

SECRET REFLECTIONS: SOME THOUGHTS ABOUT SECRETS AND COURT PROCESSES IN CHILD PROTECTION MATTERS

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All the times that I've cried keeping all the things I knew inside,
It's hard, but it's harder to ignore it.
If they were right, I'd agree, but it's them they know not me...
Cat Stevens, *Father and Son*¹

When his father sang the song again, Rudy dissolved into laughter.
Scatological humor is the best stuff for six-year olds.
"Don't sing this around your mother," Rudy's father warned him.
Thus they had a secret, another step in creating a bond between
them.
John Irving, *The Fourth Hand*²

I. INTRODUCTION

In the penultimate confrontation between Luke Skywalker and Darth Vader, battle lines have been drawn. Light sabers are pulled out, flashing and slashing. The battle between Luke and Darth is furious; it ebbs and flows in each combatant's favor. Advantage Luke. Advantage Darth. A little trash talk soon followed by Darth's grudging praise: "Obiwan has taught you well."

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1. CAT STEVENS, *Father and Son*, TEA FOR THE TILLERMAN (A&M Records 1970).
2. JOHN IRVING, *THE FOURTH HAND* 41 (2001).

As the fight works its way to an open bridge, Darth finally seizes the upper hand. Darth is ready to go in for the kill—but he hesitates as he tries one last time to win Luke over to the Dark Side:

Darth: Obiwan never told you what happened to your father.

Luke: He told me enough. He told me you killed him.

Darth: No. . . I am your father.

Luke: No, no, that's not true. . . That's impossible.

Darth: Search your feelings, you know it to be true.

Luke [crying out in anguish]: Nooo. NOOOOOO!

. . . .

[Later, while alone] Luke: Ben, why didn't you tell me?³

Like Luke and Darth, all families have secrets. Secrets are a powerful and important part of our individual and collective selves.⁴ Humans have opposing but powerfully related needs both to keep secrets and to share secrets. We sometimes need to keep secrets from others (or from some particular others). We sometimes need to share secrets with those we select to be “in on it.”⁵

In the Child Advocacy Clinic at the James E. Rogers College of Law, upper level law students represent children in child protective proceedings in the Pima County, Arizona Juvenile Court. For the most part we represent children as their attorneys.⁶ As attorneys,⁷ we are obligated, as far as is practicable, to

3. STAR WARS: THE EMPIRE STRIKES BACK (20th Century Fox 1980).

4. See generally SECRETS IN FAMILIES AND FAMILY THERAPY (Imber-Black ed., 1993); THOMAS J. COTTLE, CHILDREN'S SECRETS (1980); MAX VAN MANEN & BAS LEVERING, CHILDHOOD'S SECRETS: INTIMACY, PRIVACY AND THE SELF RECONSIDERED (1996); Mark A. Karpel, *Family Secrets: Conceptual and Ethical Issues in the Relational Context*, 19 FAMILY PROCESS 296 (1980); Peggy Papp, *The Worm in the Bud: Secrets Between Parents and Children*, in SECRETS IN FAMILIES AND FAMILY THERAPY 65–85 (Imber-Black ed., 1993).

5. VAN MANEN, *supra* note 4, at 6–9; Karpel, *supra* note 4, at 295–98.

6. On occasion we act as Guardians ad Litem. Throughout the country, there are many permutations of the lawyer/child-client relationship varying from the GAL model to the attorney model with each state seeming to have its own way of doing things. See JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 26 (1997). Peters commented: “If our survey revealed one thing, it was chaos. We joked in our office that the ‘fifty-plus state’ survey revealed fifty-six state systems for representing children in child-protective proceedings.” *Id.* Some even advocate that children should have no independent representation without the consent of the parent. See, e.g., JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 142–46 (1996).

7. In Pima County, Arizona, we follow what appears to be a growing number of jurisdictions that adhere to the American Bar Association Standards for Representing Children in Child Abuse and Neglect Cases. See A.B.A. STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE & NEGLECT CASES (1996) [hereinafter A.B.A. STANDARDS]. The purpose of this article is not to advocate any particular approach.

maintain normal lawyer-client relationships.⁸ We are expected to advocate for our clients' articulated positions.⁹ We are expected to advise our clients¹⁰ and to help them make informed decisions.¹¹ We are expected to keep our clients' secrets.¹²

In the course of representing children, we regularly confront secrets in two distinct ways. First, we often are privy to "family secrets" about which our child-client is apparently unaware. Like Luke's situation, we have had a surprising number of cases where we learned that the person our child-client thinks is his or her father is not.¹³ We have been informed that a parent is dying of a terminal illness about which the child has not been told. We have been informed that the parent is a drug addict, a prostitute, or has committed a heinous crime. We have been told any number of other shameful family secrets that have, presumably, been kept from a child.

Second, our child-clients sometimes have secrets that have caused them great pain over time and that they ask us not to disclose. Child-clients might be pregnant, victims of sexual abuse, or drug abusers. Children might be privy to family secrets that they feel cannot be discussed with anyone outside the family. In some cases, our clients have run away, but have kept in touch with us. We know how to contact them, but they have asked us to keep their whereabouts secret.

That is an interesting debate for another day. This article assumes the ABA lawyer-client approach.

8. MODEL RULES OF PROF'L CONDUCT R. 1.14(a) (1983); A.B.A. STANDARDS, *supra* note 7, at Standard A-1 cmt.

A-1. The Child's attorney.

The term "child's attorney" means a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client.

Commentary.

These Standards explicitly recognize that the child is a separate individual with potentially discrete and independent views. To ensure that the child's independent voice is heard, the child's attorney must advocate the child's articulated position. Consequently, the child's attorney owes traditional duties to the child as client consistent with ER 1.14(a) of the Model Rules of Professional Conduct. In all but the exceptional case, such as with a preverbal child, the child's attorney will maintain this traditional relationship with the child/client. As with any client, the child's attorney may counsel against the pursuit of a particular position sought by the child. The child's attorney should recognize that the child may be more susceptible to intimidation and manipulation than some adult clients. Therefore, the child's attorney should ensure that the decision the child ultimately makes reflects his or her actual position.

A.B.A. STANDARDS, *supra* note 7, at Standard A-1 cmt.

9. See MODEL RULES OF PROF'L CONDUCT R. 1.2.

10. *Id.* at R. 2.1.

11. *Id.* at R. 1.4, 2.1.

12. *Id.* at R. 1.6.

13. Other variations on this theme include a "dead" father who is really alive, a "living" father who is really dead, or an imprisoned parent who is "away" for other reasons.

Child protection proceedings encompass dependency,¹⁴ foster care placement, termination of parental rights, guardianship, and adoption. Most of our cases involve dependency—i.e., where a child is dependent on the state because the child has no parent willing or able to exercise proper care for the child.¹⁵ Most of the children we represent have been removed from their parents or other caretakers because of concerns for their safety.

Dependency cases have two phases. The first is the adjudication phase where the court determines whether evidence presented is sufficient to warrant state intervention into the parent child relationship.¹⁶ The second is the disposition phase, where once dependency has been established, the court, the state agency, and the parents work to try to put the family back together.¹⁷ We sometimes call this the reunification phase.¹⁸

While the paramount goal in child protection matters is the safety of children, the law also recognizes that, in the long run, children are best served when they are living with their families.¹⁹ Thus, a second, but primary goal of child protection is the therapeutic outcome of strengthening families.²⁰ We want to return children to healthy, stable, and safe families. We try to accomplish these goals while mindful that families have a fundamental constitutional right to be free

14. Most dependency matters involve allegations of child abuse or neglect—both purposeful and unintentional. In Arizona, dependency also encompasses other situations where there is no parent willing or able to care for a child, such as the imprisonment or death of a parent.

Arizona Revised Statutes § 8-201 (13) provides:

13. “Dependent child”:

(a) Means a child who is adjudicated to be:

(i) In need of proper and effective parental care and control and who has no parent or guardian, or one who has no parent or guardian willing to exercise or capable of exercising such care and control.

(ii) Destitute or who is not provided with the necessities of life, including adequate food, clothing, shelter or medical care, or whose home is unfit by reason of abuse, neglect, cruelty or depravity by a parent, a guardian, or any other person having custody or care of the child.

(iii) Under the age of eight years and who is found to have committed an act that would result in adjudication as a delinquent juvenile or incorrigible child if committed by an older juvenile or child.

(iv) Incompetent or not restorable to competency and who is alleged to have committed a serious offense as defined in § 13-604.

ARIZ. REV. STAT. § 8-201(13) (2002).

15. *Id.*

16. ARIZ. REV. STAT. § 8-844 (2002).

17. ARIZ. REV. STAT. § 8-845 (2002).

18. See NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICES IN CHILD ABUSE & NEGLECT CASES (1995) [hereinafter RESOURCE GUIDELINES].

19. See Adoption & Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 [hereinafter ASFA].

20. *Id.*

from unwarranted interference by the state. As such, the due process rights of parents must be protected as well.²¹

The case of Luke Skywalker is not unlike many that we confront in the Child Advocacy Clinic. Typically, there is some condition that prevents the child from living with his or her birth or adoptive parents. Often, that condition revolves around a family secret—something that the family (or someone in the family) does not want the rest of the world to know.²² The secret might be about paternity, substance abuse, domestic violence, child sexual abuse, or any number of imaginable family problems.

Frequently, the secret has been kept from others for years—from the state, from the children, from other family members. Sometimes, an individual keeps the secret alone. Sometimes it is kept within the small circle of the family. In other situations, the reverse may be true. The secret holder might believe that only a few people know about the secret. Yet, in fact, many other people—including children—are quite aware of the secret.²³

We have learned that, in some circumstances, the sharing of a secret can strengthen a family or individuals within the family.²⁴ In other situations, keeping secrets can be poisonous.²⁵ In some situations, disclosing secrets to children may be healthy. In others, disclosure may be harmful. And under some conditions, disclosure may be both, depending on who reveals what to whom.²⁶

Were we to undertake the case of Luke Skywalker, the following would happen. A petition would be filed detailing the allegations that Luke is a dependent child. Darth would be appointed a lawyer.²⁷ We would be appointed as lawyers for Luke. Darth would be entitled to a hearing to contest the allegations in the petition and to protest the state's interference with his parental rights. Investigations would continue. Darth would receive a psychological evaluation and be offered remedial services. Luke would be sent to therapy.

We have learned in our Clinic that these legal processes, in and of themselves, impact children and the goal of family reunification. Legal processes are not without consequences for children. Generally speaking, the legal processes that address child protection demand that we unlock family secrets like those in the Vader-Skywalker family.

