *Revelation will likely expose Shannon to "failure to protect" liability and deprive her of possible custody.*[240]

EVALUATION: The domestic violence case is tricky for two primary reasons: (1) financial trouble is often correlated with *unintentional* acts of child maltreatment or neglect[241] and (2) non-abusive victims of domestic violence may face "failure to protect" liability if their child is similarly abused. The former concern is expressed in research that finds a high correlation between poverty and child maltreatment for the categories of neglect that overwhelm reporting statistics: lack of supervision, environmental neglect, and risk of harm.[242] The latter concern is expressed in many places, though quite explicitly in a hypothetical of the Indiana State Bar Association Ethics Opinion No. 2 of 2015, as follows:

> A domestic violence victim with children consults a legal services attorney, detailing the abuse she has endured, in the course of seeking advice on obtaining a protective order. Instead, the legal services attorney, based on the mandatory reporting statute, immediately notifies the Department of Child Services of Mother's disclosures. As subjecting children to domestic violence indubitably subjects them to harm, DCS would be fully justified, if they questioned Mother's commitment to leaving her batterer, in placing the children in foster care.[243]

In evaluating what Shannon's attorney ought to do here, we must consider the capabilities that would be impaired by revealing the incident of child abuse:

- **(PARENTAL) AUTONOMY OF NON-ABUSIVE CARETAKER:** Oftentimes, child protection agencies focus on the mother's "failure to protect" rather than the partner's violence and continuing presence around the child.[244] As a result, the institutional response has, in most cases, separated caretakers from their children in failure to protect cases.[245] Thus, in these cases, children are often removed

239. Boyer, *supra* note 173 (noting that lawyers who reveal child abuse while representing domestic violence victims may be barred from advocating for "intermediate interventions," before full custody, that serve both the client and child. These interventions most often include social services and supports).

240. This anecdote is inspired by the concerns raised in Lockie, *supra* note 32, and Robert H. Aronson, *What About the Children? Are Family Lawyers the Same (Ethically) as Criminal Lawyers? A Morality Play.* 1 J. INST. FOR STUDY LEGAL ETHICS. 140, 141–53 (1996).

241. *See generally* Boyer, *supra* note 173.

242. *Id.*

243. Indiana State Bar Ass'n, *supra* note 3.

244. Lockie, *supra* note 32, at 150.

245. *Id*.

from their *non-abusive* parent and placed in foster care.[246]

- **(ECONOMIC) AUTONOMY OF NON-ABUSIVE PARENT:** Even when the child abuse report is against the batterer, disclosure of child abuse necessarily involves the domestic violence victim in the child protection system.[247] Adrienne Jennings Lockie, Director of the Domestic Violence Advocacy Project, states:

> Frequent court appearances may place the client's job in jeopardy, which exacts an uneven toll on women of color and women with limited economic resources. Moreover, child protection cases are frequently tracked via the mother's name even when the mother is not a party to the action. As a result, significant detriments to employment opportunities and earning potential for women whose children are involved in the child protection system arise. For example, the domestic violence victim may be prohibited from working in the school system or a daycare center, or otherwise working with children, a frequent employment opportunity for women. This is particularly troubling because lack of access to financial resources often results in a victim remaining with her batterer.[248]

- **(ECONOMIC) AUTONOMY OF CHILD PROTECTIVE AGENCIES:** If Shannon's attorney, and all lawyers in similar situations after her, were to report the abuse in this case, this would unnecessarily strain child protective agencies. Child protection agencies are already inundated with unsubstantiated reports and, because of both over-and under-reporting, often do not know where to devote their energy.[249] To prevent this, these agencies must be empowered to make decisions about where to devote their limited resources—and this means deciding between separating a child from a non-abusive parent or removing another child from inescapable danger.[250]

- **PHYSICAL HEALTH/ BODILY INTEGRITY:** Reporting child abuse leads to an investigation, which could further enrage the batterer, leading to aggravated attacks against both the domestic violence victim and her

246. *Id.*
247. *Id*. at 149.
248. *Id*. at 149.
249. Beyea, *supra note 48*, at 294.
250. *See* Lockie, *supra* note 32, at 254.

children.[251] Moreover, a child who faces removal is exposed to unforeseen abuses and insecurity in the foster care system.[252] Significantly, the child loses control over his or her living status, proximity to caring family members, friends, and familiar educational system.

Outcome: CONFIDENTIALITY

In this case, Shannon's attorney decides to preserve the privilege: she knows that "failure to protect" allegations will merely distract the representation from its goal of securing safety for mother and daughter. She works in conjunction with mental health professionals and social services to restore Camryn to the sole custody of her mother without the threat of the partner's abuse.[253] She understands, however, that collaboration with other professionals in the same office space increases the chances of inadvertent disclosure (which may risk civil or criminal liability); as such, she implements a "confidentiality wall" when working with the mental health team and social worker.[254] This allows certain professionals who operate under different mandatory reporting requirements to work together in service of an individual.[255] In this case, the wall is placed "around predictable points in the legal representation process where [an outside professional] might be most likely to inadvertently encounter protected info."[256] This permits Shannon's attorney to shield Shannon from additional liability, while taking every step possible to support her and her daughter in securing safe housing and other services.[257] Because she knows Shannon will likely face greater financial instability, she helps her apply for public assistance and online courses to further her education.

