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INCREASING SAFETY FOR BATTERED WOMEN AND THEIR CHILDREN: CREATING A PRIVILEGE FOR SUPERVISED VISITATION INTAKE RECORDS

Nat Stern *

Karen Oehme **

Client intake is used by a host of entities to obtain information: government agencies,¹ social service providers,² and even lawyers.³ In many instances, intake may appear to be a mundane bureaucratic exercise. Yet when used to elicit information from victims of domestic violence, it can significantly increase the risk of harm to the victim and her children. In supervised visitation, a relatively new service that courts routinely rely on to protect domestic violence victims,⁴ staff use intake to question a victim about the risks that exist for her⁵ and her children so that a safe

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1. See, e.g., Laurie M. Stegman, Note, *An Administrative Battle of the Forms: The EEOC's Intake Questionnaire and Charge of Discrimination*, 91 MICH. L. REV. 124, 126 (1992) ("In a typical claimant's situation, on the first visit to an EEOC office, the individual completes an intake questionnaire which requests her name and address, the reason for the alleged discriminatory action, a brief description of the action complained of, and the name, address, and size of the employer. On the basis of this submission, an EEOC official determines whether grounds exist for the filing of a formal charge.").

2. See, e.g., Lorne Sossin, *Boldly Going Where No Law has Gone Before: Call Centres, Intake Scripts, Database Fields, and Discretionary Justice in Social Assistance*, 42 OSGOODE HALL L.J. 363, 373-75 (2004) (stating that public assistance decisions are often based on telephone intake screening of vulnerable applicants at call centers).

3. See, e.g., Julie M. Tamminen, *Client Relations: Client Intake Can Build Positive Working Relationship*, 11 ME. B.J. 6, 6 (1996) (stating that the "best way to plan intake sessions is to determine what information to cover with clients to best address their concerns").

4. See *infra* Part I.

5. This article refers to victims of domestic violence as females, while acknowledging that a small percentage of victims of domestic violence are males. According to the Bureau

visit between the batterer parent and the children can be provided.⁶ If those intake records later fall into the hands of the batterer, however, as one victim put it, “you might as well give him a loaded gun.”⁷

Despite the danger inherent in the accessibility of these documents, they currently receive scant formal protection from efforts of estranged partners to obtain them. This article proposes that state legislatures enact a statutory privilege for intake records at supervised visitation programs in domestic violence cases where a court has entered a civil order for protection.⁸ Such a privilege would obligate a program to keep the victim’s intake records confidential unless she consented to their release. Part I of this arti-

of Justice and Labor Statistics, more than 85% of violent victimization by intimate partners between 1993 and 1998 were perpetrated against women. NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, A GUIDE FOR EFFECTIVE ISSUANCE AND ENFORCEMENT OF PROTECTION ORDERS, 1 n.2 (2005).

6. See *infra* Part II (further discussing the intake process).

7. E-mail from Melissa Scaia, Executive Director, Advocates for Family Peace Visitation Program, to Karen Oehme, Program Director, Clearinghouse on Supervised Visitation, Florida State University College of Social Work (Jan. 6, 2006, 17:00:40 EST) (on file with authors) (“When we conducted a focus group of battered women about our services we discussed confidentiality. One battered woman in the group said, ‘If he had access to the information I shared with you at intake, you might as well give him a loaded gun.’”).

8. Our proposed privilege would apply when the court has (1) entered a civil protection order, and (2) ordered that the contact between the perpetrator and the children be supervised at a supervised visitation program. Civil protection orders are available in every state and American territory and in the District of Columbia. They are used to enjoin perpetrators of domestic violence from contacting, harming, harassing, or stalking their victims. The overarching goal of protection orders is to protect the victim, not punish the abuser. See NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *supra* note 5, at 2; see also, e.g., ARIZ. REV. STAT. ANN. § 13-3602(E) (2001) (“The court shall issue an order of protection . . . if the court determines that there is reasonable cause to believe: . . . the defendant may commit an act of domestic violence or the defendant has committed an act of domestic violence within the past year or within a longer period of time if the court finds that good cause exists to consider a longer period.”); D.C. CODE § 16-1005(c) (2001) (“If, after hearing, the Family Division finds that there is good cause to believe the respondent has committed or is threatening an intrafamily offense, it may issue a protection order . . .”); 750 ILL. COMP. STAT. ANN. 60/214(a) (West 1999) (“If the court finds that petitioner has been abused by a family or household member or that petitioner is a high-risk adult who has been abused, neglected, or exploited, as defined in this Act, an order of protection prohibiting the abuse, neglect, or exploitation shall issue . . . Petitioner shall not be denied an order of protection because petitioner or respondent is a minor. The court, when determining whether or not to issue an order of protection, shall not require physical manifestations of abuse on the person of the victim.”); MICH. CT. R. 3.207(A)–(B)(1) (2006) (“The court may issue *ex parte* and temporary orders with regard to any matter within its jurisdiction, and may issue protective orders against domestic violence. . . . Pending the entry of a temporary order, the court may enter an *ex parte* order if the court is satisfied by specific facts set forth in an affidavit or verified pleading that irreparable injury, loss, or damage will result from the delay required to effect notice, or that notice itself will precipitate adverse action before an order can be issued.”).

cle describes how issues of domestic violence are being addressed through judicial initiatives, particularly reliance on supervised visitation. Part II describes how intake is currently conducted by supervised visitation programs and analyzes the problems with releasing intake records to batterers. Part III spells out the scope of the privilege that we propose, placing its reach and rationales within the context of existing privileges barring disclosure of sensitive information.

I. JUDICIAL RESPONSES TO THE SCOURGE OF DOMESTIC VIOLENCE: THE ROLE OF SUPERVISED VISITATION

It is now beyond debate that domestic violence is among the most serious and pervasive ills afflicting American society.⁹ In the American Bar Association's definition, domestic violence is

a pattern of behavior that one intimate partner or spouse exerts over another as a means of control. Domestic violence may include physical violence, coercion, threats, intimidation, isolation, and emotional, sexual or economic abuse. Frequently, perpetrators use the children to manipulate victims: by harming or abducting the children; by threatening to harm or abduct the children; by forcing the children to participate in abuse of the victim; by using visitation as an occasion to harass or monitor victims; or by fighting protracted custody battles to punish victims. Perpetrators often invent complex rules about what victims or the children can or cannot do, and force victims to abide by these frequently changing rules.¹⁰

The sheer magnitude of the problem is staggering. Anywhere from one to four million women¹¹ are assaulted by their partners

9. See MURRAY A. STRAUSS & RICHARD J. GELLES, *How Violent Are American Families? Estimates from the National Family Violence Resurvey and Other Studies*, in PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES 95 (1990); U.S. ADVISORY BD. ON CHILD ABUSE & NEGLECT, U.S. DEPT OF HEALTH & HUMAN SERVS., A NATION'S SHAME: FATAL CHILD ABUSE AND NEGLECT IN THE UNITED STATES, 7-10 (1995); U.S. DEPT OF JUSTICE, VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS 3-7 (1998); Peter Lehmann & Bonnie E. Carlson, *Crisis Intervention with Traumatized Child Witnesses in Shelters for Battered Women*, in BATTERED WOMEN AND THEIR FAMILIES 99 (Albert R. Roberts ed., 2d ed. 1998).

10. ABA Comm'n on Domestic Violence, *Are You Being Abused?*, <http://www.abanet.org/domviol/areyou.html> (last visited Nov. 7, 2006) (citation omitted).

11. Although there are victims of domestic violence who are male, this article will refer to the victim as female and the batterer as male. An overwhelming majority of domestic violence victims in heterosexual relationships are women. As many as 95% of domestic violence perpetrators are male. New Beginnings: A Women's Crisis Center, Domestic Vio-

each year,¹² and research has documented the immediate and long-term detrimental effects of domestic violence on victims and children.¹³ Confronted by the dimensions of domestic violence and its impact, judges have changed their view of the court's role in assuring the safety of victims and their children.¹⁴ Most conspicuously, the judicial system has responded by creating specialized domestic violence courts and applying a therapeutic concept to the function of the law in these cases.¹⁵ The result is often a

lence Fact Sheet, http://www.newbeginningsnh.org/html/dv_dv.html (last visited Nov. 7, 2006). Even in the relatively small number of cases involving male victims, much of female violence is committed in self-defense and inflicts less injury than male violence. VIOLENCE IN FAMILIES: ASSESSING PREVENTION AND TREATMENT PROGRAMS 42 (Rosemary Chalk & Patricia A. King eds., 1998).

12. The most conservative estimate is that one million women each year suffer from domestic violence; other estimates are much higher. See Community Violence Intervention Center, Statistics, <http://www.cviconline.org/stats.htm> (last visited Nov. 7, 2006). Thirty percent of Americans say they know a woman who has been physically assaulted by her husband or boyfriend in the past year. Children's Home Society & Family Services, Startling Statistics on Domestic Violence, http://www.chsfs.org/Statistics_on_Domestic_Violence.html (last visited Nov. 7, 2006). Nearly one-third of American women report being physically or sexually assaulted by a boyfriend or husband in their lives. Family Violence Prevention Fund, *The Facts on Domestic Violence*, <http://www.endabuse.org/resources/facts/Children.pdf> (last visited Nov. 7, 2006).

13. See Family Violence Prevention Fund, *The Facts on Domestic Violence*, <http://www.endabuse.org/resources/facts/DomesticViolence.pdf> (last visited Nov. 7, 2006). Each year, an estimated 3.3 million children are exposed to domestic violence perpetrated on their mothers or female caregivers. PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY, AMERICAN PSYCHOLOGICAL ASSOCIATION, REPORT ON VIOLENCE AND THE FAMILY, 11 (1996). In a national survey of more than 6000 American families, 50 percent of the men who frequently assaulted their wives also frequently abused their children, and children who are exposed to domestic violence are more likely to exhibit behavioral and physical health problems including depression, anxiety, and violence toward peers. Family Violence Prevention Fund, *The Facts on Children and Domestic Violence*, *supra* note 12, http://www.chsfs.org/Statistics_on_Domestic_Violence.html (last visited Nov. 7, 2006). For an in-depth discussion of domestic violence and its effects, see Mildred Daley Pagelow, *Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements*, MEDIATION Q., Summer 1990, at 347, 348-53.

14. See, e.g., American Bar Association, *Judicial Checklist to Help Judges Protect Children in Cases with Domestic Violence*, 39 FAM. L.Q. 5, 5-6 (2005) (offering definitions and facts about domestic violence, examples of abusive behavior, and questions judges should ask about the violence, including whether visitation and exchange locations have been arranged to ensure the safety of the child and victim-parent).

