
The Troubling Admission of Supervised Visitation Records in Custody Proceedings

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Introduction

Supervised visitation programs provide services to courts in visitation and custody disputes in which a parent alleges physical or sexual abuse, domestic violence,¹ or other harmful behaviors against a spouse or partner. Hailed as a welcome tool in the judicial management of high-conflict family court cases,² these programs are garnering increased attention from legislatures, judges, and lawyers nationwide. The flurry of activity focused on funding and developing these programs, however, has obscured evidentiary questions arising from the visitation reports created at each visit. The widespread misuse of visitation reports, this article argues, threatens to compromise both the interests of abused children and the safety of domestic violence victims, whom supervised visitation was developed to protect.

Part I of this article explores the purposes of supervised visitation programs and the legal community's call for their development. Part II describes the efforts of legislatures and provider networks to develop standards and guidelines for the administration of supervised visitation services. Part III addresses issues surrounding the use and admissibility of observation reports and other reporting tools routinely kept by supervised visitation programs. Focusing on disputed custody cases with

¹See, e.g., Amy B. Levin, Comment, *Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interests of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?*, 47 UCLA L. Rev. 813, 819 (2000) (advocating that courts mandate supervised visitation for batterers and their children so that children can be safe and batterers can have continuing contact with their children).

²See generally Bonnie S. Newton, *Visitation Centers: A Solution Without Critics*, Fla. B.J., Jan. 1997, at 57 (describing supervised visitation as "solution without a downside"); Sarah H. Ramsey, *The Wingspread Report and Action Plan: High-Conflict Custody Cases: Reforming the System for Children*, 39 Fam. & Conciliation Cts. Rev. 146, 152 (2001) (listing supervised visitation among services that should be available to all families without regard to income); Debra A. Clement, Note, *A Compelling Need for Mandated Use of Supervised Visitation Programs*, 36 Fam. & Conciliation Cts. Rev. 294, 311 (1998) (concluding that "[t]here is no better service that state legislatures could perform for their most vulnerable children than to make supervised visitation programs available to every troubled family that can benefit from them"). One author has recommended: "Basic infrastructure improvements should be instituted to reduce opportunities for harmful conflict. Every community that has a public school should also have a center where safe, supervised visitation, waiting, and transfer can be accomplished, if necessary, without the necessity for contact between conflicted parents." Thomas E. Schacht, *Prevention Strategies to Protect Professionals and Families Involved in High-Conflict Divorce*, 22 U. Ark. Little Rock L. Rev. 565, 581 (2000).

allegations of parental unfitness,³ this section examines the tendency of courts to call for program staff to make explicit evaluations based on visit interaction and the improper use of so-called "objective records." Finally, Part IV proposes a standard limiting the circumstances under which courts may admit program records into evidence in custody proceedings.

I. The Growing Call for Supervised Visitation Programs

For years, judges have asked parties litigating custody cases to find "neutral third parties," generally a family member or close friend, to supervise visitation. This can be a daunting task for a volunteer, however, given the time and energy required of a visitation supervisor. Even if a family member or friend agrees to supervise visits, he or she may be vulnerable to the noncustodial parent's demands and threats, rendering the supervision ineffective.⁴ There is also a risk that the volunteer may simply not believe the allegations made about the visiting parent and may decide to only loosely monitor the visit, further endangering the child.⁵ Supervised visitation programs⁶ address this problem by providing ongoing contact between a child and his or her noncustodial⁷ parent in the presence of a neutral third party in cases where physical or sexual abuse, neglect, parental dysfunction, or domestic violence has been alleged.⁸ These programs often include a variety of services⁹ ranging from one-on-one supervision with a monitor continuously in the room, to visits in large rooms monitored by several supervisors.¹⁰ Expertise of staff also varies; because of limited resources, many programs must rely heavily on volunteers, students, and paid community members to provide monitoring of visits.¹¹ The level of security present at programs also varies, with only some programs offering on-site private security officers or law enforcement personnel.¹²

³This article addresses supervised visitation in custody disputes, not the juvenile court or child welfare ("dependency") setting in which children have been removed from their homes and placed in foster care or relative placement.

⁴Karen Oehme, *Supervised Visitation Programs in Florida: A Cause for Optimism, A Call for Caution*, Fla. B.J., Feb. 1997, at 50.

⁵*Id.*

⁶Supervised visitation programs may be referred to by various terms, including supervised access, e.g., Janet R. Johnston & Robert B. Straus, *Traumatized Children in Supervised Visitation: What Do They Need?*, 37 Fam. & Conciliation Cts. Rev. 135, 135 (1999), and family visitation centers, e.g., Minn. Stat. Ann. § 119A.37 (West 2001).

⁷Some states refer to the parent with whom the child primarily resides as the "custodial parent." E.g., Mo. Ann. Stat. § 452.376 (West 2002); Nev. Rev. Stat. Ann. § 125C.200 (Michie 2001); Margaret B. v. Jeffrey B., 435 N.Y.S.2d 499, 500 (Fam. Ct. 1980); Eichelberger v. Eichelberger, 345 S.E.2d 10, 11 (Va. Ct. App. 1986). Other states use the term "residential" parent. E.g., Del. Code Ann. tit. 13, § 722 (2001); Ohio Rev. Code Ann. § 3109.051 (Anderson 2001).

⁸See, e.g., Barbara E. Flory et al., Note, *Supervised Access and Exchange: An Exploratory Study of Supervised Access and Custody Exchange Services: The Parental Experience*, 39 Fam. Ct. Rev. 469, 473 (2001) (listing circumstances warranting referral to supervised visitation program).

⁹See Robert B. Straus, *Supervised Visitation and Family Violence*, 29 Fam. L.Q. 229, 234 (1995) (discussing range of services that comprise supervised visitation).

¹⁰Kathryn Marsh, *The Services*, in New York Society for the Prevention of Cruelty to Children Professionals' Handbook on Providing Supervised Visitation 31, 35 (Anne Reiniger ed., 2000) [hereinafter NYSPCC Handbook].

¹¹Nancy Thoennes & Jessica Pearson, *Supervised Visitation: A Profile of Providers*, 37 Fam. & Conciliation Cts. Rev. 460, 464, 475 (1999).

¹²See Marsh, *supra* note 10, at 35 (stating that supervised visitation program staff may include security guards).

Some visitation programs additionally offer monitored exchange:¹³ *i.e.*, monitoring the child's transfer from the custodial parent to the noncustodial parent at the start of visitation and back to the custodial parent at the end of the visit.¹⁴ This service, as well as other ancillary services such as phone call monitoring and parent education classes, are helpful to courts in addressing the needs of high-conflict families and families in which domestic violence is alleged.¹⁵

In making decisions regarding visitation and custody, trial courts use the "best interest of the child" standard,¹⁶ and are vested with a wide discretion in resolving custody and visitation issues.¹⁷ Resolving custody disputes, rarely considered an easy task by judges, is further complicated in "high-conflict" cases. In these cases, couples engage in extensive, ongoing litigation, often alleging mistreatment of the child by the other parent.¹⁸ Experts disagree whether the definition of "high-conflict" should include cases marked by domestic violence;¹⁹ as one author has put it, however,

¹³Monitored exchanges are sometimes referred to as monitored transfers, e.g., Marsh, *supra* note 10, at 32, or exchange monitoring, Minimum Standards for Supervised Visitation Program Agreements § I(A)(7) (Fla. Sup. Ct. 1999) [hereinafter Fla. Standards], available at <http://www.flcourts.org/osca/divisions/family/bin/svnstandard.pdf>.

¹⁴*See, e.g.*, Cal. Rules of Ct., Standards of Judicial Admin. § 26.2(b) (2002) [hereinafter Cal. Standards] (specifying that standards for providers of supervised visitation applicable to supervision of exchanges); Child Exch. and Visitation Ctr. Guidelines § 2.3 (Kan. Att'y Gen. 1999) [hereinafter Kan. Guidelines] (defining exchange/visitation supervisor), available at <http://www.ink.org/public/ksag/contents/children/cevc-6.htm>; Fla. Standards, *supra* note 13, § I(A)(7) (defining exchange monitoring as "the supervision of a child's movement from the custodial to noncustodial parent at the start of noncustodial parent/child visit or from the noncustodial parent back to the custodial parent at the end of visit").

¹⁵*See* M. Sharon Maxwell & Karen Oehme, *Strategies to Improve Supervised Visitation Services in Domestic Violence Cases*, Violence Against Women Online Resources (Oct. 2001) (noting that while historically such services were provided in child welfare situations, recently there has been increased reliance upon supervised visitation in family law cases involving domestic violence), at <http://www.vaw.umn.edu/FinalDocuments/CommissionedDocs/strategies.asp>.

¹⁶The "best interest of the child" standard is codified in almost all United States jurisdictions. *See* Appendix A (listing statutes codifying standard). The best interest of the child standard is a broad, flexible test that allows judges to fully consider the circumstances of children when making decisions in disputed custody cases. States develop their own criteria to guide judges in determining parental custody and visitation. Courts base their decisions on an evaluation of enumerated factors that affect the welfare of the child. Such factors can include, for instance, the wishes of the child's parent or parents as to his or her custody; the interaction and interrelationship of the child with his or her parent or parents, and his or her siblings; the child's adjustment to his or her home, school, and community; the character and circumstances of all individuals involved; the need to promote continuity and stability in the life of the child. *See* Idaho Code § 32-717 (Michie Supp. 2002), for a partial list of these factors.

¹⁷*See, e.g.*, Turoff v. Turoff, 527 P.2d 1275, 1278 (Haw. 1974) (declining to set aside family court's factual findings without showing of clear error); *In re Marriage of Diehl*, 582 N.E.2d 281, 294 (Ill. App. Ct. 1991) (holding that showing of manifest injustice to child or parent was needed to overturn visitation decisions).

¹⁸*See* Schacht, *supra* note 2, at 565 (discussing gravity of high-conflict divorce); *see also* Newton, *supra* note 2, at 57 (asking rhetorically: "In a time of crowded court calendars, how can a judge sort out the truth on totally conflicting testimony about past events to determine whether allegations of child endangerment are genuine?").

¹⁹*See* Andrew Shepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. Ark. Little Rock L. Rev. 395, 413 (2000) (noting that while some believe high-conflict divorce includes domestic violence, others believe term's use should be limited to situations of repetitive litigation). Some define high-conflict divorce as when: (1) children's opportunities to maintain relationships with both parents are precluded by parental behaviors; (2) ongoing adult interpersonal conflict exposes children to negative messages and inappropriate role expectations; (3) on-going interparental verbal or physical conflict exposes children to potential emotional or physical harm; (4) child physical or sexual abuse or neglect is alleged; or (5) domestic violence exposes adult victims to potential physical harm. Flory, *supra* note 8, at 469. Others define high-conflict divorce as when: (1) conflicts last more than two years after divorce; (2) children have been enmeshed in parental dispute; and (3) parents have poor coping strategies. Barry Bricklin & Gail Elliot, *Qualifications and Techniques to be Used by Judges, Attorneys, and Mental Health Professionals Who Deal with Children in High Conflict Divorce Cases*, 22 U. Ark. Little Rock L. Rev. 501, 501 (2000).

divorce litigation involving allegations of child abuse or neglect by a parent qualifies as "high-conflict" by anyone's definition.²⁰ These cases impose enormous strain on the judicial system,²¹ and courts have recognized the need for judicial intervention and special services for the children who are damaged by their parents' behavior.²²

A. *Effects of Domestic Violence on Children*

Supervised visitation programs are particularly important in the context of cases where there are allegations of domestic violence or child abuse. The tragic effects of domestic violence on children have been well-documented,²³ with studies showing that between fifty and seventy percent of batterers also abuse their children.²⁴ Even those children who do not suffer direct physical abuse suffer psychological harm from witnessing violence between their parents.²⁵ In response to these concerns, the vast majority of states have legislation requiring judges to consider domestic violence when making custody determinations, either as a factor in determining a child's best interest, or as a rebuttable presumption against custody for batterers.²⁶

When faced with allegations of parental abuse or violence, courts often applaud the availability of visitation programs in their community.²⁷ These courts feel relieved that they are no longer forced to choose between: (1) no contact between the parent and child, which may damage the parent-child bond; and (2) unrestricted contact, which risks further abuse to the child.²⁸ Commentators have expressed a variety of views on the appropriate and inappropriate reasons to order supervised

²⁰Schepard, *supra* note 19, at 414.

²¹*See id.* at 399 (noting statistics showing that, in 1995, domestic relations cases made up one-fourth of all civil filings).

²²*See* Judith S. Kaye & Jonathan Lippman, *New York State Unified Court System: Family Justice Program*, 36 *Fam. & Conciliation Cts. Rev.* 144, 144 (1998) (stating, as judges, that "the skyrocketing caseloads . . . are not likely to diminish").

²³*See, e.g.*, Am. Psychol. Ass'n, *Violence and the Family* 70-71 (1996) (reporting that exposure of children to violence at home, even if they have not been physically or sexually abused themselves, typically produces posttraumatic stress symptoms); Barbara J. Hart, *Children of Domestic Violence: Risks and Remedies*, Minn. Ctr. Against Violence & Abuse (providing overview of studies showing that majority of children from violent homes observe violence inflicted by their fathers upon their mothers, and that children who witness domestic violence experience behavioral somatic or emotional problems similar to those experienced by physically abused children), at <http://www.mincava.umn.edu/hart/risks&r.htm> (last modified Nov. 8, 2000).

²⁴Janice A. Drye, *The Silent Victims of Domestic Violence: Children Forgotten by the Judicial System*, 34 *Gonz. L. Rev.* 229, 230 (1998); *see* Pauline Quiron et al., *Protecting Children Exposed to Domestic Violence in Contested Custody and Visitation Litigation*, 6 *B.U. Pub. Int. L.J.* 501, 508-09 (1997) (citing sources that show that more than half of all men who abuse their partners abuse their children and an additional eighty percent of batterers threaten to abuse their children).

²⁵Drye, *supra* note 24, at 231-32. *See generally* Philip C. Crosby, *Case Comment, Custody of Vaughn: Emphasizing the Importance of Domestic Violence in Child Custody Cases*, 77 *B.U. L. Rev.* 483 (1997) (providing an informative case study on domestic violence and its effect on adult and child victims).

²⁶Some states have a rebuttable presumption against custody for batterers. *See* Appendix B (listing statutes). Other states list domestic violence as one factor in determining a child's best interest. *See* Appendix C (listing statutes).

²⁷W. David Dugan, *A View From the Bench*, B. & Bench Visitation Rep., Summer 2001, at 2-3 (discussing how "critical" supervised visitation is to judge trying to serve goals of visitation).