Model 2: Unrelated Issue (Disclosure Does NOT Directly Bear on Legal Issue of Parental Fitness)

CONCERN: All too often, lawyers are sidetracked by the "client-

251. *Id.* at 148–9.
252. *Id.* at 150.
253. Others have proposed an amendment to mandatory reporting statutes: "A... provision that creates an exception in [domestic violence] cases could ensure the safety of domestic violence victims and their children while also providing an opportunity to make a report once it was safe to do so. . .. Therefore, a report could not be put off indefinitely. The exception would not exempt lawyers from ever making a report but enable them to do so when it is safe." Vanessa Deverson, *Child Abuse and Neglect: Mandatory Reporting and the Legal Pro*., 2 UNISA STUDENT L. REV. 102, 118 (2016).
254. St. Joan, *supra* note 172, at 426–30.
255. *Id.* at 432.
256. *Id.*
257. *Id.*

oriented, libertarian . . . 'hired gun' approach."[258] This is the *historically* dominant approach to legal ethics, but certainly not the "*only* reasonable approach."[259] These individuals claim that "client autonomy, the adversary nature of our system, or notions of the right to counsel are [in]sufficient to justify assisting the client in conduct that threatens the physical welfare of children."[260] In cases where the legal dispute—such as an employment or landlord dispute—*is not one of parental fitness or custody*, a lawyer may disclose the incident of child abuse without jeopardizing the client's end goal. This approach follows a "morality of care" ethic:[261]

> *Michael seeks an attorney to represent him in a contract dispute with his employer, Crestview Electric. He is a single father with sole custody of his 12-year-old son, who regularly accompanies his father to meetings with the attorney after school hours. Michael is facing recent unemployment from what he alleges was a wrongful termination by his employer. Over the course of several meetings with Michael and his son, Michael's attorney starts to suspect that he is abusing the boy. Michael—who has picked up part-time shifts at a local hardware store though still struggles financially—has told his attorney of the immense pressure he is facing. He has admitted that the pressure is getting to him and that he feels bad that he has been losing his temper on his son. Michael admitted that he had not signed up for anger management meetings or other counseling. When his son accompanied him to meetings with his attorney, he had bruised arms and legs, as well as a black eye on one occasion.*[262]

EVALUATION: This case is like MODEL 1 in that it contains another incident of child abuse revealed to an attorney during the representation of a parent-client. Yet, it is different in two main elements. In this case, Michael is a single father and has sole custody of his son; he shows little interest in signing up for or attending anger management meetings and, significantly, the abuse against his son is not the result of environmental neglect or other unintentional mistreatment associated with poverty. Additionally, Michael's attorney is representing him in a dispute entirely unrelated to the issues of parental fitness and custody.[263] In this case, the son, rather than the

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258. Robert H. Aronson, *What About the Children? Are Family Lawyers the Same (Ethically) as Criminal Lawyers? A Morality Play.* 1 J. INST. FOR STUDY LEGAL ETHICS. 140, 141-153 (1996).

259. *Id.*

260. *Id.*

261. *Id.*

262. This anecdote is inspired by the concerns raised in Beyea, *supra* note 32, at 270.

263. Camile Glasscock and Cathy O. Morris in *The Attorney as Mandatory Reporter,* TEXAS BAR J. 207, 207-215 (2005), list a similar hypothetical in which the lawyer who comes across abuse is

parent or child protective agency, will suffer the most harm to his developing capabilities. These include:

- **(1) PHYSICAL HEALTH, (2) (BODILY) INTEGRITY/ AUTONOMY, (3) SOCIAL ASSOCIATION, (4) CRITICAL REASON, (5) IMAGINATION/ PLAY:** if denied protection from abuse and neglect, children are significantly (or even fatally) impaired in their abilities to mature physically, emotionally, and mentally; to feel secure in their bodies, health, and home environments; to cultivate imagination through play and recreation; to develop critical social attachments; to fully function in educational settings and thus sharpen intellectual reasoning; and, ultimately, to develop a high sense of self-esteem and agency.[264] Abused children are often isolated from others, deprived of healthy interpersonal connections, and thus may suffer deficits in emotional processing.[265] This can lead to social delays, difficulty expressing emotion, and engaging or communicating with others.[266] Child abuse has been linked to negative physical, psychological, and somatic symptoms in adulthood—including anxiety disorders and depression, chronic pain syndromes, serious functional impairments, and eating disorders.[267] Those mistreated as children may exhibit greater susceptibility to high-risk health behaviors, including smoking and drug-use, suicide, as well as trouble forming strong relationships.[268] Additionally, a significant body of literature traces childhood abuse to poor educational outcomes, including lower grades and attendance rates.[269]

In this case, Michael, as a result of his lawyer's revelation, may be deprived of custody rights and face subsequent emotional harm, but the outcome of his dispute with his employer may remain untouched. Further, Michael will

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also representing his client in a matter unrelated to parental fitness, as follows: "You meet with John and Jane Doe to advise them on estate planning matters. During their meeting, you learn that the couple recently completed marital counseling. Jane Doe discloses that approximately nine months earlier, during an argument with her husband, their 11-year-old son intervened and was inadvertently injured by her husband. This injury resulted in a trip to the hospital and stitches. The hospital did not question the injury. Mr. Doe indicates that this incident prompted him to seek counseling and that the family has been in counseling since then."

264. Beyea, supra note 32, at 274.

265. Joanna Cahall Young & Cathy Spatz Widom, *Long-term Effects of Child Abuse and Neglect on Emotion Processing in Adulthood*, 38 CHILD ABUSE NEGL. 1369, 1369–81 (2014).

266. *Id.*

267. *Id*. at 1371. *See also* Beyea, supra note 32, at 274.

268. CHILD WELFARE INFORMATION GATE, *Long-Term Consequences of Child Abuse and Neglect*, (April 2019), https://www.childwelfare.gov/pubpdfs/long_term_consequences.pdf **[**https://perma.cc/8NAN-2ZKT].

269. Young, *supra* note 264, at 1369.

not face an egregious threat to his bodily integrity; nor will he face permanent impairment of his cognitive or physical capabilities. He will not lose his opportunity to fully cultivate intellectual faculties, to imagine and to play, and (retrospectively) to develop those social attachments most critical in the tender period of youth. Michael will suffer a legal grievance and may well lose the opportunity to live or spend full time with his son, but this deprivation is justified: the child is removed from a violent home and perhaps shielded from other adverse factors correlated to maltreatment, including poverty, parental substance abuse, and disruptive family dynamics.[270]

Outcome: DISCLOSURE

Michael's attorney decides to abrogate the attorney-client privilege after weighing the abuse suffered by his son, and the impairment of his capabilities, against the legal grievance to his client.