15. Therapeutic jurisprudence is the "study of the law's healing potential." Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33, 33 (2000); see also Lowell D. Castleton et al., *Ada County Family Violence Court: Shaping the Means to Better the Result*, 39 FAM. L.Q. 27, 33 (2005) (stating that courts traditionally did not deal effectively with domestic violence cases, which led to a "crisis point"). Ada County, Idaho, developed a Family Violence Court specifically to deal with these extremely complex cases involving issues of family violence. *Id.* at 27-29. For a broader discussion of the development of domestic violence courts, see Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285 (2000).

comprehensive, multidisciplinary, community response to domestic violence that integrates multiple services for the parties involved.¹⁶ In addition, the American Bar Association (ABA) has bolstered this approach by promoting the concept of unified family courts.¹⁷ A unified family court

combines all the essential elements of traditional family and juvenile courts into one entity and contains other resources, such as social services, critical to the resolution of a family's problems. It is a comprehensive court with jurisdiction over all family-related legal matters. The structure of a unified family court promotes the resolution of family disputes in a fair, comprehensive, and expeditious way. It allows the court to address the family and its long-term needs as well as the problems of the individual litigant. Through its insistence on collaboration among court staffs and units, its "team approach," and its outreach to social service providers and local volunteers, a unified family court can provide the highest quality of service to its clients and its community.¹⁸

The creation of these courts thus reflects growing recognition that families have multiple, overlapping problems—e.g., child protection, domestic violence, and divorce issues—which should be addressed in an integrated fashion.¹⁹ This new approach requires courts, among other things,²⁰ to identify and gather together resources in the community to address the needs of both children exposed to domestic violence and their non-offending parents.²¹ There is a "growing consensus" that a coordinated,

16. See Winick, *supra* note 15, at 39.

17. See ABA Coordinating Council on Unified Family Courts, Unified Family Courts Home Page, <http://www.abanet.org/unifiedfamcrt/home.html> (last visited Nov. 7, 2006).

18. James W. Bozzomo & Gregory Scolieri, *A Survey of Unified Family Courts: An Assessment of Different Jurisdictional Models*, 42 FAM. CT. REV. 12, 12 (2004) (quoting ABA Coordinating Council on Unified Family Courts, What Is a Unified Family Court?, <http://www.abanet.org/unifiedfamcrt/about.html> (last visited Nov. 7, 2006)).

19. See *id.* at 13.

20. For a thorough statement of the need for and benefits of therapeutic domestic violence courts, see Catherine Shaffer, *Therapeutic Domestic Violence Courts: An Efficient Approach to Adjudication?*, 27 SEATTLE U. L. REV. 981 (2004), which outlines the philosophy and development of such courts.

21. See Donna J. Hitchens & Patricia Van Horn, *The Court's Role in Supporting and Protecting Children Exposed to Domestic Violence*, 6 J. CENTER FOR FAM. CHILD. & CTS. 31, 42 (2005). Courts have been called on to conduct "individualized evaluations" of whether the procedures and programs within a given court meet these needs. In a survey of jurisdictions that have unified family courts, the most common support services were mediation (94%), substance abuse services (94%), parent education services (94%), adult representation (89%), supervised visitation (89%), and guardian ad litem for the child (83%). Bozzomo & Scolieri, *supra* note 18, at 15; see also Julia Weber, *Domestic Violence Courts:*

community approach is necessary to address the problem of domestic violence.²² As a result of this attempt to address the needs of vulnerable citizens, every state now has a civil protection order statute to protect domestic violence victims.²³ Nearly every state has adopted laws requiring family court judges to consider domestic violence as a factor in custody decisions; many have a statutory presumption against placing a child with a batterer parent.²⁴ The list of common community resources available for courts to address family violence has grown to include parenting programs, batterer's intervention programs, victim support, child therapy programs, and supervised visitation programs.²⁵ Supervised visitation programs, in particular, have become an increasingly prominent part of efforts to mitigate the effects of domestic violence. Indeed, in many domestic violence cases, the service of a supervised visitation center offers the only assurance of safety to the victim and her children.²⁶ The crucial function of these centers stems from the continued access that batterers normally have to their children. Despite the harsh effects of domestic violence,²⁷ attorneys who practice family law are advised that the

Components and Considerations, 2 J. CENTER FOR FAM. CHILD. & CTS. 23, 31 (2000) (stating that "[o]ne of the more universal features of domestic violence courts is the increased accessibility of social or community services for petitioners and respondents" in domestic violence cases).

22. Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes*, 53 HASTINGS L.J. 1, 8-9 (2001).

23. Shaffer, *supra* note 20, at 984.

24. Many state statutes require that judges consider domestic violence as one factor in determining a child's best interest when making custody and visitation decisions. *See, e.g.*, COLO. REV. STAT. § 14-10-124(1.5)(b)(V) (2006); IDAHO CODE ANN. § 32-717(1)(g) (2006); MICH. COMP. LAWS ANN. § 722.23(k) (West 2002 & Supp. 2006); N.Y. DOM. REL. LAW § 240(1)(a) (Consol. Supp. 2006); S.C. CODE ANN. § 20-7-1530 (Supp. 2005). Other states have a rebuttable presumption against custody for batterers. *See, e.g.*, FLA. STAT. ANN. § 61.13(2)(b)(2) (West 2006); IOWA CODE ANN. § 598.41(2)(c) (West Supp. 2006); TEX. FAM. CODE ANN. § 153.004(e) (Vernon Supp. 2006); WIS. STAT. ANN. § 767.24(2)(b)(2c) (West Supp. 2006).

25. *See* Bozzomo & Scolieri, *supra* note 18, at 15; Hitchens & Van Horn, *supra* note 21, at 42-43.

26. *See* Peter G. Jaffe, et al., *Parenting Arrangements After Domestic Violence: Safety as a Priority in Judging Children's Best Interest*, 6 J. CENTER FOR FAM. CHILD. & CTS. 81, 90 (2005).

27. There has been recognition of the severe effects of domestic violence on child victims. Children can be physically injured during an assault even if they are not targets of the violence. *See* MARIA D. RAMOS, CULTURAL CONSIDERATIONS IN DOMESTIC VIOLENCE CASES: A NATIONAL JUDGES BENCHBOOK § 3.10 (Michael W. Runner ed., 1999). They can also be traumatized by witnessing abuse, and by seeing or hearing screaming, yelling, throwing of objects, or name-calling in the home. *Id.* Children are also adversely affected by observing the visible injuries of a battering. *Id.*

reality of most court systems is that it is “not likely that [a batterer] will be denied all visitation.”²⁸ This practice embodies both traditional public policy favoring continued contact by parents with their children and empirical research supporting the benefit that children gain from maintaining a relationship with both parents.²⁹ The majority of states, however, now acknowledge that it is not always in children’s best interest³⁰ to allow a parent to have *unsupervised* access to them, especially in cases involving domestic violence.³¹ Unsupervised access in these cases can expose the children to continued violence, irresponsible parenting, and undermining of the victim parent’s authority.³² Asking family members or friends to supervise the contact between a batterer and his children does not necessarily reduce these risks; the supervisor may not believe the victim, may be intimidated by the batterer, or may not have training in the dynamics of domestic violence.³³ Moreover, acquaintances do not provide neutrality, a

28. Dobbie Steyer, *Structuring a Visitation Order for a Victim of Domestic Violence*, in *THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER’S HANDBOOK* 252, 252 (Margaret B. Drew et al. eds., 2d ed. 2004).

29. *See id.*

30. The fundamental responsibility of family court judges is to determine the “best interest” of the child and to render decisions that will promote their well-being. Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions*, *JUV. & FAM. CT. J.* Fall 2003, at 11. Most states have codified the “best interest of the child” standard for custody and visitation decisions. *See, e.g.*, ALASKA STAT. § 25.24.150(c) (2004); GA. CODE ANN. § 19-9-3(a)(2) (2004 & Supp. 2006); KAN. STAT. ANN. § 60-1610(a)(3) (2005); MISS. CODE ANN. § 93-5-24(1) (West Supp. 2005); TENN. CODE ANN. § 36-6-401(a) (2005); UTAH CODE ANN. § 30-3-10(1)(a) (Supp. 2006).

31. *See* Scott A. Young, *A Presumption for Supervised Visitation in Texas: Understanding and Strengthening Family Code Section 153.004(e)*, 37 *TEX. TECH L. REV.* 327, 329 & n.17 (2005) (including a list of state statutes addressing supervised visitation); *see, e.g.*, HAW. REV. STAT. § 571-46(9) (Supp. 2005) (“In every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that family violence has been committed by a parent raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence.”); LA. REV. STAT. ANN. § 9:364(A), (C) (2006) (“There is created a presumption that no parent who has a history of perpetrating family violence shall be awarded sole or joint custody of children If the court finds that a parent has a history of perpetrating family violence, the court shall allow only supervised child visitation with that parent.”); N.D. CENT. CODE § 14-05-22(3) (2004 & Supp. 2005) (“If the court finds that a parent has perpetrated domestic violence . . . , the court shall allow only supervised child visitation with that parent unless there is a showing by clear and convincing evidence that unsupervised visitation would not endanger the child’s physical or emotional health.”).

32. Lavita Nadkarni & Barbara Zeek Shaw, *Making a Difference: Tools to Help Judges Support the Healing of Children Exposed to Domestic Violence*, *FAM. CT. REV.*, Summer 2002, at 24, 28.

33. *Id.*

crucial component of supervised visitation programs.³⁴ Recognizing the potential hazards of unsupervised access by perpetrators of violence, many communities have developed supervised visitation programs.³⁵ As some commentators have noted, these programs may be essential to the protection of women and children from ongoing abuse.³⁶ The programs offer a safe and structured environment in which visitation between the battering parent and his children can take place.³⁷ Historically, supervised visitation programs were used to provide visitation in child abuse/dependency cases: i.e., instances in which the child had been removed from the home pursuant to an investigation of abuse, neglect, or abandonment by child protective services agents or law enforcement.³⁸ More recently, however, they have been developed to provide contact between batterers and their children in domestic violence cases.³⁹ Supervised visitation thus

34. See Nat Stern & Karen Oehme, *Defending Neutrality in Supervised Visitation to Preserve a Crucial Family Court Service*, 35 SW. U. L. REV. 37 (2005).

35. Maureen Sheeran & Scott Hampton, *Supervised Visitation in Cases of Domestic Violence*, JUR. & FAM. CT. J., Spring 1999, at 13, 13.

36. See Peter G. Jaffe et. al., *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, JUV. & FAM. CT. J., Fall 2003, at 57, 60.

37. See ABA Div. for Pub. Educ., *Representing Victims of Domestic Violence* 4 (2001), <http://www.abanet.org/publiced/representingvictims.pdf>.

38. See, e.g., FLA. STAT. ANN. § 39.401(1) (2005) (“A child may only be taken into custody: (a) Pursuant to the provisions of this part, based upon sworn testimony, either before or after a petition is filed; or (b) By a law enforcement officer, or an authorized agent of the department, if the officer or authorized agent has probable cause to support a finding: 1. That the child has been abused, neglected, or abandoned, or is suffering from or is in imminent danger of illness or injury as a result of abuse, neglect, or abandonment; 2. That the parent or legal custodian of the child has materially violated a condition of placement imposed by the court; or 3. That the child has no parent, legal custodian, or responsible adult relative immediately known and available to provide supervision and care.”). In Robert B. Straus & Eve Alda, *Supervised Child Access: The Evolution of a Social Service*, 32 FAM. & CONCILIATION CTS. REV. 230 (1994), the authors place the recent growth of supervised visitation in a historical context and note that supervised visitation began in child protective services cases for children who had been removed from their parent’s care and spread to visitation in the context of divorce. *Id.* at 231; see also Young, *supra* note 31, at 344 n. 190 (stating that the idea of visitation centers originally arose in family rehabilitation, not family violence, cases).