21. See *Santosky v. Kramer*, 455 U.S. 745 (1982).

22. See Karpel, *supra* note 4, at 296.

23. See DENIS M. DONOVAN & DEBORAH MCINTYRE, *HEALING THE HURT CHILD. A DEVELOPMENTAL-CONTEXTUAL APPROACH* 74–75 (1990).

24. See Karpel, *supra* note 4, at 297.

25. See Papp, *supra* note 4.

26. See Karpel, *supra* note 4, at 295–98.

27. See 42 U.S.C. § 5106 (Supp. II 1996). As originally enacted in 1974, CAPTA required states, as a condition of receipt of federal funds, to “provide that in every case involving an abused or neglected child which results in a judicial proceeding a guardian ad litem shall be appointed to represent the child in such proceedings.” In 1996, Congress amended CAPTA to define guardian ad litem as either an attorney or a lay advocate. See 42 U.S.C. § 5106a(b)(2)(A)(ix).

We disclose secrets to judges in order to provide courts with the information necessary to make informed decisions about the best interests of children.²⁸ In our experience, most judges have an insatiable desire for such information. When it comes to the welfare of children, judges want to make sure that they make the right decisions. Thus, we broaden the rules of evidence in child protection proceedings both in theory and in practice.²⁹

For this reason, the law also requires professionals and other designees to disclose information about potential child abuse and neglect. There is no privilege for information about potential child abuse or neglect. To the contrary, there is an absolute obligation to disclose.³⁰ Secret-keepers are mandated to reveal their secrets if those secrets indicate potential harm to a child. Doctors, nurses, therapists, and teachers are all mandated reporters. They *must* reveal a child's secrets in order to make sure that a child is safe.³¹

Indeed, if a child protection matter proceeds to litigation, those secrets and others will be revealed to case managers and to the parents—sometimes at a great cost to the child.³² Due process requires that any information that reaches a judge must be disclosed to the litigants. Under our adversarial system, all litigants must be given an opportunity to refute or explain any information relied upon by a judge.³³ We consider it fundamentally unfair to allow courts to make decisions based on information to which only one side—or neither side—is privy.³⁴

Yet it is easy to imagine an abused child who is naturally reticent to talk about the abuse. The child may wish to protect herself, her siblings, her own privacy, or even the abusing parents. It is also easy to imagine that the child might want to disclose the secret of abuse to someone—maybe a trusted outsider such as a lawyer, a therapist, a case manager or a judge—but only if the fact or substance of the disclosure is not communicated to the parent.

I remember discussing therapy with a troubled twelve year old. The child asked me how private the therapy would be. I told her that the therapist would probably keep her notes private but that she would write a report to the child's case manager. I also explained that the report might be copied to her parents' lawyers

28. See RESOURCE GUIDELINES, *supra* note 18.

29. See, e.g., ARIZ. R. JUV. CT. 45–52.

30. For a listing of the requirements in each state see SETH KALICHMAN, MANDATORY REPORTING OF SUSPECTED CHILD ABUSE: ETHICS, LAW, & POLICY (2d ed., 1999).

31. *Id.* at 31.

32. See, e.g., ARIZ. R. CIV. P. 26.1; ARIZ. R. JUV. CT. 44.

33. See Barbara Atwood, *The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 ARIZ. L. REV. 629 (2003).

34. See, e.g., ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3 (B)(7) (2000); MODEL RULES OF PROF'L CONDUCT R. 3.5 (b) (2002) [hereinafter MCJC]. Nevertheless, there are circumstances under which "secret" evidence involving a child—that is, evidence not made available to the parties—has been allowed. Courts have held that withholding the transcript of an *in camera* interview of a child in a private custody proceeding does not violate due process as long as the information is available to the appellate court. *Willis v. Willis*, 775 N.E.2d 878 (Ohio App. 2002). However, the Author is unaware of any decisions allowing secret evidence in a child protective proceeding involving the state.

and shown to her parents. The child was horrified. I can recall with amazing clarity the look on her face as she pleaded to me, "I do not want anyone knowing what's inside my brain! I do not want my parents to know any of it!"

In other types of legal processes, when revelations are not a matter of consent, we generally protect private matters.³⁵ Thus, we shield rape victims from inquiries about their past.³⁶ We protect the privacy of HIV patients.³⁷ We allow judicial by-pass for some abortions for minors.³⁸ We allow children in custody disputes to testify *in camera*—sometimes without any record being kept of the conversation.³⁹

In child protection proceedings, however, the law takes the opposite point of view. Mandatory reporters need to report.⁴⁰ Judges need to know.⁴¹ And everybody else must know everything that the judge knows.⁴² Nevertheless, despite all the players need to know, do not children in child protection proceedings have a basic developmental need to keep some things secret?

The child's need to keep some matters secret often becomes a central issue for a child's lawyer who may be the only person in the child welfare system with whom the child can confide.⁴³ Everybody else has to disclose when a secret concerns a child's welfare. For the most part, lawyers are mandated to keep them.⁴⁴

We have learned that holding those secrets can be a powerful responsibility for a concerned lawyer. Sometimes we have had to keep those secrets despite significant and well-meaning pressure from others within the system who have genuine concerns for a child's welfare. We have learned to accept the responsibility. We have also learned that we are remarkably untrained for that responsibility.⁴⁵

35. I differentiate child protection proceedings from cases in which a litigant puts private matters in issue—e.g., parents in a private custody dispute or litigants suing for pain and suffering putting their psychological history in issue. Children in child protection proceedings are rarely there because they have initiated legal action.

36. See, e.g., ARIZ. REV. STAT. § 13-1421 (2003).

37. ARIZ. REV. STAT. § 36-664 (2003).

38. See, e.g., ARIZ. REV. STAT. § 36-2152(D) (2003). We were recently involved in the first judicial by-pass petition in Pima County under this statute. The preservation of confidentiality was extraordinary. The petition was filed under a fictitious name. The doors to the courtroom were locked. The judge, attorneys and witnesses referred to the fictitious name only—even during direct and cross-examination. A special representative from the court clerk's office was physically present to hand carry the judge's decision and personally seal the records.

39. See Atwood, *supra* note 33.

40. See KALICHMAN, *supra* note 30.

41. See RESOURCE GUIDELINES, *supra* note 18.

42. See MCJC, *supra* note 34.

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

44. *Id.*

45. See KOH PETERS, *supra* note 6; ANN GRAFFAM WALKER, HANDBOOK ON QUESTIONING CHILDREN: A LINGUISTIC PERSPECTIVE (2d ed. 1999).

Disclosing secrets is not the only issue. While child protection processes pressure the revelation of family secrets, alternative legal concerns may require some participants to keep their secrets from the courts and from others—even when revealing the secret might be in the litigant's or the child's mental health interests. For example, parents' attorneys must protect their clients' confidences. Information revealed is information that may be used against a parent to remove a child from the home or as evidence in a termination of parental rights. In many child protection cases, there is a concurrent criminal investigation. Parents' attorneys know that revealed confidences can and will be used by prosecutors to support criminal convictions. Yet, we also know that often both individual and family healing can only begin with disclosure.⁴⁶

Our own duties suggest that children's lawyers may need to disclose parents' secrets to children in order to give the children a voice in decision-making. We are ethically obligated to help our clients make informed decisions.⁴⁷ Moreover, how can a child's voice be heard unless everyone knows that it is an informed voice? How can the child's voice be meaningful if all the other players know things that the child does not know? It is too easy to dismiss the child's message as uninformed.

But is revealing a family secret a wise idea for the mental health of a child? Can the revelation be harmful? Are there family secrets that a child ought not to know? Or may not want to know? Certainly, Obiwan did not think it wise to reveal the family secret of Vader's paternity to young Luke. One can easily imagine other family secrets that would impose an unnatural burden on a child's mental health. Further, what would the effect of any such revelation be if it came, not from Darth, but from Luke's lawyer in an office conference?

In the spirit of this multi-disciplinary conference, I chose to look at the nature of secrets from several points of view outside the law. My goal was to see if any insights from other disciplines might offer a different perspective on some of these legal processes. Perhaps other disciplines might suggest some alternative points of view to help us better understand and improve the role of the court and that of the lawyer in the child welfare arena. Perhaps a better understanding of secrets would suggest processes that would be more consistent with human needs and more supportive of the therapeutic goals of the child welfare system such as strengthening and reunifying the family.⁴⁸

From the context of what we might learn from understanding secrets, this article hopes to address the tension between three specific litigation processes and

46. See Karpel, *supra* note 4.

47. MODEL RULES OF PROF'L CONDUCT R. 1.4, 2.1 (1983).

48. Strengthening the family is not the only goal of a dependency proceeding. Certainly, the child's safety is paramount. Permanency—i.e., finding a permanent and stable home for the child—is also important. But in most child protective proceedings, the law mandates the therapeutic goal of family reunification. That the law can be therapeutic is not a novel concept to those of us at the University of Arizona. Our colleague, David Wexler, has influenced us greatly in the Clinic by encouraging us to apply the law in a therapeutic manner. See generally, DAVID B. WEXLER & BRUCE WINICK, LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (1996).

the therapeutic goal of the reunification of families. In Part II, I review some of the psychological and sociological literature about the nature of secrets and family secrets in particular. In Parts III and IV, I look at the ways in which family therapy and adoption look at secrets. In Part V, I look at litigation processes—specifically the voice of the represented child, the protection of parents' rights, and the court's need for information—in light of family secrets. Finally, in Part VI, drawing on the general principles of therapeutic jurisprudence and by examining these processes in the context of secrets, I hope to make some suggestions to improve the chances of achieving healthy children and family reunification.

For lack of a better term, I am going to define the underlying goals of each of these processes as being driven by “adult legal needs.” I realize that “adult legal needs” is a loaded term. It is not precise. It may not even be accurate—for all of these adult legal needs are important in producing decisions resulting in safe and healthy kids. I simply use the term to differentiate from another loaded term—“child therapeutic needs”—that is, seeing these issues from the child's therapeutic perspective alone.

Let me offer one caveat. I am a lawyer, not a scientist. I do not pretend to be a psychologist, a developmental specialist, or a doctor. It may well be that a little knowledge is dangerous. I certainly do not contend that I have conducted an exhaustive survey of all of the literature. Nor can I say that I have the highest ability to distinguish between good studies and poor ones in fields other than law. Yet, all lawyers, of necessity, must be conversant in other disciplines. There is much to be learned from any exercise that offers a different perspective on the law.

I will, from time to time, refer back to the case of Luke and, anecdotally, to some of the prototypical cases that we have experienced in the Child Advocacy Clinic. I will use these cases as illustrations that may help put into context some of the suggestions that I think should be considered.

II. SECRETS

A. The Meaning and Significance of Secrets

The word “secret” comes from the Latin “secretus”—to keep separate, set apart, hidden.⁴⁹ “To keep a secret from someone . . . is to block information about it or evidence of it from reaching that person and thus from possessing it, making use of it, or revealing it.”⁵⁰ Secrets are either withheld, shared with some or revealed to all.⁵¹ In the latter instance, they are no longer secrets. When we keep secrets, we know something that others do not and that has meaning for us.