Model 3: Dependency/ Divorce/ Relocation (Disclosure Directly Bears on Legal Issue of parental fitness)

CONCERN: If lawyers are mandated reporters in all situations, anyone seeking to maintain or regain custody but who has, in the past, abused or neglected their child will never secure full and effective representation. Morally, this sounds unproblematic, but it seems repulsive to the any notion of procedural fairness. Perhaps this is why neither the Model Rules nor malpractice law impose a "general duty of care to the child of a client in a custody case."[271] And the research supports this: zealous representation in child welfare proceedings, for instance, is linked to "improved case planning, expedited permanency and cost savings to state government."[272] This does not, however, save lawyers any distress when the interests of the child collide with the wishes of the client.[273] Some attorneys, for instance, offer a counterpoint: Model Rule 1.4(b), in requiring a lawyer to advise the client of the most likely outcome of litigation, implies a duty to consider the best interests of the child.[274] But the lawyer must be careful not to alienate her client(s). Many parents still approach the child welfare system with

270. *See generally* Boyer, *supra* note 173.

271. Lewis Becker, *Ethical Responsibilities of a Lawyer for a Parent in Custody and Relocation Cases: Duties Respecting the Child and Other Conundrums*, 15 J. AM. ACAD. MATRIM. LAW. 33, 36 (1998).

272. *See supra* note 176.

273. Becker, *supra* note 271, at 35.

274. *Id.* at 38.

hesitancy or hostility; a lawyer's disclosure, especially if uninformed or premature, may exacerbate their mistrust, creating barriers to meaningful collaboration.[275] This is particularly true for minority clients: research shows that minority families "are more likely than white families under similar circumstances to be reported for child abuse and neglect and to have their children removed from the home."[276] As a result, others suggest leaving it up to the ultimate trier of fact. Custody and child welfare cases naturally turn on issues of parental fitness. Courts in these cases are charged with investigating the best interests of the child. In fact, children in these situations will likely be appointed a guardian ad litem or Court Appointed Special Advocate to represent their wishes. The Court will consider the mental and physical states of the parents and child, the home environment of each parent, the ability of each parent to provide nourishment and medical care, etc.[277] If the child must be removed from the home, the Court will strive for the permanency plan that maximizes "family preservation [and] reunification."[278]

> *A state Child Protective Services Agency recently challenged Maria and Dominic's custody of their five-year-old daughter, Camryn, after a report was made about potential maltreatment by her schoolteacher. Maria and Dominic secure an attorney to advocate for them in the upcoming proceeding. During their first meeting, Maria and Dominic are visibly emotional and angered by the report made against them. Their attorney soon learns that the couple's relationship is strained; Maria suffers from severe mental health issues, and Dominic is often absent from the home. During particularly bad episodes, Maria concedes that she has taken her anger out on her daughter, occasionally using physical force. Dominic admits he hasn't been home much, and, when he is, tries to ignore his wife's outbursts so as not to upset her further.*
>
> *The attorney recognizes that it is likely in Camryn's best interest to secure temporary, or permanent, substitute care for her. However, she is representing Camryn's parents in the proceeding, and needs them to work cooperatively with her to ensure the best outcome. She is reassured by the fact that a guardian ad litem or Court Appointed Special Advocate (CASA) will likely be assigned to*

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275. *See supra* note 176 at 5.

276. *Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*, *supra* note 178.

277. CHILD WELFARE INFO. GATEWAY, CHILD'S BUREAU, *Determining the Best Interests of the Child*, CHILDREN'S BUREAU 1-4 (2020), https://www.childwelfare.gov/pubpdfs/best_interest.pdf [https://perma.cc/A7AN-XYDW].

278. *See supra* note 176, at 2.

Camryn, but still believes that the Court, one way or another, must know the full extent of the abuse.[279]

EVALUATION: This case—and related divorce and dependency disputes—is particularly agonizing because the lawyer is representing parent-clients in disputes directly bearing on issues of parental fitness. Of course, revelations of child abuse and neglect harm determinations of parental fitness, which directly influence who may keep custody of the child in question. Here, the lawyer faces a particularly distressing choice: any disclosure, no matter how minor, would seem to betray the role of the lawyer as partisan advocate. Indeed, professional guidelines for high quality representation of parent-clients in child welfare disputes usually encourage: (1) full understanding of the client's strengths, needs, and resources; (2) full consideration of parents' wishes for the legal representation; and (3) comprehensive plan to solve problems and meet case goals.[280] These state-sanctioned recommendations, however, are not always enough to sooth a lawyer's conscience. This situation exemplifies those instances in which capability determinations are unclear.

To make this balancing decision, the lawyer will need access to the comprehensive facts of the child's status within the house, and perhaps even her medical records. She will also need the ability to foresee how her revelation might bias the court's determination, impair the relationship with her client (who may already be wary of legal professionals), and harm the adversarial system more broadly. Recognizing that these determinations are difficult, if not impossible, she may judge that the court, specifically charged with making the parental fitness decision and possessing all relevant and available material, stands in a superior position to investigate and report the child abuse. She knows that all states, including the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands have statutes listing the factors that must be considered to ensure the child's best interest is served in a custody battle.[281] Here, the "best interest" decision generally refers to "the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child as well as who is best suited to take care of a child."[282] She knows that these factors include, amongst others: family integrity and preference for avoiding the removal of a child from his or her home; health, safety, and/or protection of the child; timely

279. This anecdote is inspired by the concerns raised in Boyer, *supra* note 173, at 1621.
280. ABA Center on Children and the Law, *supra* note 171, at 2.
281. *Determining the Best Interest of the Child*, CHILD WELFARE INFORMATION GATE.
282. *Id.*

permanency decisions; and assurance that a child removed from his or her home will be given care, treatment, and guidance that will assist the child into developing into a self-sufficient adult.[283] Importantly, she also knows that many factors relating to parental fitness are considered: the emotional ties and relationships between the child and his or her parents; the capacity of the parents to provide a safe home and adequate food, clothing, and medical care; the mental and physical health of the parents; and the presence of domestic violence.[284]

Outcome: CONFIDENTIALITY

Recognizing that "lawyers are rarely among the first to learn of abuse," and seldom in possession of all relevant and available material to evaluate issues of parental fitness, the lawyer decides to defer to the court, who is specifically charged with investigating this matter.[285] Thus, she does not disclose the abuse: she understands that it would irreparably harm her advocacy efforts and potentially subject her to civil or criminal sanctions. By leaving it up to the court, specifically charged with investigating the best interests of the child in this case, she is relieved of any obligation to report. As the court performs their investigation and substantiates the abuse, she may advise her clients that securing full custody is unlikely. Her clients may even come to this realization on their own.