39. See Jaffe, *supra* note 26, at 91 (stating that one important development in the United States is the considerable expansion of supervised visitation and exchange services through the Office on Violence Against Women (“OVW”), U.S. Department of Justice, which has poured millions of dollars into communities to develop supervised visitation services for victims of domestic violence). The U.S. Code provides:

The Attorney General, through the Director of the Office on Violence Against Women, may award grants 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 (1) to provide *supervised visitation* and safe visitation exchange of chil-

offers judges a way to address the fundamental tension between the policies of protecting children and of allowing their batterer parent contact with them.⁴⁰ Under this arrangement, the balance struck in meeting the court's dual obligations is provided by trained staff rather than by family and friends of the batterer. Staff at supervised visitation programs receive training to understand the dynamics of domestic violence.⁴¹ They therefore appreciate that a woman who has left her violent partner is at heightened risk for "separation violence" as the batterer tries to reassert his power and control over the victim.⁴² This violence may represent either an effort by the batterer to punish the victim for leaving or an attempt to force her to return to him.⁴³ In either case, the staff will approach their task with a measure of insight on the nature of domestic violence.⁴⁴

dren by and between parents in situations involving domestic violence, dating violence, child abuse, sexual assault, or stalking; (2) to protect children from the trauma of witnessing domestic or dating violence or experiencing abduction, injury, or death during parent and child visitation exchanges; (3) to protect parents or caretakers who are victims of domestic and dating violence from experiencing further violence, abuse, and threats during child visitation exchanges; and (4) to protect children from the trauma of experiencing sexual assault or other forms of physical assault or abuse during parent and child visitation and visitation exchanges.

42 U.S.C.A. § 10420(a) (West Supp. 2006) (emphasis added).

40. See Straus & Alda, *supra* note 38, at 232.

41. See, e.g., CAL. R. CT. § 26.2 (rev. ed. 2006) (setting forth the uniform standards of practice for providers of supervised visitation, listing numerous topics on which professional and therapeutic providers of supervised visitation should receive training, including domestic violence); SUPERVISED VISITATION NETWORK, STANDARDS AND GUIDELINES OF THE SUPERVISED VISITATION NETWORK at § 11.2 (2000), <http://www.svnetwork.net/StandardsAndGuidelines.html> (providing that a Visit Supervisor shall complete training covering a variety of topics, including family violence).

42. Separated/divorced women are fourteen times more likely than married women to report having been a victim of violence by their spouse or ex-spouse. YesICan.org, Domestic Violence Statistics, <http://www.yesican.org/dvstats.html> (last visited Nov. 7, 2006). Sixty-five percent of intimate homicide victims physically separated from the perpetrator prior to their death. *Id.*

43. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 65 (1991). Also, according to the National Council of Family and Juvenile Court Judges,

[t]he process of leaving their abusers presents a heightened potential for danger for survivors of domestic violence. Many survivors experience separation violence as the act of leaving or seeking protection from an abuser challenges the abuser's power and control. While the decision to leave may be quite powerful for survivors, it also increases the risk to their safety and security.

NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *supra* note 5, at 17 (2005).

44. See Praxis International—Supervised Visitation Technical Assistance, http://www.praxisinternational.org/vista_ta_frame.html (last visited Nov. 7, 2006), for a collec-

Many states' domestic relations laws now formally recognize the role of supervised visitation in resolving custody disputes.⁴⁵ These statutes vary considerably in the degree to which they regulate the manner in which supervision will occur. While some simply acknowledge the court's prerogative to order supervised visitation,⁴⁶ others spell out in considerable detail the standards of practice for visitation providers.⁴⁷

Whether by statutory directive or judicial initiative, most cases are sent to supervised visitation programs by the court overseeing the custody dispute.⁴⁸ However, a judicial order may include little information regarding the risks in the case. The mandatory Supervised Visitation Order used in California, for example, includes a series of check boxes of broad allegations in the case, including abduction, physical abuse, drug abuse, neglect, sexual abuse, domestic violence, alcohol abuse, and "other."⁴⁹ Other jurisdictions include no indication of the issues that resulted in the order for supervised visitation. The standard Order for Supervised Visitation in Chatham County, North Carolina, for example, only instructs the parties to use a supervised visitation program and to participate in intake and orientation; it does not require any assessment or identification of the risks involved.⁵⁰ As the New Hampshire Task Force on Family Law has observed:

Frequently, court orders do not include detailed court findings of the risks giving rise to the supervision requirement. Such findings are important to inform the parties and supervisors of what needs to oc-

tion of written and audio/visual training materials on making supervised visitation safe for children and victims of domestic violence.

45. *E.g.*, ALA. CODE § 30-3-135(b)(2) (LexisNexis 1998 & Supp. 2005); ALASKA STAT. § 25.20.061(2) (2004); COLO. REV. STAT. § 13-3-113(5)(b)(IV) (2006); HAW. REV. STAT. § 571-46(11)(B) (Supp. 2005); 725 ILL. COMP. STAT. ANN. 5/112A-14(b)(7) (West Supp. 2006).

46. *E.g.*, GA. CODE ANN. § 19-9-7(a)(2) (2004).

47. *E.g.*, CAL. R. CT. § 26.2 (rev. ed. 2006).

48. It is accepted practice for programs to receive their referrals from courts. Federal grants are awarded by the Attorney General after consideration of several factors, including the extent to which the supervised visitation program applicant "demonstrates coordination and collaboration with State and local court systems, including mechanisms for communication and referral" from those systems. 42 U.S.C.A. § 10420(b)(4) (West Supp. 2006).

49. PAMELA E. PIERSON & VANCE W. RAYE, CALIFORNIA CIVIL PRACTICE—FAMILY LAW LITIGATION, § 11:98 (2003).

50. State of North Carolina, County of Chatham, Order for Supervised Visitation/Exchange, obtained February 26, 2006 (on file with authors).

cur or not occur in the visits; to measure how the risks are or are not changing over the period of the supervision requirement⁵¹

It is this gap in information that intake at supervised visitation seeks to fill.

II. INTAKE AT SUPERVISED VISITATION: THE NEED FOR INFORMATION AND THE RISKS OF DISCLOSURE

To make up for the deficiency in court orders and to provide critical information to staff, visitation programs conduct their own intake sessions with each parent prior to monitoring any visits. The New York Society for the Prevention of Cruelty to Children Professional's Handbook on Providing Supervised Visitation describes supervised visitation intake records as including basic contact, identification, and statistical data, such as parents' names, addresses, telephone numbers, and children's names and ages.⁵² More importantly, intake questions also address the fundamental problems that have brought the family to the visitation program. Screening for evidence of domestic violence, of course, is especially important:

A thorough intake application should screen for a history of domestic violence as a means of assessing the risk of harm to adults and children. . . . Some areas to consider questioning are: whether any type of violence occurred in the home . . . [including] a description of the first incident and the most recent incident. It is important to find out if the children witnessed the violence, and if they made any attempts to stop it.⁵³

Interviews at intake cover a range of potentially pertinent topics. Supervised visitation staff routinely inquire as to whether the children have been abused,⁵⁴ whether either parent abuses alcohol or other substances,⁵⁵ and whether the parents are on any

51. Nina Gardner, *Report of the Task Force on Family Law*, N.H. B.J., Winter 2005, at 20, 28 (stating that courts should develop protocols for supervised visitation or supervised exchange orders because there is no uniform procedure in the courts for custody cases where supervised visitation or supervised exchange is ordered).

52. Nadine Blaschak-Brown, *Providing the Service*, in *NEW YORK SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN PROFESSIONALS' HANDBOOK ON PROVIDING SUPERVISED VISITATION* 67, 70 (Anne Reiniger ed., 2000) [hereinafter *NYSPCC*].

53. *Id.*

54. *Id.*

55. *Id.* at 71.

medication that can affect behavior during visitation.⁵⁶ The Wellstone Family Safety Program in Minnesota, for example, uses an intake assessment to “establish[] if there has been a history of family violence.”⁵⁷ The assessment is designed primarily to help staff determine “the level of monitoring necessary for the visit.”⁵⁸ Included in the information that staff seek to elicit are details concerning the impetus for the request for visitation services; risk factors presented by any of the parties, including the risk of abduction and any history of violence; any history of mental illness, substance abuse, or other parental dysfunction; and parents’ concerns about issues that may arise during the visits.⁵⁹

In order to obtain this information, programs generally rely on formal intake forms with a list of questions to ask the victim about her domestic violence experiences.⁶⁰ Programs may either develop these forms themselves or use danger assessment forms such as one created at Johns Hopkins University.⁶¹ Among the questions about the batterer that this form asks a victim to answer are:

- Does he own a gun?
- Have you left him after living together?
- Is he unemployed?
- Is he an alcoholic or problem drinker?
- Do you believe he is capable of killing you?
- Does he threaten to harm the children?
- Does he use illegal drugs?⁶²

Thus, supervised visitation programs seek such specific background information to assess risk to the victim, the children, and program staff; to be attuned to the dynamics of the case; and to inform the staff’s observations at visits.⁶³ In many instances, the

56. *Id.* at 71–72.

57. WELLSTONE FAMILY SAFETY PROGRAM POLICIES 27 [hereinafter WELLSTONE POLICIES] (on file with authors).

58. *Id.*

59. *Id.* at 28.

60. See Appendix B, in NYSPCC, *supra* note 52, at 156, 156 (setting forth a detailed checklist of suggested information to be gathered during intake).

61. DangerAssessment.org, *Danger Assessment* (2004), <http://www.dangerassessment.org/WebApplication1/pages/da/DAEnglish.pdf>.

62. *Id.*

63. See WELLSTONE POLICIES, *supra* note 57, at 27–28 (including as information sought during intake details of the reasons for the request for supervised visitation; risk factors, including risk of abduction and history of family violence; history of parental dys-

victims may not have divulged this information to the court. The same reasons that may have delayed the victim in reporting the abuse in the first place—shame, denial, fear⁶⁴—could have kept her from disclosing specific information to the court. Accordingly, she may have simply decided to provide the minimal information required to obtain an order for protection.⁶⁵

When a victim of domestic violence brings her children to a supervised visitation program, she typically has already taken many risks. By leaving her batterer, she has severely increased her chances of violent assault or murder.⁶⁶ Moreover, as the party who requested the supervised visitation (where the court has not ordered it *sua sponte*), she has publicly betrayed her partner by exposing the dark secret of domestic violence. These seemingly simple steps are profoundly difficult for many victims who may have suffered privately for years.⁶⁷ Once the victim arrives at intake at the supervised visitation program, she faces the reality that her violent partner will be in contact with their children during each visit. He will also presumably know at certain times—i.e., the start or conclusion of the visit—either her whereabouts or those of the family member or friend who will be dropping off and picking up the children. Thus, both the victim and staff have a stake in the victim disclosing the possible risks to supervised visitation staff.

function, including mental illness or substance abuse; concerns about issues that may arise during visits with the children; and requests for special restrictions during visits).