Some secrets can be private delights: surprises for loved ones or personal covenants [that] we have with others. Through secrecy, we can feel “special.” Other secrets cause us to feel burdened and

49. WEBSTER'S NEW INTERNATIONAL DICTIONARY 2261 (2d ed. 1954).

50. SISELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 5–6 (1984).

51. See Karpel, *supra* note 4, at 295.

caught in someone else's story; not allowed to tell, we exclude others. When we refer to secrets, we mean hidden information—that is, information that is “owed another.” Secrecy protects something by concealing it from view.⁵²

Max Van Manen and Bas Levering identify three different kinds of secrets:

1. Existential Secrets: secrets that we can never understand completely.⁵³ The notion that we can never really understand another human being is an example of an existential secret.⁵⁴

2. Communicative Secrets: secrets that we keep hidden because we cannot communicate our thoughts completely.⁵⁵ Our use of language is limited. Thus, a child may keep secrets because the child is simply developmentally incapable of communicating certain thoughts.⁵⁶

3. Personal Secrets: secrets that we choose to keep inside or to share.⁵⁷ Although communicative secrets have tremendous importance to the child's attorney, I will focus mainly on the latter in this article.⁵⁸

Personal secrets perform many functions. Possessing a secret is a way for the individual to understand his or her own separateness. If I know something that you do not, then I am separate from you. In this way, children learn that keeping secrets is a way of differentiating themselves from their parents. Secrets are therefore necessary to self-boundary formation.⁵⁹

Self-boundary formation starts with very young children and is one of the earliest manifestations that the child is separate from the parent.⁶⁰ Often, the earliest people we keep secrets from are our parents. Because keeping a secret is to experience separateness, however, “the earliest experience of keeping a secret can be unsettling, disturbing or even terrifying.”⁶¹ Van Manen points out that for a young child, keeping a secret from a parent has:

peculiar relational consequences: On the one hand, keeping a secret makes one intensely aware of how close one is tied to this other person; and, on the other hand, keeping a secret flexes and loosens

52. Marilyn J. Mason, *Shame: A Reservoir for Family Secrets*, in SECRETS IN FAMILIES AND FAMILY THERAPY 29, 30 (Imber-Black ed., 1993).

53. VAN MANEN, *supra* note 4, at 11.

54. *Id.*

55. *Id.* at 12.

56. *Id.*

57. *Id.* at 12–14.

58. The ABA standards draw an interesting line at the communicative level. See A.B.A. STANDARDS, *supra* note 7, at Standard B-3 cmt. We are obligated to advocate for our child-client's position if they are capable of expressing a position to us. I am rarely sure that “expression” is the same as real communication for the very young child. See WALKER, *supra*, at note 45.

59. See VAN MANEN, *supra* note 4, at 1–22.

60. *Id.* at 13.

61. *Id.*

the relation, since it has the effect of creating feelings of separateness and detachment.⁶²

Searching for self-identity—in part through the keeping and sharing of secrets—continues long into adolescence. The sharing of secrets with friends is part of the adolescent's search for normalcy.⁶³ Keeping secrets from parents is part of the development of adult separateness.⁶⁴ An awareness of secrecy is essential to adolescent education.⁶⁵ Thus, keeping and sharing secrets is a necessary part of growing up. It is a normal part of the maturation process.⁶⁶

Once people are able to keep secrets, they can live in two worlds. Living in two worlds has moral import in both friendship and intimacy. Thus, we can choose to share or not. We can keep or entrust secrets for a reason. For this reason, our secrets are relational.⁶⁷ They impact how we view others and how others view us. They impact whether and how we relate to others. Sharing a secret may carry many subtle consequences for our relationships.⁶⁸

Secrets are systemic phenomena. They are relational, shaping dyads, triangles, hidden alliances, splits, cut-offs, defining boundaries of who is "in" and who is "out," and calibrating closeness and distance in relationships. Certainly the questions "Who knows the secret?" and, by implication, "Who does not know the secret?" orient us to the ways that secrets affect relationship possibilities.⁶⁹

In Thomas Cottle's classic work, *Children's Secrets*, he describes the essentiality of secrets:

All of us as children and adults have kept a fair number of secrets, or, at least promised to keep them. At one point in our lives the promise not to tell a living soul of a certain matter became the

62. *Id.* at 13–14.

63. *See* COTTLE, *supra* note 4, at 186–87.

64. *See* VAN MANEN, *supra* note 4, at 13–14.

65. Jo-Ann Krestan & Claudia Bepko, *On Lies, Secrets, and Silence: Multiple Levels of Denial in Addictive Families*, in SECRETS IN FAMILIES AND FAMILY THERAPY 141, 151 (Imber-Black ed., 1993).

While it is important to know one's children, secrecy and privacy are pedagogically important since (among other things) they provide the condition for the development of inner competence and personal identity. Parents and other educators can make a space for the experience of secrecy by recognizing from the outset the child's right to privacy. Moreover the fact of secrecy and privacy—make bearable the task of bringing up and teaching children, since it makes us realize that complete supervision and control over the child's (inner and out) space is not only undesirable but even impossible.

Id.

66. Papp, *supra* note 4, at 68.

67. *See* VAN MANEN, *supra* note 4, at 12–14; Karpel, *supra* note 4.

68. *See* VAN MANEN, *supra* note 4, at 12–15.

69. Charles Imber-Black, *An Overview*, in SECRETS IN FAMILIES AND FAMILY THERAPY 3, 9 (Imber-Black ed. 1993).

essence of our bond of friendship. At another point in our lives our secret keeping not only strengthened our bond of friendship but allowed others, perhaps to lighten their burden. Secret keeping, in other words, offers protection now and again, just as it enhances human attachments. Naturally, if secrets bond some people more closely together, they also can play a divisive role in friendships. All a child has to do to cause frenzy in another child is announce that an important secret is being kept. Hell has no fury, one might say, like a child denied access to secrets.⁷⁰

Sharing secrets can thus have the opposite effect from keeping them. Being “in on” a secret can create a powerful sense of belonging. WE know something you do not; we are special. Thus, we have societies with secret handshakes, secret passwords and secret languages. Lovers and gang members speak their own language that binds them together. In law, we certainly understand the power of the secret language.

B. Family Secrets

My parents tried to spare me the worst of knowledge. ‘We try to keep things from the boy’ was another frequently overheard phrase. But keeping things from the boy meant telling me nothing except that my father was ill, would have to see a specialist, would go into hospital for an operation, would soon be home again, would have to go back into hospital. . . . Keeping things from the boy meant that I lived without siblings in an atmosphere of uncomprehended menace in which the three of us were moving inexorably forward to some unimagined disaster which, when it came, would be my fault. Children are always ready to believe that adult catastrophes are their fault.⁷¹

How a secret impacts a relationship is in large part determined by content. The content of family secrets is of particular interest to the child advocate. Mark Karpel identifies three kinds of family secrets:

Individual secrets involve those cases in which one person keeps a secret from the other person or persons in the family.⁷² . . . [I]nternal *family secrets* involve those cases in which, at least two people keep a secret from at least one other.⁷³ . . . [L]ast, *shared family secrets* involve those cases in which all members of the family know the secret but are pledged to keep it from persons outside the family.⁷⁴

70. COTTLE, *supra* note 4, at 1.

71. P.D. JAMES, *THE CHILDREN OF MEN* 25 (1992).

72. Karpel, *supra* note 4, at 296. Examples might include a spouse’s extramarital affair or a mother’s knowledge that her husband is not their child’s father.

73. For example, both parents know that their child is adopted but the child does not. Or, a mother informs her teenage daughter that she plans to file a divorce, but does not tell the father.

74. Examples might include a parent’s alcoholism, a son’s homosexuality or the birth of an illegitimate child to a daughter.

A single secret can migrate from one category to another depending on revelation. Thus, after Obiwan's leaving the everyday world, Vader's paternity was an individual secret. It became an internal family secret when Luke learned of it but Leia did not. In turn, it could become a shared family secret.

Evan Imber-Black posits that some family secrets:

[A]re positive, such as the temporary secrets involved in many rituals or in gift-giving, the secrets that adolescents keep from parents in order to begin differentiation, the "pillow talk" secrets of vulnerability that couples keep, or the secrets that oppressed people keep from their oppressors that provide a source of bonding or strength. Some secrets are toxic, engendering debilitating symptoms and erosion of the relationship reliability. Toxic secrets are often long-standing. . . . Some secrets, such as current sexual and physical abuse, are dangerous, requiring immediate steps by the therapist to ensure safety.⁷⁵

The same secret can have both a positive and negative meaning depending on the reason it is being kept and its impact on other family members. For instance, in Luke's case, Obiwan may have kept the secret of paternity for the positive purpose of protection.⁷⁶ Obiwan may have been trying to spare Luke from the shame and stigma of knowing that his father had gone over to the dark side. Or Obiwan may have been trying to make sure that Luke did not find out before he was mature enough to understand. To Luke, however, this secret may have made him feel deceived—"Ben, why didn't you tell me?" Perhaps the secret left Luke with a negative sense of unease about his past.⁷⁷

Karpel refers to a situation like Luke's as "living a lie."

This expression—"living a lie"—perhaps better than any other captures the consequences of secrets for the ethical-existential dimension of people's lives. Both the secret-holder who deceives the unaware and the unaware him/herself are "living a lie." One knows it and the other does not, but this fact exists in both their lives.⁷⁸

Why do families keep toxic secrets? "Families keep secrets from one another around potentially embarrassing, shameful, humiliating or painful events. A teenage love relationship, an untimely pregnancy, an adoption plan, financial

75. Imber-Black, *supra* note 69, at 11.

76. See generally Kathy Weingarten, *On Lies Secrets and Not Telling the Truth: A Training Curriculum*, in *SECRETS IN FAMILIES AND FAMILY THERAPY* 380–83 (Imber-Black ed., 1993); Papp, *supra* note 4, at 72.

77. *Id.* See also Karpel, *supra* note 4, at 299–300; BARBARA TAYLOR BLOMQUIST, *INSIGHT INTO ADOPTION: WHAT ADOPTIVE PARENTS NEED TO KNOW ABOUT THE FUNDAMENTAL DIFFERENCES BETWEEN A BIOLOGICAL & AN ADOPTED CHILD—AND ITS EFFECT ON PARENTING* 10–12 (2001).

78. Karpel, *supra* note 4, at 300.

mismanagement, serious mental or emotional illness, a criminal history, drug use—all fill the compartments of that darkened cedar chest.”⁷⁹

In her book, *Family Secrets*, Harriet Webster offers that “[S]ecrecy is one tool we use to adapt to what has happened to us. Through the conscious, deliberate concealment or disclosure of information, we take some control of our lives and exercise a degree of power over those with whom we interact.”⁸⁰ Webster further elaborates that we use the tool of secrets to feel protected or to protect.⁸¹ We use the tool of secrecy to guard our public image and reputation.⁸² We use the tool of secrecy because of our sense of shame.⁸³

Often, the most toxic family secrets are those kept because of a sense of “shame.”⁸⁴ Irrespective of content, the mere keeping of a secret can engender shame. Shame itself is relational.⁸⁵ Families experience a sense of shame when they violate social law or a moral code to which they are loyal.⁸⁶ Shame is not necessarily related to content. For example, for some families the fact of adoption might be shameful—implying a failure to be able to conceive. In other families, the same fact might be a source of pride.⁸⁷

While shame is relational, it is maintained in the self and thus felt personally.