²⁸*See, e.g.*, Margaret Tortorella, *When Supervised Visitation Is in the Best Interests of the Child*, 30 *Fam. L.Q.* 199, 200 (1996) (discussing level of contact alternatives). Commentators have stressed the importance of weighing the child's need for ongoing contact with the stress that contact may cause the custodial parent and the negative effects on the child. *See, e.g.*, Janet R. Johnston et al., *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 *Am. J. Orthopsychiatry* 576, 588 (1989) (finding that the more often children have contact with both parents in distressed families, the more problematic is their adjustment).

visitation.²⁹ Most agree, however, that while the court is investigating allegations against the parents, or providing crucial services to the family members,³⁰ the neutral setting of supervised visitation programs offers crucial advantages over no-contact orders or orders allowing family members or friends to supervise visits.³¹

B. Intervention Through the Use of Supervised Visitation

Supervised visitation has been welcomed as "an essential component of an integrated community intervention system" to eliminate domestic violence and protect its victims,³² and described as an "equitable remedy serving the dual purpose of preserving the constitutionally protected and emotionally vital parent-child relationship while protecting the child and sometimes, the other parent."³³ The American Bar Association has approved a policy encouraging courts to "provide or identify and make use of locations" in which supervised visitation can safely occur.³⁴ Attorneys are urged to become leaders in their communities and to encourage the development of supervised visitation programs to promote the safety of parents and children.³⁵ It is not surprising, then, that such programs have burgeoned over the past decade. A national study identified ninety-four supervised visitation programs in 1999.³⁶ The Supervised Visitation Network of visitation providers currently lists 240 U.S. members and an additional thirty-three members providing these services abroad.³⁷

Although commentators have long lamented the lack of adequate funding for supervised visitation services,³⁸ these programs continue to emerge, sustained by (though sometimes only marginally)

²⁹See, e.g., Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and Their Children: Who Needs What Kind of Help?* 22 U. Ark. Little Rock L. Rev. 453, 477, 478 (2000) (arguing that supervised visitation should not be used as "a dispositional alternative when an indigent family cannot afford other types of services," or to ensure an abusive parent's right of access to the child when the child is chronically uncomfortable and distressed with that access).

³⁰These services can include substance abuse evaluations and treatment, counseling, victim and batterer services, sexual offender evaluations, and parent education classes. Jessica Pearson & Nancy Thoennes, *Supervised Visitation: The Families and Their Experiences*, 38 Fam. & Conciliation Cts. Rev. 123, 134 (2000).

³¹See Newton, *supra* note 2, at 57 (advocating advantages of supervised visitation). Victim advocates have long acknowledged the risks inherent in having family members—who may tolerate inappropriate behavior—provide supervision. See, e.g., ABA Comm. on Domestic Violence, Policy OOA109A (2000) [hereinafter ABA Policy] (explaining that allowing family members to conduct supervised visits does not adequately address safety, and places the family member at risk of violence or manipulation by abuser).

³²Model Code on Domestic and Family Violence § 406 cmt. (Nat'l Council of Juv. & Fam. Ct. Judges 1994). "Visitation Centers may reduce the opportunity for retributive violence by batterers, prevent parental abduction, safeguard endangered family member, and offer batterers continuing contact and relationship with their children." *Id.*

³³Clement, *supra* note 2, at 297.

³⁴ABA Policy, *supra* note 31.

³⁵Fam. Violence Project, Nat'l Council of Juv. & Fam. Ct. Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 Fam. L.Q. 197, 224 (1995).

³⁶Thoennes & Pearson, *supra* note 11, at 463.

³⁷Telephone Interview with Nancy Fallows, Executive Director of the Supervised Visitation Network, Supervised Visitation Network (Mar. 12, 2002) (on file with authors).

³⁸See, e.g., Katherine M. Reihing, *Protecting the Victims of Domestic Violence and their Children after Divorce: The American Law Institute's Model*, 37 Fam. & Conciliation Cts. Rev. 393, 404 (1999) (criticizing practicality of A.L.I. model statute on child custody for suggesting low-cost court-ordered services like supervised visitation for families affected by domestic violence without acknowledgement of lack of necessary funding for developing and providing such services); Clement, *supra* note 2, at 306 (arguing that "demonstrated inability of most supervised visitation programs to endure, let alone thrive, because of inadequate financial resources provides a compelling reason for state funding").

a pastiche of funding sources.³⁹ The federal Violence Against Women Act of 2000⁴⁰ provided \$15 million for the development of supervised visitation pilot programs, ensuring new services for visitation in situations involving domestic violence, child abuse, sexual assault, and stalking⁴¹ for 2002 and 2003.⁴² These efforts ensure that more supervised visitation programs will emerge in the near future. The continued growth of these programs necessitates a critical examination of how the court system has used the programs in custody cases.

II. Misguided Reliance on Visitation Records in Custody Proceedings

The Supervised Visitation Network (SVN) is a multi-national non-profit membership organization consisting of a network of agencies and individuals who are interested in assuring that children can have safe, conflict-free access to parents with whom they do not reside.⁴³ In 1996, SVN developed a set of standards and guidelines for the provision of such services.⁴⁴ These policies were intended to focus on quality assurance and to serve as a resource for the development of future programs, as well as for the establishment of accreditation, licensing, and funding standards.⁴⁵ No state appears to have incorporated the standards in full. Several states, however, have created legislation, much of which resembles SVN guidelines, to define the tasks of supervised visitation programs, coordinate the provision of those services, and set standards for the services.⁴⁶ Other states have developed

³⁹See Julie Kunce Field, *Visits in Cases Marked by Violence: Judicial Actions That Can Help Keep Children and Victims Safe*, 35 Fam. Ct. Rev. 23, 26 n.26 (1998) (describing federal funding sources); Maxwell & Oehme, *supra* note 15 (mentioning Victim of Crime Act funds, Rural & Child Victimization grants, and local grants); Thoennes & Pearson, *supra* note 11, at 464, 475 (noting that most programs rely on volunteers because they lack resources for paid staff and security).

⁴⁰Pub. L. No. 106-386, Div. B, 114 Stat. 1509 (codified as amended in scattered sections of 42 U.S.C.).

⁴¹42 U.S.C.A. § 10420(a) (West Supp. 2002). The Safe Havens for Children Pilot Programs provides for the awarding of: [G]rants to States, units of local government, and Indian tribal governments that propose to enter into or expand the scope of existing contracts and cooperative agreements with public or private nonprofit entities to provide supervised visitation and safe exchange of children by and between parents in situations involving domestic violence, child abuse, sexual assault or stalking.

⁴²*Id.* § 10420(e); see generally Office of Justice Programs, U.S. Dep't of Justice, Safe Havens: Supervised Visitation and Safe Exchange Grant Program (2002) (providing application and program guidelines for fiscal year 2002).

⁴³*About Supervised Visitation Network*, at <http://www.svnetwork.net/AboutSVN.html> (last modified Aug. 2, 2002). Private providers of child access, both for-profit and non-profit, can be members of the Supervised Visitation Network. See *id.* (listing who members may be). Currently, SVN membership is entirely voluntary, as no state requires SVN membership for its visitation programs. See *id.* (discussing membership without mentioning any state requirements).

⁴⁴Supervised Visitation Network, Standards and Guidelines for Supervised Visitation Network Practice (2000) [hereinafter SVN Guidelines], at <http://www.svnetwork.net/StandardsAndGuidelines.html>.

⁴⁵*Id.* at 126, § 1.2.

⁴⁶See, e.g., Cal. Fam. Code § 3200-3203 (West Supp. 2002) (directing Judicial Council to develop uniform standards of practice for providers of supervised visitation, found in Cal. Standards, *supra* note 14, § 26.2); Conn. Gen. Stat. § 17a-101(l) (2001) (directing state agency to establish supervised visitation centers); Haw. Rev. Stat. Ann. § 571-46 (Michie 2001) (specifying that supervised visitation center provide secure setting, specialized procedures, and supervision by person trained in security and avoidance of family violence); Kan. Stat. Ann. § 75-720 (2001) (directing Kansas Attorney General to coordinate and cooperate with local governmental agencies in providing child exchange and visitation centers); Minn. Stat. Ann. § 199A (West 2001) (establishing grants for "parenting time" centers); N.J. Stat. Ann. § 2A:12-11 (West 1987) (establishing statewide supervised visitation program). Other states allow the courts to order families to use visitation programs. E.g., Mass. Gen. Laws Ann. ch. 209A, § 3(b) (West. Supp. 2002). In 2001, the Louisiana Senate established a Child Visitation Center Review Commission to study the feasibility of establishing child visitation centers in the state. 2001 La. Res. 4 (2001).

standards that are judicially or administratively, but not legislatively, mandated.⁴⁷ Legislatures and providers acknowledge that minimum and best practice standards are necessary for the safe, effective provision of supervised visitation.⁴⁸

Existing legislative standards have focused on the visit itself, not evidence produced during the visit that will affect the litigation that resulted in the supervision. It is entirely understandable that providers of this service would concentrate on preparing children and parents for visits, training staff, utilizing a child-friendly site, and providing safety measures. There exists, however, a gap between practices of keeping and using visit records and the lack of judicial and legislative standards governing their admissibility. The resulting inappropriate reliance on these records in custodial proceedings can cause unintended consequences directly adverse to the best interest of the children and their custodial parents.

A. The Evidence Produced from Supervised Visits

When a noncustodial parent is referred to a visitation program, he or she will be presented with the rules of the program.⁴⁹ In court-ordered cases, these rules are generally incorporated into the court order by reference.⁵⁰ The custodial parent will bring the child to the program (optimally through a separate area), and staff will accompany the child to the visit.⁵¹ Observation reports completed by staff are used to describe the visit. Detailed observations can be used;⁵² other possible instruments include a form in checklist format⁵³ and a bubble-sheet.⁵⁴ According to the SVN Guidelines, observation reports should at least detail the following: identifying client information, information about who provided the supervision, the date, time, and duration of contact, who attended the visitation, an account of critical incidents, a summary of activities by the parent and child, comments or requests made by the parents or child, and interventions made during the contact, including early termination

⁴⁷*E.g.*, Fla. Standards, *supra* note 13 (judicially mandated); Kan. Guidelines, *supra* note 14 (administratively mandated); *see* Kan. Stat. Ann. § 75-720 (directing attorney general to provide for child exchange and visitation centers). Some states do not even have formal standards to govern their programs. *See, e.g.*, 2001 La. Res. 4 (authorizing study of feasibility of establishing child visitation centers). Other states' programs operate by internally produced procedures, rather than rules required by funding sources, or standards developed by an umbrella social services agency under which the supervised visitation program operates. Vermont, for example, as of this writing, has nine providers (not all of whom are members of SVN) who collaboratively developed their own procedures, which they all in good faith agree to follow. Telephone Interview with Ann Marie Roth, Executive Director, Family Connection Center, Burlington, Vt. (Mar. 18, 2002) (on file with authors).

⁴⁸*See, e.g.*, 42 U.S.C.A. § 10420(c)(4) (West Supp. 2002) (stating that Attorney General shall award grants to applicants that "prescribe standards by which the supervised visitation or safe visitation exchange will occur").

⁴⁹*See* Nadine Blaschak-Brown, *Providing the Service*, in NYSPCC Handbook, *supra* note 10, 67, 74 (stressing that clients be presented with guidelines so that they have clear understanding of acceptable behaviors and expectations).

⁵⁰Numerous examples of common court orders of this type are on file with authors.

⁵¹*See* Maureen Sheeran & Scott Hampton, *Supervised Visitation in Cases of Domestic Violence*, Juv. & Fam. Ct. J., Spring 1999, at 13, 17 (suggesting methods for precluding contact between parents by using separate arrival and departure times, parking lots, entrances, and waiting areas).

⁵²*E.g.*, Fla. Standards, *supra* note 13, IV(C).

⁵³Blaschak-Brown, *supra* note 49, at 79. Some providers use checklists in an effort to be objective. But checklists do not allow for detailed information about parent-child interaction. Also, a "yes/no" format that includes the statement "Child was happy to see his/her parents" has not gotten around the problem of subjectivity. Rather, the statement should read, "The child (laughed) (smiled) (cried) on seeing the visiting parent." *Id.*

⁵⁴Erma's House, in Columbus, Ohio, uses a fill-in-the-blank bubble-sheet form that is filled in by monitors, with spaces for free response. The University of Dayton analyzes the information for statistic-keeping purposes. Forms are available at 1024 Brown Street, Dayton, OH 45409, attn. Peggy Seboldt.

of the visit with the reason for the termination.⁵⁵ Many programs use narrative documentation,⁵⁶ or detailed observations,⁵⁷ describing the behavior and statements of the visitation participants. Many visitation programs also use video cameras⁵⁸ to record visits to supplement observation reports. The following scenario helps to clarify how the process develops:

*Fred and Marie Jones have a four-year-old daughter, Jennifer. Marie has filed for divorce and asked the court for a restraining order against Fred; she alleges that he punched and kicked her during the marriage, and has been threatening her and stalking her since she left the marital home a month ago. Marie also alleges that Jennifer saw some of the violence in the home, and that she is afraid that Fred will harm Jennifer. The court enters the injunction against domestic violence and tells Fred that he will temporarily have supervised visitation with Jennifer at the local visitation program. Fred attends five visits over the next month and goes back to court on a motion to reinstate unsupervised access to his daughter, claiming that his visits show that he is not a danger to Jennifer. The observation reports detail accounts of the activities in which Mr. Jones and Jennifer engaged during the visit, and statements that the father and daughter made. The judge asks to see the report at the hearing on Mr. Jones's motion.*⁵⁹

Pioneers in the provision of supervised visitation services recognized the potential for records to be used to influence decisions about parental access to the child, and issued the following SVN-recommended cautionary note to appear on all reports or observation notes:

The observations are of parent-child contacts which have occurred in a structured and protected setting. No prediction is intended about how contacts between the same parent(s) and child(ren) might occur in a less protected setting and without supervision. Care should be exercised by the users of these observations making such predictions.⁶⁰

Unfortunately, the Guidelines are contradictory on this point. Section 5.3 states that providers should not perform evaluations or make recommendations, but then goes on to list additional duties of the provider if she does conduct an evaluation.⁶¹ Section 22.1, on the other hand, states that providers shall not provide reports that express opinions.⁶² The authors of the Guidelines acknowledged that there was "intense pressure" from courts for programs to give opinions based on their

⁵⁵SVN Guidelines, *supra* note 44, § 21.2.

⁵⁶Blaschak-Brown, *supra* note 49, at 80 ("Narrative documentation gives a play-by play account of parent-child interaction . . . an overall picture of what is happening.")

⁵⁷Fla. Standards, *supra* note 13, § IV(C)(1) ("Detailed observations offer a comprehensive account of events that took place between the non-custodial parent and child.").