64. RAMOS, *supra* note 27, § 3.4.

65. See, e.g., IND. CODE ANN. § 34-26-5-2(a)(1) (LexisNexis Supp. 2006) (stating that a person who is or has been a victim of domestic violence or family violence may file a petition for an order for protection against a family or household member who commits an act of domestic or family violence); TEX. FAM. CODE ANN. § 81.001 (Vernon 2002 & Supp. 2006) (entitling a petitioner to a protective order “if family violence has occurred and is likely to occur in the future”). A victim may reveal part of the story of the family—just enough to convince the court to order a protective order. For example, a victim may tell of one of two instances of violence and threats, but may withhold a perpetrator’s sexual abuse of the children.

66. See *supra* note 42 and accompanying text.

67. For a good discussion of the commonly asked question, “Why does a victim of domestic violence stay in the relationship?,” the Indiana University School of Law-Bloomington has created a website called the Protective Order Project. The site has a “Why She Stays” page that describes the hopelessness, shame, isolation, societal denial, danger, and lack of resources that battered women face. Indiana Law, Protective Order Project—Why She Stays, http://www.law.indiana.edu/pop/domestic_violence/stays.shtml (last visited Nov. 7, 2006).

Currently, staff at visitation programs generally advise victims that the information they provide at intake is not confidential. For example, Faith and Liberty's Place ("FLP") in Dallas, Texas created a supervised visitation program after the 2001 murders of Faith and Liberty Battaglia, whose father killed them while they were in his unsupervised care.⁶⁸ The large staff at FLP includes approximately fifteen employees; some are contract workers who only conduct intake, while other employees only monitor visits.⁶⁹ This type of organizational structure makes sharing of information essential to ensure victim safety. Intake at FLP is regarded as "an opportunity" for the client to discuss what brought him or her to the facility and "any questions, concerns, or other information that he/she thinks FLP should know."⁷⁰ The intake notes are typed and signed by the staff member who obtains them.⁷¹ FLP lists information to obtain during intake, and the program director notes that the question, "What brings you to FLP," invariably yields relationship information.⁷² Staff are already aware that such information is important. The instructions for intake state that staff should "let the client decide what they wish/need to talk about as far as any abuse history. If [the] client chooses to talk about abuse, re-emphasize that it will be recorded."⁷³ FLP has an established protocol for parties to obtain any program records. Depending on the case, the program may require a subpoena duces tecum before releasing record information. As the FLP "Intake Issues" explain:

The intake is the opportunity for a victim of domestic violence to tell the center staff her story. . . . It should be a time when a victim can freely tell us what aspects of her life are most important to her for us to know. . . . She may disclose aspects of the abuse that have never come out before. . . . This record can be subpoenaed, and we are un-

68. FAITH AND LIBERTY'S PLACE, HISTORY OF FAITH AND LIBERTY'S PLACE (on file with authors). The goal of FLP is to provide a safe, neutral, child-centered environment for families affected by family violence. FAITH AND LIBERTY'S PLACE, FAMILY CENTER PROGRAM POLICIES, § 1 (on file with authors).

69. E-mail from Ona Foster, Director, Faith and Liberty's Place, to Karen Oehme, Clearinghouse on Supervised Visitation, Florida State University (Apr. 18, 2006, 13:03:27 CST) (on file with authors).

70. FAITH AND LIBERTY'S PLACE, FLP FAMILY CENTER INTERNAL GUIDELINES, Outline for Conducting Intakes (on file with authors).

71. *Id.*

72. Telephone Interview with Ona Foster, Director, Faith and Liberty's Place, in Dallas, Tex. (Mar. 6, 2006) (on file with authors).

73. *Id.*

able to prevent that from happening. Once information is subpoenaed, the abuser will have access to it. . . . [A]n abuser can then read everything that the victim has reported to us. This clear message to a victim that the conversation [she is] about to have with us could end up in the abuser's hands is enough to ensure that many of those conversations are stilted and filtered. This leaves us feeling that we are lacking important information.⁷⁴

Other programs, well aware of the risks of the batterer's obtaining information from the intake records of the victim, have chosen not to record the information that the victim gives to them. One director noted that staff are responsible for remembering what the victim identified as the risks in the case without formally recording them.⁷⁵ Although this approach may work over a short period of time in small communities with little staff turnover, it is not an effective way to deal with long-term caseloads, staff turnover, and the fragility of human memory. Still, the approach is grounded in the intention of keeping the victim safe while obtaining enough information to keep the staff informed of the risks to children and staff during the time that the perpetrator is on-site.

If a victim is represented by an attorney, then the attorney already knows of the privileges that exist—and do not exist—in that jurisdiction. In divorce and custody cases, then, attorneys may advise victims of domestic violence not to reveal certain information about the batterer. For example, attorneys who represent victims already evaluate the risks and benefits of referring their clients to counselors. Some commentators give advice to lawyers who represent victims: "Caution your client about information that she should and should not share with the counselor. This approach is especially important when the communication with the counselor does not fall under any evidentiary privilege."⁷⁶ When they are informed by lawyers or supervised visitation staff that the information they reveal is not privileged, victims will have the benefit of being specifically advised not to reveal information that may fall into the hands of the batterer. This benefit, however, is a double-edged sword. By withholding

74. FAITH AND LIBERTY'S PLACE, INTAKE ISSUES: FLP FAMILY CENTER (on file with authors).

75. Cf. E-mail from Melissa Scaia, *supra* note 7.

76. Caitlin Glass et al., *Custody and Visitation: Considerations for Every Attorney Retained by a Survivor of Domestic Violence*, 36 J. POVERTY L. & POL. 529, 533 n.34 (2003).

the information, victims are keeping crucial information from the people charged with providing for their safety—and the safety of their children—at visits.

The problems that can arise from allowing batterers to access their victims' supervised visitation intake records take on a variety of forms. The following scenarios—hypothetical but realistic—illustrate the nature of certain recurring problems.⁷⁷ All of the custodial parents in these scenarios received orders for protection

77. The following cases present scenarios demonstrating that these hypotheticals reflect real-life situations for victims of domestic violence. In *Sharp v. Arkansas*, No. CACR01-545, 2001 Ark. App. LEXIS 798 (Ark. Ct. App. Nov. 14, 2001), a husband with a history of violence against his wife was angry about their divorce. *Id.* at *1. He stole into his ex-wife's house, hit her with his gun, threw her up against the fireplace, and kicked her. *Id.* at *1-2. These acts all took place in the presence of her son. *Id.* at *2. The appellant then placed a gun to her head, forced her to tie up her son, and abducted her. *Id.* In *Stevenson v. Stevenson*, 714 A.2d 986 (N.J. Super. Ct. Ch. Div. 1998), the husband, in a drunken rage, beat and tortured his wife. *Id.* at 988. She was so severely injured that she had to be transported by emergency helicopter to a trauma unit, where she was diagnosed as having suffered, *inter alia*, a fractured skull, a concussion, four broken ribs, and a punctured lung. *Id.* at 989. She testified to a history of domestic violence on his part and expressed fear that her husband would take their ten-year-old son and leave the area. *Id.* She reported that he would do "anything and everything to get physical custody and keep their son away from her." *Id.* She added that their son was in the house during the forty-five minute assault. *Id.* *Paslov v. Cox*, 104 P.3d 1025 (Mont. 2004), involved a public argument in which an ex-husband threatened to ruin his former wife's upcoming wedding, "stalk her for the rest of her life, and harm both her and her children." *Id.* at 1027. In *In re W.L.*, No. 05-00-02023-CV, 2002 Tex. App. LEXIS 1574 (Tex. Civ. App. Feb. 28, 2002), the husband, among other salient abuses, choked his oldest child and hit another child in the head with a broom. *See id.* at *5. In addition, the children stated that he had hit their mother, used drugs, hit them with a belt, and threatened to throw them out the upstairs window. *Id.* The father was charged with sexually abusing his daughter after she reported abuse and had also been arrested five times for allegedly assaulting individuals other than his wife (and at least seven other times for various other offenses). *See id.* at *6, *8. In *State v. Baldwin*, 540 S.E.2d 815 (N.C. Ct. App. 2000), an estranged husband with a history of domestic violence brandished a gun and confined his wife and children against their will for almost twenty hours. *See id.* at 818-19. He repeatedly pointed the gun at his head and threatened to kill himself. *See id.* A final illustration of the domestic violence that forms the backdrop of our scenarios is presented by the events that triggered *State v. Traeger*, 997 P.2d 142 (N.M. Ct. App. 2000). After the defendant was told by his wife that she wanted a divorce, he grabbed her, pulled her toward the bedroom, and put a string around her neck so that she had great difficulty breathing. *Id.* at 143. Once in the bedroom, the husband dropped the string, brandished a baseball bat, and he told his wife to remove her clothes. *Id.* When she hesitated, he held the bat with both hands and hit her foot as if he was hitting a ball. *Id.* The defendant continued to threaten her with the bat, so she relented and removed her clothes. *Id.* He told her that she had destroyed his life and he wanted to kill her. *Id.* As she struggled with the defendant, he continued to beat her and eventually raped her. *Id.* The more that the wife struggled with the defendant, the more he hurt her. *Id.* The wife told the defendant that she did not want to have intercourse, but the defendant forced himself on her. *Id.* She eventually convinced him to take her to the hospital; her foot was broken in five places. *Id.*

against their partners. All are informed at intake by visitation staff that the information they provide may be subject to disclosure.

When Mrs. Meyer arrives at the visitation program for intake, the director asks whether she believes that there will be any risk of kidnapping at the program. Mrs. Meyer answers that Mr. Meyer often threatened that he would kidnap the children if she left him. She did not report that allegation to the court in her petition, because Mr. Meyer threatened to never let her see the children again if she did.

Parental kidnapping is lamentably common in cases in which the parents are disputing custody.⁷⁸ If staff do not record Mrs. Meyer's concern, the file will not reflect what could be one of the biggest dangers in the case. If staff do record Mrs. Meyer's concern, Mr. Meyer may subpoena the records and then retaliate against her with violence or with the kidnapping that he threatened.

Ms. Williams has a two-year-old daughter with her former boyfriend, who requested visitation rights after the state sought child support from him. She tells the supervised visitation staff that she is aware of an abuse investigation that took place several years ago in another state when he allegedly physically and sexually abused his daughter from a previous relationship. However, Ms. Williams begs staff to swear to keep this information—which she found out a few months earlier—a secret. Otherwise, she fears, her former boyfriend will “hunt her down like a dog.” She asks staff to “watch where he puts his hands” during the visit.