Shame is an inner sense of being completely diminished or insufficient as a person. It is the self judging the self. A moment of shame may be humiliation so painful or an indignity so profound that one feels one has been robbed of her or his dignity or exposed as basically inadequate, bad, or worthy of rejection. A pervasive sense of shame is the ongoing premise that one is fundamentally bad, inadequate, defective, unworthy, or not fully valid as a human being.⁸⁸

Even without knowing the secret, a child can adopt the shame of his or her parents.⁸⁹ John Bradshaw refers to this process as the “internalization of shame.”⁹⁰ In his characterization, a child with “shame-based” parents identifies with them as shame-based role models. These shame-based parents shut down emotionally; they are too ashamed to show their true emotions. They are incapable of mirroring and affirming their child’s emotions. The child feels abandoned. The

79. BETSY KEEFER & JAYNE E. SCHOOLER, TELLING THE TRUTH TO YOUR ADOPTED CHILD OR FOSTER CHILD: MAKING SENSE OF THE PAST 2 (2000).

80. HARRIET WEBSTER, FAMILY SECRETS: HOW TELLING AND NOT TELLING AFFECTS OUR CHILDREN, OUR RELATIONSHIPS AND OUR LIVES 11 (1991).

81. *Id.*

82. *Id.* at 13.

83. *Id.* at 12.

84. See Mason, *supra* note 52, at 31.

85. *Id.*

86. *Id.*

87. See KEEFER, *supra* note 79.

88. MERLE A. FOSSUM & MARILYN J. MASON, FACING SHAME: FAMILIES IN RECOVERY 5 (1986).

89. See JOHN BRADSHAW, HEALING THE SHAME THAT BINDS YOU 10–13 (1988).

90. *Id.* at 10.

child needs a parent who can mirror and affirm, but the parent is too shame-based to do so.

The child then becomes shame-bound, turning healthy shame (i.e., a developmental awareness of difference) into toxic shame. “*To be shame-bound means that whenever you feel any feeling, any need or any drive, you immediately feel ashamed.* The dynamic core of your human life is grounded in your feelings, your needs and your drives. When these are bound by shame, you are shamed to the core.”⁹¹

According to Bradshaw, the shaming process repeats itself, over and over, and forms verbal and visual images that become memory imprints or “collages of shame.” “As the years go on, very little is needed to trigger these collages of shame memories. . . . Shame as an emotion has now become frozen and imbedded into the core of a person’s identity. Shame is deeply internalized.”⁹²

Shame is also a powerful deterrent to getting help and often perpetuates itself.⁹³ Karpel notes that “secrets perpetuate shame and guilt in the secret holder by sealing these feelings up within the secret holder, but out of reach of those who might help.”⁹⁴ In the same vein, keeping a shameful secret comes at a considerable cost to the secret holder. There is a tremendous amount of anxiety related to the fear of disclosure either accidentally or intentionally by others. The secret holder is constantly attempting to deceive. The secret holder must regularly distort information. The emotional costs of constant anxiety are high.⁹⁵

That personal feeling of a relational concept has significant implications for children. When children are made part of the keeping of a shameful family secret, such as alcoholism or out of wedlock pregnancy, even when the secret does not directly relate to the child, the mere fact of keeping the secret often causes the child to feel shame.⁹⁶ Thus, Luke is overwhelmed with shame that Vader is his father—even though Luke has done nothing shameful.

The sharing of shameful secrets with a child can have a long-term negative impact. Donovan and McIntyre offer that:

Family secrets can constitute an incredibly noxious, pathogenic, dissociogenic force. A look at the nature of secrets reveals why. To conscious problems, conflicts or impediments there can be conscious solutions, resolutions or accommodations. Even to unconscious problems, conflicts or impediments, there can be (at times brilliant) unconscious solutions, resolutions or accommodations. But to secrets there can be no such resolution: they are, by their very nature, inaccessible. They are, therefore, by their very nature, unresolvable. Because of this, even otherwise

91. *Id.* at 12.

92. *Id.* at 13.

93. *See* Karpel, *supra* note 4, at 300.

94. *Id.*

95. *Id.* at 296.

96. *See* COTTLE, *supra* note 4, at 2.

innocuous, mundane secrets can exert a malignant effect on cognition and behavior.⁹⁷

Even when the secret is not actually shared, there can be negative consequences for children. Karpel opines, "The unaware are likely to experience anxiety in relation to seemingly inexplicable tension that develops when areas relevant to the secret are discussed. They may also experience confusion and a variety of negative feelings in relation to the 'explanations' they formulate in an attempt to understand this anxiety."⁹⁸ Karpel also comments that secrets "may contribute to a vague but tenacious sense of shame or guilt in the unaware."⁹⁹ They know something is amiss but they do not know what it is.

Donovan and McIntyre suggest that children keeping family secrets can experience a decline in academic performance due to the cognitive conflict between school as a place when children tell adults what they know and keeping the family secret.¹⁰⁰ Disclosing the secret would be an act of betrayal.¹⁰¹ The result is that a "child ends up not allowing himself to know what he knows or to tell what he knows—and academic performance falls, sometimes dramatically."¹⁰²

There are other, even more serious, consequences to children carrying the burden of and internalizing the shame of a family secret. Two that are readily apparent are *parentification* and *self-blame* for the acts or failures of the parent. Parentification is generally defined as a "functional and/or emotional role reversal in which the child sacrifices his or her own needs for attention, comfort, and guidance in order to accommodate and care for the logistical or emotional needs of the parent."¹⁰³

Parentification occurs in many dependency situations: alcoholism, mental illness, addiction, and sexual abuse among others. When a child is parentified, the child assumes the role of the parent including that of protector instead of the other way around.¹⁰⁴

In extreme cases when a parent's dependency is too great and when the parent abdicates parental responsibility for restructuring and protecting the child from "doing too much" or "carrying the load," the parentified child may learn in this process that her needs are of less importance than those of others.... When adults abdicate parental responsibility children face abdication, by default, of their childhood status and the range of developmental needs, pleasures, struggles and opportunities childhood rightly entails. Children thus learn first to give up their childhood. . . .¹⁰⁵

97. DONOVAN, *supra* note 23.

98. Karpel, *supra* note 4, at 300.

99. *Id.*

100. See DONOVAN, *supra* note 23, at 75.

101. See Karpel, *supra* note 4, at 297.

102. DONOVAN, *supra* note 23, at 75.

103. BURDENED CHILDREN, THEORY RESEARCH, & TREATMENT OF PARENTIFICATION 5 (Nancy D. Chase ed., 1999).

104. *Id.* at 5-6.

105. *Id.* at 6.

Parentified children frequently develop behaviors that require therapeutic intervention. Children exhibit impulsivity, hyperactivity, anxiety, guilt, depressive symptoms, impaired individualism, low self-esteem, and a host of other problems that may extend into adult life.¹⁰⁶ Because parentification is relational as well, the symptomatic behavior can be seen not only as a cry for help for the child but for the entire family system.¹⁰⁷

Similarly, a child can keep and internalize the shame of the family secret without actually knowing what the secret is about. Peggy Papp discusses children whose parents have not yet told them of an impending divorce:

If, on the other hand, the children are continually caught in crosscurrents of hostility and suspicion, experience an unpredictable withdrawal of affection from the parents, or witness mysterious and inexplicable events, they are likely to experience an unidentifiable but pervasive guilt and hold themselves responsible for what they do not understand.¹⁰⁸

Further, some children may actually take on the responsibility of child abuse by taking on the shame of the secret. Thus, child victims of sexual abuse can actually blame themselves for the abusive acts of their parent.¹⁰⁹

A parent does not need to consciously disclose a family secret to a child for the secret to affect the child. There are parental secrets about which a child is assumed to have no knowledge, yet as Donovan and McIntyre observed:

It has been our consistent experience over the years, however, that children often know much more than adults assume—at an earlier age and with much greater complexity than would be thought possible. Such split off knowledge often permeates the child's play or thematic preferences. Not consciously accessible to the child, it is often present in the form of behavioral memories.¹¹⁰

Nor does a child have to actually “know” the secret to be affected by it.¹¹¹ The awareness of a secret, without knowledge of the content, can have an impact. Karpel refers to family members who did not actually know but “wondered” or “suspected” that there was secret.¹¹² He also offers the opposite but typical remark upon disclosure that the family member knew of the content but not that it was a

106. Deborah Jacobvitz et al., *Cross Sex and Same Sex Family Alliances: Immediate and Long Term Effects on Sons and Daughters*, in BURDENED CHILDREN, THEORY RESEARCH, & TREATMENT OF PARENTIFICATION 49 (Nancy D. Chase ed., 1999).

107. Helen W. Coale, *Therapeutic Rituals and Rites of Passage: Helping Parentified Children and their Families*, in BURDENED CHILDREN, THEORY RESEARCH, & TREATMENT OF PARENTIFICATION 132 (Nancy D. Chase ed., 1999).

108. Papp, *supra* note 4, at 67.

109. See, e.g., Bret K. Johnson & Mary Beth Kenkel, *Stress, Coping, and Adjustment in Female Adolescent Incest Victims*, 15 CHILD ABUSE & NEGLECT 293–305 (1991).

110. DONOVAN, *supra* note 23, at 75.

111. See Karpel, *supra* note 4, at 296–97.

112. *Id.*

secret. “Well, it’s funny. I always knew this was something I shouldn’t talk about. . . . but I never really thought of it as a secret.”¹¹³

As a final note, many psychologists and sociologists believe that the distinction between secrecy and privacy is a critical one. Van Manen and Levering observe that secrecy is qualitatively different from privacy.¹¹⁴ Privacy is about the power to keep secrets. Thus, any question is an invasion of privacy. Privacy functions to prevent others from learning intimate information and therefore from acquiring a means of control or interference. Secrecy is about content—a particular secret. Privacy is about me. Secrecy is compromised when the content is revealed. Privacy is compromised by the attempt to gain access.¹¹⁵ Accordingly, privacy refuses relation and protects what is ours, while secrecy interprets relation.