Either way, she can then advocate for the next best outcome: substitute care for the child with a suitable relative and visitation rights.[286] Here, the court will help her efforts: the court must "review agency decisions about the family, the suitability of the child or youth's temporary placement, and the child's permanency plan."[287] The child's interests will also likely be represented by a guardian ad litem or Court Appointed Special Advocate.[288] The court may even observe the child for a period of time in school and in their placement and check in with important contacts, such as teachers, substitute guardians, or service providers.[289] Or, the court may suggest an alternative dispute forum, such as family group conferencing that directly involve the child, extended family members, child welfare agency, and community organizations.[290] The attorney will then be able to advocate for

283. *Id.*
284. *Id.*
285. Indiana State Bar Ass'n, *supra* note 3, at 28.
286. *See supra* note 176, at 2. The goal of permanency planning is to maximize "family preservation" and "reunification."
287. *Id.*
288. *See supra* note 177, at 43.
289. *Id.* at 9.
290. *See supra* note 177, at 70.

"necessary predicates to custody," such as social services that help both her clients and their child, which she likely would have been barred from seeking if she had disclosed the abuse.[291] These social supports will likely address "collateral legal issues" to the abuse or neglect: housing, employment, domestic violence, healthcare, and public benefits.[292]

Model 4: Juvenile Client-Victim (Issues of Rational Competency and Social Services)

CONCERN: Children in juvenile delinquency proceedings for, say, robbery or other offenses have similar rights to adults in legal representation. These include the right to notice of the charges, the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination.[293] Courts have realized that most rights are adjacent to the right, first and foremost, to full and effective assistance of counsel.[294] Of course, the attorney-client privilege is essential not only to ensuring that the attorney provides effective assistance, but also that the child understands the law and properly sets his or her goals within it.[295] Thus, if the attorney suspects or hears of an incident of abuse, does he or she have an obligation to respect the child's wishes if they prefer secrecy? Must the lawyer ask for the child's consent before disclosure? Should the lawyer encourage the child to disclose if disclosure is desirable? If the lawyer decides to disclose the incident, how might that damage the child's trust in the judicial system? A growing body of literature argues that it is wrong to assume children have diminished capacity to participate in the decision-making process regarding their representation and, moreover, that attorneys should involve children in choices that impact their legal status.[296] These scholars argue that children have the rational competency to select into certain social services, and opt out of others, in the course of their legal representation. Others may worry, however, that overestimating a child's maturity will lead to a grave misstep in the representation.

> *Anderson, a fourteen-year-old student, has been temporarily detained by local police for assaulting other students at his high school. In juvenile delinquency court, the judge appoints him an attorney. In their preliminary conversations, Anderson's attorney*

291. Boyer, *supra* note 173, at 1621.
292. *See supra* note 176, at 7.
293. Marrus, *supra* note 178, at 528.
294. *Id.*
295. *Id*. at 523.
296. Appell, *supra* note 145, at 719.

gets the sense that his hostility towards law enforcement extends to lawyers, and other members of the court system. His attorney knows that she must tread a fine line between further alienating him with legalese and fully explaining his legal options and likely outcomes. She also knows that it is important to respect Anderson's opinion and will when it comes to the goals of his representation. With this in mind, she reassures Anderson that she is his appointed advocate and is on his side. She will guide him throughout the entire process and do her best to demystify any technicalities. After this encouragement, Anderson begins to open to his attorney.

He explains that he feels like a social outcast at school, and this sadness often morphs into angry bursts against others. As Anderson divulges more, his attorney gets the sense that his deviance stems from a deeper frustration with his home life. She soon learns that Anderson's mother and father abuse drugs, and, when doing so, harass him and his siblings. Depending on the severity of the drug abuse, his parents may castigate, beat, or entirely detach from him and his siblings. Anderson concedes that he hasn't told anyone else about his parents because it only happens occasionally, and he wouldn't want to be ripped away from his mom, dad, or siblings. In this case, Anderson acknowledges the potential consequences of his revelation, and expresses the desire to remain as one family unit. With this in mind, his attorney knows that revelation of the abuse before the judge would likely bias them against Anderson's wishes. At the same time, she feels that it is unconscionable to subject Anderson and his siblings to further abuse.[297]

EVALUATION: In cases like these, the first question is whether Anderson has the rational competency to make a fully informed decision about disclosure (this may be obvious, or it may require the input of outside professionals). If his attorney ascertains that he does not have diminished capacity to participate in his own representation, she might first consider explaining his options and their associated consequences. In this case, several core capabilities are in jeopardy:

- **CHILD-CLIENT AUTONOMY:** In the legal system, children are often viewed as "developing beings who are irrational, unwise, vulnerable, and unable to exercise authority over their own lives or those of others."[298] A growing body of research, however, challenges this traditional conception. These scholars argue that

297. This anecdote is inspired by the concerns raised in Marrus, *supra* note 178.
298. Appell, *supra* note 145, at 723.

child-clients ought to have the same rights as adults in legal representation.[299] In other words, the legal system should empower the voices of young clients, rather than impose the opinions of parents, schools, or administrative agencies on them. The notion of "legal childhood" obstructs a child's capability to exercise agency and individuality.[300] If the lawyer's opinion on disclosure conflicts with the child-client's wishes, he or she may stifle the small agency that the law affords the child-client by imposing that opinion. After disclosure, the child may not feel comfortable fully and openly consulting with his or her lawyer; this may impede the child's ability to receive effective assistance of counsel, to understand the nuances of the legal representation, and to achieve his or her ultimate goals.[301]

- **PHYSICAL & EMOTIONAL WELFARE:** Of course, the most important question is whether the child's wishes ought to trump his or her best interests regarding his physical and emotional welfare, if they conflict. The lawyer must also consider whether the child's physical health and safety will be best served by disclosing an incident of abuse or negotiating alternative sentencing options.[302] A brutal fact is that juvenile clients do not always receive services if an attorney discloses an incident of abuse during representation.[303]