Child sexual abuse issues are frequently tied to domestic violence. Researchers have pointed out that the crimes of sexual abuse and domestic violence are similar. Both deal with issues of power and control of the batterer over a victim, both are crimes

78. In 1999, there were an estimated 203,000 child abductions in the United States by family members. HEATHER HAMMER ET AL., U.S. DEP'T OF JUSTICE, CHILDREN ABDUCTED BY FAMILY MEMBERS: NATIONAL ESTIMATES AND CHARACTERISTICS 4 (2002), available at <http://www.ncjrs.org/pdffiles1/ojdp/196466.pdf>. According to one study, 34% of batterers threaten to kidnap their children and 11% actually abduct them. Deborah M. Goelman, *Shelter from the Storm: Using Jurisdictional Statutes to Protect Victims of Domestic Violence After the Violence Against Women Act of 2000*, 13 COLUM. J. GENDER & L. 101, 112 (2004) (citing Marsha B. Liss & Geraldine Butts Stately, *Domestic Violence and Child Custody*, in BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE 175, 183 (Marsali Hansen & Michele Harvey eds., 1993)).

committed in families in secret, and children who witness domestic violence may be more vulnerable to child sexual abuse because they already have witnessed the power of the violence and dare not resist the sexual abuse.⁷⁹ If Ms. Williams suspects that her former boyfriend has abused her own daughter, she may know that she faces a common “double bind”: mothers routinely are prosecuted for “allowing” partners to sexually abuse their children, but mothers who report the abuse to protective services also are accused of fabricating the stories or “alienating” the child.⁸⁰

Mrs. Tyler knows that her husband has several guns hidden in the house, and frequently drives with one in his car. She has not told staff, because she believes that Mr. Tyler will be enraged by the disclosure and kill the family pets that she left behind when she took the children to a domestic violence shelter. He also has held a gun to her head in the past to get the children to “behave.”

Firearms and domestic violence are often a fatal combination. If Mrs. Tyler does not tell supervised visitation staff that Mr. Tyler has guns, she is omitting a crucial piece of information in intake. That information is relevant not only to her and her children, but also to the visitation staff and the surrounding community. As research regarding domestic violence notes, batterers who have access to firearms “pose a lethal threat to those they have abused and to the wider community.”⁸¹ Most states authorize judges to include in their protection orders provisions that deny batterers access to firearms. Still, the federal and state firearm laws are sometimes confusing,⁸² and a victim may fear disclosing the existence of firearms to the court or law enforcement. If a batterer brings his gun on-site to supervised visitation—for example, hidden in his car—the safety of the visit is severely compromised.

79. See LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* 90 (2002). One study by researcher Murray Straus reported that 49% of batterers physically abuse children, while only 7% of non-battering men do. Dalton et al., *supra* note 30, at 18.

80. Lynn Hecht Schafran, *Evaluating the Evaluators: Problems with “Outside Neutrals,”* JUDGES’ J., Winter 2003, at 10, 14.

81. Darren Mitchell & Susan B. Carbon, *Firearms and Domestic Violence: A Primer for Judges*, CT. REV., Summer 2002, at 32 (“Abusers who kill their intimate partners also may injure or kill third parties.”); see also JAMES ALAN FOX & MARIANNE W. ZAWITZ, U.S. DEPT OF JUSTICE, *HOMICIDE TRENDS IN THE UNITED STATES: INTIMATE HOMICIDE*, <http://www.ojp.usdoj.gov/bjs/pub/pdf/htius.pdf> (last visited Nov. 7, 2006) (stating that from 1990 to 2004, over two-thirds of homicide victims killed by their spouses or ex-spouses were killed by guns).

82. See Mitchell & Carbon, *supra* note 81, at 33.

Mrs. Smith tells staff that her husband is addicted to drugs and often gets high when he is under pressure. She instructs staff: "Don't write that down, just remember it." The staff member who conducts the intake gets a higher-paying job offer the next month and leaves the program.

There is a well-established link between substance abuse and domestic violence. Researchers estimated that a significant percentage of men who commit acts of domestic violence also have substance abuse problems.⁸³ In addition, victims of substance abuse may "self-medicate" to deal with the abuse.⁸⁴ Mrs. Smith may fear disclosing Mr. Smith's substance abuse because she is afraid that Mr. Smith will retaliate, or that he might reveal that she is also using drugs. She may fear that such a disclosure will cause her to lose her children in the child protection system. Supervised visitation staff who understand the link between domestic violence and substance abuse may know of community services available that can help her with the dual goals of safety and sobriety;⁸⁵ these can protect the children in the long-term.

Mr. and Mrs. Coleman have four children, ages two, three, five, and seven. Mrs. Coleman suspects that her unemployed husband is mentally ill, because he was diagnosed in another city after what doctors called a "psychotic episode" at work. Mrs. Coleman worked to support the family. She kept the children quiet and out of Mr. Coleman's way when he seemed annoyed or nervous, in an effort to reduce his stress and the often connected violence. Now that she has left the household and obtained an order for protection, she fears that he will "fall to pieces" without financial support and help. She hints to visitation staff that Mr. Coleman has

83. See Edward W. Gondolf, *Alcohol Abuse, Wife Assault, and Power Needs*, 69 SOC. SERV. REV. 274, 275 (1995); see also, JAMES J. COLLINS & DONNA L. SPENCER, RESEARCH TRIANGLE INST., LINKAGE OF DOMESTIC VIOLENCE AND SUBSTANCE ABUSE SERVICES 1 (1999), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/194122.pdf>.

84. The links between domestic violence and substance abuse are extremely complicated, with the abuser in some cases forcing the victim to become dependent on substances as a means of controlling her "and as a way to destroy her functionality and self esteem." Denice Wolf Markham, *Mental Illness and Domestic Violence: Implications for Family Law Litigation*, J. POVERTY L. POL'Y, May-June 2003, at 23, 25, available at http://www.lri.lsc.gov/pdf/03/030142_dv.pdf; see also Jane C. Murphy & Margaret J. Potthast, *Domestic Violence, Substance Abuse, and Child Welfare: The Legal System's Response*, 3 J. HEALTH CARE L. & POL'Y 88, 94 (1999).

85. See <http://www.svnetwork.net/members/TelephoneTrainingArchive.html> (describing training of supervised visitation staff in the dynamics of safety and sobriety) (last visited Nov. 7, 2006).

not spent a great deal of time with the children, and that they make him nervous. She is very worried about how Mr. Coleman will cope at visits, but the issue of a possible mental illness is an even bigger secret than the domestic violence was.

The vast majority of batterers do not suffer from mental health problems, but a small percentage of batterers do have mental illnesses and “would benefit from inpatient or outpatient psychotherapy and/or medication *in addition* to specialized batterer treatment.”⁸⁶ Nevertheless, the responsibility for disclosing this condition should not fall on the victim, who already has suffered at the hands of her abuser.

III. PROTECTING THE CONFIDENTIALITY OF VISITATION INTAKE

Our proposed creation of a privilege for visitation intake records flows from the premise that sensitive information obtained at intake should be considered presumptively confidential. Thus, barring exceptional circumstances, communications recorded by intake staff should not be released without the consent of the party who made them. The privilege would rest primarily on a rationale central to privileges already established in law: *viz.*, the necessity of candor by those who receive vital services to those who provide them. In addition, we believe that domestic violence concerns related to visitation presents grounds for confidentiality not typically associated with the attorney-client and other traditional privileges. In aim and justification, the privilege for visitation intake records would resemble the more recently adopted privilege for communications with victim counselors. The special conditions of visitation, however, call for a privilege with somewhat different contours and exceptions.

86. David Adams, *Guidelines for Doctors on Identifying and Helping Their Patients Who Batter*, J. AM. MED. WOMEN'S ASS'N, May-July 1996, at 123, 125, available at <http://www.jamwa.org/index.cfm?objectid=5CDDAE24-D567-0B25-5119BOD21D103D2>.

A. *The Scope of the Privilege*

Under the proposed privilege, victims'⁸⁷ intake records would be statutorily characterized as confidential documents.⁸⁸ Incident to the requirement, records would be kept in a secure place accessible only to visitation staff, and only to the extent that information was needed to ensure the safety and effectiveness of a specific visit. A visitation center would be prohibited from releasing the record of an intake session without the knowing and voluntary consent of the party whose statements were recorded. Such consent would have to be in writing with adequate assurances of authenticity and absence of coercion. A center could reject a request for an intake record without ascertaining the preference of the party whose statements it contained; however, the center would be required to make reasonable efforts to notify the victim of its action. Ideally, statutes would include penalties sufficient to deter even inadvertent violation of the obligation of confidentiality.

Though designed to guard tightly against dissemination of intake reports, the privilege would allow for narrow exceptions. First, of course, is the provision for waiver of the privilege inher-

87. This article reserves the question of the extent to which a statutory privilege also should be granted to intake records of batterers, except for those who also have obtained an order for protection. In those cases in which both parties have separate injunctions, our proposal would confer the privilege on *both*, even though one of the parties in fact may be the batterer. See, e.g., FLA. STAT. ANN. § 741.30(1)(i) (West Supp. 2006) ("The court is prohibited from issuing mutual orders of protection. This does not preclude the court from issuing separate injunctions for protection against domestic violence where each party has complied with the provisions of this section. Compliance with the provisions of this section cannot be waived."). This special circumstance aside, the concern over intimidation and inhibition of victims that prompts our proposal obviously does not apply to batterers. In addition, it may be that visitation staff should be afforded greater latitude in reacting to threats and other ominous statements made by individuals with a history of violence. While these and other considerations should ultimately be weighed, the scope of this article is confined to what we regard as the far more pressing issue of ensuring that the goals of supervised visitation are not undermined by ready access to intake records of victims.

88. Privilege ordinarily refers to a rule of evidence barring the introduction of a statement into a formal proceeding without the consent of the holder of the privilege. See Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 224-28 (1992). On the other hand, a requirement of confidentiality forbidding disclosure irrespective of setting is imposed by ethical norms of the relevant profession. See John M. Burman, *Ethical Considerations When Representing Organizations*, 3 WYO. L. REV. 581, 600 (2003). The statutory privilege that we propose encompasses elements of both these concepts. As discussed in this section, the privilege's reach would impose a strict but not categorical requirement of confidentiality extending well beyond the courtroom.

ent in the possibility of consent. Second, the mandatory reporting requirements of child abuse laws necessarily would trump the privilege. Thus, if a parent revealed to supervised visitation staff that she was abusing her child, staff would be compelled to report this information to authorities.⁸⁹ Third, visitation staff would be not only permitted but required to report information indicating that either a child or parent was in danger of suffering immediate physical harm at the hands of the other parent. To avoid defeating the aim of the privilege, however, this exception should be crafted to assure that it could not be invoked lightly. A statute could thus impose several criteria: e.g., that the harm threatened is serious and imminent, that the reporting staff member has good reason to regard the alleged threat as credible, that the harm can be averted only by disclosure to law enforcement or other appropriate authority, and that the benefit of disclosure clearly outweighs the risk.⁹⁰ Fourth, where violence is actually inflicted on a child or parent, a record of a prior threat could be introduced as evidence of the other parent's intent as the accused perpetrator of the violence. Fifth, since legislation cannot anticipate every instance of compelling need for intake records, a statute should contain a catchall exception for extraordinary circumstances not addressed in the specific provisions. Again, however, the release of records under this provision should have to satisfy

89. See, e.g., MONT. CODE ANN. § 41-3-201(1) (2005) ("When the professionals and officials . . . know or have reasonable cause to suspect . . . that a child is abused or neglected, they shall report the matter promptly to the department of public health and human services."); NEB. REV. STAT. § 28-711(1) (Supp. 2005) (stating that any health care provider, law enforcement official, or any other person who "has reasonable cause to believe that a child has been subjected to child abuse or neglect or observes such child being subjected to conditions or circumstances which reasonably would result in abuse or neglect . . . shall report such incident . . . to the proper law enforcement agency or to the department"); NEV. REV. STAT. ANN. § 432B.220(1) (LexisNexis 2006) (stating that any health care providers, therapists, counselors, social workers, or athletic trainers; hospital staff; coroner; clergyman, Christian Science or religious healer; school administrator, teacher, or counselor; any employee of a child care facility or camp; licensed foster home provider; law enforcement officials; an attorney; any employee or volunteer of an agency who advises persons on child abuse; any employee or volunteer of a youth shelter; or any employee of an entity that provides organized activities for children, who "knows or has reasonable cause to believe that a child has been abused or neglected shall . . . report the abuse or neglect of the child to an agency which provides child welfare services or to a law enforcement agency . . . not later than 24 hours after the person knows or has reasonable cause to believe that the child has been abused or neglected."); N.J. STAT. ANN. 9:6-8.10 (West 2002 & Supp. 2006) ("Any person having reasonable cause to believe that a child has been subjected to child abuse or acts of child abuse shall report [it] immediately to the Division of Youth and Family Services.").