Thus we may feel a lack or loss of privacy not because someone has actually found some secret information but merely because someone seems to be inquisitive about our personal matters or seems to have access to the intimate sphere of our life. In other words, without actually having been intruded upon or without having lost anything specific, we can already feel that we have lost our privacy. Why? Because privacy is ultimately a certain mood, rather than a certain space, that governs a sphere of life.¹¹⁶

Sisella Bok makes a similar distinction.¹¹⁷ Bok defines secrecy as “intentional concealment and privacy as being protected from unwanted access by others.”¹¹⁸ With an eye to the therapeutic consequences of Bok’s distinction, Charles Imber-Black notes:

When we attempt to apply these definitions in family life or in therapy, however, ethical struggles regarding their overlap and who is doing the defining become apparent. A husband may define his affair as “private” while his wife may experience it as a secret. A biological mother who gives up her child for adoption may claim a right to privacy, and the state may even codify such privacy into law, while the adult adoptee regards the information as a secret being kept from him. . . . What is kept secret often engenders shame, privacy not so. Secrets are often connected to fear and anxiety regarding disclosure while privacy implies a certain zone of comfort, free from the entrees of others. Therapy itself is a socially constructed arena where the experience of an umbrella of privacy can often be sufficient to enable the opening of painful secrets.¹¹⁹

As we discuss therapeutic intervention below, this umbrella of privacy has meaning to our discussion.

113. *Id.*

114. *See* VAN MANEN, *supra* note 4, at 55–77.

115. *Id.* at 59.

116. *Id.* at 70.

117. *See* BOK, *supra* note 50, at 10.

118. *Id.*

119. *Id.*

Before entering into that discussion, here is a summary of what I think I have learned:

1. Secrets can have positive functions:
 - Secrets are essential to identity formation both in very young children and in adolescents.
 - Sharing secrets can bond people together.
2. Secrets can be toxic:
 - Family secrets can take a toll on both the secret holder and the unaware.
 - Vigilance and deception takes a toll on secret holders.
 - The shame of others' secrets can be internalized—even by a child. Children can assume the shame of others. Children can take the blame for others' actions—even when they are not at fault in any way. Children can become parentified by the failure of caretakers who are limited by toxic family secrets.
 - Being on the outside of a secret can cause strife in a family.
3. Privacy is important independent of the contents of any secret. One can feel a violation of privacy by the mere fact that someone is asking about a secret. The feeling of violation can be present even if the secret remains undiscovered.

III. DISCLOSURE IN THERAPY AND FAMILY THERAPY

Family therapy is part of the recommended treatment in nearly all child protection matters.¹²⁰ Even for severely abused children, the American Professional Society on the Abuse of Children recognizes family therapy as part of its model of psychotherapy for abused children.¹²¹ William Friedrich recommends involvement of both the non-abusing parent and the abusing parent in at least some portions of the therapy.¹²² Even for abused children, Friedrich's treatment model notes that "[i]t is important early on in the therapy process to help children feel that they have a secure base in their home and that their parent supports their disclosure of abuse."¹²³

It is in the nature of the general therapeutic model for a patient to disclose a problem or information about a problem to the therapist. Then, with the therapist's insight or intervention, the patient and therapist devise a strategy to deal

120. See William N. Friedrich, *An Integrated Model of Psychotherapy for Abused Children*, in THE APSAC HANDBOOK ON CHILD MALTREATMENT 104–18 (Biorere et al. eds., 1996).

121. *Id.*

122. *Id.* at 108.

123. *Id.*

with the problem. Bradshaw refers to the old therapeutic adage: "The only way out is through."¹²⁴ In the context of toxic shame, Bradshaw refers to this process as coming "out of hiding." "We cannot change our 'internalized' shame until we 'externalize' it."¹²⁵

Coming out is not an easy process. Disclosure of a problem or of information requires a trust between the therapist and the patient.¹²⁶ That trust is founded on the notion of confidentiality—that is, that the therapist will not reveal the client's confidences to others. The patient must feel safe and trusting in his or her ability to reveal without adverse consequences.¹²⁷

The concepts of shame and keeping secrets to protect others as described above are examples of situations where a patient would want his or her disclosures to be limited to the therapist only. The notion of confidentiality and "feeling safe" are critical to the therapeutic modality.

So critical is the trust engendered by confidentiality that it is written into the ethical codes of therapist, psychologist, and mental health professionals.¹²⁸ Psychologists, therapists and other mental health professionals all adhere to standards requiring confidentiality.¹²⁹

How essential is confidentiality? Seth Kalichman analyzed the singular situation where breach of confidentiality is not only allowed but required—the mandatory reporting of suspected child abuse. In his book on mandatory reporting laws, Kalichman reviewed some of the literature that suggests that reporting is destructive to helping relationships.

Educators, clinicians and other service providers oppose mandated reporting on the grounds that reporting their clients, including children, breaches confidentiality, and is therefore destructive to their services. Surveys of practicing psychologists show that 31% believe reporting has adverse consequences for their clients and their treatment An extreme perspective . . . comes from Bollas and Sundelson, who stated that breaches of confidentiality in reporting dismantles the therapeutic relationship Bollas and Sundelson wrote "Were there to be a restriction in this basic process, that is if the patient felt that he could . . . not discuss sexuality or aggression, then the entire procedure would come to a halt." They also stated, "Psychoanalysis cannot function if the patient does not have complete confidence that what he says to his psychoanalyst is privileged." Bollas and Sundelson found that

124. BRADSHAW, *supra* note 89, at 115.

125. *Id.* at 115–17.

126. *See generally* JANE STEERE, *ETHICS IN CLINICAL PSYCHOLOGY* 34–37 (1984).
See also Karpel, *supra* note 4; Weingarten, *supra* note 76.

127. *See* STEERE, *supra* note 126.

128. *See* THE HANDBOOK OF CLINICAL PSYCHOLOGY: THEORY, RESEARCH AND PRACTICE 1409–10, 1428–31 (C. Eugene Walker ed., 1983); FOUNDATIONS OF MENTAL HEALTH COUNSELING, 359–61 (William J. Weikel & Artis J. Palmo eds., 2d ed. 1996).

129. *See* KALICHMAN, *supra* note 30, at 25–40.

reporting betrays the therapeutic trust and can cause great harm to persons in therapy.¹³⁰

Individual confidentiality in the abuse and neglect arena is difficult. Confidentiality in family therapy may be even trickier. Not only are there reporting requirements, each family member has to feel secure with the therapist as well as in what may be revealed to other family members. This requires the therapist to balance a number of confidences in such a way as to allow the family members to reveal them, if necessary, in a safe, therapeutic atmosphere.¹³¹

In some sense, certain forms of family therapy may simply be about the management of secrets. Three critical questions are: (1) the extent to which secret information is being kept from those within the family who need to have it; (2) the extent to which secret information is being shared with those in the family who should not have it; and (3) the extent to which secrets ought to be disclosed outside the family system.

For the therapist, it is important to know both the content of secrets and the relations between the family members. As a general rule in family therapy, unlocking secrets allows the patient to give new, less harmful meanings to them. The general trend is toward revelation. Thus, Marilyn Mason observes:

Not every secret has to be shared with children; however it is important that we do share our secrets with someone. In so doing, we allow ourselves to be known to others and to allow others to reveal themselves to us. Shameful secrets result in isolation and pain; when we reveal secrets, we can externalize the shame. We begin to separate our self from our shame.¹³²

Karpel, while generally in favor of disclosure in family therapy, suggests a concept that he calls "accountability with discretion."¹³³ That involves exercising control over the revelation. The secret holder must seriously consider the relevance of the secret to the unaware. The secret holder must consider this relevance from

130. *Id.* at 31.

131. *See* Karpel, *supra* note 4.

132. MASON, *supra* note 52, at 42.

When people reveal their shameful secrets in therapy, I ask them to tell their secret to at least one other person. This can be a true risk for many. When secrets are revealed, we have less to hide and can be more spontaneous and more vulnerable. Often when there is a shameful secret, there is a sense that something is missing. It is then that I will make a comment that it seems there is a secret somewhere, thus opening the door for the secret-bearer to reveal his or her secret. . . . Of course when we do reveal secrets, we face consequences. We risk the loss of relationship trust. . . . Yet, when we risk more of our humanness, we feel our natural human connection. As we learn that shame is learned in relationships, we can develop greater self-empathy and eventually greater other-empathy, as well.

Id.

133. *See* Karpel, *supra* note 4, at 302.

the point of view of the unaware. Then, if the secret is to be revealed, the secret holder must be sensitive to timing.¹³⁴

Karpel believes that disclosure is necessary in nearly all cases.¹³⁵ But he also notes that the timing and manner of disclosure should be flexible in order to ease the shock of disclosure both to the secret holder and the unaware.¹³⁶

Papp, while also in general agreement about revelation, asks the secret holder and the therapist to consider the following factors:

1. Does the secret interfere with current functions?
2. Does the secret interfere with direct and open communication within the family?
3. What is the risk of accidental disclosure?
4. Who should reveal the secret, to whom and under what circumstances?
5. What will be the effects of disclosure?¹³⁷

To the latter point, Papp suggests that “[t]he time, place and circumstances [of disclosure] should be considered so that time is allowed for absorption and reaction to the new knowledge.”¹³⁸

Like Mason and Karpel, Papp concludes that family therapy requires an openness that allows family members to confront their secrets. “Facing secrets involves each person taking responsibility for his or her own actions and reactions and holding others responsible for theirs.”¹³⁹ If the family therapy is to be successful and the family is to heal, all participants will have to address their toxic secrets. Luke, Darth and the spirit of Obiwan have a lot of work to do.

In conclusion, here is a summary of what I have learned about family therapy for abused and neglected children:

1. Children often know more than we think they know about family secrets.
2. Keeping a toxic secret has adverse consequences for both the secret holders and the unaware. Children who keep family secrets are under tremendous psychological pressure—including the responsibility for possible betrayal—that may force them to be deceitful in very unhealthy ways. They need to be freed from that pressure.
3. Family therapy requires an openness that allows family members to safely confront their secrets and take personal responsibility for their actions.

134. *Id.*

135. *Id.*

136. *Id.*

137. Papp, *supra* note 4, at 69–70.

138. *Id.*

139. *Id.* at 72.

4. Both disclosure and the processing of disclosures require a trusting relationship with the psychotherapist. Confidentiality is critical to that trust.
5. The time, place, and manner of disclosure are critical to preventing bad reactions in family members who are unaware of the secret. Generally, however, disclosure is a positive step for the unaware.

IV. THE SECRET OF ADOPTION

One of the more studied and complex family secrets is the secret of adoption. Secrecy associated with adoption can be from and by both the adoptive parents and the birth parents. Their perspectives may be very different. Secrecy in adoption appears rooted in both American culture and policy.¹⁴⁰ Historically, Americans have adhered to the notion that through adoption we can create the equivalent of the biological family—that is, we can substitute the adoptive family for the natural in every respect except the biological.¹⁴¹

David Kirk identifies a central feature of this substitution as a denial that adoptive parenting is any different from biological parenting. Kirk calls this denial the “rejection of difference.”¹⁴² Ann Hartman furthers Kirk’s analysis as follows:

In order to construct adoption this way, and to support this denial, anything that makes adoption different must be denied or minimized. The greatest threat to this denial of difference is the existence of the biological family and, thus, this connection must be totally and permanently broken. Although adoptive parents were advised to tell a child he or she was adopted, little information about the child’s background was given to the family or to the child.¹⁴³

From an adoptive parent’s perspective, unlike some of the family secrets discussed above, the fact of adoption is not necessarily a shameful secret. Many families embrace the fact of adoption at an early age with creative and positive family stories. In those families, the secret is no secret at all. It is embraced under the notion of choice. The message to the adopted child is: “We chose you.”¹⁴⁴

On the other hand, there may be reasons why a parent might not want to let a child know that he or she has been adopted. For example, a parent may fear losing the child’s love and affection because of a perceived divided loyalty with

140. See JUDITH S. MODELL, *A SEALED & SECRET KINSHIP: THE CULTURE OF POLICIES & PRACTICES IN AMERICAN ADOPTION* 1–22 (2002).