⁵⁸See Marsh, *supra* note 10, at 35 (pointing out that video cameras may offer added security to supervised visitation program).

⁵⁹See *infra* text accompanying notes 138-39 for an elaboration of this hypothetical.

⁶⁰SVN Guidelines, *supra* note 44, app. D.

⁶¹*Id.* § 5.3. According to § 5.3, providers should perform evaluations and make statements of opinion about a family member or the contact between a child and adult only if the referring court or agency has specifically requested them to do so. *Id.* Moreover, providers should be specifically trained to provide evaluations, follow acceptable procedures, and inform both parents of the evaluation. *Id.*; see *id.* § 5.3 ed. note (maintaining that supervision and evaluation should be two separate functions, performed by different specialists).

⁶²*Id.* § 22.1.

evaluations.⁶³ Still, this pressure does not justify courts' attempts to make supervised visitation programs all things to all people.

There is a dearth of studies on the documentation produced at supervised visitation, and much more research needs to be conducted about the results of providing the service of supervised visitation itself. A review of the existing studies and literature, however, discloses several troubling trends. A 1999 study shows that nearly eighty percent of visitation programs serving divorced families make factual reports to the court,⁶⁴ and nearly sixty percent offer recommendations about parent contact to the court.⁶⁵ Thirty-three percent offer advice to the court regarding the validity of allegations such as parental neglect or sexual abuse.⁶⁶

The fact that disputed custody and visitation cases are a notorious drain on the judicial system⁶⁷ does not justify having visitation staff make recommendations to the court, even when parents affirmatively want programs to offer such information.⁶⁸ Supervised visitation was originally established to provide a crucial service, parent-child access, and was never intended to be used as a backdoor parenting evaluation. Using supervised visitation reports and staff to "document behavior by each parent that either supports or discourages access [to the child]" does just that.⁶⁹ When a court allows a program's observation report into evidence in lieu of having the staff member testify,⁷⁰ it often effectively substitutes an irrelevant narrative for a formal evaluation.

That courts routinely review or hear evidence of visitation records in the parents' litigation⁷¹ means that parents may want to use the behavior at visits to strengthen their requests for relief.⁷² A non-custodial parent, for example, may seek to use the records to gain less structured visitation, unsupervised visitation, or custody. A custodial parent may seek to use the reports to justify requests for a prohibition on contact by the noncustodial parent.

B. The Limitations of Visitation Reports

Courts using reports in this fashion ignore the inadequate credentials of staff and the artificial nature of supervised visitation. Although some programs provide what is commonly known as therapeutic supervision-using licensed mental health professionals to directly address the conditions that led

⁶³Robert B. Straus, Nadine Blaschak-Brown & Anne Reiniger, *Standards and Guidelines for Supervised Visitation Practice: Introductory Discussion*, 36 Fam. & Conciliation Ct. Rev. 96, 100-01 (1998).

⁶⁴Thoennes & Pearson, *supra* note 11, at 466.

⁶⁵*Id.*

⁶⁶*Id.*; see Clement, *supra* note 2, at 299 (stating that testimony and records of supervised visitation staff have become extremely valuable evidence should either parent petition for modification of visitation).

⁶⁷Kaye & Lippman, *supra* note 22.

⁶⁸Pearson & Thoennes, *supra* note 30, at 138. According to that study, fifty-four to sixty-seven percent of parents favored supervised visitation programs making recommendations to the court. *Id.*

⁶⁹*Id.* at 128.

⁷⁰See Leigh Goodman, *From Property to Personhood: What the Legal System Should do for Children in Family Violence Cases*, 102 W. Va. L. Rev. 237, 281-822 (1999) (describing D.C. Superior Court's Supervised Visitation Program as fairly typical example of important contribution a center can make to ensuring safety of children).

⁷¹See Newton, *supra* note 2, at 56 ("All supervisors keep records and make their observations known to the court").

⁷²See Pearson & Thoennes, *supra* note 30, at 138 (reporting that many parents think that programs are supposed to provide court with factual information about visits, make recommendations to court about what should happen with respect to custody and visitation, and assess validity of allegations bringing them into supervised visitation).

to the referral⁷³-the majority of United States programs do not use licensed mental health professionals to monitor visits. Instead, programs generally use students who are interns in local colleges and universities majoring in social work or psychology, other student volunteers, community member volunteers, part-time workers, or college-educated staff⁷⁴. Training is required in states that have formal standards, and SVN recommends that visit supervisors be trained a minimum of thirteen hours, but preferably twenty-five.⁷⁵

These sessions, which focus on important issues such as child development, substance abuse, administrative procedures, observation skills, and divorce dynamics, are nevertheless a poor substitute for years of education, training, and professional licensure. Mental health professionals have much more access to information regarding the parties and are highly trained in understanding such complicated issues as domestic violence and sexual abuse⁷⁶. Mental health professionals would also be in a position to know whether they need further access to the parties, or further information from mental health evaluations, substance abuse evaluations, or violence risk assessments.⁷⁷

What subverts the reports' utility even more is that visits are highly controlled and manipulated in order to make them successful. In our example above, allowing Mr. Jones to use the records to buttress his claim for unsupervised visits would ignore the artificial nature of the supervised visit itself, and might further endanger the child and custodial parent. Such reports should not be admissible for several reasons.

The visit, from the initial intake appointment⁷⁸ to the exit of the parent from the center, is meticulously arranged to ensure safety and reduce stress to the child. Staff emphasize the rules of the program to the parent; these rules include: specific time periods for arrival and departure,⁷⁹ policies on what subjects can and cannot be discussed,⁸⁰ criteria for physical movement around the program,⁸¹ prohibitions on the tone of voice to be used,⁸² and numerous other restrictions designed to ensure

⁷³Marsh, *supra* note 10, at 37.

⁷⁴See Johnston & Straus, *supra* note 6, at 145 (noting that supervised visitation programs are not staffed by clinicians with training to make recommendations about access of child to dysfunctional noncustodial parent and thus are not organized to answer such questions); Thoennes & Pearson, *supra* note 11, at 464 ("Approximately one half of the programs use graduate and undergraduate students to supervise visits on a volunteer basis, and one third to one fourth of the respondents use other community members as volunteers"); Eilene Zimmerman, *When Real Solutions Can Be No Solution*, San Diego Mag., Mar. 2, 2002, <http://www.sandiegomag.com/issues/march02/featurea0302.shtml> (discussing questionable qualifications of supervised visitation coordinators).

⁷⁵SVN Guidelines, *supra* note 44, § 11.2(a).

⁷⁶See SVN Guidelines, *supra* note 44, § § 2.13, 10.8, 11 (referencing and outlining mental health professional training).

⁷⁷See *id.* § § 11.1-11.2 (listing training that puts mental health professionals in position to seek access to parties and information).

⁷⁸See Blaschak-Brown, *supra* note 49, at 69-72 (describing intake procedures).

⁷⁹*Id.* at 76. Some programs designate different entrances to the visitation building for custodial and noncustodial parents, and/or different car parking areas for each adult. In addition, it is recommended that the custodial parent leave at least 15 minutes before the visiting parent/*id.*

⁸⁰See, e.g., Cal. Standards, *supra* note 14, § 26.2(i)(6) (barring "derogatory comments about the other parent, his or her family, caretaker, child or child's siblings"); *id.* § 26.2(i)(7) (forbidding discussion of the court case or possible future outcomes).

⁸¹See *id.* § 26.2(i)(4) (requiring that contact between child and noncustodial parent be within provider's sight and hearing at all times).

⁸²See, e.g., *id.* (prohibiting whispering and requiring that all conversation be audible to the monitor)

that the visit does not traumatize the child.⁸³ The noncustodial parent is constantly reminded of the nature of the visit by the presence of a monitor, who may be holding a clipboard and jotting down notes to aid in the preparation of the report.⁸⁴ In some programs, the presence of a video camera serves as a constant reminder of staff scrutiny.⁸⁵ Many programs also prepare the child for the visit in a special intake session intended to alleviate her fear and make her more comfortable with the visit.⁸⁶

In addition to preparing the parents and children for the visit, visitation staff are encouraged to promote the child's safety and welfare before and during the visit by suggesting or encouraging age-appropriate activities and by facilitating parent-child recreation.⁸⁷ This can mean that the staff may have suggested to the parent certain activities, such as games and sports, to enjoy during the visit.⁸⁸ This type of assistance is not therapy; rather, it is helpful and supportive encouragement of parent-child interaction.⁸⁹

The sterile environment created for safe visits sends the visiting parent the message that the program and the court take the visit seriously. Thus, it drastically increases the likelihood that a noncustodial parent will follow the rules of the center. Children receive the message at the outset that they will be safe at the program. Even though they may experience some discomfort in the unfamiliar surroundings, sympathetic staff (who have oriented, introduced, and reassured the children⁹⁰) and a physical environment which has been specially designed to be child-friendly⁹¹-decorated with bright colors and scattered with toys and games⁹²-may very well assuage or even mask any fear or anxiety the child has in spending time with his parent. This is not to say that some children are not genuinely pleased to see their parent; many no doubt are. Commentators have long noted that the child may be longing for renewed contact, while also wanting the abuse to stop.⁹³

⁸³ *See id.* § 26.2(i)(8) (prohibiting use of staff or the child to gather information about other party or caretaker or to transmit documents, information, or personal possessions).

⁸⁴ *See Fla. Standards, supra* note 13, § III(B)(2) (providing that visitation supervisor and monitor/observer record observations, complete checklists, and prepare reports to the court); *Kan. Guidelines, supra* note 14, § 9.5b(3)(6) (providing that exchange/visitation supervisor record observation notes and document supervised exchanges or visitations); *see also Cal. Standards, supra* note 14, § 26.2(c)(4)(iii) (directing that providers of supervised visitation receive training in record-keeping procedures).

⁸⁵ *See Newton, supra* note 2, at 56 (mentioning that supervision may include passive observation through video equipment).

⁸⁶ *See Blaschak-Brown, supra* note 49, at 73 (recommending that providers offer children time to come to visitation sites and meet staff before first visits with noncustodial parents and take active roles to alleviate children's anxieties or fears); *see also Robert B. Straus, Special Issues and Risks, in NYSPCC Handbook, supra* note 10, 89, 100 (discussing preparation of child for visitation in cases of sexual abuse or domestic violence).

⁸⁷ *See Fla. Standards, supra* note 13, § I(E)(5)(e) (stating that part of role of visitation supervisor is to facilitate child/parent interaction during supervised contact).

⁸⁸ Hedi Levenback, *Setting Up the Physical Environment, in NYSPCC Handbook, supra* note 10, 51, 60-62 (suggesting dozens of age-appropriate toys and games for visitation centers).

⁸⁹ *See Fla. Standards, supra* note 13, § I(A)(8) (defining facilitation of visits as encouraging age-appropriate activities, promoting child's safety and welfare, and discouraging inappropriate conduct-not therapeutic intervention).

⁹⁰ *See, e.g., Kan. Guidelines, supra* note 14, § 6.1 (directing that in age appropriate manner, children be oriented to the setting, introduced to staff and reassured of availability, and told of their arrangements for visits, including frequency, duration, and procedures).

⁹¹ *See Levenback, supra* note 88, at 54-59 (describing NYSPCC's Ronald McDonald Visitation Room as prototype).

⁹² *Id.* at 60-62.

⁹³ *E.g., Straus, supra* note 86, at 96.

Under these sanitized circumstances, it is highly inappropriate to use an orchestrated hour or two visit (or a collection of visits) to prove that the child has been or will be as comfortable with that parent in any other setting. Many children at supervised visitation are "compliant and eager to please,"⁹⁴ and their special needs may not be recognized by staff. Returning a child to a violent parent under those circumstances without treating the batterer simply reinforces the batterer's control over the other parent and betrays the child, who may have sincerely hoped or believed staff's assurances that the court would make the child safe. Moreover, it increases the danger to the custodial parent, who is now convinced that the court system will not assist her.

C. The Elusive Nature of Domestic Violence

Reliance on visitation reports to show improved behavior by a perpetrator of domestic violence is particularly problematic for two reasons. First, as psychological studies have documented, batterers can often readily evade detection. Batterers are not easy to identify by sight, and thus can confound even the most experienced trier of fact.⁹⁵ Batterers come from every social, economic, ethnic, professional, educational and religious group⁹⁶. They frequently minimize or deny their actions, or attempt to project blame onto their victims or stressful circumstances in their lives.⁹⁷

Batterers are often noted to have "dual personalities"; they can be charming in public and unthinkably vicious behind closed doors.⁹⁸ Researchers studying children in the visitation setting have even noted that children themselves have a "double image" of their batterer fathers, who at times can be "loving caretakers or doting suitors."⁹⁹ To the outside world, a batterer "usually appears to be a good provider, a loving father, and a law-abiding citizen."¹⁰⁰ This public image, buttressed by most batterers' lack of criminal records,¹⁰¹ makes it relatively easy for a batterer to choose to adapt to

⁹⁴Johnston & Straus, *supra* note 6, at 137.

⁹⁵*See, e.g.*, Ramsey, *supra* note 2, at 153 (recommending that judges be trained in child development, child abuse and neglect, domestic violence, and related issues). The fact that it is difficult to determine whether a parent following the rules of a program is a batterer should not deter judges from seeking this crucial training. Such continuing education may assist judges with a better understanding of the complicated dynamics of violence and its impact on litigants, children, and the community.

⁹⁶Linda Peterman & Charlotte G. Dixon, *Assessment and Evaluation of Men who Batter Women*, J. Rehabilitation, Oct.-Dec. 2001, at 38.

⁹⁷Sheeran & Hampton, *supra* note 50, at 18.

⁹⁸Haydee Beattie, *Domestic Violence is Everyone's Problem*, Cayuga Med. Ctr. at Ithaca (2000), at <http://www.cayugamed.org/articles/read.dbm?ID=191>; *see* Donald G. Dutton, *The Batterer: A Psychological Profile* 24 (1995) (noting how victims describe their batterers' metamorphosis as transformation "from a kindly Dr. Jekyll personality to a terrifying Mr. Hyde"); Susan Weitzman, "Not To People Like Us": Hidden Abuse in Upscale Marriages 155 (2000) (noting that the "upscale batterer" recognizes that most people would doubt he is physically abusive, carefully grooming his public image to hide his true nature); *id.* at 157 (noting that upscale batterer is not always horrible, making the woman's involvement with him all the more addictive).

⁹⁹Johnston & Straus, *supra* note 6, at 140.

¹⁰⁰Peterman & Dixon, *supra* note 96, at 38; *see* Melanie Frager Griffith, *Battered Woman's Syndrome: A Tool for Batterers?*, 64 *Fordham L. Rev.* 141, 168 (1995) (emphasizing that batterer acts like a model husband and fools the outside world). The use of the word father and husband in this context reflects the fact that the majority of adult victims of family violence are women, and the majority of victimizers are men, *Violence and the Family*, *supra* note 23, at 9.