90. The rationale for this exception is further discussed *infra* text accompanying notes 132-38.

a high standard consistent with the safety that is the overriding goal of the proposed privilege and visitation itself. Perhaps inappropriate disclosure under the exception could be deterred by a procedural safeguard such as requiring judicial authorization.

Moreover, while records falling outside these exceptions would be shielded from disclosure, the privilege would not preclude using information obtained at intake in ways that further the goals of visitation without betraying a party's reliance on the assurance of confidentiality. Obviously, nonsensitive information readily available through other means—e.g., names and ages—can be shared generally with staff and with others who have responsibility for promoting safe and congenial visitation conditions. A more difficult case would arise where a victim's statements indicate cause for concern, but do not meet the exception for clear threats of serious and imminent harm. In this situation, personnel responsible for security could be apprised that staff had determined that a particular visitation presents a heightened risk of disruption or harm. Even on these occasions, however, visitation staff would be expected to observe both the letter and spirit of the statutory privilege in conveying information and inferences gleaned from intake. Barring exigent circumstances already covered by exceptions, staff would not offer the intake reports themselves to security personnel. Nor would information be provided to advance goals of law enforcement or investigation; rather, its release should be closely tailored to personnel's need to be adequately prepared for a potentially problematic visit.

B. *The Utility of Privileges*

The proposed privilege for intake records would not constitute a novel measure. On the contrary, its rationale draws from privileges conferred on recipients of services and other assistance within a variety of relationships.⁹¹ In each instance, the law⁹² has sacrificed access to potentially valuable information in recogni-

91. See generally *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450 (1985) (examining the legal system's protection of communications made by individuals within the context of confidential relationships).

92. The development of privileges has been overwhelmingly a creature of state law. The Federal Rules of Evidence do not recognize specific privileges. Rather, federal courts are instructed to look to the state rule governing privilege in an action involving a claim or defense under that state's law, and otherwise to determine the availability of a privilege in each instance "in the light of reason and experience." FED. R. EVID. 501.

tion that candor is crucial to the function of the relationship. While some privileges have evoked additional justifications as well,⁹³ a fundamental aim of fostering frank communication pervades them all. Our proposal here rests squarely on this utilitarian rationale.⁹⁴

The oldest and most renowned of these privileges, of course, protects communications between attorneys and clients.⁹⁵ Virtually universally adopted,⁹⁶ the attorney-client privilege is considered "central to the practice of law."⁹⁷ The obligation of confidentiality underlying the privilege is articulated and status enshrined by the American Bar Association: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation[,] or the disclosure is permitted by [one of the enumerated exceptions]."⁹⁸ Though not absolute,⁹⁹ the privilege will be sustained even in in-

93. These justifications have included protection of privacy interests. See Elizabeth B. Cooper, *Testing for Genetic Traits: The Need for a New Legal Doctrine of Informed Consent*, 58 MD. L. REV. 346, 374 (1999) (protecting the physician-patient relationship); Mary Crossley, *Infected Judgment: Legal Responses to Physician Bias*, 48 VILL. L. REV. 195, 258-59 (2003) (protecting the physician-patient relationship); Thomas G. Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 92 (1973) (protecting the psychotherapist-patient relationship); David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 112-13 (1956) (protecting attorney-client and clergy-penitent relationships); Stephen M. Wittenberg, *Recent Decisions, Radiant Burners, Inc. v. Am. Gas Ass'n*, 61 MICH. L. REV. 603, 605 (1963) (protecting attorney-client relationships). Promoting individual autonomy is another justification. See, e.g., Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 512 (1990); Charles Fried, *Correspondence, The Lawyer as Friend*, 86 YALE L.J. 573, 586 (1977); Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 605 (1980); Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 340-41 (1987).

94. See *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996) (stating that "[o]ur cases make clear that an asserted privilege must also 'serv[e] public ends'" (alteration in original) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)); 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2285 (John T. McNaughton ed. 1961 & Supp. 1991).

95. See WIGMORE, *supra* note 94, § 2290.

96. See Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 352-53 (1989).

97. Douglas R. Richmond, *The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era*, 110 PENN ST. L. REV. 381, 382 (2005).

98. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2002).

99. See *id.* at R. 1.6(b) (describing circumstances in which "[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary").

stances where the information that it shields might prove invaluable to the search for truth.

In validating the attorney-client privilege, the Supreme Court has underscored the privilege's function of "encourag[ing] 'full and frank communication between attorneys and their clients and thereby promot[ing] broader public interests in the observance of law and the administration of justice.'"¹⁰⁰ As the Ninth Circuit Court of Appeals has elaborated, the privilege arises from the

necessity of insuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense. This assistance can be made safely and readily available only when the client is free from the consequences of apprehension of disclosure by reason of the subsequent statements of the skilled lawyer.¹⁰¹

Judicial acknowledgement that "[t]he fundamental purpose of the attorney-client privilege is . . . to encourage full and open communication between client and attorney"¹⁰² has been widely seconded by scholarly observers. Echoing Wigmore's assertion that the privilege exists "to promote freedom of consultation of legal advisers" by removing "the apprehension of compelled disclosure,"¹⁰³ commentators have continued to emphasize the privilege's value in encouraging candor and full disclosure by clients.¹⁰⁴

100. *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (quoting *Upjohn Co. v. United States*, 499 U.S. 383, 389 (1981)).

101. *Baird v. Koerner*, 279 F.2d 623, 629-30 (9th Cir. 1960); *see also* *Schwimmer v. United States*, 232 F.2d 855, 863 (8th Cir. 1956) (stating that the attorney-client privilege "exists to enable a client to have subjective freedom of mind in committing his affairs to the knowledge of an attorney"); *Anderson v. State*, 297 So. 2d, 871, 871-72 (Fla. Dist. Ct. App. 1974) (describing policy underlying privilege as "promot[ing] freedom of consultation with legal advisers through removing the apprehension of compelled disclosure by such advisers" (citing WIGMORE, *supra* note 94, § 2291)); *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 581 N.E.2d 1055, 1059 (N.Y. 1991) (stating that privilege "fosters the open dialogue between lawyer and client that is deemed essential to effective representation").

102. *People v. Meredith*, 631 P.2d 46, 51 (Cal. 1981).

103. WIGMORE, *supra* note 94, at § 2291.

104. *See, e.g.,* Craig S. Lerner, *Conspirators' Privilege and Innocents' Refuge: A New Approach to Joint Defense Agreements*, 77 NOTRE DAME L. REV. 1449, 1471 (2002); Melanie B. Leslie, *Government Officials as Attorneys and Clients: Why Privilege the Privileged?*, 77 IND. L.J. 469, 483 (2002); Mosteller, *supra* note 88, at 230-31; Sally R. Weaver, *Client Confidences in Disputes Between In-House Attorneys and Their Employer-Clients: Much-*

Privileges involving medical services rest on similar underpinnings. The physician-patient privilege prohibits a physician's testimony about information conveyed by the patient in the course of treatment.¹⁰⁵ As with the attorney-client relationship, the cloak of confidentiality enveloping communication between physician and patient is designed primarily to encourage patients to supply information needed to determine appropriate care.¹⁰⁶ Moreover, within the profession a distinct privilege has evolved to protect confidences disclosed to psychotherapists by their patients.¹⁰⁷ While expectations of privacy obviously play a special role in this privilege,¹⁰⁸ it is also recognized that patients' trust in the confidentiality of psychotherapeutic sessions is essential to effective treatment.¹⁰⁹

Ado About Nothing—or Something?, 30 U.C. DAVIS L. REV. 483, 522 (1997).

105. See, e.g., ARIZ. REV. STAT. ANN. § 12-2235 (2003 & Supp. 2005) (providing that “[i]n a civil action a physician or surgeon shall not, without the consent of his patient . . . be examined as to any communication made by his patient with reference to any physical or mental disease or disorder or supposed physical or mental disease or disorder or as to any such knowledge obtained by personal examination of the patient,” except under statutory exemptions); HAW. REV. STAT. § 626-504 (1993 & Supp. 2005) (conferring on the patient “a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient’s physical, mental, or emotional condition” except under one of statute’s exceptions); OHIO REV. CODE ANN. § 2317.02(B)(1) (LexisNexis Supp. 2006) (prohibiting testimony by “[a] physician or a dentist concerning a communication made to the physician or dentist by a patient in that relation or the physician’s or dentist’s advice to a patient” except under one of Code’s exceptions or in event of patient’s waiver of privilege); *Roosevelt Hotel P’ship v. Sweeney*, 394 N.W.2d 353, 355 (Iowa 1986) (stating that physician-patient privilege “is given liberal construction, in accordance with its purpose to make consultation between a patient and physician entirely confidential and free from disclosure in a legal proceeding” (citations omitted)); *State v. Broussard*, 529 P.2d 1128, 1130 (Wash. Ct. App. 1974) (describing “subject matter protected by the physician-patient privilege, whether it be a communication or information the physician obtains by observation or personal examination” as “limited to subject matter confidential in nature, the disclosure of which would be a breach of professional confidence” (citations omitted)).

106. See *Laburre v. East Jefferson Gen. Hosp.*, 555 So. 2d 1381, 1383 (La. 1990); *Nelson v. Lewis*, 534 A.2d 720, 721–22 (N.H. 1987).

107. See, e.g., CAL. EVID. CODE § 1010-1014 (West 1995 & Supp. 2006); FLA. STAT. ANN. § 90.503(2) (West Supp. 2006) (providing that the “patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient’s mental or emotional condition . . . between the patient and the psychotherapist.”); *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996) (confirming that Rule 501 of the Federal Rules of Evidence protects “confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment”). See generally Robert M. Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 WAYNE L. REV. 609 (1964).