141. Ann Hartman, *Secrecy in Adoption*, in *SECRETS IN FAMILIES AND FAMILY THERAPY* 87 (Imber-Black ed., 1993).

142. H. DAVID KIRK, *SHARED FATE* 152 (1964).

143. Hartman, *supra* note 141.

144. See MIRIAM KOMAR, *COMMUNICATING WITH THE ADOPTED CHILD* 1–18 (1991); K.A. Kowal & K.M. Schilling, *Adoption Through the Eyes of Adult Adoptees*, 55 *AM. J. ORTHOPSYCHIATRY* 354, 354–62 (1985).

the biological parents.¹⁴⁵ The parent may also fear that the child might not be able to understand the complexities of the adoption until the child is older or more mature. Perhaps the parent may fear that the child would model him or herself after the birth parents.¹⁴⁶ In some cases, the adoptive parents may be ashamed that they could not conceive a birth child of their own.

From the birth parents' perspective, there may be a need to keep secret the fact that a child has been placed for adoption. There may be shame in the reasons a child became available for adoption. There might be shame associated with abandonment or the termination of parental rights because of recurrent drug abuse or some other family secret.

For these reasons, adoption records are generally sealed and unavailable to the adoptive child.¹⁴⁷ The justifications for closure include arguments that closure (1) protects the child from the stigma of adoption and/or illegitimacy; (2) protects the adoptive family and the child from intrusion by the birth parent; (3) protects the birth parents from intrusion by the adopted child, and; (4) reassures birth parents that records will be confidential so that they will place the child for adoption.¹⁴⁸

Adoption is thus actually two secrets—the fact of adoption and the facts about the past that pre-date an adoption.¹⁴⁹ While most parents disclose the fact of adoption, not all parents are completely forthcoming about background information. Some parents simply do not know the history. Of those who do, however, one study showed that fewer than 40% of adopting parents had given their adopted children all of the information available.¹⁵⁰ More than 25% had falsified or omitted information and the remainder had given little or no information to the children.¹⁵¹ Another study reported that less than 25% of parents had been totally forthcoming.¹⁵²

What happens when the secret is kept or not fully disclosed? As with all family secrets, the secret holders may experience the anxieties associated with fear of inadvertent disclosure and deception described above. In addition, children experience the stigma of being associated with (or just plain being) the secret. Hartman summarizes research that concluded:

[T]he connection between secrecy and stigma . . . is intuitively known by children and, as an adoptee wrote, "an important aspect of

145. See KEEFER, *supra* note 79, at 15–16.

146. *Id.* at 16–17.

147. Hartman, *supra* note 141, at 88–90.

148. *Id.*

149. KEEFER, *supra* note 79, at 17–22.

150. See MARY WATKINS & SUSAN FISHER, TALKING WITH YOUNG CHILDREN ABOUT ADOPTION 3 (1993).

151. *Id.*

152. There are, of course, complex privacy issues associated with balancing the rights of birth parents to their privacy, adoptive parents to control the flow of information and to limit contact with the birth family and the child's need to know. Most states have laws to protect the privacy of birth parents, so an adoptive parent may have little access to the information sought by the child. See MODELL, *supra* note 140.

secrecy is the easily made assumption that if one is not allowed to know something, especially about oneself, it must be bad. . . ." The recursive relationship between secrecy and stigma is clear. A stigmatized person is protected by secrecy but secrecy also promotes stigmatization.¹⁵³

In addition, adoption researchers tell us that children may experience significant identity issues when they do not have a sense of their genealogy.¹⁵⁴ The phenomenon has been referred to as "genealogical bewilderment."¹⁵⁵

[F]or adoptees, especially where there is little or no information about where they came from, there is an awareness that they do not really have the genetic information to do that kind of sorting out of their identity. They are basing . . . [identity formation] on their family of intimacy—the adoptive family, but that's not necessarily where their abilities, interests and traits have come from.¹⁵⁶

Many adoptees refer to the lack of information as a "void" or a vacuum. There is a recognized sense that "part of me is missing."¹⁵⁷

Uninformed adopted children may experience a number of other discomfoting symptoms. These may include unrealistic fantasies about their birth parents, magical thinking, divided loyalties, a feeling of being disconnected, a fear of future abandonment, and a general fear of unanswered questions about their genetic and medical history.¹⁵⁸

There is certainly much debate about how much information adoptive parents should provide an adopted child about that child's birth family. While researchers are not in agreement, the trend among adoption researchers is that, despite the discomfort felt by adoptive parents in talking about the birth family, the better and more open the communication, the better the child will be able to cope with the psychological issues associated with adoption.¹⁵⁹

The research suggests that the more information a child has, the more the child will be able to form identity and to cope with the plethora of issues experienced by adopted children.¹⁶⁰ Kids seem to fare better when they know where they come from. As Hartman concluded in her summary of the literature:

153. Hartman, *supra* note 141, at 87 (quoting STANTON K. TEFFT, *SECRECY: A CROSS CULTURAL PERSPECTIVE* (1980) and P.C. Partridge, *The Particular Challenges of Being Adopted*, 61 SMITH C. STUD. IN SOCIAL WORK 202 (1991)).

154. See, e.g., R.G. McRoy et al., *Adoption Revelation and Communication Issues: Implications for Practice*, 71 FAMILIES IN SOCIETY 550, 550-57 (1990).

155. Hartman, *supra* note 141, at 93 (quoting D. Bertocci & M. Schechter, *Adopted Adults Perception of Their Need to Search: Implications for Clinical Practice*, 61 SMITH C. STUD. IN SOCIAL WORK 169-96 (1991)).

156. KEEFER, *supra* note 79, at 27 (quoting JOYCE MAGUIRE PAVAO, *THE FAMILY OF ADOPTION* (1999)).

157. *Id.*

158. *Id.* at 25-35.

159. *Id.* See also BLOMQUIST, *supra* note 77; KOMAR, *supra* note 144.

160. See Hartman, *supra* note 141, at 90.

Adoptees, birth parents, and adoptive parents have been teaching adoption and mental health professionals about the meaning of secrecy in their lives. They have taught us how it is to *be* a secret and to have those around keep vital, even crucial information from them. They have shown us how disempowering it is to have the law of the land deny them access to their origins.¹⁶¹

That does not mean that every child needs to be told everything at once. Nearly all of the literature indicates that timing is critical.¹⁶² Moreover, any “telling” must be developmentally appropriate and communicated in a positive and supportive manner with an eye to the needs of the child.¹⁶³ The telling should come from a parent and not a stranger. There should be plenty of opportunity for age appropriate discussion and questions.¹⁶⁴ When children are told about adoption secrets in a supportive manner, they seem to fare quite well at an early age.

We can conclude the following in connection with adoption:

1. Children can feel the stigma of a secret even when they do not know its content. They know that something is wrong.
2. Children have a strong psychological desire to know about their background.
3. Children can handle information—even when the secret may be difficult to hear—if it is disclosed to them by a secret-holder (the parent) in a safe, supportive, and developmentally appropriate manner.
4. When children do not know the content of adoption secrets, they may suffer emotionally. That suffering can include feelings of disempowerment, runaway imagination, and a sense that something is wrong about them.

V. SOME QUESTIONS FOR LUKE AND FOR OTHERS ABOUT ADULT LEGAL NEEDS

How does the above impact what we do in the Juvenile Court? Let us go back to the three areas of adult legal process that I selected, at the beginning of this article—the voice of the represented child, the protection of parents’ rights, and the court’s need for information. In each of these processes, there is a pressure on the family to disclose information in a non-therapeutic setting. There may also be pressure to receive information in an equally non-therapeutic setting.

In our Clinic we have experienced a basic tension between the needs of the adult legal processes and the therapeutic needs of the families. Are we causing additional and perhaps unnecessary harm to the family by exposing it to these

161. *Id.* at 103.

162. *See* KEEFER, *supra* note 79, at 53–61.

163. *Id.* at 11–16, 53–61. *See also* KOMAR, *supra* note 144, at 19–68.

164. *See* KEEFER, *supra* note 79, at 11–16, 53–61; KOMAR, *supra* note 144, at 19–68.

adult legal processes? If so, can we modify the adult processes to minimize their negative impact and maximize the therapeutic impact on the family?

A. *The Court's Need for Information*

"Tell it to the Judge!"¹⁶⁵

In general, we want judges to know as much as they can. We want judges to make intelligent and informed decisions for kids. The last thing we need is a judge who is ignorant about a child and her family but who makes a decision that will impact the child forever.

Yet, do judges need to know *everything* about a child's private life? Do judges need access to children's confidential therapy reports or notes? Will parents disclose their problems and secrets to therapists if they know that judges will hear the disclosures?

We have learned that it is normal and even healthy for children to have some secrets from their parents—even those dealing with very serious issues. We know that some shared family secrets can act to bond the family. We also know that family therapists try to create a safe atmosphere for children and parents to deal safely and openly with the secrets that have caused the family problems. The therapeutic atmosphere is maximized if it moves forward without fear of retribution, shame or loss of control. We want to maximize healthy disclosure and thus strengthen the healthy bond between children and their families.

One could argue that we should maximize therapeutic disclosure by keeping judges out of therapy and revealing nothing at all. Yet, as Papp notes, some children's secrets, such as hiding drugs under a mattress, are not healthy secrets and should not be ignored by parents.¹⁶⁶ Neither should they be ignored by a court *in loco parentis*.

Further, some adult secrets, such as alcoholism or substance abuse, require state intervention. We cannot ask a court to put blinders on and ignore basic information about the nature of the problem that caused a dependency. Nor should we prevent a court from monitoring the progress of reunification.

Can we figure out ways to maximize therapeutic disclosure without undermining the court's essential need for information?

B. *Lawyer Child-Client Relations*

You first notice the serious hazel eyes. The neat, short-cropped brown hair accentuates an oddly sober expression—hinting too early of the adult face-to-come. The boy wears green khaki shorts and a bright red t-shirt that says "Wildcat Basketball"—just like any and every other nine-year old in Tucson. The boy stands a few inches from his mother. He stays close but not clingy—a good sign. More

165. *The People's Court* (Warner Bros. television advertisement, 2002).

166. See Papp, *supra* note 4, at 68.

secure than most. His mother introduces you to the boy as his lawyer—whatever that means to him. He shakes your hand—a good handshake. You’ve read the file... all the papers. You know the whole story. But you know that you do not know anything until you meet him in person. You are pleased to meet him. Finally. Sort of.