¹⁰¹*See, e.g.*, Edward Gondolf, *Discussion of Violence in Psychiatric Evaluations*, 7(3) *J. Interpersonal Violence* 334, 337 (1992) (reporting that fewer than half (forty-seven percent), of "recently violent patients" in study of psychiatric patients had been previously arrested); *see also* Dutton, *supra* note 98 at 24-25 (reporting that "cyclical abusers," who are not constantly violent but periodically so, are abusive only within confines of the relationship).

the visitation setting. Supervised visitation staff may find it difficult to fathom that such a pleasant person could be responsible for the heinous acts alleged by victims, especially in light of often convincing denials and minimization¹⁰² and appropriate, even loving and affectionate, behavior on-site.¹⁰³

Where domestic violence has been alleged, courts may not give credence or sufficient weight to a history of partner abuse in making decisions about child custody or visitation¹⁰⁴. Judges too often disbelieve credible evidence of domestic violence and discount its seriousness.¹⁰⁵ These allegations often are wrongly perceived as false simply because they are made in a contentious environment¹⁰⁶ and because of the misperception that litigating parents concoct violence charges to gain an advantage in court.¹⁰⁷ Further, courts that already regard allegations of violence with skepticism may be far too willing to allow unqualified visitation staff to make assessments, or may be quick to accept a report portraying positive interaction between the parent and the child as reflecting the whole relationship. Thus, reports on visitations, whose controlled environment can conceal violent tendencies, may place victims and their children at risk by reinforcing an already deceptively benign image of the abusive parent.

D. The Camouflage of Sexual Abuse

Some of the same obstacles to detecting domestic violence arise in family court cases in which sexual abuse has been alleged. First, like domestic violence, sexual abuse is a crime committed in private, behind closed doors. Physical evidence of abuse is present in only fifteen to twenty percent of sexual abuse cases¹⁰⁸. The United States Supreme Court has acknowledged that child abuse is one of the most difficult crimes to discover and prosecute, in large part because there are often no witnesses except the victim.¹⁰⁹ Therefore, a court is forced to rely on other evidence in deciding visitation and custody. Second, experts in sexual abuse note that mothers are often considered "hysterical" by a court system¹¹⁰ that is suspicious of the veracity of the allegations and convinced

¹⁰²Sheeran & Hampton, *supra* note 51, at 18.

¹⁰³*Cf.* Dutton, *supra* note 98, at 24 (discussing how charming batterers can be). Admittedly, some batterers choose not to comply with conditions for visitation. There have been documented incidents of stalking and other unlawful behavior at supervised visitation centers. *See e.g., Supervised Visitation Critical Incident Report*, B. & Bench Visitation Rep., Spring 2002, at 9 (discussed in Maxwell & Oehme, *supra* note 15) (listing parental behaviors that violated program rules), available at <http://familyvio.ssw.fsu.edu/b&bspring2002.pdf>. *See infra* notes 181, 199-203 and accompanying text for a discussion of how these egregious violations of program rules can be addressed under our proposed standards' admissibility of critical incidents.

¹⁰⁴*See* Violence and the Family, *supra* note 23, at 100 (pointing out that "the nonviolent parent may be at a disadvantage, and behavior that would seem reasonable as a protection from abuse may be misinterpreted as a sign of instability").

¹⁰⁵Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 Fam. L.Q. 247, 249 (1993); *see also* Rita Smith & Pamela Coukos, *Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations*, Judges' J., Fall 1997, at 38, 41 (tracing tendency to wrongly blame reporting parent to rise in diagnoses of insupportable syndromes such as "Parental Alienation Syndrome").

¹⁰⁶Smith & Coukos, *supra* note 105, at 41.

¹⁰⁷*Id.* at 40.

¹⁰⁸*See* Module 4, Training on Sexual Abuse for Florida Department of Children and Families Services Staff (2002) (asserting that only fifteen to twenty percent of child sexual abuse cases can be verified by physical signs).

¹⁰⁹*Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).

¹¹⁰*See, e.g.,* John E.B. Myers, *A Mother's Nightmare - Incest: A Practical Legal Guide for Parents and Professionals* 146 (1997) (stating that "a mother's perfectly natural emotional response to abuse can be twisted into 'evidence' that she is a

that they were made to gain the upper hand in a disputed custody case.¹¹¹ Third, like batterers, perpetrators of sexual abuse can be from any socio-economic group, and there is no way to identify a perpetrator merely by outward appearance.¹¹²

A fourth commonality between domestic violence and child sexual abuse is that an abused child may very well "show no fear of the abusive parent and may be delighted to see him or her."¹¹³ The child may also recant the allegation of abuse. This reaction is a particularly insidious shield to identifying sexual abuse, and can be explained by the Child Sexual Abuse Accommodation Syndrome.¹¹⁴ In this phenomenon, children who have reported abuse often recant once they realize the devastating effect their revelation has on the family.¹¹⁵ To cultivate this mindset, a molester can "groom" his victim to accept increasing levels of sexual contact over time, threaten her with punishment if she tells, make her feel ashamed of what she has done, and convince her to keep it secret.¹¹⁶ When a child does reveal sexual abuse, the family may lose the financial support of the perpetrator, and the family often suffers extreme humiliation and shame.¹¹⁷ Family members frequently become angry at the child for the consequences of the revelation.¹¹⁸ Many children then recant under this enormous pressure.¹¹⁹

The fifth common feature of domestic violence and sexual abuse allegations is that many family court judges and lawyers believe that false allegations of sexual abuse, like domestic violence, are rampant in custody cases.¹²⁰ Some judges and lawyers deem virtually all accusations of sexual

hysterical woman pursuing a baseless vendetta against her innocent husband"); Nancy L. Berson, *Too Quick to Judge: Examining Alternative Explanations in Child Abuse Cases*, J. Child Sexual Abuse, vol. 8 no. 4 1999, at 123, 124 (noting that divorcing mothers are too often labeled hysterical when making abuse allegations).

¹¹¹See, e.g., Amy Neustein & Ann Goetting, *Judicial Responses to the Protective Parent's Complaint of Child Sexual Abuse*, J. Child Sexual Abuse, vol. 8 no. 4 1999, at 103, 105 (criticizing scientifically discredited psychological syndromes, such as Parental Alienation Syndrome and Malicious Mother's Syndrome, which ascribe to mother false allegations of sexual abuse intended to deprive former spouse of access to child).

¹¹²See Myers, *supra* note 110, at 46 (pointing out absence of scientifically valid psychological tests that can determine whether a man has committed sexual abuse); Violence and the Family, *supra* note 23, at 88 (stating that no test, measure, or technique can definitely determine likelihood that a particular person may be or become child sexual abuser).

¹¹³Straus, *supra* note 86, at 97. For a discussion of an abused child's conflicted feelings, see Marcia Sheinberg & Peter Fraenkel, *The Relational Trauma of Incest: A Family-Based Approach to Treatment* 32-33 (2001). The authors describe a child's reaction to the question of whether she missed her abusive stepfather: I do miss him a little, 'cause he was there when I got glass in my hand, a splinter in my finger, and when I had to go to the hospital 'cause I-I was rollerblading and I fell on my side and he brought me to the hospital. . . . He took me to get ice cream, he bought me stuff, and he was really nice. . . .*Id.*

¹¹⁴Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 Child Abuse & Neglect 177, *passim* (1983).

¹¹⁵See Gail Ryan, *Consequences for the Victim of Sexual Abuse in Juvenile Sexual Offending: Causes, Consequences, and Correction* 161 (Gail Ryan & Sandy Lane, eds., 2d ed. Jossey-Bass Publishers 1997) (describing how sexually abused child may retract statements to escape impact and stigma of outside world's response to disclosure).

¹¹⁶See Sylvia I. Mignon, et al., *Family Abuse: Consequences, Theories, and Responses* 119 (2002) (noting that most experts agree that secrecy is hallmark of sexual abuse).

¹¹⁷See Summit, *supra* note 114, at 188 (outlining fragmentation of families).

¹¹⁸*Id.* at 167 (noting that "even when the victim's disclosure is believed and intervention takes place, the victim's removal from the home, loss of the relationship with the perpetrator, and intrusive interviews with strangers may seem a high price to pay for protection against the unwanted sexual experience").

¹¹⁹See Summit, *supra* note 114, at 188 (asserting that "[w]hatever a child says about sexual abuse, she is likely to reverse it").

¹²⁰See P. Susan Penfold, *Questionable Beliefs About Child Sexual Abuse Allegations During Custody Disputes*, 14 Can. J. Fam. L. 11, 13 (1997) (asserting that judges often react harshly to mothers who allege sexual abuse, even to the point of

abuse in the context of child custody cases to be false,¹²¹ but this assumption is not supported by the literature or clinical experience.¹²² Regardless of the controversy surrounding allegations, assessing accusations of child sexual abuse remains a complex task to be conducted only by well-trained professionals.¹²³ The fact that there are some Machiavellian parents who fabricate allegations during divorce will never justify the wholesale dismissal of all allegations; neither does it justify ceding the ability to make decisions about their accuracy to unqualified visitation staff.

E. Inadequate Recognition of Visitation Reports' Subjectivity

Many supervised visitation programs either succumb to judicial pressure or sincerely but mistakenly believe they are qualified to make recommendations to the court. In some instances, states have acknowledged the inappropriateness of offering evaluative reports.¹²⁴ Even these states, however, have failed to appreciate fully the danger of incorporating evidence of visitations into custodial determinations.

A telling example is the Kansas Attorney General's Child Exchange and Visitation Center Guidelines.¹²⁵ These guidelines go the furthest of those we have reviewed to identify the problem of supervised visitation assessment, but even they do not go far enough to address it. The Kansas Guidelines were created pursuant to legislation granting the Attorney General's office authority to develop guidelines and funding for supervised visitation programs.¹²⁶ These guidelines expressly state that it is inappropriate for supervised visitation providers to offer an evaluative or professional opinion reports, defining evaluative report as one which expresses opinions or assessments about the need for ongoing exchange or supervised visitation services.¹²⁷ The Kansas Guidelines go so far as to list the reasons why evaluations are improper for visitation staff to carry out.¹²⁸

transferring custody to father). Penfold, a child psychiatrist and clinical director of a child psychiatry inpatient unit, lists a series of "pervasive assumptions" sometimes made by lawyers and judges, including the belief that false allegations are very common during custody disputes and that mothers making the allegations are either vindictive, mentally ill, or were themselves abused as children. *Id.*

¹²¹See Kathleen Coulborn Faller, *Child Maltreatment and Endangerment in the Context of Divorce*, 22 U. Ark. Little Rock L. Rev. 429, 430 (2000) (asserting that domestic relations courts usually respond to abuse allegations with skepticism).

¹²²See *id.* (citing study showing that half of such allegations deemed likely; other studies, between two-thirds and three-fourths).

¹²³See Kathy Kuehnle, *Assessing Allegations of Child Sexual Abuse* 294 (1996) (concluding that assessing allegations of child sexual abuse is complex task, to be conducted only by well-trained professionals).

¹²⁴See Cal. Standards, *supra* note 14, § 26.2(g)(2) (specifying that reports include facts, observations, and direct statements, but not opinions or recommendations regarding future visitation unless ordered by court); Fla. Standards, *supra* note 13, § IV(c)(4) (directing that, without prior approval from court, program not offer report that provides recommendations or expresses opinions about appropriate future course of access); Kan. Guidelines, *supra* note 14, § 6.4 (discouraging providers from offering evaluative or professional opinion reports).

¹²⁵Kan. Guidelines, *supra* note 14, § 6.4.

¹²⁶Kan. Stat. Ann. § 75-720 (2001).

¹²⁷Kan. Guidelines, *supra* note 14, § 6.4.

¹²⁸These are: a. an evaluative report is inconsistent with the provider's role and function in relation to the provision of services; b. the provision of evaluative reports is likely to lead to services being used primarily for assessment and legal/tactical purposes, rather than supervision of exchange and visitation services; c. providers will only see part of the story and this will be too limited to validate any attempt at broad evaluation; and d. supervised exchange and visitation center staff may have a variety of backgrounds and experience. Courts are generally prepared to accept professional opinion (including evaluation) evidence only from those who have professional qualifications and experience. Inappropriate attempts to provide evaluative reports will adversely affect the credibility of child exchange and visitation centers. *Id.*

At the same time, the Kansas Guidelines mandate that each client record should:

[I]nclude[] *at a minimum*:

1. a means of identifying who provided the service
2. the date, time, and duration of the service
3. summary of activities during the drop-off, the service, and pick-up
4. comments and/or requests made by the children and/or parents
5. interventions made during the service, including early termination of the visit and the reason for the intervention
6. account of any physical or verbal altercation, threats, or violation of protection orders or court visitation orders
7. account of any failure to comply with the rules and conditions for participation in the service as set forth by the provider
8. any incidence of abuse as required [to be reported] by law.¹²⁹

While it may be possible to distinguish these two types of documents—evaluative and factual-in theory, we view these two sections as inherently contradictory in practice. In effect, they allow providers to interpret conduct and invite courts to make determinations of fitness based on those interpretations. An unintended illustration of the inextricability of evaluative and factual reporting is provided by the New York Society for the Prevention of Cruelty to Children Professionals' Handbook. The Handbook sets forth a list of parent and child actions that are "typically observed, documented, and reported to the court in this type of program":¹³⁰

- timeliness of the arrival of parents and children;
- child(ren)'s reactions to the visit, e.g., resistant, eager, ambivalent;
- custodial parent's encouragement or discouragement of child's participation in the visit;
- greeting between child(ren) and visiting adult;
- preparation for the visit made by the visiting adult;
- proximity of the adult and child during the visit;
- activities during the visit;

¹²⁹*Id.* § 6.3 (emphasis added).

¹³⁰Marsh, *supra* note 10, at 35.

- indicators of child's comfort during visit: e.g., relaxed demeanor, physical aggression, flat affect, excessive requests to leave visit room, crying, etc.;
- adult's ability to allow child to establish the pace of verbal and physical interactions;
- adult's ability to participate directly in visit activities with the child;
- adult's understanding of child's developmental stage;
- adult's ability to establish appropriate boundaries for child's behavior;
- criticism or positive affirmations given to child by the adult
- adult's ability to place child's emotional needs above his or her own;
- separation behaviors of adult and child at visit's end;
- any interventions required by the visit supervisor during the visit;
- actions or statements by the child that indicate an inappropriate knowledge of adult conflicts.¹³¹

Simply labeling a report factual or calling it an observation note as opposed to an evaluative report does not cure it of its underlying biases, instill in the author neutrality of judgment, or render it objective. In fact, calling a document merely descriptive or observatory may actually lead a court to mistakenly assume that it has more value because it is "objective."