108. See *Developments in the Law*, supra note 91, at 1544–48.

109. See *In re Zuniga*, 714 F.2d 632, 638 (6th Cir. 1983); *In re “B.”*, 394 A.2d 419, 425–26 (Pa. 1978); Major Dru Brenner-Beck, “*Shrinking*” the Right to Everyman’s Evidence:

Another privilege, for clergy-congregant communications, can likewise be justified by its advancement of a social good without losing sight of the nonutilitarian values that it embodies. The privilege generally protects confidential communications integral to confession, counseling, or other activities associated with the clergy's capacity as spiritual guide.¹¹⁰ Though its current breadth has been questioned in light of recent scandals,¹¹¹ the privilege continues to enjoy statutory recognition in every state and the District of Columbia.¹¹² Like legislative protection of psychotherapist-patient communications, these statutes reflect the crucial role of confidentiality in the effective functioning of a relationship deemed beneficial to the individual and society.¹¹³ At the same time, the privilege is also thought to implicate privacy¹¹⁴ and First Amendment¹¹⁵ concerns.

A final privilege designed to promote valuable communication, though protecting a relationship different from those already discussed, is the right of journalists to refrain from disclosing confidential sources. The vast majority of states have adopted "shield laws" granting journalists exemption from contempt proceedings in most circumstances if they refuse to reveal these sources.¹¹⁶

Jaffee in the *Military*, 45 A.F. L. REV. 201, 209–12 & nn.57 & 60 (1998); Thomas F. Guernsey, *The Psychotherapist-Patient Privilege in Child Placement: A Relevancy Analysis*, 26 VILL. L. REV. 955, 961 (1981).

110. See Jane E. Mayes, Note, *Striking Down the Clergyman-Communicant Privilege Statutes: Let Free Exercise of Religion Govern*, 62 IND. L.J. 397, 400–01 (1987); see, e.g., N.C. GEN. STAT. § 8-53.2 (2005); TENN. CODE ANN. § 24-1-206(a)(1) (2000 & Supp. 2005); WASH. REV. CODE ANN. § 5.60.060(3) (West Supp. 2006); WIS. STAT. ANN. § 905.06(2) (West Supp. 2005).

111. See R. Michael Cassidy, *Sharing Sacred Secrets: Is it (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?*, 44 WM. & MARY L. REV. 1627, 1629–30 (2003). For a history of the privilege's development, see Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 96–108 (1983).

112. See Ronald J. Colombo, *Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege*, 73 N.Y.U. L. REV. 225, 231 & n.39 (1998).

113. See Fred L. Kuhlmann, *Communications to Clergymen—When Are They Privileged?*, 2 VAL. U. L. REV. 265, 286–87 (1968).

114. See Cassidy, *supra* note 111, at 1634–35.

115. See *id.* at 1700–22 (discussing bearing of Free Exercise and Establishment Clause considerations on proposed "dangerous person" exception to clergy-congregant privilege). See generally Christopher R. Pudelski, Comment, *The Constitutional Fate of Mandatory Reporting Statutes and the Clergy-Communicant Privilege in a Post-Smith World*, 98 NW. U. L. REV. 703 (2004).

116. See Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL'Y REV. 97, 114 (2002); see, e.g., MD. CODE ANN., CTS. & JUD. PROC. § 9-112(c)(1) (LexisNexis 2002 & Supp. 2005); N.Y. CIV. RIGHTS LAW § 79-h(b), (c) (Consol. 2001 & Supp. 2006); PA. CONS. STAT. ANN. § 5942(a) (West 2000

Unlike an attorney advising a client or physician treating a patient, an anonymous source does not minister to the personal needs of the recipient journalist. In one sense, though, this special dynamic makes the case for confidentiality of journalists' contacts even stronger. Unlike the client or patient, whose interest dictates supplying some degree of information to obtain appropriate counsel or care, the ordinary source has no personal need to communicate with the journalist at all. Thus, shield laws are borne of recognition that much information of importance to the public would never surface in their absence.¹¹⁷

C. *The Heightened Need for an Intake Record Privilege*

In a number of respects, intake records present an especially compelling case for legal safeguards of confidentiality. A victim has a focused, concrete, and powerful stake in restricting knowledge that she has reported behavior indicating additional specific risks at supervised visitation. Conversely, the interest asserted in obtaining this information is generally much feebler than with communications that are nonetheless shielded by established privileges. Moreover, the likelihood that the communication in question would not occur at all in the absence of a privilege appears unusually pronounced in the case of intake sessions.

Empirical evidence supports the intuitive conclusion that a victim has much to fear from her batterer's awareness of the extent to which she has told of his violent behavior.¹¹⁸ Widespread adoption of victim counselor confidentiality laws¹¹⁹ reflects societal recognition that repercussions from having reported sexual assault or other violence are far from speculative. In addition, the law has reason to regard the typical party exercising an intake record's privilege in a more sympathetic light than many beneficiaries of testimonial privileges, particularly the privilege for attorney-client communications. However vital the attorney-client privilege to the operation of our legal system, it is inescapable

& Supp. 2006).

117. See Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371, 1374-75 (2003).

118. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 889 (1992) (finding that "[b]attering husbands often threaten their wives or her children with further abuse if she tells an outsider of the violence") (citation omitted)).

119. See *infra* Part III.D.

that the privilege often serves to protect individuals from the consequences of their misconduct.¹²⁰ Furthermore, the privilege necessarily has an element of professional self-interest¹²¹ absent from the rationale for protecting the confidentiality of intake records.

Not only is the need for keeping intake records confidential exceptionally strong, but the case for obtaining them is usually weak. The successful exercise of a testimonial privilege, by hindering the pursuit of truth,¹²² entails the sacrifice of an important government interest. For this reason, such privileges are construed no more broadly than necessary.¹²³ By contrast, the experience of visitation staff directors does not remotely suggest a comparably weighty need for intake records. The typical reported request—by a batterer for the record of his victim's intake session¹²⁴—does not imply inherently that a significant purpose will be served by granting it. Unlike a judge or jury seeking to ascertain the facts relevant to a litigated issue, the batterer is already familiar with the events that have been reported at intake. At best, his desire to learn what the victim has told visitation staff might be interpreted as simple curiosity, or even anxiety that the

120. Legislative and judicial acknowledgement of this truth is usually phrased more delicately, but the gist seems apparent. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.19(a) (2002 & Supp. 2006) (prohibiting attorney's disclosure of information that client "has requested be held inviolate or the disclosure of which would be *embarrassing* or would be likely to be *detrimental* to the client" (emphasis added)); *Fisher v. United States*, 425 U.S. 391, 403 (1976) (stating that "if the client knows that *damaging information* could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer" (emphasis added)); *In re Grand Jury Investigation*, 631 F.2d 17, 19 (3d Cir. 1980) (stating that information concerning attorney-client relationships might be protected "if the person asserting the privilege can show a strong probability that disclosure of the fact of retention or of the details of a fee arrangement would implicate the client in the very criminal activity for which legal advice was sought" (citations omitted)).

121. By encouraging individuals to seek legal services, Marion J. Radson & Elizabeth A. Waratuke, *The Attorney-Client and Work Product Privileges of Government Entities*, 30 STETSON L. REV. 799, 799 (2001); Stephen A. Saltzburg, *Corporate and Related Attorney-Client Privilege Claims: A Suggested Approach*, 12 HOFSTRA L. REV. 279, 285 (1984), the attorney-client privilege obviously promotes the livelihood of lawyers. *See* Paul W. Vapnek, *Ethics and Professional Responsibility Issues*, in 835 PRACTICING LAW INSTITUTE, ADVANCED PATENT PROSECUTION WORKSHOP 2006, 7, 11 (2006) (describing "primary purpose" of attorney's duty of loyalty to client as "encourag[ing] public confidence in the integrity of the legal profession").

122. *See* *United States v. Bryan*, 339 U.S. 323, 331 (1950); *In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973); *State v. Briley*, 251 A.2d 442, 446 (N.J. 1969).

123. *See* *Trammel v. United States*, 445 U.S. 40, 44-45 (1980); *United States v. Nixon*, 418 U.S. 683, 710 (1974); WIGMORE, *supra* note 94, at § 2291.

124. *See supra* notes 73-74 and accompanying text.

batterer's behavior has been misrepresented. The former does not rise to a legal "right to know," while the bar to sharing records for law enforcement purposes would limit the consequences of the latter. In any event, the problem of false statements of fact in intake records can be dealt with by means other than wholesale access to their contents.¹²⁵ On the other hand, it is hardly cynical to suspect that less benign motives lie behind many such requests. In the absence of privilege, the request for records may serve to intimidate a victim seeking to escape domination by her batterer. His access to her statements to intake staff signals that even after her physical departure, he retains the capacity to monitor her account of the relationship to others. If he is consumed by anger or aggression, he may be want to learn what she is saying about him to further fuel his violent proclivities.¹²⁶ Any of these aims is a far cry from the fact-finder's need for pertinent evidence, especially in a criminal case¹²⁷—a need that is routinely defeated by established privileges.

Moreover, a lack of privilege will undermine the effectiveness of intake regardless of whether a particular request for records is propelled by such dark motives. Victims' knowledge of batterers' right to obtain intake records will evoke understandable concern over whether and why that right might be exercised. With an indelible grasp of her batterer's capacity for violence, a victim might well hesitate to volunteer information that could incur physical retaliation. Thus, victims' awareness of their batterers' access to intake records will tend strongly to chill their willingness to be forthcoming in the way that successful intake requires. In this respect, the justification for the proposed intake privilege resembles the rationale for shield laws: without assurance of confidentiality,

125. While it is beyond the scope of this article to offer a comprehensive scheme for the operational details of the proposed privilege, a state could readily craft means to discourage false statements at intake and to mitigate their effects. Penalties for unauthorized dissemination of information in intake records, limited access by parties who can make an independent prima facie showing that records portray them falsely, and susceptibility of knowingly false assertions to the state's defamation laws are among measures that come to mind.

126. See FAITH AND LIBERTY'S PLACE, INTAKE ISSUES: FLP FAMILY CENTER (on file with authors).

127. See *Cheney v. United States Dist. Ct.*, 542 U.S. 367, 384 (2004) (stating that "the need for information in the criminal context is much weightier because 'our historic[all] commitment to the rule of law . . . is nowhere more profoundly manifest than in our view that "the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer"' (alterations in original) (citations omitted)).

the only source of valuable information will perceive it to be against her best interest to provide it.

Finally, the special circumstances of supervised visitation point to two additional grounds for statutorily enforceable confidentiality for intake records. First, if disseminated beyond the setting and purpose for which they are intended, these internal records can easily be misconstrued and abused.¹²⁸ In eliciting statements from a victim about her batterer's conduct, intake staff are *not* seeking to build a legal case against the batterer. Rather, they are attempting to make a reasoned judgment about the risk posed by the batterer's participation in visitation, and to a lesser extent, about the state of mind of the victim. Accordingly, the degree of certainty to be attached to the victim's representations need not be as high as would be expected for the resolution of formal adjudication. Allowing the circulation of records to individuals where this context is not well understood may lead to the casual dissemination of the victim's allegations as proven facts, with potentially harmful consequences.¹²⁹

A second feature of visitation supporting formal safeguards of confidentiality is the number of people who may be exposed to intake records. In the case of traditional privileges such as those for the attorney-client and physician-patient relationships, the protected communication would ordinarily be entrusted to a single individual. In general, the security of that communication rests reliably on that person's adherence to professional canons of conduct. No such assurance, however, attends the exchanges that take place at intake. While intake may be conducted by a lone staff member, it is likely that others will also be consulting the record of that session. Turnover at supervised visitation centers is often high.¹³⁰ Even where it is not, the rotation of shifts makes it likely that a number of staff will be apprised of the contents of the records. Indeed, it is this lack of continuity of responsibility

128. Supervised visitation programs also keep other records, created after intake: e.g., observation notes, critical incident reports, and visit logs/attendance records. See Nat Stern & Karen Oehme, *The Troubling Admission of Supervised Visitation Records in Custody Proceedings*, 75 TEMP. L. REV. 271, 278-81 (2002).