- **SOCIAL/EDUCATIONAL/VOCATIONAL OPPORTUNITIES:** If a lawyer does not disclose the incident of child abuse, he or she may continue to negotiate alternative sentencing options.[304] Those available to juvenile client-victims include: counseling, continued education, community service, short-term residential placement, and mentoring programs.[305] Considering these opportunities, some claim that lawyers are in a better place than social services to help child-clients.[306] In fact, a 2005 study on child abuse and juvenile delinquency found that children who are removed from the home are "twice as likely to be subject to future delinquency petitions as

299. *Id.*
300. *Id.*
301. Marrus, *supra* note 178, at 523.
302. Megan M. Smith, *Causing Conflict: Indiana's Mandatory Reporting Laws in the Context of Juvenile Defense*, 11 IND. HEALTH L. REV 444, 454 (2014).
303. *Id.* at 455.
304. *Id.*
305. *Id.* at 454.
306. *Id*. at 455.

children who remain in the family home."[307] This avenue, however, requires non-disclosure.

Outcome: DISCRETIONARY

Lawyers, when representing "cross-over" or "dual status" children (youth who experience abuse or neglect and engage in delinquency), may inhabit many different roles.308 The goal in juvenile delinquency proceedings is to maximize both the agency of the child-client and the provision of social services on his or her behalf. The chosen role largely depends on the capacity of the child-client to fully consider his or her options and articulate his or her wishes. If, for instance, the lawyer is representing an adolescent client who has the competency to assess his or her options and who expresses the desire for secrecy, the lawyer may pursue alternative sentencing options.309 This may mean securing temporary residential placement for the client, educational or vocational services, and counseling (if abuse is revealed in counseling, the therapist has a duty to report).[310] If, on the other hand, the child-client is uncertain, hesitant, or in other ways expresses an inability to make a determination regarding disclosure, the lawyer may survey the full range of relevant evidence and present her findings before the judge or trier of fact.[311] In this role of "neutral investigator," the lawyer does not act as an advocate for one particular outcome over another, but compiles and presents all relevant evidence before the judge or trier of fact.[312] Lastly, if the child is so young or of so diminished capacity due to severe abuse, the lawyer may act as "champion."[313] In this role, the lawyer may very well decide for the client that disclosure is in his or her best interests.[314] While the lawyer in this capacity speaks on behalf of the client, she believes the child, who cannot ask for help or express his or her own wishes, will be better off as a "dependent ward of the court rather than a delinquent."[315] Here, she can still advocate for a temporary or permanency plan that maximizes the child's contact with his or her family and collateral contacts, including friends and teachers.[316] Ideally, Child Protective Services would then assist the child

307. Smith, *supra* note 302, at 454.

308. *See supra* note 177, at 77. These children may be "simultaneously receiving services, at any level, from both the child welfare and juvenile justice systems or they may be 'dually adjudicated' youth who are concurrently adjudicated by both the child welfare and juvenile justice systems."

309. Smith, supra note 302, at 454.

310. *Id.* at 454.

311. Marrus, *supra* note 178, at 532.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.* at 533.

316. *See supra* note 171, at 2.

and family.[317]

Lawyers may also pursue alternative dispute forums that naturally bring incidents of abuse to light. For instance, the rise in family violence has encouraged the development of courts specializing in the root problems of juvenile delinquency—"mental illness, addiction, limited anger and risk-management skills, cognitive impairments, poverty, and social marginalization."[318] These non-adversarial forums, or "problem-solving courts," seek to remedy the underlying issues that lead to the co-occurrence of child maltreatment and juvenile delinquency.[319] The judge, by probing deeper into the child's home life and exploring all possible solutions, will likely uncover the abuse on her own.[320]

D. Policy Discussion: Towards Contextual Legal Ethics

It is hard to propose a new approach to an old dilemma in lawyering without necessarily questioning the premises of legal ethics. The "Agency-Capability" approach discussed herein is another step in the movement towards *contextual* ethics,[321] as contrasted with the traditional "the rules are the rules" approach.[322] Indeed, the growing interest in contextual ethics developed from criticisms of the moral paradigm dominant in the 20th and the start of the 21st century:[323]

According to this paradigm, the main focus of moral philosophy was on the development of prescriptive, universalist theories such as theories of contractualism, utilitarianism, obligation, rights, and so on, and this work was often considered to be independent of an understanding of the actual social and ordinary life contexts of human beings . . .[324]

A contextual approach tugs at the tightly sutured morality of adversarial ethics by asking lawyers to contemplate the different interests at stake in any dispute.[325] As is so important in the present context, it understands that

317. Marrus, *supra* note 7, at 534.
318. *See supra* note 179, at 80.
319. *Id.*
320. *Id.* at 81.
321. Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 FORDHAM L. REV., 1629, 1641. (2002); *see also* Deborah L. Rhode, IN THE INT. OF JUST: REFORMING THE LEGAL PROFESSION (Oxford Univ. Press ed. 2000).
322. David L. Hudson Jr., *Duty to Report Cases of Child Abuse Involving Clients is Not Absolute, Says State Ethics Opinion*, *ABA* J. (Jan. 1, 2016), https://www.abajournal.com/magazine/article/duty_to_report_cases_of_child_abuse_involving_clients_is_not_absolute_says **[**https://perma.cc/6EAV-ZHK7].
323. Anne-Marie Søndergaard Christensen & Cecilie Eriksen, Contextual Ethics – Developing Conceptual and Theoretical Approaches, 21 SATS 81 (2020).
324. *Id.* at 81–2.
325. *Id.* at 82.

"the legal issue can be settled without the ethical issue being settled with it."[326] According to Sharon Dolovich, Deborah Rhode states "that [t]he idea is [] not uniform substantive outcomes, but moral reflection and deliberative action by responsible agents."[327] In this sense, Rhode's account pushes a lawyer's focus beyond the image of their client to "the interests at stake and the likely consequences of alternative actions."[328] Broadly sketched, a contextualist legal ethics values certain core competencies: (1) reflective judgment, (2) discretion, (3) flexibility, and (4) accountability.[329] For the present purpose, the universalizable guidepost in moments of lawyerly discretion is the metric of capabilities and functionings.