Apparently disregarding the contradiction inherent in the practice, most providers make what are labeled "factual" reports to the court that document whether visitation occurred and whether there were problems.¹³² The troublesome issue lies in the interpretation of what is factual. The authors of the largest documented study of visitation programs to our knowledge assert that "feedback is greatly valued by courts and family law professionals."¹³³ They quote a lawyer as saying: "It is good that the supervisor can tell the court that there were *no problems* or that visits were missed. Otherwise you've got my client saying, 'He never shows up' and the husband saying 'It's a lie,' and the judge doesn't know who to believe."¹³⁴

Feedback is not a term of art. It is an interpretation that depends on the experience, background, and expertise of the person providing it. Two different visit monitors could interpret the same statement or behavior by a parent in entirely different ways, depending on many factors, including the background, age, experience, and training of each monitor. Even professional parenting evaluators are warned that they should constantly be aware of their biases and values that "contribute to the ultimate recommendations that are made."¹³⁵ Therefore, a written account of behavior and

¹³¹*Id.* at 34-35; *seesupra* note 44 and accompanying text (citing SVN Guidelines to the same effect).

¹³²Thoennes & Pearson, *supra* note 11, at 466.

¹³³*Id.*

¹³⁴*Id.* (emphasis added).

¹³⁵Phillip Stahl, *Ethical Considerations*, in *The AFCC Resource Guide for Custody Evaluators: A Handbook for Parenting Evaluations* 1, 11 (Phil Bushard & Dorothy A. Howard eds., 2d ed. 1995); *see id.* at 10 (reminding evaluators that they may

statements cannot be considered factual to the same degree as dates, times of contact, and identifying information. If the above lawyer wanted simply to ascertain the parties' compliance with the visitation order, there would be little concern (and no need for observation reports)¹³⁶. It is clear, however, that mere records of dates and times of visits are not all that the court and lawyers want from the visitation staff, and not the only things the visitation staff are providing.

F. The Flawed Reliance on Visitation Records

We can think of few reasons why a party or a court would allow visitation records to be admitted into evidence other than to use it to prove or gauge a parent's behavior, and to assist with determinations of appropriate parental access. As one experienced provider whose program's observation reports, which can be upwards of thirty pages, and are filed with the court after every visit, put it:

Sometimes I'm suspicious that judges are misusing our service when they order supervised visitation and unsupervised visitation at the same time. If the parties don't need supervision, why are the judges ordering it anyway? This leads me to believe that they are looking for a forensic evaluation. But we're not a forensic evaluation service, period. That's not what we do.¹³⁷

As explained earlier, observation reports are not needed to ensure that a party complied with the court order. If a program does not have sign-in sheets, intake information and visitation logs containing information such as when the party arrived and left, who attended the visits, and whether the program forms were complete, are easily created.

Compilation and preservation of observation reports can serve valid purposes. For example, observation reports might be used for training staff in accurate recordkeeping, and those programs that utilize psychology or social work students from local colleges may argue that visitation records are a valuable training tool for these students. These purposes, however, do not justify their admission into custody proceedings.

An elaboration of our earlier hypothetical case¹³⁸ illustrates the hazard of allowing testimony as to "facts" about visitations. In that scenario, Mr. Jones calls the visit monitor to the witness stand and allows her to use her observation reports to refresh her memory of the visits. If she has remained truly neutral, she may feel trapped by the following questions:

Q: What did Mr. Jones and Suzy do during the visits?

A: They mostly played Monopoly and tossed a frisbee on the playground.

Q: Did Suzy smile during the visit?

have biases that affect how they analyze and process the information in an evaluation). These biases may be about religion, homosexual rights, and parental contact in relation to abuse. Before starting an evaluation, the evaluator needs to make his or her biases clear to the parents, attorneys, and the court. *Id.* at 11.

¹³⁶The program could simply develop sign-in sheets and documents establishing when parents came and left the program, identifying information, etc.

¹³⁷Telephone Interview with Beth Zetlin, Executive Director of the Visitation Program of NYSPCC (Mar. 11, 2002) (on file with authors).

¹³⁸*See supra* text accompanying note 59 for the hypothetical.

A: Yes, at times.

Q: Did Suzy laugh?

A: Yes, once or twice.

Q: What did Suzy do when the visit was over?

A: She hugged Mr. Jones and said "See you next week, Dad."

The attorney can claim to be eliciting factual information from the observations reports, but instead he is using it to have the court infer that Mr. Jones and Suzy are comfortable around each other. The attorney is using this line of questioning to suggest that Suzy is happy with Mr. Jones. Indeed, Suzy might have been happy at the time, but that information is irrelevant to Mr. Jones's fitness for custody or unsupervised visitation.

A parent's mere attendance at and participation in visitation services should not be used to infer any more than the fact that the parent complied with the court order. An orchestrated visit as described above should be recorded only as occurring "according to program policy"; this means nothing more than that the staff arranged a highly controlled visit and that the parent participated in the visit. Others have emphasized that supervised visitation is not a substitute for a formal parenting evaluation, therapy, treatment, or other intervention.¹³⁹ It is unfortunate that these other crucial services are expensive and perhaps inaccessible to some litigants. Still, supervised visitation cannot be all things to all people. Its unauthorized, unwarranted, and unacknowledged use in family litigation is a disservice to children, litigants, and the community at large.

III. Evidentiary Objections to Admission of Observation Reports for Determining Custody¹⁴⁰

Observation reports offered to establish what took place during a visitation constitute hearsay in the classic sense.¹⁴¹ Therefore, absent qualification as an exception to hearsay's exclusion, or some other compelling reason, these reports should be barred as exclusive evidence of visitation experiences in custody proceedings.¹⁴² Moreover, even where introduction of unsupplemented reports meets local evidentiary standards, their use may violate due process.

A. *The Problem of Hearsay*

¹³⁹See Thoennes & Pearson, *supra* note 11, at 467 (quoting lawyers and mediators pointing out artificiality of supervised visitation and that custody evaluation is needed to shed light on what should be done in the long run).

¹⁴⁰This article addresses only the disposition of custody issues in family law and matrimonial courts. Child welfare cases, in which children have been removed from their homes and placed in foster care or relative placement, raise a distinct set of questions and lie beyond the scope of the article.

¹⁴¹See Fed. R. Evid. 801(1)(c) (defining hearsay as "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted").

¹⁴²In some instances, the introduction of visitation evidence may involve a parent's attempt to gain unsupervised visitation rather than full custody. In both cases, however, the asserted relevance is to the parent's fitness. Our analysis of custody proceedings, therefore, applies to disputes over unsupervised visitation as well.

Reliance on an observation report's narrative of a visitation falls squarely within the hearsay rule's objection to testimony that cannot be directly tested.¹⁴³ While a report could obviously assist the recollection of a visitation center's director or staff member,¹⁴⁴ only her live testimony can be probed in court. Only under unusual circumstances might a report's author be considered unavailable in the sense contemplated by rules of evidence as excusing the courtroom presence of the declarant.¹⁴⁵

1. The Business Records Exception

A more plausible candidate for overcoming the hearsay barrier is the exception for reports and records "kept in the course of a regularly conducted business activity."¹⁴⁶ Observation reports do appear to meet the literal criteria of this section. The term "business" is defined expansively,¹⁴⁷ and the making of the report would typically fall within a visitation center's "regular practice."¹⁴⁸

Yet, even if observation reports conform to the evidence code's technical definition of business records, their introduction in custody disputes hardly furthers the rationales for the exception. The exercise of witnessing and characterizing a visitation session lacks the indicia of reliability that undergird the exception. Common sense dictates that records of transactions, routinely relied upon by the business compiling them, may be considered without demanding testimony recalling each specific transaction.¹⁴⁹ By contrast, there can be no "routine" parent-child encounter at a visitation. Rather, each is a unique event whose dynamic the author of an observation report seeks to capture in an inevitably subjective manner. In assessing the value of each account, courts should not accept lifeless reports as substitutes for the opportunity to interrogate the reporter.

Moreover, the gain in efficiency¹⁵⁰ from admitting ordinary business records is largely offset in the case of observation reports by the condition that the business's record-keeping practice be corroborated by "testimony of the custodian or other qualified witness."¹⁵¹ In this case, that "qualified witness" would presumably be the visitation center's director or staff member who composed the report in question. Even if the author's presence were not required, Rule 803(6) still appears to

¹⁴³See *California v. Green*, 399 U.S. 149, 154 (1970) (stating reason for hearsay rule is that declarant not subject to cross-examination); *Chi., St. Paul, Minneapolis & Omaha Ry. Co. v. Kulp*, 102 F.2d 352, 358 (8th Cir. 1939) (same).

¹⁴⁴Fed. R. Evid. 803(5) (excepting from hearsay rule records "concerning a matter about which a witness once had knowledge . . . shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly").

¹⁴⁵See *id.* R. 804.

¹⁴⁶*Id.* R. 803(6).

¹⁴⁷See *id.* (including "business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit").

¹⁴⁸*Id.*

¹⁴⁹See *United States v. Baker*, 855 F.2d 1353, 1359 (8th Cir. 1988) (holding laboratory analyses of controlled substances admissible when made on routine basis); *People v. Stribel*, 609 P.2d 113, 115 (Colo. 1980) (finding trustworthiness of business record based upon its nature as routine entry in the ordinary operations of the enterprise); *In re N.W.*, 688 N.E.2d 855, 858 (Ill. App. Ct. 1998) (noting credibility of business record dependent on regular, prompt, and systematic nature of the entry and business's reliance on it); *Wallace v. Lakes Region Constr. Co.*, 474 A.2d 1037, 1039 (N.H. 1984) (ruling that admissibility of medical records assumes their systematic preparation in modern hospital or clinic and that they are routinely relied upon by physicians in diagnosis and treatment of patients).

¹⁵⁰See *State v. Henderson*, 554 S.W.2d 117, 122 (Tenn. 1977) (recognizing that hearsay exceptions promote efficiency).

¹⁵¹Fed. R. Evid. 803(6).

mandate that some representative from the center testify. Given that unavoidable commitment of time, and the superiority of firsthand testimony, that representative may as well be the person whose perceptions the court is seeking.

The applicability of the business records exception is further undermined by the common prohibition on admitting records created in anticipation of litigation.¹⁵² Admittedly, visitation center employees, as presumptively neutral parties in custody disputes, do not pose the risk of tendentious reporting by parties and their allies that is a central concern of the ban.¹⁵³ Nevertheless, if observation reports are routinely allowed as evidence in custody cases, those who compile them will be keenly aware of this potential use of their work. Especially if the author has formed a tentative judgment about a parent's fitness, that awareness might well color her account of the parent's visits. It is exactly the distorting consciousness of specific legal implications that this prohibition seeks to avoid.

Finally, even a generous reading of the business records exception may confront an exceptionally high hurdle when observation reports relate exchanges between the report's author and a parent or child.¹⁵⁴ Where the parent or child volunteers information thought relevant to the custody decision, the report's presentation of that information amounts to double-level hearsay.¹⁵⁵ Without a compelling showing of necessity, double-level hearsay has typically proved highly difficult to introduce.¹⁵⁶

2. The "Custody Decision" Exception

Courts have long been vested with broad discretion to make an individualized determination as to what custody arrangement would be in the best interest of a child.¹⁵⁷ It might therefore be inferred that rules of evidence should be modified in these proceedings. Under this attitude, the normal resistance to introduction of hearsay should yield to the greater flexibility needed to deal with the delicate issues raised by custody disputes. Family court judges, after all, presumably possess the

¹⁵²*E.g.*, 725 Ill. Comp. Stat. Ann. 5/115-5(a) (West 2001) (admitting only normal business records, not those in anticipation of litigation); *see* *Palmer v. Hoffman*, 318 U.S. 109, 113-15 (1943) (holding that employee accident report was not in the regular course of business and thus inadmissible); *People v. Tsombanidis*, 601 N.E.2d 1124, 1133 (Ill. App. Ct. 1992) (stating that records prepared for litigation not normally admissible even if prepared as part of regular course of business, including police reports); *Jones v. Hatchett*, 504 So. 2d 198, 202 (Miss. 1987) (rejecting admissibility of letter from physician in personal injury case as having been prepared in anticipation of litigation); *Henderson*, 554 S.W.2d at 120 (holding laboratory results in criminal prosecution inadmissible as having been prepared in anticipation of litigation).

¹⁵³*See Tsombanidis*, 601 N.E.2d at 1133 (indicating that records prepared for litigation have diminished probability of trustworthiness); *Solomon v. Shuell*, 457 N.W.2d 669, 676-78 (Mich. 1990) (holding that homicide investigation reports made in anticipation of litigation lacked trustworthiness and were thus inadmissible).

¹⁵⁴*See, e.g.*, Kan. Guidelines, *supra* note 14, § § 6.3(3), (4) (requiring that record of visitation include "summary of activities during the drop-off, the service, and pick-up" and "comments and/or requests made by children and/or parents").

¹⁵⁵*See* Fed. R. Evid. 805 (hearsay included within hearsay admissible only if "each part of the combined statements conforms with an exception to the hearsay rule").

¹⁵⁶*See, e.g.*, *United States v. Dotson*, 821 F.2d 1034, 1035 (5th Cir. 1987) (excluding hearsay within hearsay where one level did not qualify under exception); *Russo v. Abington Mem'l Hosp. Healthcare Plan*, Civ. A. No. 94-195, 1998 U.S. Dist. LEXIS 18595, at *8-9 (E.D. Pa. Nov. 16, 1998) (excluding double hearsay); *Montana v. Daniels*, 682 P.2d 173, 178-79 (Mont. 1984) (excluding hearsay within hearsay absent both levels qualifying as hearsay exceptions).

¹⁵⁷*See* Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 Law & Contemp. Probs. 226, 230-46 (1975) (discussing the discretionary nature of contemporary custody standards). *See supra* notes 16-17 and accompanying text for a brief discussion of the discretion vested in trial courts in resolving custody and visitation issues.

experience and sophistication to properly assess the value of technically inadmissible but potentially probative evidence.

However seductive this justification for ignoring evidentiary strictures, it appears to be bottomed on instinct rather than proof. The family court setting has not been shown to suspend the epistemological assumptions underlying the rules of evidence. Nor are we aware of any empirical studies demonstrating that family court judges possess a special immunity from the dangers posed by hearsay and other evidence that the law generally excludes. Like other legal shibboleths, this one cries out for testing independent of the self-validating experience of its adherents.