Your mood is one part eager and one part dread. Is this conversation such a good idea? What does he know about what happened? Does he know the truth? Or part of it? Does he think his father is dead? Does he know about the beatings and the shooting? Does he remember his father or anything at all? What suppressed demons are you going to release? Maybe you should be home watching American Idol.

The social study says that five years ago, his father beat his mother senseless. The pictures are horrifying. As the beating was winding down, the police came. His father held her and the boy hostage and threatened to kill both of them. Fortunately, a very accurate SWAT shooter beat him to the punch with one clear shot. His father lived and is in prison for a long, long time. The termination petition says the mother wants to sever his parental rights. Incredibly, the father is contesting that petition. You have been appointed to represent the boy in that proceeding.¹⁶⁷

1. Sharing Secrets with Children

The adult legal process that impacts our Clinic most directly is the relationship between the lawyer and the child-client. The process is a relatively simple one. We represent child-clients as their lawyers. It is they, not we, who set the goals of representation.¹⁶⁸ We are assigned by the court to represent children without anyone asking them if they want a lawyer. Counsel is mandatory under Arizona law.¹⁶⁹ Nevertheless, we are supposed to take direction from them; we act at their behest.

It is axiomatic that clients need information in order to make informed and wise choices.¹⁷⁰ When a lawyer works with a child, the process is no different.¹⁷¹ The lawyer tries to keep the child-client as informed as possible. The lawyer advises the client and presents the available options. Then, the client makes a choice.

What is different with child-clients is that there may be information necessary for a legal choice that adults normally do not share with children or that

167. This scenario is based on a composite of several cases we have had in our Clinic. Identifying information has been changed. Unfortunately, the problem is not that unusual.

168. See MODEL RULES OF PROF'L CONDUCT RULE 1.2; A.B.A. STANDARDS, *supra* note 7, at Standard A-1.

169. ARIZ. REV. STAT. § 8-821 (2003).

170. See MODEL RULES OF PROF'L CONDUCT R. 1.4.

171. *Id.* See also A.B.A. STANDARDS, *supra* note 7, at Standard A-1; ARIZ. OP., ATT'Y GEN. 86-13 (1986).

the parents have chosen to keep secret. Maybe this information would not be healthy for a child to know. Maybe we ought to differentiate between the child as a litigant and the child as a child. But circumstances have placed a duty on *us* to treat them as litigants.¹⁷²

For example, as children's attorneys, we have been told that paternity is different from that which a child has been told, that a child's parents do not want him, that a child's parent has committed a notoriously heinous crime, that a child's parent is deceased, or that a child's parent is a hopeless drug addict and prostitute. As far as we were told, the children were not aware of these pieces of legally necessary information.

Often, we are asked by the professionals *not* to disclose these secrets to the child. Recently, we learned that a child's father had died of a drug overdose. The father's parental rights had been terminated several years before. The child was about to make a decision about whether or not he wished to be adopted by his foster family. Knowing that his father had died might have helped him make a better decision. Nevertheless, there was a real concern among his treatment team that sharing that secret with the child would be therapeutically unwise—especially if the secret were to be revealed by a lawyer who is not trained to be a therapist. There was a real concern among the professionals that this child was too emotionally fragile to process this information.

As lawyers, what do we do? We have an adult legal duty to keep the child informed. Without information, children cannot make informed decisions. Knowing that the child's decision was based upon missing information, the court and others will pay little attention to the child's point of view—a point of view that, we believe, is critically important to the judge's decision-making.¹⁷³

In our experience, kids often instinctively know what works for them. A judge who does not hear that point of view may be lacking a critical piece of information for decision-making. The judge needs to know why a child would prefer to live with a bad parent rather than in disinterested foster care. Or why a child might not want to return to a parent who has finally controlled the drug abuse. But the judge also needs to know that the child's point of view is rooted in reality. If the court knows that a child does not know salient facts, the court will pay less attention to the child's perspective.

Despite the need for information, as attorneys, the last thing we want to do is to cause a child harm in the process of eliciting the child's point of view—especially if we are primarily motivated by *our* adult legal duty to give a voice to the child. Simply asking the wrong question might cause harm. Professor Emery's remarks are a red flag to the harm of asking.¹⁷⁴ Our Clinic has represented children with post-traumatic stress disorder from childhood abuse. There were some very

172. See MODEL RULES OF PROF'L CONDUCT R. 1.14; A.B.A. STANDARDS, *supra* note 7, at Standard A-1; ARIZ. OP., ATT'Y GEN. 86-13 (1986).

173. See generally KOH PETERS, *supra* note 6, at § 4.3.

174. See Robert Emery, *Children's Voices: Listening—and Deciding—is an Adult Responsibility*, 45 ARIZ. L. REV. 621 (2003).

real concerns that we, the lawyers, could trigger post-traumatic stress disorder episodes merely by asking the wrong question.

Moreover, as lawyers, we might not be sufficiently skilled in therapeutic questioning to discover what a child knows without inadvertently revealing a toxic family secret, or the damaging fact of a secret. It would be ironic if our adult legal need to hear a child's voice caused further harm to an already damaged child. If we keep children out of the loop, however, or if they are not "in on" the secrets that impact decisions that affect their lives, we have witnessed that they may feel both excluded and lacking in control over their own situation.

The first piece of good news is that maybe it is a non-issue. Our exploration of secrets has led us to question whether children in fact know more than the adults think they know.¹⁷⁵ As described below, our anecdotal evidence supports the research. Children often know more than the adults believe.

Operating on the assumption that they might know decreases our fears of inadvertently revealing damaging information. What we have learned to do is to ask open-ended exploratory questions. "So, Luke Skywalker, what do you know about all this?" Or "What do you think we should know, Luke?"

In the Clinic, we have been surprised by some very detailed answers that indicate that these children know a lot more about the family secrets than the adults ever dreamed. In the scenario above,¹⁷⁶ we were asked to represent a child in a termination of parental rights proceeding brought by her mother. The father was in prison for kidnapping, severe domestic violence against the mother, and a number of other charges. A SWAT team had to be called in when the father held the mother hostage. The child was a witness to some of the acts—when the child was four years old. The mother wanted to get on with her life. Her explanation to the child was that "Daddy had to go away."

We were quite nervous about the harm we might cause by performing our role. The mother had informed us, through her attorney, that the child had been kept in the dark about all that had happened. We were concerned that merely telling the child why we were there—i.e., there was a proceeding to terminate the father's parental rights—might undermine the mother's credibility or trigger some other psychological harm. We certainly did not want to damage the relationship between the child and his mother. Nor did we want to confuse or hurt the child.

We wanted to honor the Hippocratic oath and do no harm.¹⁷⁷ What we did was test the assumption that the child probably knew more than the mother thought he knew. We told him that we were his lawyers—without much context. We then asked the child if there was anything he thought we should know.

175. See DONOVAN, *supra* note 23, at 75; Karpel, *supra* note 4, at 299–300.

176. The facts have been changed in key details to protect confidentiality.

177. See HIPPOCRATES, THE OATH (400 B.C.E.), as reprinted in 38 HARVARD CLASSICS 3 (1910). The Oath of Hippocrates does not actually use the phrase "do no harm." Rather, it says "I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous." *Id.*

The child knew about everything—the violence, the standoff, even prison. He knew far more than we did. What was ironic was that the child was initially reluctant to tell us what he knew in order to protect his mother's secret.¹⁷⁸ Once we explained the confidentiality of our conversations, out came all the details. Having that information enabled us, over time, to work with him as a client. The information also helped us persuade his mother to get him to therapy to address the aftermath of what he already knew and of his assumed role of protecting his mother.

The second piece of good news for us is the realization that kids have a need to know independent of their legal need. This is borne out by the adoption research as well as the general unease that kids feel when they know something is amiss but do not know what it is.¹⁷⁹ They want to be “in on it.” They feel distanced, isolated, and powerless when they are not “in on it.” We have seen that their imaginations can run wild when their hopes or fears are not supported by facts. They are more likely to be vested in any decisions about their lives if they understand them. The harm of revealing the family secret may be less than we might fear.

Or it might not. We, as lawyers, have to make a judgment call about how much of a family secret is revealed to our clients. It is not an easy choice. We are not psychologists. Even with their help, we sometimes get it wrong. In one case, where the family secret was revealed, our client sadly asked us, “*You* wanted me to know, didn't you? Why did you have to let me find out?” In another case, where we held off—and our client found out anyway—he was very angry that we kept the secret from him. Indeed, as secret keepers to and from our child-clients, we are subject to the same problems and stresses that the family secret keepers struggle with.

What we need to do more than anything is get to know our clients well. As Jean Koh Peters says, we have to get to know the “child in context.”¹⁸⁰ The other answer is that we have to give up some of our control and ask for help from the professionals. The research shows that family secrets usually need to be revealed.¹⁸¹ Revealing secrets is our default position. Nevertheless, we need to ask for help before making those decisions without violating confidentiality and our duty of loyalty to our clients. The new Model Rule 1.14—adopted by the ABA but not yet by most states—allows us some leeway to ask for help.¹⁸² Communicating with the professionals can be essential.

Although we cannot abdicate our role as lawyers, we can, within limits, discuss a potential client disclosure with therapists and case managers. We have also learned to ask for guidance from the court. In several cases—especially where we disagreed with the professionals—we have made a request to the judge for guidance.

178. See *supra* text accompanying notes 102–06.

179. See *supra* text accompanying notes 96–98, 149–60.

180. KOH PETERS, *supra* note 6, at § 4.3.

181. See *supra* text accompanying notes 130–37.

182. See MODEL RULES OF PROF'L CONDUCT R. 1.14 (1983) (amended 2002).

Further, when we have made a decision to disclose a family secret, we have learned that the secret needs to be revealed in a therapeutic setting—preferably by the secret keeper and not by us.¹⁸³ Luke should not have to find out about his father from his lawyer. Lawyers may be the last people on earth who should be telling kids about family secrets. We are not trained therapists. We are natural outsiders. We may not even be believed.

Family secrets should be revealed in a planned, therapeutic way. The timing of what gets said, how it is said, and how much information is given to a child is not a legal decision. It is a therapeutic decision. And for the most part, if healing is to occur, children should learn family secrets from their parents or other caretakers under the care of a qualified therapist.¹⁸⁴

The latter problem poses difficulties of control for lawyers. We are asking outsiders to deliver our confidential communications to our clients. We may not be present. We may not know all that is said. There will be no privilege for what is said to them and for what they say back.¹⁸⁵ Our clients' reactions may be subject to discovery and disclosure. Further, the parents may have a legal need to keep their mouths shut and not participate in the family therapy.

The very fact that lawyers are the only legally designated secret holders for both parent and child makes it difficult to allow our clients to address their issues in family therapy. Is there a way to make our function more therapeutic and less focused on the adult legal needs?