1. Lessons From Medical Ethics

The field of medical ethics, in particular, models a contextual approach to issues of confidentiality. Scholars and practitioners of bioethics, like those in legal ethics, hold varied opinions on confidentiality in the context of professional relationships.[330] Nancy J. Moore was one of the first to highlight the connection between medical and legal ethics decades ago. She notes that "just as in medical ethics . . . difficult questions do arise in determining when this prima facie duty [of confidentiality] ought to be overridden by other, more weighty considerations."[331] Several bioethicists have recently tackled an issue parallel to the Catch-22 before us—that of informed consent. Traditionally, the rights-based "Hippocratic tradition," which stressed patient-physician trust through confidentiality, dominated bioethics.[332] Similar to legal ethics, medical ethics followed an "autonomy model" with its hyper-focus on "autonomy, dignity, and privacy."[333] As discussed, the autonomy model of legal ethics stemmed from the American Revolution and independency of the Bar from government and other third parties. The autonomy model of medical ethics has similarly deep roots, originating from the "oppressive history of eugenics and coercion of human subjects in the name of so-called public interest."[334] This rights-model extended to informed consent, or the idea that "patients have a legitimate

326. *Id*. at 82.
327. Dolovich, *supra* note 321, at 1641.
328. *Id.* at 1646.
329. *Id.* at 1647.
330. *See generally* Margit Sutrop, *Changing Ethical Frameworks: From Individual Right to the Common Good?*, CAMBRIDGE QUARTERLY OF HEALTHCARE ETHICS 533 (2011).
331. Moore, *supra* note 141, at 247.
332. *Id.* at 534.
333. *Id.* at 533–35. Critics of the traditional autonomy approach claim that "bioethics has suffered from one-sidedness, absolutizing the freedom and choices of the individual, and relegating responsibility, solidarity, and equity to the background."
334. *Id.* at 534.

interest in privacy and preventing third parties from gaining access to sensitive data."[335] When in 2002 the Human Genome Organization (HUGO) named human genomic databases "public goods," however, critics contemplated a more flexible approach:[336]

> As regards electronic health databases, we might care more about health than privacy and think that asking for explicit consent will require considerable resources (both time and money) that could be used for medical treatment. We also understand that if too few patients are included, the social uses of the databases will be lost, and we thus voluntarily give up our privacy to promote health—our own as well as others.[337]

These bioethicists, following the communitarian tradition, suggest that the patient's right to privacy should not be absolute. They believe in the importance of autonomy, but not to the complete exclusion of "solidarity, citizenry, and universality."[338] If human genomic databases were public goods, then "humanity as a whole should be the beneficiary."[339] With sufficient population-data, these databases could identify genetic susceptibilities to common diseases and improve community health.[340] Several bioethicists thus argue that, instead of insulating a patient's full autonomy, informed consent should be modified or eliminated to facilitate vital research.[341] These critics support the "open consent" model in which participants agree to share their "biological samples and data" in public databases for future scientific research.[342]

Like legal ethics, then, the main approaches to informed consent can be categorized under two competing frameworks. The first, "opt-in" model, supports the medical ethics tradition of a constrained common good in favor of a patient's liberty to accept a plan of treatment and prevent third parties from gaining access to personal health data.[343] In the context of the

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335. *Id.* at 540. Sutrop states: "the principle of informed consent was codified in various international documents that argued that respect toward individual interests and choices was paramount, and that social interests or the paternalistic impulses of the medical community would never be allowed to override the individual interests in medicine." *Id*. at 534.

336. *Id.* at 536.

337. Margit Sutrop, *How to Avoid a Dichotomy Between Autonomy and Beneficence: From Liberalism to Communitarianism and Beyond*, 269 J. INTERNAL MEDICINE 375, 377 (2011).

338. Sutrop, *supra* note 330, at 534.

339. *Id.* at 537.

340. *Id.* As a result, several ethicists claim that human genomic databases, as an "immense public resource, . . . require 'a vetting of current ethical principles and relinquishment of the focus on individual autonomy.'"

341. *Id.*

342. *Id.* at 536.

343. *Id.*

confidentiality conundrum, this framework is most similar to the classical liberal "hired-gun": a lawyer's duty is directed solely to the client (the harms to child victims of abuse are but an ancillary consideration). The other, the "opt-out" model, still grants the patient liberty to prevent disclosure of sensitive information, but it is more likely to ensure that "the data from the majority of the population will be available for administrative and statistical purposes, as well as for a sound research base."[344] This framework is most similar to the communitarian "martyr": a lawyer's duties are divided equitably among client, third parties, and the public (while the lawyer still acts in the client's interest, she also has a duty to disclose adverse information that would be useful to public health and safety).

Dr. Margit Sutrop, bioethicist and Professor of Practical Philosophy, warns that these models, however, fail to understand beneficence and autonomy as co-dependent.[345] Similar-minded scholars do not reject the individual rights of research participants, but hold that these liberties should not be absolute.[346] They recognize the subtler notion that "individual rights and the common good are irreducible moral commitments, and both are essential pillars of a good society with neither side entitled a priori to the moral high ground."[347] Sutrop suggests that the emergence of personal health data as a public good necessitates a contextual ethics. It is just not possible, she claims, to "apply the same ethical principles to public health, clinical trials, treatment-oriented medical practice, and the acquisition, possession, and use of personal info, including genetic and medical information."[348] Under a contextual approach to medical ethics, the patient's accordion-like right to privacy shrinks or expands depending on the circumstances of the case.

The coexistence of autonomy and beneficence often depends on particular contexts (e.g., respect for autonomy without beneficence – in the case of mental incapacity, for instance—instructs ignorance toward the person's real desire to be helped by others).[349] The Supreme Court of California also emphasizes the importance of context-based discretion in *Tarasoff v. Regents of the University of California* (1976), holding that the confidentiality privilege is abrogated when public safety so demands:

> [T]he therapist's obligations to his patient require that he not disclose a confidence unless such disclosure is necessary to avert danger to others, and even then that he do so discreetly, and in a fashion that

344. Sutrop, *supra* note 337, at 376.
345. *Id.* at 377.
346. *Id.* at 377.
347. *Id.* at 118.
348. Sutrop, *supra* note 330, at 542.
349. Sutrop, *supra* note 33729, at 378.