In any event, the proper way to alter a problematic legal standard should be express amendment, not ad hoc waiver. If custodial decisions truly call for rejection of premises behind standards of admissibility, that principle should be embodied in formal rules of evidence.¹⁵⁸ Until then, family court judges, like other judges, should be bound by the evidentiary code as written.

3. The Guardian Ad Litem Example

While the issue of admitting observation reports on visitations has received relatively little attention, courts have had substantial experience confronting the admissibility of reports by guardians ad litem (GAL), known in some jurisdictions as Court Appointed Special Advocates (CASAs).¹⁵⁹ That experience, frequently involving the evaluation of accusations against former spouses or partners, militates against reliance on reports as evidence of custodial fitness. In a representative case, one appeals court invoked the hearsay rule to overturn the trial court's reliance on a GAL report to change the custody of children who had been living with their father.¹⁶⁰ The availability at trial of witnesses quoted in the report did not excuse the absence of the GAL herself:

It is a fundamental right in this country to confront one's accuser and to examine evidence the trial court relies upon to reach a decision. The parent in a change of custody case must be allowed an opportunity to rebut the conclusions of the report and to cross-examine the preparer.¹⁶¹

Admittedly, no definite consensus on this question has emerged. On the contrary, it appears that most jurisdictions have not confronted the issue. Moreover, where the issue has arisen, several courts have found GAL reports admissible under an exception to the hearsay rule.¹⁶² We do not believe, however, that these individual decisions-along with a few instances of courts' admission

¹⁵⁸*Cf. In re Fla. R. Fam. Ct. P.*, 607 So. 2d 396, 396 (Fla. 1992) (citing difference between family law cases and other civil matters as reason for establishing separate family court rules of procedure).

¹⁵⁹For an overview of the responsibilities of guardians ad litem and CASAs, see Ann M. Haralambie, *The Child's Attorney: A Guide to Representing Children in Custody, Adoption, and Protection Cases* 5-11 (1993).

¹⁶⁰*Miller v. Miller*, 671 So. 2d 849, 851 (Fla. Dist. Ct. App. 1996); *see also Scaringe v. Herrick*, 711 So. 2d 204, 204-205 (Fla. Dist. Ct. App. 1998) (stating that reports by guardians ad litem usually contain hearsay).

¹⁶¹*Miller*, 671 So. 2d at 851; *see Betz v. Betz*, 575 N.W.2d 406, 410 (Neb. 1998) (holding that hearsay remains hearsay although within report prepared by guardian ad litem appointed by court pursuant to statute); *Clark v. Alexander*, 953 P.2d 145, 154 (Wyo. 1998) (ruling that guardian ad litem report should not be filed with court or received into evidence without express agreement of parties)

¹⁶²*In re J.R.B.*, 715 P.2d 1170, 1172-74 (Alaska 1986); *Heldebrandt v. Heldebrandt*, 623 N.E.2d 780, 784 (Ill. App. Ct. 1993); *Schmitz v. Schmitz*, 351 N.W.2d 143, 145 (S.D. 1984).

of reports without explanation¹⁶³ -refute the position that GAL reports should not be routinely admitted as primary evidence in custody cases. Courts that have excluded GAL reports recognize that the stakes in custody cases are too high to admit evidence the law has long presumptively excluded.¹⁶⁴

Nothing in the nature of observation reports suggests that they should be treated differently from GAL reports as evidence of custodial fitness. If anything, observation reports should be viewed with greater skepticism. Introduction of GAL reports at least furthers the purpose for which they are compiled. As discussed earlier,¹⁶⁵ however, observation reports are designed to chart the quality of visits, not the quality of parenting.

B. Due Process Objections

Even where reliance on observation reports meets local evidentiary standards, it may violate procedural due process. The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."¹⁶⁶ Where the restoration of custody is at stake, a fair hearing should entail an opportunity to cross-examine the staff member whose observations jeopardize that custody. The Supreme Court has held that parents must be afforded ample means to contest charges of unfitness.¹⁶⁷ Significant reliance on an unsubstantiated observation report to deny custody clashes with this conception of due process.

It is true that the Court has not categorically barred consideration of written reports as grounds for terminating important benefits. In *Richardson v. Perales*¹⁶⁸, a case involving a claim for Social Security disability benefits, the Court expressly approved a physician's written report as substantial evidence supporting a finding of nondisability when the only live testimony was presented by the claimant and contradicted the report.¹⁶⁹ Later, in *Mathews v. Eldridge*¹⁷⁰, the Court upheld a state agency's termination of disability benefits where neither the claimant's physician nor a psychiatric consultant, whose reports the agency reviewed, had presented oral testimony.¹⁷¹

These rulings, however, seem too far removed from parental custody to govern the procedures needed for fair resolution of that issue. Whereas *Perales* and *Eldridge* involved efforts to deny a claimed benefit or to withdraw a property interest initially created by the government,¹⁷² decisions

¹⁶³*In re Lawler*, 484 So. 2d 451, 453-54 (Ala. 1985); *Dames v. Bentley*, No. CA 90-336, 1991 Ark. App. LEXIS 409, at *13-14 (June 26, 1991); *Fernando v. Nieswandt*, 940 P.2d 1380, 1383 (Wash. Ct. App. 1997).

¹⁶⁴*See Miller*, 671 So. 2d at 852 (stating that parent seeking to modify child custody award carried extraordinary burden).

¹⁶⁵*See supra* Parts II.A-B.

¹⁶⁶*Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

¹⁶⁷*See Santosky v. Kramer*, 455 U.S. 745, 747-48, 769 (1982) (requiring clear and convincing evidence for state to permanently terminate rights of parents in their natural child).

¹⁶⁸402 U.S. 389 (1971).

¹⁶⁹*Perales*, 402 U.S. at 402-04.

¹⁷⁰424 U.S. 319 (1976).

¹⁷¹*Eldridge*, 424 U.S. at 326; *see also Love v. Garcia*, 634 So. 2d 158, 160 (Fla. 1994) (noting that trustworthiness of medical records is presumed under business records exception).

¹⁷²*Eldridge*, 424 U.S. at 332 (dealing with withdrawal of property interest); *Perales*, 402 U.S. at 407 (dealing with denial of benefits).

about custody implicate an innate fundamental liberty.¹⁷³ Moreover, while not mechanical, determination of eligibility for government benefits rests heavily on objective indicia reasonably captured in written documentation.¹⁷⁴ By contrast, the impression of the mood of a visitation is inescapably subjective; the ability to question the recorder of that impression vastly enhances whatever value it might have. Finally, the Supreme Court's tolerance of reliance on written reports to deprive claimants of government benefits has assumed that the deprivation would not inflict irreparable harm.¹⁷⁵ The loss inflicted by restricted access to one's child can hardly be compensated by contact at some point in the future.

IV. Confining the Use of Observation Reports in Custody Proceedings: A Proposed Model

Concerns about the role of visitation in determining custody transcend the evidentiary objections to admission of observation reports discussed in Part III. Those objections flow from the prejudice to parents caused by adverse observations presented only in writing, and can largely be circumvented by modification or liberal interpretation of evidentiary rules. As discussed in Part II, however, we believe that raw accounts of visitations in custody proceedings are often inherently misleading in whatever form they appear. In particular, we believe that the artificial conditions of visits can foster unduly optimistic assessments of parent-child relationships.¹⁷⁶ Accordingly, we propose a standard to govern the admissibility of reports regardless of the form in which they appear or the purpose for which they are intended.

Specifically, we propose: *In a proceeding to resolve a dispute over the custody of a child, records of a parent's supervised visitation with that child shall not be admitted without a proper predicate. In such proceedings, a sufficient predicate may consist of testimony on the parent's custodial fitness by a licensed mental health professional who has had ongoing involvement in the case for evaluative*

¹⁷³See *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (affirming parent's fundamental right to make decisions concerning the care, custody, and control of her children); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116-17 (1996) (stating that case involving termination of parental rights "demands the close consideration the Court has long required when a family association so undeniably important is at stake"); *Santosky*, 455 U.S. at 753 (noting "Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment"); *Lassiter v. Dep't of Soc. Servs. of Durham County*, 452 U.S. 18, 27 (1981) (stating that parent's desire for and right to companionship, care, custody, and management of child is important interest that undeniably warrants deference and protection); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (noting constitutional protection of parents' interests in their children). While loss of custody does not rise to the level of termination of parental status, *M.L.B.*, 519 U.S. at 491, this difference goes to the weight rather than the nature of the interest. See *Woodrum v. Woodward County*, 866 F.2d 1121, 1124-25 (9th Cir. 1989) (balancing custody interest of parents against interests of state); *Ellis v. Hamilton*, 669 F.2d 510, 512 (7th Cir. 1982) (holding that rights of great-aunt, adoptive grandmother, and de facto parents under due process clause was not violated by county's removal of children); *Halverson ex rel Halverson v. Tafllin*, 617 N.W.2d 448, 451 (Minn. Ct. App. 2000) (citing *Baker v. Baker*, 494 N.W.2d 282, 287 (Minn. 1992)) (noting that in ex parte emergency circumstances parent's due process interests must yield to considerations of child's welfare).

¹⁷⁴See *Eldridge*, 424 U.S. at 345 (noting that medical test results are best presented in writing); *Perales*, 402 U.S. at 404 (referring to medical reports as "routine, standard, and unbiased").

¹⁷⁵See *Eldridge*, 424 U.S. at 342-43 (describing potentially available sources of temporary income to erroneously terminated disability recipient); *id.* at 349 (pointing out that claimant had right to evidentiary hearing and subsequent judicial review before denial of claim became final).

¹⁷⁶See *supra* Parts II.B-D for a discussion of the artificiality of supervised visitation.

*purposes, or testimony of substantially equivalent value. The term "record" as used in this paragraph includes written observation reports, videotapes, and oral testimony by employees of visitation centers. Written reports may be introduced only when the party offering the report has demonstrated by clear and convincing evidence that the report's author is unavailable, and that the report is supported by substantial indicia of reliability. The above restrictions notwithstanding, courts may in their discretion admit records of critical incidents at visitations. The term "critical incident" as used in this paragraph means conduct by a parent that warrants termination of a visit.*¹⁷⁷

We believe this standard addresses the insufficiently appreciated danger of misplaced reliance on visitation reports to construct an overly benign picture of custodial fitness. At the same time, the proposal guards against the introduction of hostile observations without parents being given an opportunity to counter the observation's adverse implications. The standard does not categorically bar the introduction of accounts of visitations. Rather, the limitations are tailored to admit such evidence in those instances where confidence in its pertinence and reliability is justified. The standard's benefits, we believe, substantially outweigh the objections that may be lodged against the restrictions that we propose. Most importantly, they serve the overriding goal of custody proceedings: to protect the best interest of the child.¹⁷⁸

A. Advantages of the Standard

We believe that heavily qualifying the admissibility of visitation accounts improves the quality of custody proceedings in three principal ways. By reversing the tacit assumption of an account's relevance, the proposal gives effect to the principle that "[n]o prediction is intended about how contacts between the same parent[s] and child[ren] might occur in a less protected setting and without supervision."¹⁷⁹ More broadly, by drawing a conspicuous boundary between custody and supervised visitation,¹⁸⁰ this standard would focus the attention of judges otherwise tempted to conflate these two distinct spheres. Finally, by encouraging the participation of mental health professionals, adoption of this approach would promote custodial decisions based on expertise rather than anecdote and intuition.

1. Avoiding the Trap of the "Good Visit"

Again, the temptation to casually base benign predictions on parent-child contacts in the carefully controlled environment of visitations appears irresistible to many courts.¹⁸¹ Curbing the natural but misguided leap from placid visits to custodial competence, therefore, cannot be left to judicial

¹⁷⁷Examples would include the following conduct by a noncustodial parent: arriving openly intoxicated, issuing overt threats to staff, making sexualized physical contact with the child, or engaging in actively delusional behavior. See *Supervised Visitation Critical Incident Report*, *supra* note 103, at 9 (listing reported critical incidents). The definition is set forth as an objective standard, so that arbitrary termination would not qualify. It is expected that experience would give further substance to the concept of critical incident.

¹⁷⁸See *supra* note 16 and accompanying text for a discussion of the "best interest of the child" standard.

¹⁷⁹SVN Guidelines, *supra* note 44, app. D. See *supra* text accompanying note 60 for a fuller quote.

¹⁸⁰Subsequent references to visitation denote supervised visitation only. Unsupervised visitation or other unrestricted access is grouped with custody for purposes of our analysis.

¹⁸¹See *supra* Part II.A for a discussion of this tendency of the courts.

sensitivity and self-restraint. Rather, only a formal requirement of exceptional justification for admitting reports on visitation will confine reliance on these reports to their proper context.

Nor do the restrictions proposed here represent a sharp philosophical departure from traditional evidentiary standards. The law of evidence contains numerous exclusions of information that a factfinder might consider illuminating, but is excluded in part because it poses too much danger of distorting the truth.¹⁸² In each case, factfinders are feared to be inclined toward reading too much into the defendant's gesture.¹⁸³

Where reports of good behavior at visitations are admitted to show custodial fitness, the danger is greater and the stakes are higher. Absent an appropriate predicate from a qualified evaluator, the reports have even more (false) appeal as providing probative value. Here, though, the cost of unfounded reliance on misleading evidence is not payment of damages, but rather sacrifice of a child's well-being.

2. Maintaining the Visitation/Custody Distinction

The law has long excluded even relevant evidence if its probative value is substantially outweighed by the danger of confusion of the issues.¹⁸⁴ The tendency to view "good" visits as grounds for supporting custody reflects a larger failure to recognize the distinct purposes of visitations and custody decisions. As discussed earlier,¹⁸⁵ visitations and the broader parent-child relationship diverge too much to permit routine disregard of their separate dynamics.

Blurring the line between visitation and custody may not only wrongly enhance prospects for gaining custody, but unfairly undermine them as well. Just as courts might extrapolate too generously from "good" visits, they might extract an overly pessimistic view of parenting skills from "bad" visits as well. This danger is especially pronounced where the observer and parent do not share the same culture. Because visitation monitors are not trained experts,¹⁸⁶ they may misinterpret or mischaracterize parenting behavior that simply reflects culturally shaped alternative forms of expression. An ethnocentric monitor might, for example, write critically of a parent perceived as

¹⁸²See Fed. R. Evid. 403 (providing that evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice); *id.* R. 407 (disallowing evidence of subsequent remedial measures); *id.* R. 408 (disallowing evidence of compromise or offer compromise); *id.* R. 409 (disallowing evidence of payment of medical expenses).