129. Concern with ascribing undue weight to a victim's statements in a sense represents the flip side of objections to admitting supervised visitation records into proceedings for the determination of custody. There, the artificiality of a parent's best conduct recorded during monitored visitation can produce an unduly benign picture of the parent's fitness. See *id.*

130. See *id.* at 281 & n.74.

that necessitates the creation and maintenance of records in the first place. Moreover, unlike attorneys and physicians, visitation staff are not required to meet rigorous standards of education and licensing.¹³¹ As the number of such persons exposed to intake records multiplies, so do the chances that sensitive information will be inappropriately divulged. An explicit legal mandate of confidentiality would go far toward reducing these odds.

D. *Building on the Counselor-Victim Privilege*

In logic if not scope, the proposed privilege for intake records represents an extension of laws providing for the confidentiality of communications between sexual assault or domestic violence victims and their counselors. Every state and the District of Columbia has enacted some form of this privilege.¹³² Aside from each containing narrow exceptions, including provisions for victim consent, statutes vary in their central restriction. Some contain a flat prohibition on the disclosure of victims' confidential communications with counselors.¹³³ Others more specifically bar such disclosure at a formal proceeding.¹³⁴ In a number of states, the ban is framed as a privilege authorizing the victim to prevent others from disclosing confidential statements made to counselors.¹³⁵ Somewhat more permissive are statutes that forbid compelled testimony about confidential communications between counselors and victims,¹³⁶ thus apparently leaving open the pos-

131. See *id.* at 281; Nat Stern & Karen Oehme, *Toward a Coherent Approach to Tort Immunity in Judicially Mandated Family Court Services*, 92 KY. L.J. 373, 432-33 (2003-2004).

132. *E.g.*, ALA. CODE §§ 15-23-40 to -45 (LexisNexis 1995 & Supp. 2005); CAL. EVID. CODE §§ 1035-1035.8 (West 1995 & Supp. 2006) (addressing sexual assault); *id.* §§ 1037-1037.8 (addressing domestic violence); IND. CODE ANN. §§ 35-37-6-1 to -9 (LexisNexis 1998 & Supp. 2006); N.J. STAT. ANN. §§ 2A:84A-22.14 to .15 (West 1994 & Supp. 2006); TEX. HEALTH & SAFETY CODE ANN. § 44.071(a) (Vernon 2001 & Supp. 2006).

133. *E.g.*, IOWA CODE ANN. § 915.20A(2) (West 2003 & Supp. 2006); MASS. ANN. LAWS ch. 233, § 20J (LexisNexis 2000 & Supp. 2006) (addressing sexual assault); *id.* ch. 233, § 20K (addressing domestic violence); TEX. HEALTH & SAFETY CODE ANN. § 44.071(a), (c) (Vernon 2001 & Supp. 2006).

134. *E.g.*, CONN. GEN. STAT. ANN. § 52-146k(b) (West 2005 & Supp. 2006); 735 ILL. COMP. STAT. ANN. 5/8-802.1(d), -802.2(c) (West 2003 & Supp. 2006); WYO. STAT. ANN. § 1-12-116(b) (2005).

135. *E.g.*, CAL. EVID. CODE §§ 1035-1035.8 (West 1995 & Supp. 2006); FLA. STAT. ANN. §§ 90.5035(2), .5036(2) (West 1999 & Supp. 2006); HAW. R. EVID. 505.5(7)(b) (1993 & Supp. 2005); KY. R. EVID. 506(b) (2006); NEV. REV. STAT. ANN. § 49.2547 (LexisNexis Supp. 2005); N.H. REV. STAT. ANN. § 173-C:2(I) (LexisNexis 2001).

136. See, *e.g.*, N.M. STAT. § 32-25-3 (2000); N.Y. C.P.L.R. 4510(b)(2) (Consol. 2003 &

sibility of voluntary disclosure. Potentially most porous are those laws that confine their ban on disclosure to programs receiving funds from the state.¹³⁷

The most stringent of these protections emphatically embody the understanding that

any risk of disclosure [of communications between a battered woman and her counselor] necessarily inhibits the victim from freely revealing her fears, feelings, and anxieties, thereby limiting the effectiveness of the counseling. Any hesitation to disclose this sensitive information to a counselor impairs the counselor's ability to help the victim make a full recovery.¹³⁸

Likewise, the strict confidentiality that we propose for communications at intake is designed to advance the twin goals of fostering ample disclosure by victims and effective assistance by visitation staff. While counseling and intake obviously differ in function and dynamics, neither can fully serve its purpose in the absence of vital information that can be obtained only from victims. The counselor-victim privilege recognizes that these often frightened and intimidated individuals need firm assurance that they will not be endangered by their cooperation with those seeking to help them. The privilege for intake records would apply this insight to a setting that also holds much promise for the welfare of victims and their children.

E. *Limitations on Exceptions*

The exceptions included in our proposed privilege for intake records are, we believe, self-evident and uncontroversial on the whole. It is worth underscoring their narrow scope, however, to avoid defeating the purpose of the privilege by overly expansive interpretation. In particular, we elaborate here on what we perceive as the limited character of two of these exceptions.

First, the obligation to report indications of imminent physical harm must be understood in the special context of intake in do-

2006).

137. See, e.g., MO. ANN. STAT. § 455.220(1)(5) (West 2003 & Supp. 2006); W. VA. CODE ANN. § 48-26-701(a) (LexisNexis 2004).

138. Michael B. Bressman & Fernando R. Laguarda, *Jaffee v. Redmond: Towards Recognition of a Federal Counselor-Battered Woman Privilege*, 30 CREIGHTON L. REV. 319, 345-46 (1997) (footnotes omitted).

mestic violence cases. While this provision has obvious parallels in exceptions to the psychotherapist-patient and attorney-client privileges, it should not be regarded as identical to them in all respects. A psychotherapist's duty to warn of potentially dangerous patients on pain of civil liability is famously associated with the California Supreme Court's decision in *Tarasoff v. Regents of the University of California*.¹³⁹ The court ruled that when a therapist "does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, [the therapist] bears a duty to exercise reasonable care to protect the foreseeable victim of that danger."¹⁴⁰ This duty to warn or otherwise to protect persons to whom a patient appears to pose a serious threat has been adopted by most other states.¹⁴¹

While both therapists and intake staff must try to avert foreseeable harm, the therapist's duty stands on the solid footing of professional training and intimate familiarity with the patient.¹⁴² Accordingly, without presuming to predict behavior with certainty, the therapist can act with confidence on a conclusion that a patient poses a significant risk of dangerous conduct. Visitation staff, on the other hand, often lack the professional credentials and close relationships that allow therapists to exercise considerable latitude in judging potential threats. Moreover, the civil order entered by the court¹⁴³ has already established that the batterer is considered a danger to the victim; release of statements made at intake should therefore be confined to instances where the statements clearly indicate an additional risk of harm. To report this information on a lesser showing without the victim's consent would undermine not only the integrity of the privilege, but also the victim's ability to participate in decisions about her safety. Thus, staff should be cautious about compromising the confidentiality of intake communications based on a unilateral judgment of imminent danger. At a minimum, visitation centers

139. 551 P.2d 334 (Cal. 1976) (en banc).

140. *Id.* at 345.

141. See *Currie v. United States*, 644 F. Supp. 1074, 1078 (M.D.N.C. 1986), *aff'd*, 836 F.2d 209 (4th Cir. 1987) (stating that there has been "virtually universal judicial approval of the *Tarasoff* decision"); George C. Harris, *The Dangerous Patient Exception to the Psychotherapist-Patient Privilege: The Tarasoff Duty and the Jaffee Footnote*, 74 WASH. L. REV. 33, 46 (1999).

142. See *Tarasoff*, 551 P.2d at 345.

143. See *supra* note 8 and accompanying text.

should have a process in place whereby suspected signs of impending violence are assessed by designated figures within the center before being reported to outsiders.

The exception to the attorney-client privilege for disclosure of information where a lawyer believes it necessary "to prevent reasonably certain death or substantial bodily harm"¹⁴⁴ similarly affords an imprecise analogy to its counterpart at intake. Though not possessing the psychotherapist's clinical insights, an attorney will normally have a broader perspective on the client's circumstances than that produced by intake staff's limited encounters with victims. Moreover, clients will have directly announced their own intentions,¹⁴⁵ whereas intake staff must typically discern a batterer's plans through the filter of his former partner's representations. While these representations must of course be taken seriously, they do not carry the same degree of reliability as the client's firsthand revelation. In addition, an attorney's familiarity with the justice system and law enforcement will impart a deeper sense of appropriate occasions to report otherwise confidential communications. Again, these considerations do not eliminate a visitation staff's duty to report clear evidence of imminent harm, but rather counsel against them too readily inferring the existence of a definite threat.

In addition, similar or even greater caution should be observed with the exception for disclosure by consent of the party whose statements at intake are being sought. Given the vulnerability of victims, the potential for at least tacit coercion in this situation is obvious. To assure that waiver of the privilege is knowing and voluntary, certain minimum safeguards should be observed. Waiver should be express and formal; rarely if ever should the doctrine of implied waiver¹⁴⁶ operate in this setting.¹⁴⁷ Furthermore, the consent form should contain an explanation of the party's legal privilege and the meaning of waiver, as well as an affirmation that the party has read and understood both of these.

144. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1); *e.g.*, CAL. EVID. CODE § 956.5 (West 1995 & Supp. 2006).

145. *See, e.g.*, *People v. Dang*, 113 Cal. Rptr. 2d 763, 767 (Cal. Ct. App. 2001); *Mulka v. Fain*, No. CV89-0363274S, 1994 WL 146793, at *3 (Conn. Super. Ct. App. 14, 1994).

146. *See Developments in the Law, supra* note 91, at 1629-65.

147. Should a compelling need for intake communications arise in which a party could plausibly be deemed to have implicitly consented, we propose that the justification have to meet the requirements for the catchall exception. *See supra* Part III.A.

Finally, ideally as a matter of law, but at least as practicing policy, active steps should be taken to discourage the grant of consent without due consideration or under duress. Possible requirements include a mandatory waiting period, an interview with the visitation center's supervisor, and consultation with an attorney.

CONCLUSION

The need for protection of victims' intake records is so apparent that its absence may best be explained by legislative inattention to this relatively new problem. Encouragement of candor, which lies at the heart of existing privileges, is indispensable to the communication that takes place at the threshold stage of supervised visitation. It is not our position that a privilege promoting this aim must mirror every detail of our proposal. What is crucial is that legislatures take steps to ensure that those who conduct supervised visitation receive the information that they need to perform this vital service.