> would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger. (*See* Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma* (1974) 62 Cal.L.Rev. 1025, 1065–1066.)

The revelation of a communication under the above circumstances is not a breach of trust or a violation of professional ethics; as stated in the Principles of Medical Ethics of the American Medical Association (1957), section 9: "A physician may not reveal the confidence entrusted to him in the course of medical attendance . . . *unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community*." We conclude that the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins.[350]

The field of medical ethics, as it attempts to reconcile competing moral commitments, is confronted with a challenge similar to that of the legal profession. Bioethicists wrestle with how "a balance should be found between the principles of autonomy and privacy, on the one hand, and the risks and benefits of human research, on the other."[351] In the context of this article, the principles of autonomy, zealous advocacy, and efficiency, on the one hand, must be balanced with the risk and benefits of ethical rules with a greater focus on disclosure, on the other.

2. The Policy Landscape

Capabilities and functionings are, of course, tied to the public policies that guide a lawyer's discretion in contemplating child abuse disclosure. This Article lists the focal policy concerns—raised in Committee Ethics opinions, journal articles, and research reports—that dominate our current setting. These policy concerns define the *context* in which lawyers are situated when making capability-determinations:

- ***Harm to the Attorney-Client Relationship*:** it is likely that disclosure of child abuse will affect a client's faith in the adversarial system—e.g., the client's desire to stay with his or her original attorney, the client's full disclosure of all details relevant to his or her effective representation, the client's willingness to retain counsel

350. Tarasoff v. Regents of Univ. of Cal., 17. Cal. 3d 425 (1976).

351. Jeantine E. Lunshof et al., *From Genetic Privacy to Open Consent*, 9 NATURE REV. GENETICS 1, 5 (2008).

in the future, etc.[352] Even the preliminary mention of an attorney's reporting requirements at the first meeting may spook the client.[353] This mistrust can then hinder the *institutional capabilities* of the adversarial system. This mistrust might reinforce social and economic disparities amongst those, such as domestic violence victims, who already face limited economic resources and now face another obstacle to legal representation.[354] It might also reinforce the low self-esteem of domestic violence victims who "are not accustomed to having their confidentiality, privacy, or autonomy valued" to begin with.[355] It is necessary, nonetheless, to distinguish the different effects of disclosure in cases where the dispute directly bears on issues of parental fitness (e.g., dependency/ child welfare) versus an unrelated matter.

- ***Over-Reporting/Under-Reporting*:** An ancillary, though certainly related, concern to child welfare involves institutional resources. Since the inauguration of mandatory reporting statutes, resources have been increasingly devoted to child maltreatment.[356] Alison Beyea, however, recalls a worrying statistic: "a study conducted by the United States Department of Health and Human Services...estimates that 68% of the children who met the criteria for abuse and neglect were not reported, yet, among reported cases, 56% were ruled to be unsubstantiated."[357] It is thus important to consider how a lack of guidance on "what constitutes child abuse or a reasonable suspicion of abuse" frustrates the institutional capability of child protective agencies.[358] How might investments in public and professional education empower individuals to exercise autonomy in correctly identifying substantiated incidents of child abuse? How might this education, specifically, decrease the rate of unfounded reports that currently inundate child protective agencies?[359] How might bolstering the economic capabilities of child protective agencies, on the other hand, alleviate concerns that "child welfare services are unable to respond," thus leading to under-reporting?[360]

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352. Lockie, *supra* note 32, at 131.
353. *Id.*
354. *Id.*
355. *Id.* at 141.
356. Beyea, *supra* note 48, at 292–93.
357. *Id.* at 293.
358. *Id.*
359. *Id.*
360. Beyea, *supra* note 48, at 293.

- ***The Crime and Severity of Child Abuse and Neglect*:** While child abuse is defined as "a multitude of nonaccidental physical and psychological traumas to children, in the vast majority of cases, over an extended period of time," this does not do justice to the cruelty of the act.[361] Child abuse has been termed a "continuing crime" for its ongoing nature: it is often a pattern of behavior rather than an isolated act.[362] Children who are abused, often at the hands of a parent or guardian, may sustain severe physical injuries, including brain damage and death.[363] After the event, many children suffer from Post-Traumatic Stress Disorder (PTSD), which entails "anxiety, nightmares, generalized fear response, depression, psychopathology, neurosis, character disorders, and trauma-specific fears."[364] More generally, children will suffer from low self-esteem, a lack of empathy, and struggle with low verbal, cognitive, and motor abilities.[365] Abused children suffer academically and in developing and maintaining strong interpersonal relationships. Self-destructive, aggressive, or antisocial behaviors may stunt social growth. Childhood abuse and neglect is also traced to "future juvenile delinquency and adult criminality."[366] What if the lawyer also knew that early intervention could prevent serious economic repercussions? For instance, "if early intervention had prevented only 20% of the abuse and neglect reported in 1983, a minimum of ninety-seven million dollars could have been saved in initial hospitalization, mediation,[] and foster care costs."[367] If the lawyer recognizes that the child—often too young and intimidated, and financially dependent on the abuser—cannot just "walk away," how might this, in combination with early intervention statistics, modify his or her approach?[368]

- ***Statutory Definitions of Abuse*:** When definitions of abuse are unclear, as seen in the previous bullet point, this can lead to both under- and over-reporting. Unhelpful slogans such as "you know it when [you] see it" only compound the problem.[369] Beyea states,

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361. *Id.* at 272.
362. *Id.* at 271–72.
363. *Id.* at 274.
364. *Id.*
365. Beyea, *supra* note 48, at 274.
366. *Id.*
367. *Id.*
368. *Id.* at 275.
369. Lockie, *supra* note 32, at 141. (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)