2. Keeping the Secret

Sometimes it is the child who has the secret. We have learned that kids need a private place. Keeping some secrets is an essential element of their identity formation. It is part of growing up.¹⁸⁶ Even with toxic secrets, children need to share the secret with someone safe.¹⁸⁷ For abused or neglected children, it is usually not their parents. That position may have been forfeited by the abuse or neglect. In the child protective world, the next best available person would often be their therapist.

Unfortunately, in the context of child protection, there are no secure ways for a child to share a secret with a therapist. Therapy is less than private.¹⁸⁸ Judges

183. See *supra* text accompanying notes 130–37.

184. *Id.*

185. See THOMAS A. MAUET & WARREN D. WOLFSON, TRIAL EVIDENCE 271 (2d ed. 2001).

186. See *supra* text accompanying notes 58–69.

187. See *supra* text accompanying notes 118–37.

188. Indeed, it is common practice in our jurisdiction for children's therapists to assert that only Child Protective Services (the agency that hired them and has custody of the child)—and not the child herself—can authorize the release of information about our clients to us. The child does not own her privacy rights; it is owned by the parent or by the state *in loco parentis*. See *Ariz. Dept. of Econ. Sec. v. Superior Court*, 832 P.2d 705 (1992). See also ARIZ. REV. STAT. § 25-403(H) (2003).

and case managers need the information to make informed decisions, and parents will have access to information as a matter of due process.¹⁸⁹

By default, the secret keeper becomes the child's lawyer. Under most rules of evidence, nobody can make us tell.¹⁹⁰ We are very effective at keeping secrets, but we are not therapists. We are not trained mental-health professionals. We are poorly equipped to help a child process secrets in a healthy way.

Can we protect our clients by finding ways to help them participate in therapy that is not conducted in a legal fish bowl?

C. The Rights of Parents

Several years ago, I was driving in my car one day and heard an ad on the radio from the Attorney General of New York. In brief, it went something like this:

Sounds of a crying baby. Sounds of an angry parent.

Then the Attorney General saying:

"If you are a parent who sometimes loses control or feels like you are about to lose control, there is help. If you feel angry and at the end of your rope, there is help. Call the parent hot line at 800-555-5555. We can help!"

It sounded great. What a thoughtful service. "Except," I thought, "Call the hot line. Leave your name. Get arrested? Lose your kids?"

We know that the healthy thing to do is to get abused children in therapy with their parents. The parents need to unburden themselves in order to heal. The parents need to take responsibility for the family secrets. And, if we are to prevent blame taking, internalizing shame, and parentification, children need to know that the parents are taking responsibility.¹⁹¹

Unfortunately, adult legal needs keep parents from participating in family therapy with their children. Talk about it and you expose yourself to criminal liability. Talk about it and it gets back to the judge. Talk about it and they may keep your children forever. Every lawyer knows that the only safe legal advice is that they should exercise their right to remain silent.

Parents' rights take a different twist when it comes to maximizing their opportunity to disclose family secrets therapeutically in the interest of healing their child and the family. We have learned that family therapy is a critical part of any plan for healing an abused or parentified child. We know that we want family therapy to work. We have learned that for family therapy to work, parents have to participate and take responsibility for their part of the family secrets.

Unfortunately, for many parents, full disclosure has criminal ramifications. If parents talk openly within therapy, they could be subject to

189. See *Santosky v. Kramer*, 455 U.S. 745 (1982).

190. MAUET, *supra* note 185, at 271-72.

191. See *supra* text accompanying notes 100-12.

criminal sanctions that could result in incarceration. There is no privilege for information relating to child abuse. Parents are routinely instructed by their lawyers not to talk to anyone.¹⁹² The choice then becomes one between freedom and assisting in the healing process for the child and the family. In my view, from the perspective of the child, that is an untenable choice.

In our Clinic, we have seen many, many cases in which the parent, because of fear of criminal liability, stands mute. The parent does not participate in individual psychological or psychiatric counseling.¹⁹³ The parent does not participate in family therapy. In the meantime, the clock is ticking on return of the child. The parent may not be able to complete the reunification process in the time allotted under federal law.¹⁹⁴ By trying to stay out of jail, the parent may further contribute to the end of the family.

More problematic is the parent's right to information to which the court is privy. Certainly, parents hold sufficient due process interests in the adjudication of dependency to know and be able to respond to what the court knows. However, when what the court knows comes directly from the child and refers to a family secret, we are putting a tremendous amount of pressure on the child either (1) to disclose shameful information to strangers, or (2) to engage in a known act of betrayal to the child's parents.¹⁹⁵

We know that some children may internalize the shame. Disclosure then becomes all the more painful. We also know that betrayal of a family secret puts tremendous pressure on a child.¹⁹⁶ If, as Professor Emory argues, we place an unreasonable burden on children when we ask them to assume the responsibility of choosing between their parents in a custody case, imagine the burden when we ask them to disclose shameful family secrets.¹⁹⁷

VI. A COUPLE OF SUGGESTIONS: IN THE INTERESTS OF THE CHILD, LET'S ALL GIVE UP A LITTLE CONTROL

A. Limited Reporting

When we become more mindful of the complex nature of secrets, family secrets, and the healing process, we know that we need to maximize the opportunities for therapy to work. Therapy has to be safe and confidential. And it has to include the parents taking responsibility for their actions. We have learned

192. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 480–81 (1968).

193. In one recent situation, a parent moaned out loud (much to the consternation of her lawyer), "I want to apologize to her. Tell her it's not her fault. But my lawyer said that I have to keep mum."

194. See ASFA, *supra* note 19. When children are placed in non-relative foster care, a parent has to be able to reach a level of parental competence within fifteen months under most circumstances or the state will be pressured to pursue a permanent termination of those rights.

195. See *supra* text accompanying notes 98–100.

196. *Id.*

197. See Emery, *supra* note 174.

that shame and stigma are powerful toxins within the family. Knowing that a judge may hear the shameful secret can only intensify the shame. Allowing the secret to be opened without immediate exposure might encourage parents to become more engaged in family therapy.

We need to ask courts, child protective workers, and even law enforcement to back off somewhat—to be conscious of the effect of outside intrusion into family secrets and into the family therapy process. We cannot ask them to stop doing their jobs—their jobs are essential for keeping children safe. However, we can remind them that being too intrusive can have adverse consequences for the parents and children involved in family therapy.

How can we intelligently back off? First, we can allow therapists and their clients some autonomy to reveal only what is essential to a judge's decision-making. For example, Kalichman argues that mandatory reporting laws interfere too much in the healing process for abusing families because, in part, of the need for trust and confidentiality in therapy.¹⁹⁸ He argues that we should give mental health providers much more autonomy about what to report and when. Kalichman's thesis is that mandatory reporting triggers such a panoply of adverse events for the discloser that it undermines the basic therapeutic mission. He argues that we should trust the therapist to report what is really necessary to report—especially where the potential abusers are already in therapy.¹⁹⁹

There are many arguments concerning unreported child abuse that cannot be addressed in this article. However, for abuse and neglect that has already been reported and is under court supervision, a better understanding of the nature of secrets and of family therapy strongly suggests that we allow courts leeway to grant some autonomy to mental health providers. Judges could have some discretion to allow therapists to work with their clients and decide collaboratively what information needs to be revealed to the court. Loosening reporting requirements might be especially appropriate where there is no question of immediate safety for a child.

Further, restricting the abilities of the parties to force testimony from therapists might also enhance therapeutic success. Parties are naturally reluctant to forego calling the therapist as a witness—at least when the therapist's position is aligned with theirs. But we have had some success in getting them to stipulate to limited therapeutic autonomy in their questioning so as not to undermine the therapeutic relationship. Usually that involves stressing our position as the child's attorney and the long-term interests of the child in effective family therapy.

B. Limited Parental Immunity

I also advocate limited parental immunity.²⁰⁰ Whatever parents say in the context of court-ordered therapy or in the context of court discussions about a

198. See KALICHMAN, *supra* note 30, at 31, 169–93.

199. *Id.*

200. With the exception of New Mexico, this is done only on an ad hoc basis from jurisdiction to jurisdiction. See N.M. STAT. ANN. § 32A-4-11 (Michie 2002).

child's case plan should be given full use immunity in any criminal prosecution—and maybe even by the juvenile or family court. The immunity should be at the discretion of the judge in charge of safeguarding the best interests of the child. It should not be in the discretion of a criminal court or a prosecutor. Their jobs are not to put the child first.

I realize that it may appear that a limited immunity would interfere in essential prosecutorial functions. From the prosecutor's perspective, if circumstances are sufficiently serious to warrant criminal prosecution, the juvenile or family court should not interfere in the pursuit of evidence. Nonetheless, in a practical sense, there is little for a prosecutor to lose. Once a parent is before the juvenile court, that parent is appointed counsel who will, in all probability, strongly advise the client to remain silent. If the advice is followed, there will be no statements that a prosecutor could use. There is no evidence to pursue.

With limited immunity, the parent could participate in the family therapy and freely make the kinds of disclosures that would have been stopped by the parent's lawyer for the benefit of the child and of the family. The parent could participate in family therapy. The parent could assist the therapist in providing background information for the child's individual therapy.²⁰¹

Limited immunity is a small, but important, concession to the child's healing process. Even if the only thing a parent says to the child is "It's my fault, not yours," the healing process can begin. Without some form of immunity, the adult legal processes work against the child's interest in promoting a healthy family.

Moreover, limited immunity would allow the dependency judge access to some critical information about the mental health of the parents. The judge may not even need all of the details. The mere fact of parental participation in family therapy may be a significant piece of information in the planning process for a child.

New Mexico is currently the only state that allows immunity to be granted by the family court judge.²⁰² In most other states, the function is that of the prosecutor—and is entirely discretionary. Where there is good communication between the child protective system and the criminal justice system, a grant of immunity is more likely. We have had very limited success in getting prosecutors to agree to immunity. But we will continue to work at it.

C. Limited Discovery and Disclosure of a Child's Therapy

The adult need is to gather information and then to share it with the parties. Judges need to know and parents and CPS need to know what the judge knows. If the child is in therapy, then the child's secrets become disclosed to all.

We justify that forced disclosure in the interests of children's safety. I sometimes wonder, however, if that interest goes too far. Certainly after

201. Background information can be a critical element in adolescent therapy. See Friedrich, *supra* note 120.

202. N.M. STAT. ANN. § 32A-4-11.

adjudication, the child ought to be safe. Perhaps, at that point, during the reunification phase, the parents' due process interest in knowing what the judge knows is less exact. Perhaps we can take some pressure off the child and insulate the child's disclosures and the therapeutic process of disclosure from parental scrutiny until the therapeutically optimal conditions are put in place.

These are not dramatic suggestions. The adult legal need for information and the child and family's need for protected therapy are both important. Nonetheless, if the object of child protection proceedings is therapeutic, and we fully understand the implications of adult legal processes on therapeutic success, perhaps the long term interests of the child will help the legal system see the big picture goal of a more healthy family.

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