¹⁸³See *Pennington v. Sears, Roebuck & Co.*, 878 P.2d 152, 155 (Colo. Ct. App. 1994) (stating that even where legally relevant, defendant's offer to pay plaintiff's medical expenses and later refusal to do so excludable under Rule 403 because of "danger of unfair prejudice, misleading the jury, and confusion of the issues"); *Schlossman & Gunkelman, Inc. v. Tallman*, 593 N.W.2d 374, 380 (N.D. 1999) (noting that admission, for purposes of impeachment only, of statements made during settlement negotiations could be taken by jury as admission of liability); *Lang v. Sanger*, 44 N.W. 1095, 1096 (Wis. 1890) (expressing concern that jury might interpret subsequent repair as acknowledgement of negligence). Excluding such evidence also serves to foster behavior favored by public policy. See, e.g., *Ala. Power Co. v. Marine Builders, Inc.*, 475 So. 2d 168, 171-72 (Ala. 1985) (noting that exclusion of evidence of subsequent remedial measures is intended to remove disincentive to repair).

¹⁸⁴Fed. R. Evid. 403.

¹⁸⁵See *supra* notes 76-94 and accompanying text for a discussion of how the visitation setting distorts the parent-child relationship.

¹⁸⁶See *supra* notes 73-75 and accompanying text for a discussion of the lack of professional credentials of visitation monitors.

given to insufficient (or excessive) displays of affection toward the child. In a society where cultural misunderstanding is commonplace,¹⁸⁷ this danger should not be lightly dismissed.

Recognizing the pitfalls of misconstruing the significance of visits could prompt wider recognition that current overreliance on observation reports is propelled by expediency, not principle. In a sense, supervised visitation has become a judicial dumping ground for a range of family law issues deemed too intractable for resolution through the appropriate process.¹⁸⁸ It is certainly convenient to utilize visitation reports as a substitute for adequately exploring the question of parents' fitness in custody determinations. We see, however, with regard to other aspects of children's welfare, that convenience does not justify foregoing independent determinations of separate questions. The results of testing a child's vision, for example, are not transplanted to the measurement of his hearing. A child's achievements in mathematics do not obviate a full assessment of her progress in social studies. The family court system is designed to serve some of society's most vulnerable children; the illogic of evidentiary shortcuts should be rejected here as well.

3. Incorporating Expertise

The participation of mental health professionals under our standard is principally intended to guard against the abuse of visitation evidence in custody proceedings. By allowing such evidence when a psychologist or other professional has laid a proper foundation, the proposal acknowledges that visitation contacts in many instances can form a valid piece of the custodial picture. That evidence, however, should play an adjunct part in evaluating a parent's fitness; it should not be the centerpiece of the evaluation. Rather, someone with professional training and ongoing involvement with the child should be responsible for advising the court on the probative value of visits. In this respect, our proposal contemplates a place for mental health professions similar to that of expertise required in other areas of evidence.¹⁸⁹

An obvious related object of the proposal is to promote reliance on professional evaluations apart from the limited function of commenting on visitation reports. It is unthinkable that a court charged with a major decision affecting the physical health of a child would not consult an appropriate physician. Similarly, courts ruling on an issue profoundly affecting the direction of a child's life should also seek the insights of a specialist. We concede that the state of medical science is generally

¹⁸⁷See, e.g., Keri B. Lazarus, *Adoption of Native American and First Nations Children: Are the United States and Canada Recognizing the Best Interests of the Children?*, 14 *Ariz. J. Int'l & Comp. L.* 255, 265-66 (1997) (noting that removal of Indian children from their homes sometimes mistakenly based on failure of social workers and judges to recognize cultural differences between dominant society and Native Americans); Pratibha Reebye, *Child Custody-Access Evaluation: Cultural Perspectives*, at <http://www.priority.com/psych/custody.htm> (noting that even most seasoned evaluator may misjudge based on uncertainties around cultural issues) (last visited July 29, 2002); see also Stahl, *supra* note 135, at 10 (discussing bias of evaluator).

¹⁸⁸See Peter Macdonald, *A View from the Bench*, B. & Bench Visitation Rep., Winter 1999, at 5 (declaring it "all too easy [for a judge] to refer a family to the visitation center and then forget about what occurs from that point on"), available at <http://familyvio.ssw.fsu.edu/barbench.pdf>.

¹⁸⁹See Fed. R. Evid. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. . . ."); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (requiring qualification of all expert testimony); *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993) (setting standard for qualifying scientific expert testimony).

more advanced than that of mental health counseling. On the other hand, the impact of custody on a child will be greater than that of all but a handful of medical events. In seeking to give due recognition to that impact, we are hardly alone in calling for an enhanced role for mental health professionals in custody proceedings.¹⁹⁰

B. Objections to the Standard

We readily acknowledge that a number of plausible objections may be brought against our proposal. These range from specific evidentiary considerations to broader questions of competence and social policy. We address below each of the major criticisms that we anticipate.

1. Uniform Treatment of Disparate Evidence

It may be argued that the proposal's sweeping definition of "record" fails to distinguish the varying reliability of written reports, live testimony, and videotape. In technical terms, this is undoubtedly true. A monitor's oral testimony is not subject to the hearsay objection that may be raised against the use of observation reports as primary evidence.¹⁹¹ Likewise, videotape is widely admitted where assurance exists that the tape provides a fair and accurate representation of what it depicts.¹⁹² We would expect this condition to be met in a literal sense in most cases.

While conceding qualitative differences among these different instruments for reporting, we think this criticism misconceives our fundamental critique of raw visitation evidence. Although videotape, testimony, and written reports may represent a descending hierarchy of reliability, each suffers, in our view, the grave defect of diverting the court from its focus on parental fitness. Without a proper foundation, any account of visitation contacts-however "objectively" faithful-inherently risks misleading a court that is ruling on custody.

The issue of videotapes especially underscores the gap between conventional notions of admissibility and the danger of superficial relevancy in this setting. To assume that technically valid videotape is admissible because of its relevance to the parent's visitation conduct begs the question of whether the conduct itself is "a fact which is of consequence to the outcome of the action."¹⁹³ Again, we believe that is not, or at least that its prejudicial impact outweighs its probative value in the absence of a proper predicate. Without that predicate, videotape merely provides a less subjective version of information that distorts the court's inquiry in whatever form it appears. That information's prejudice may be obscured partly because it is unusual; its harm-particularly in the case of "good" visits-is not so much to the party resisting its admission, but to the best interest of the child.

¹⁹⁰See, e.g., Bricklin & Elliot, *supra* note 19, at 513-14 (suggesting specialized roles for mental health professionals in high-conflict divorce cases); Ramsey, *supra* note 2, at 147-48 (calling for active role for mental health professionals in family issues through community and courts); Levin, *supra* note 1, at 850-53 (supporting intervention by mental health professionals in custody and visitation cases through treatment of batterers and supervised visitation programs).

¹⁹¹See *supra* Part III.A for a discussion of the hearsay objection that can be raised against observation reports.

¹⁹²See, e.g., McPherson Redevelopment Corp. v. Watkins, 782 S.W.2d 690, 691-92 (Mo. App. 1989) (ruling videotape admissible); New York v. Higgins, 392 N.Y.S.2d 800, 803-04 (Sup. Ct. 1977) (finding no statutory or constitutional barriers to admission of videotape).

¹⁹³Fed. R. Evid. 401 (defining "relevant evidence").

2. Exclusion of Visitation Evidence Offered for Valid Purposes

A separate charge of overbreadth is that the proposal's undifferentiated exclusion of visitation activity effectively throws out the baby with the bathwater. That is, even assuming the potential of visitation evidence generally to mislead courts in custody cases, reports on particular aspects of visits may have substantial probative value. For example, if a parent lost custody primarily because of alcohol or drug abuse, then the parent's conduct at visitation sessions might bolster a claim of sobriety. Similarly, if concern exists that a parent's unrestricted access poses a risk of flight, accounts of reassuringly stable behavior at visitations could alleviate that concern. Admission of such specific facets of visits, it may be argued, assists custody determinations without transforming visitation records into wholesale evaluative tools.

The fallacy of this argument lies in the discrepancy between theoretical compartments and the realities of decision-making. The line between what we consider improper use of visitation evidence and what advocates of limited admissibility would allow would not be clear-cut in practice. A judge exposed to visitation records for one of the specific purposes described above could not be expected to mentally dismiss the records' implications for the broader issue of custodial fitness. Inevitably, the formal wall between permissible and impermissible reliance on visitation contacts would dissolve, and visitation reports would resume their function as misguided (but now backdoor) evaluations of parenting. Only a prophylactic, *per se* ban on unsupplemented visitation records provides sufficient strategic protection to the integrity of the custody decision.

Moreover, the argument for admission on grounds of special relevance still tacitly assumes that an adequate evaluation has not been conducted. If custodial fitness has been fully and professionally evaluated, then evidence from visits about sobriety or stability becomes superfluous. Conversely, if admission of visitation records for one of these purposes is deemed indispensable, then the court must lack other evidence on which to make a determination. In that case, visitation evidence has again become the phenomenon to which we object: a meager substitute for a full-scale assessment of the custodial placement that will most benefit the child.

3. Refusal to Distinguish Between Judges and Juries

However real the dangers of improperly weighing visitation records, one might contend that we have exaggerated them by failing to appreciate judicial responsibility in custody cases. After all, custody determinations overwhelmingly are made by judges without involvement by juries.¹⁹⁴ Limitations on admissibility, though, are designed largely to guard against jurors' gullibility.¹⁹⁵ Concerns about misleading the factfinder therefore diminish when the court performs that role.¹⁹⁶

¹⁹⁴See, e.g., Ala. Code § 30-3-1 (1975 & Supp. 2001) (providing that court may give custody to either father or mother "as may seem right and proper"); Cal. Fam. Code § 3421 (West 1994 & Supp. 2002) (granting court jurisdiction to make initial custody determination); Conn. Gen. Stat. § 46b-115k (Supp. 2002) (same).

¹⁹⁵See *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995) (citing authority that judges better equipped than juries to evaluate scientific reliability of expert testimony); 21 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice And Procedure* § 5023 (West 1977) (describing rules of evidence as "sometimes justified in terms of a model of the jury that is far from flattering").

¹⁹⁶*Cf.* Wright & Graham, *supra* note 195, § 5204 (discussing judge's role in insulating jury from inadmissible evidence).

In a sense, this argument is a variation of the notion of permissive admissibility in custody cases, which we earlier addressed and rejected.¹⁹⁷ We acknowledge, however, that judges' greater experience and sophistication relative to juries are entitled to some consideration. Nevertheless, we believe that the burden should be on advocates of admissibility to demonstrate judges' immunity from the distortions of visitation evidence, and that this burden has not been met. Indeed, our resistance to raw visitation accounts as inherently incomplete and misleading obtains regardless of the legal acumen of the decisionmaker. It disparages neither judges' ability nor their ethics to consider them unable to take appropriate account of visitation records without a sufficient predicate. The law contains numerous instances of requiring that a proper foundation be supplied for the admission of certain evidence, irrespective of the identity of the factfinder.¹⁹⁸ Such prerequisites are not thought to dishonor judges.

4. Asymmetrical Admission of Adverse Evidence

From the standpoint of fairness, perhaps the strongest objection to our standard would appear to be its exception for the admission of critical incidents. To a parent seeking to gain custody, it may seem inequitable that visitation evidence reflecting harshly on his parenting ability is presumptively permissible, but contacts showing him in a more favorable light are not. While the evenhanded dispensation of sauce to goose and gander is an adage, not a statute, the underlying concept is deeply ingrained in our jurisprudence. Indeed, if anything, the law often tilts toward giving the accused the benefit of the doubt.¹⁹⁹

We appreciate the surface logic and emotional resonance of this objection, but believe the exception for critical incidents to be a justifiable, even crucial, feature of our proposal. To begin with, the proposal's imbalance is more apparent than real. In fact, evidence of both ordinary "good" and "bad" visits is excluded because of its potential to generate unwarranted assumptions about custodial fitness. By contrast, a critical incident under our standard—*e.g.*, violence, threat, fondling²⁰⁰—is by definition well out of the ordinary, and therefore falls outside the normal framework. While the bearing of either trouble-free or mildly unsettling visits on custodial fitness can be easily misinterpreted, few would deny the serious presumptive relevance of conduct qualifying as a critical incident.²⁰¹ Put another way: unlike the equally inadmissible good and bad visits, a critical incident has no counterpart in an outstandingly positive visitation event that would presumptively demonstrate fitness. Formal symmetry should not be demanded where it does not serve practical needs.

Furthermore, the standard does not even categorically bar the introduction of especially favorable evidence from visitations; it merely requires that such evidence be accompanied by a proper predic-

¹⁹⁷See *supra* Part III.A.2 for a rejection of a "custody decision exception" to the hearsay rule.

¹⁹⁸*E.g.*, Fed. R. Evid. 901 (requiring authentication or identification of evidence as condition precedent to admissibility).

¹⁹⁹See, *e.g.*, *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998) (citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)) (recognizing rule that during penalty phase of capital trial, sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence); *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) (enforcing right to jury trial against state); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958) (requiring proof beyond reasonable doubt for criminal conviction).

²⁰⁰See *supra* note 177 for more examples.

²⁰¹See *Faller*, *supra* note 121, at 443-44 (cautioning generally against drawing inferences from observing parent and child together where maltreatment or endangerment is alleged, but finding abusive behavior in such sessions "very compelling").

ate. The goal of the proposal is not to exclude evidence that supports a parent's case for custody, but to assure its reliability. While no expertise is needed to demonstrate that outright physical or sexual abuse undermines that case, the significance of an exceptional display of affection should be placed in a broader context before being accepted as evidence of custodial fitness. Nor does the proposal rigidly insist on a licensed professional as the source of that context; "testimony of substantially equivalent value" may be provided. While we frankly do not envision a specific scenario in which this alternative would be invoked, we agree that the standard should retain flexibility to accommodate unusual circumstances.

Finally, an exception for critical incidents serves a vital purpose that a comparable exception for happy visitation episodes would not: *viz.*, protecting children's safety. Just as a physician's first responsibility is to do no harm,²⁰² so a court's first priority to a child under its aegis must be to guard against harm to that child. Evidence of a critical incident, in whatever setting it occurred, would certainly be crucial to an informed judgment as to how best to prevent harm. This is especially true of the carefully managed environment and limited time of a visitation, where a parent's inability to exercise restraint must be regarded as ominous. As to any alleged unfairness in stacking the deck of admissibility against the parent, nothing in the proposal bars a parent accused of involvement in a critical incident from offering evidence rebutting or extenuating the report. Moreover, it should be remembered that the very notion of "the accused" takes on a special meaning in custodial proceedings, for that proceeding is ultimately not about the desires of the parent but rather the interest of the child.²⁰³

5. Unrealistic Expectation of Resources

Perhaps the most formidable obstacle to adoption of our proposal is the scarcity of public funds. A standard that envisions an increased role for mental health professionals must obviously ensure their accessibility to those who cannot afford them. Indeed, we cannot help but suspect that the current patchwork system is borne as much of fiscal limitations as of misplaced confidence in the value of visitation reports. Our proposal, therefore, must ultimately be aimed at state legislators. It is they who must not only codify restrictions on the admissibility of visitation reports,²⁰⁴ but also provide resources for the new regime.