"given that mental health professionals find it difficult to evaluate the nature of abuse, it seems likely that attorneys would have even greater difficulty making the same sorts of evaluations. To protect themselves from potential liability, attorneys might feel compelled to 'take no chances,' making reports that do not rise to the level of abuse or neglect."[370] Or, worse yet, lawyers may sweep substantial incidents of abuse under the rug when ambiguous statutory language incentivizes them to prioritize the attorney-client relationship. In that case, untangling obscure statutory language appears a much greater undertaking than upholding the privileges of their official capacity. The *autonomy* of lawyers in providing effective counsel is greatly stifled when definitions of abuse are unclear; additionally, as a result of under-reporting, the various functionings of children may remain impeded. What are the specific facts or circumstances that constitute an incident of abuse or neglect?[371] Relatedly, when does an attorney have "reasonable cause" to believe that a child has been abused or neglected?[372] What is the attorney's obligation to investigate whether there is a "reasonable cause"?[373]

- ***Social and Economic Disparities (Specific to Domestic Violence Victims)*:** Sometimes, child abuse disclosure is legally and ethically sanctioned, and the lawyer may disregard any tangential concerns. Occasionally, however, a lawyer might consider the individual circumstances of the client in relation to the legal system. Adrienne Jennings Lockie, Director of the Domestic Violence Advocacy Project, explains: "Both the child protection arena and the domestic violence arena are 'mother-blaming' institutions . . . Failure to protect cases perpetuate stereotypes about the 'good mother' by blaming battered women for the harms perpetuated by abusive men."[374] If lawyers disclose an incident of child abuse in these cases, battered women are further harmed because "attorneys cannot provide sufficient advice when their clients face civil or criminal sanctions."[375] Disclosure in these cases also ignores the historic mistreatment of women of color within the child protection system, the remaining presence of the batterer, and the obstacles the domestic violence victim faces in "future or ongoing custody and

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internal citations omitted).

370. Beyea, *supra* note 48, at 294.
371. Lockie, *supra* note 32, at 141.
372. *Id.* at 143.
373. *Id.*
374. *Id.* at 153.
375. *Id.*

visitation disputes."[376] Disclosure, in this case, may thus mean that the domestic violence victim "will be forever tied" to the abusive partner.[377]

- ***The Child's Wishes*:** it is well known that, contrary to the rational and fully functioning adult, "the unwise, incompetent, weak child is an important feature of the moral and political theory that undergirds our legal regime . . . ."[378] Modern law disenfranchises the child's voice, assigning liberty to the parent or guardian in most matters regarding education, health, religion, freedom, and custody.[379] As Annette Ruth Appell states, "the law empowers adults—parents, teachers, lawmakers, judges—and other governmental institutions, particularly schools and administrative agencies, to dictate the terms of children's lives . . .."[380] This adds another dimension to the lawyer's morally challenging work in disputes where an incident of child abuse surfaces. What obligation, if any, does the lawyer have to investigate, verify, and respect the child's statements and wishes regarding parental fitness, safe home placement, etc.? If the lawyer decides not to disclose the incident of child abuse, does he or she have a responsibility to coordinate a check on the status of the child/ home environment after the legal proceedings?

To preempt a lawyer's response to the conundrum—by forcing an attorney to favor the right of the client or the right of the child—is to deny attorneys a sense of professional freedom that comes with licensed expertise. To force a lawyer into the position of the "hired gun" or "martyr" is, in other words, to shackle an essential arm of our democracy. A contextualist approach to legal ethics understands that, in some cases, both personal and institutional capabilities are best served by keeping client confidences and securing the safety of the child with the non-abusive parent (e.g., domestic violence cases). It also understands that, in other cases, such as when the revelation of child abuse does *not* have direct bearing on the legal issue in dispute (e.g., contract quarrel), it is best to protect the capabilities of the developing child by alerting protection agencies. It understands, in still other cases in which disclosure of child abuse bears directly on the legal issue in dispute (e.g., custody), that capabilities are best preserved when the lawyer provides thorough and unbiased representation to the client while leaving it to the

376. *Id.*
377. *Id.*
378. Appell, *supra* note 145, at 723.
379. *Id.* at 720, 756–57.
380. *Id.* at 730.

court, who, specifically charged with making determinations of parental fitness, has widest access to the relevant information and will uncover the abuse in its investigation.

CONCLUSION

The ultimate hope of this article is that the discussion herein may inspire future consideration of a topic still relevant today. The fact that individual lives are often caught in the crossfire of any policy debate, philosophical argument, or political dialogue must not be neglected. In the context of the Conundrum, this is particularly pronounced. This article began with debate amongst competing camps of philosophers–classical liberals and communitarians–to reveal the deep roots of an age-old legal ethics dilemma. The issue strikes a different political nerve in each of us, a phenomenon evident in the different mindsets of scholars Martha Fineman and Anita Bernstein.

This article then traced the debate amongst philosophers to disagreement at the level of trial courts. Four adversarial approaches - the classical liberal ("hired gun"), constrained liberal (discretionary), constrained communitarian (discretionary), and classical communitarian ("martyr") - emerged. Whether consciously or not, lawyers often inherit the persuasions of their politically minded forebears in moments of indecision. Outlining and defending the "Agency-Capability" approach, this Article presented four standard dilemmas in which a lawyer's discretion is directed towards maximizing the capabilities of the parties involved. Unlike traditional approaches to legal ethics, the "Agency-Capability" approach, premised on Martha Nussbaum's Capability Theory, represents a step in the movement towards contextual legal ethics. Indeed, the wide-ranging policy considerations that factor into child abuse disclosure by attorneys prove that a context-sensitive approach is necessary to move past the current impasse. Ultimately, this article has demonstrated that this Conundrum and the angst generated by it, is personal and real. Various lawyers attempt to dodge the decision or even act under the radar because litigation on this issue and guidance remains so limited. Lawyers, in this sense, suffer a double injustice: the conflicting rules of the Bar, privilege, and mandatory reporting statutes are compounded by a lack of policy insight and instruction. As a result, attorneys embody various adversarial roles, from the "martyr" to the "hired gun," in an attempt to reconcile their personal and professional consciences. The ultimate hope is that the "Agency-Capability" approach encourages further thought on a topic of such personal consequence for the lawyers, legislatures, and children caught in its grip.