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Has Time Rewritten Every Line?: Recovered-Memory Therapy and the Potential Expansion of Psychotherapist Liability

Jeffrey A. Mullins

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* The Author wishes to thank his stepfather, William J. Wynne, not only for his encouragement, but also for many years of building good memories.

I. Introduction

Memories may be beautiful, and yet . . .
What's too painful to remember,
We simply choose to forget.[1]

In California, a jury convicted George Franklin of a previously unsolved murder.[2] Prosecutors relied heavily on the testimony of Franklin's daughter.[3] In the daughter's account of the homicide, she described events that she allegedly recalled after repressing memories of the murder for nearly two decades.[4] In Washington state, Paul Ingram confessed to the Satanic ritual abuse of his two daughters.[5] Before his daughters' allegations of abuse, Ingram had no recollection of the abuse.[6] Ingram later allegedly remembered engaging in abusive acts that even his children did not allege.[7] In California, Gary Ramona sued his daughter's therapists.[8] Ramona as-

1. JOHNNY MATHIS, *The Way We Were*, *on* THE VERY BEST OF JOHNNY MATHIS (Heartland Music 1992).

2. *See* LENORE TERR, UNCHAINED MEMORIES 1-60 (1994) (describing George Franklin trial); *see also* Victor Barall, *Thanks for the Memories: Criminal Law and the Psychology of Memory*, 59 BROOK. L. REV. 1473, 1487-95 (1994) (reviewing HARRY N. MACLEAN, ONCE UPON A TIME: A TRUE STORY OF MEMORY, MURDER, AND THE LAW (1993) (describing George Franklin trial)). *See generally* HARRY N. MACLEAN, ONCE UPON A TIME: A TRUE STORY OF MEMORY, MURDER, AND THE LAW (1993) (describing George Franklin trial).

3. *See generally* MACLEAN, *supra* note 2 (discussing testimony of Eileen Franklin at George Franklin's trial).

4. *See generally id.* (describing Eileen Franklin's repressed memories).

5. *See generally* LAWRENCE WRIGHT, REMEMBERING SATAN (1994) (describing Paul Ingram case).

6. *Id.* at 6.

7. *Id.* at 186.

8. *See* Richard Cole, *Suit Won Against 2 Therapists*, PHILADELPHIA INQUIRER, May 15, 1994, at A3 (discussing Gary Ramona's suit against therapists accused of implanting false

serted that the therapists had negligently implanted false memories of sexual abuse into his child's mind.[9] In a landmark decision,[10] a jury agreed and awarded Ramona a substantial judgment.[11]

These cases all share a common element that lies at the heart of a controversy that currently divides both the medical[12] and legal[13] communities: recovered-memory therapy.[14] Although psychotherapists have used this therapeutic technique for many years,[15] recovered-memory therapy has gained public recognition only in the past ten years.[16] This awareness results from high-profile trials,[17] a greater awareness of child abuse,[18] and the burgeoning "self-help" industry.[19]

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memories).

9. *See generally* Katy Butler, *Clashing Memories, Mixed Messages*, L.A. TIMES, June 26, 1994, (Magazine), at 12 (discussing Ramona's claims against his daughter's therapists); *see also infra* notes 30-57 and accompanying text (describing Gary Ramona case).

10. *See* Butler, *supra* note 9, at 12 (describing Ramona case as first time court has permitted nonpatient to sue therapist for anything other than suicide or wrongful death).

11. *See* Jill Smolowe, *Dubious Memories: A Father Accused of Sexual Abuse Wins a Malpractice Judgment Against His Daughter's Therapists*, TIME, May 23, 1994, at 51 (reporting that jury awarded Ramona $500,000 in damages).

12. *See* MICHAEL D. YAPKO, SUGGESTIONS OF ABUSE 27-29 (1994) (describing how mental health profession is angrily and bitterly divided over phenomenon of repressed memories of childhood sexual abuse); *see also infra* notes 67-84 and accompanying text (outlining criticisms of recovered-memory therapy).