Even without an infusion of adequate funding, however, we believe that our standard on balance would improve the current process for determining custody. As we have argued, the introduction of visitation reports into custodial proceedings tends to do more harm than good. Where courts cannot afford a professional evaluation, other evidence relevant to custodial fitness is still frequently available. In particular, courts often look to guardians ad litem (GALs) or court appointed special advocates (CASAs)²⁰⁵ to inform their decisions.²⁰⁶ Indeed, our resistance to evidence from visitations

²⁰²See George Sarton, *A History of Science: Ancient Science Through the Golden Age of Greece* 376 (1952) (discussing Hippocratic Oath).

²⁰³See *supra* note 16 and accompanying text for a discussion of the "best interest of the child" standard.

²⁰⁴We would not expect courts voluntarily to reverse current practices.

²⁰⁵See Child Abuse Prevention and Treatment Act, 42 U.S.C.A. § 5106a(b)(6) (West 1995) (requiring states to provide representation to children in family court proceedings involving allegations of abuse or neglect).

²⁰⁶See *supra* Part III.A.3 for a discussion of GAL/CASA reports. To meet the hearsay objections discussed in Part III.A, we assume that a GAL/CASA who submits a report would be available to testify as well.

subsides somewhat when it is presented by a GAL/CASA, who can grasp visitation activity in the context of wider parent-child contacts. Because the perception of that activity is inherently subjective, it should be offered only by someone with a more comprehensive perspective than a visitation staffer who sees these contacts only in this single limited setting.

Nevertheless, we concede that scarcity of resources remains a daunting problem. An inability to supply professional evaluative services significantly undercuts the effectiveness of our proposal,²⁰⁷ and support even for GALs and CASAs falls well short of need.²⁰⁸ Ultimately, the prospect of increased funding rests with political dynamics beyond the scope of our analysis. In an era when political rhetoric prominently includes professions of solicitude for children's welfare, however, it would be sadly ironic if proposals of this type failed solely for budgetary reasons. As federal programs designed to promote children's nutrition,²⁰⁹ education,²¹⁰ and other keys to development²¹¹ have demonstrated, legislative will can make available some of the resources required to serve children's vital needs. Surely, measures seeking to ensure that children are protected from abusive parents are worth at least some additional commitment of public funds.

Conclusion

Supervised visitation is a valuable tool in preserving the potential for a healthy bond between a child and a parent against whom harmful misconduct has been alleged. We object, however, to courts' having indiscriminately allowed accounts of visitations to influence their determination of custody. Because visitation records may distort instead of illuminate that decision, we endorse a more guarded approach to consideration of such evidence. In particular, we propose a standard designed to assure that admitted records truly assist the court in serving the best interest of the child.

Until now, evaluation of visitation evidence has been predominantly the province of courts and social workers operating in quiet collaboration. Our proposal is addressed to the family law bar,

²⁰⁷The presence of a court-appointed advocate is at best a partial substitute for evaluation by a mental health professional. Moreover, the process for appointing guardians ad litem has been subjected to considerable criticism. *See* Neustein & Goetting, *supra* note 108, at 111 (summarizing this criticism).

²⁰⁸*See* Michael S. Piraino, *Lay Representation of Abused and Neglected Children: Variations on Court Appointed Special Advocate Programs and Their Relationship to Quality Advocacy*, 1 J. CENTER FOR CHILD. & CTS. 63, 69 (1999) (describing resources for CASA programs as "universally scarce"), available at <http://www.courtinfo.ca.gov/programs/cfcc/resources/publications/journal/vol1.htm/063-072.pdf>.

²⁰⁹*E.g.*, William F. Goodling Child Nutrition Reauthorization Act of 1998, Pub. L. No. 105-336 (codified as amended in scattered sections of 42 U.S.C. § 1751 et seq.); *see* 42 U.S.C.A. § 1751 (West 1994) (declaring congressional policy "to safeguard the health and well-being of the Nation's children . . . by assisting the States . . . in providing an adequate supply of foods and other facilities for the establishment, maintenance, operation, and expansion of nonprofit school lunch programs").

²¹⁰*See, e.g.*, 20 U.S.C.A. § 6301 (West Supp. 2002) (stating purpose of subchapter "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education"); Ready to Learn Act, Pub. L. No. 102-545 § 2(1) (1992) (codified as amended in scattered sections of 20 U.S.C.) (describing Act's purpose "to expand the availability of educational and instruction video programming and supporting educational resources for preschool and elementary school children and their parents as a tool to improve school readiness and literacy").

²¹¹*See, e.g.*, 42 U.S.C.A. § 9831 (West Supp. 2002) (stating purpose of Head Start Program is "to promote school readiness by enhancing the social and cognitive development of low-income children").

and ultimately to legislatures, whose intervention will be required to reform overly permissive admission of visitation records. Regardless of whether our particular standard is adopted, engagement by the legal community and public policy makers would probably lead to a more reasoned approach to reliance on this evidence. If this article helps to spur a wider discussion of this issue, it will have accomplished its purpose.

Appendix A

Table 1. Statutes Codifying "Best Interest of the Child" Standard

Jurisdiction	Statute
Alabama	Ala. Code § 30-2-40(e) (2001)
Alaska	Alaska Stat. § 25.24.150(c) (Michie 2001)
Arizona	Ariz. Rev. Stat. § 25-403(A) (2001)
Arkansas	Ark. Code Ann. § 9-13-101(a)(1)(A) (Michie 2002)
California	Cal. Fam. Code § 3011 (West 1994 & Supp. 2002)
Colorado	Colo. Rev. Stat. Ann. 14-10-124(1.5) (West 2001)
Connecticut	Conn. Gen. Stat. § 46b-57 (1995)
Delaware	Del. Code Ann. tit. 13, § 722(a) (1999)
District of Columbia	D.C. Code Ann. § 16-911(a)(5) (2001)
Florida	Fla. Stat. Ann. § 61.13(1)(a) (West 1997)
Georgia	Ga. Code Ann. § 19-9-3 (1999)
Hawaii	Haw. Rev. Stat. Ann. § 571-46(1) (Michie 1999)
Idaho	Idaho Code § 32-717(1) (Michie Supp. 2002)
Illinois	750 Ill. Comp. Stat. Ann. 5/602 (West 1999)
Indiana	Ind. Code Ann. § 31-17-2-8 (Michie 1997 & Supp. 1997)
Iowa	Iowa Code Ann. § 598.41(1)(a) (West 2001)
Kansas	Kan. Civ. Proc. Code Ann § 60-1610(a)(3) (West Supp. 2002)
Kentucky	Ky. Rev. Stat. Ann. § 403.270 (Banks-Baldwin 2001)
Louisiana	La. Rev. Stat. Ann. § 9:345(A) (West 2000)
Maine	Me. Rev. Stat. Ann. tit. 19-A, § 1653(1) (West 1998 & Supp. 2001)
Maryland	Md. Code Ann., Fam. Law § 9-102(2) (2001)
Massachusetts	Mass. Gen. Laws Ann. ch. 208, § 31 (West 1998)

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Jurisdiction	Statute
Michigan	Mich. Comp. Laws Ann. § 722.23 (West 2002)
Minnesota	Minn. Stat. Ann. § 518.17(1)(a) (West 1990 & Supp. 2002)
Mississippi	Miss. Code Ann. § 93-5-24(1) (1999 & Supp. 2001)
Missouri	Mo. Ann. Stat. § 452.375(2) (West 1997 & Supp. 2002)
Montana	Mont. Code Ann. § 40-4-212(1) (2001)
Nebraska	Neb. Rev. Stat. § 42-364(1) (1998)
Nevada	Nev. Rev. Stat. Ann. 125.480(1) (Michie 1998)
New Hampshire	N.H. Rev. Stat. Ann. § 458.17(II) (1992)
New Jersey	N.J. Stat. Ann. § 9:2-4 (West 1993)
New Mexico	N.M. Stat. Ann. § 40-4-9(A) (Michie 2001)
New York	N.Y. Dom. Rel. Law § 240(1)(a) (McKinney 1999)
North Carolina	N.C. Gen. Stat. § 50-13.2(a) (2001)
North Dakota	N.D. Cent. Code § 14.09.06.2(1) (1997)
Ohio	Ohio Rev. Code Ann. § 3109.01(A)(1) (Anderson 2000 & Supp. 2001)
Oklahoma	Okla. Stat. Ann. tit. 10, § 21.1(a) (West 1998)
Oregon	Or. Rev. Stat. § 107.137(1) (1999)
Pennsylvania	23 Pa. Cons. Stat. Ann. § 5301 (West 2001)
Rhode Island	R.I. Gen. Laws § 15-5-16(d)(2) (2000)
South Carolina	S.C. Fam. Ct. R. § 27(d) (1976)
South Dakota	S.D. Codified Laws § 25-4-45 (Michie 1999)
Tennessee	Tenn. Code Ann. § 36-6-401(a)
Texas	Tex. Fam. Code Ann. § 153.001(a)(1) (Vernon 1996)
Utah	Utah Code Ann. § 30-3-10(1) (2001)
Vermont	Vt. Stat. Ann. tit. 15, § 665(b) (1989)
Virginia	Va. Code Ann. § 20-124.3 (Michie 2000)

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Jurisdiction	Statute
Washington	Wash. Rev. Code Ann. § 26.10.100 (West 1997)
West Virginia	W. Va. Code Ann. § 48-9-207(a) (Michie 2001)
Wisconsin	Wis. Stat. Ann. § 767.24(2)(a) (West 2001)
Wyoming	Wyo. Stat. Ann. § 20-2-201(a) (Michie 2001)

Appendix B

Table 2. Statutes With Rebuttable Presumptions Against Custody For Batterers

Jurisdiction	Statute
Alabama	Ala. Code § § 30-3-131 to 30-3-133 (2001)
Arkansas	Ark. Code Ann. § 9-13-101(5) (Michie 2002)
California	Cal. Fam. Code § 3030 (West 1994 & Supp. 2002)
District of Columbia	D.C. Code Ann. § § 16-911(5); 914(a)(2) (2001)
Florida	Fla. Stat. Ann. § 61.13(2)(b)(2) (West 1997 & Supp. 2002)
Hawaii	Haw. Rev. Stat. Ann. § 571-46(9) (Michie 1999)
Illinois	750 Ill. Comp. Stat. Ann. 5/602(c) (West 1999)
Iowa	Iowa Code Ann. § 598.41(2)(c) (West 2001)
Louisiana	La. Rev. Stat. Ann. § 9:364(A) (West 2000)
Massachusetts	Mass. Gen. Laws Ann. chs. 208, § 31A, 209, § 38, 209C, § 10(e) (West Supp. 2002)
Minnesota	Minn. Stat. Ann. § 518.17(2)(d) (West 1990 & Supp. 2002)
Nevada	Nev. Rev. Stat. Ann. § 125.480(6) (Michie 1998)
North Dakota	N.D. Cent. Code § 14.09.06.2(i)(j) (1997)
Oklahoma	Okla. Stat. Ann. tits. 10, § 21.1(d), 43, § 112.2 (West 1998)
Oregon	Or. Rev. Stat. § 107.137 (1999)
South Dakota	S.D. Codified Laws § 25-4-45.5 (Michie 1999)
Texas	Tex. Fam. Code Ann. § 153.004(b) (Vernon Supp. 2002)
Wisconsin	Wis. Stat. Ann. § 767.24(2)(b)(2)(c) (West 2001)

Appendix C

Table 3. Domestic Violence As One Factor In Determining Child's Best Interest

Jurisdiction	Statute
Alaska	Alaska Stat. § 25.24.150 (Michie 2001)
Arizona	Ariz. Rev. Stat. Ann. § 25-403(e) (West Supp. 2002)
Colorado	Colo. Rev. Stat. Ann. § 14-10-124 (1.5)(b)(v) (West 2001)
Delaware	Del. Code Ann. tit. 13, § 722(a)(7) (1999)
Georgia	Ga. Code Ann. § 19-9-3(a)(3)(b) (1999 & Supp. 2001)
Idaho	Idaho Code § 32-717(1)(g) (Michie Supp. 2002)
Indiana	Ind. Code Ann. § 31-17-2-8 (Michie Supp. 1999)
Kansas	Kan. Civ. Proc. Code Ann. § 60-1610(a)(3)(B)(vii) (West Supp. 2002)
Kentucky	Ky. Rev. Stat. Ann. § 403.270(2) (Banks Baldwin 2001)
Maine	Me. Rev. Stat. Ann. tit. 19-A, § 1653(2)(D)(2) (West 1998 & Supp. 2001)
Maryland	Md. Code Ann., Fam. Law § § 9-101, 9-101.1 (1999)
Michigan	Mich. Comp. Laws Ann. § 722.23(k) (West 2002)
Missouri	Mo. Ann. Stat. § 452.375(2)(5) (West 1997 & Supp. 2002)
Montana	Mont. Code Ann. § 40-4-212(1)(f) (2001)
Nebraska	Neb. Rev. Stat. Ann. § 42-364(2)(d) (Michie 1998)
New Hampshire	N.H. Rev. Stat. Ann. § 458.17(II)(c) (1992)
New Jersey	N.J. Stat. Ann. § 9:2-4 (West 1993)
New Mexico	N.M. Stat. Ann. § 40-4-9.1 (Michie Supp. 2002)
New York	N.Y. Dom. Rel. Law § 240(1)(a) (McKinney 1999)
North Carolina	N.C. Gen. Stat. § 50-13.2(b) (2001)

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Jurisdiction	Statute
Ohio	Ohio Rev. Code Ann. § 3109.051(A) (Anderson 2000 & Supp. 2001)
Pennsylvania	23 Pa. Cons. Stat. Ann. § 5303(a) (West 2001)
Rhode Island	R.I. Gen. Laws § 15-5-16(g)(1) (2000)
South Carolina	S.C. Code Ann. § 20-7-1530 (Law. Co-op. Supp. 2001)
Tennessee	Tenn. Code Ann. § 36-6-106(a)(8) (2001)
Vermont	Vt. Stat. Ann. tit., § 665(b)(9) (Supp. 2001)
Virginia	Va. Code Ann. § 20-124.3(9) (Michie 2002)
Washington	Wash. Rev. Code Ann. § 26.09.191(2)(a)(ii)-(iii) (West 1997)
West Virginia	W. Va. Code Ann. § 48-11-209 (Michie 2001)
Wyoming	Wyo. Stat. Ann. § 20-2-201(c) (Michie 2001)