13. *See* Elizabeth F. Loftus & Laura A. Rosenwald, *Buried Memories, Shattered Lives*, A.B.A. J., Nov. 1993, at 70, 70 (noting skepticism with which many judges and juries are beginning to view some sex abuse claims based on recovered memories).

14. *See infra* notes 58-84 and accompanying text (describing recovered-memory therapy and surrounding controversy).

15. *See* Richard Ofshe & Ethan Watters, *Making Monsters: Recovered Memory Therapy*, SOCIETY, Mar./Apr. 1993, at 4, 5 (recognizing that mental health community has used concept of repression in different ways for 100 years).

16. *See* YAPKO, *supra* note 12, at 16-17 (describing rapid increase in repressed childhood abuse inquiries during 1980s); *see also* Sarah Strickland, *It Didn't Happen, But He Remembered It: An American Professor Claims to Have Concrete Evidence that Memories Can Be False*, INDEPENDENT, Oct. 9, 1994, at 22 (noting that recovered-memory controversy began to sweep United States in mid-1980s).

17. *See supra* notes 2-11 and accompanying text (outlining highly publicized cases of George Franklin, Paul Ingram, and Gary Ramona).

18. *See* YAPKO, *supra* note 12, at 18-19 (noting how, upon recognition by mental health profession that sexual abuse of children is not so uncommon, "floodgates" opened for reports of childhood sexual abuse).

19. *See id.* at 137-42 (describing United States as nation that encourages individuals to shirk responsibility for their problems, thus leading to America's rise as nation of "victims").

Recovered-memory therapy has embroiled legal scholars in heated debates over topics such as the tolling of statutes of limitations in cases involving recovered memories.[20] The landmark decision in *Ramona v. Isabella*,[21] the first case in which a nonpatient successfully sued a psycho-therapist for the negligent utilization of recovered-memory therapy,[22] shifted the focus to the propriety of nonpatient suits against negligent recovered-memory therapists.[23]

This Note examines the justification for extending psychotherapist liability beyond the traditional physician-patient relationship to include compensating nonpatient family members injured by a psychotherapist's negligent utilization of recovered-memory therapy.[24] Part II.A discusses *Ramona* itself.[25] Part II.B describes recovered-memory therapy and the surrounding medical controversy.[26] Part III.A discusses the legal controversy surrounding *Ramona*.[27] Part III.B examines how courts use policy, rather than black-letter law, to decide whether to extend physician liability to nonpatients.[28] Part III.C argues that policy considerations warrant extending psychotherapist liability to nonpatient family members in *Ramona*-type cases.[29]

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20. *See generally* Gary M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. CRIM. L. & CRIMINOLOGY 129 (1993) (advocating caution in tolling statute of limitations in repressed memory cases); Gary Strauss, Comment, *Child Sexual Abuse Civil Actions and the Statute of Limitations: Time is Running Out*, 1993 DET. C.L. REV. 1641 (discussing balance between risk of stale claims and right to cause of action in debate over statute of limitations).

21. Ramona v. Isabella, No. C61898 (Cal. Super. Ct. Napa County May 13, 1994).

22. *See* Sherrie F. Nachman, *A Victory for a Victim of "False Memories,"* AM. LAW., July/Aug. 1994, at 33 (portraying *Ramona v. Isabella* as first successful verdict against practitioners of recovered-memory therapy).

23. *See infra* notes 201-87 and accompanying text (discussing propriety of *Ramona*-type suits).

24. *Cf.* ROBERT I. SIMON & ROBERT L. SADOFF, PSYCHIATRIC MALPRACTICE: CASES AND COMMENTS FOR CLINICIANS 28 (1992) (noting traditional common-law requirement of physician-patient relationship).

25. *See infra* notes 30-57 and accompanying text (discussing *Ramona*).

26. *See infra* notes 58-84 and accompanying text (describing recovered-memory therapy and surrounding medical controversy).

27. *See infra* notes 85-92 and accompanying text (discussing legal controversy surrounding *Ramona*).

28. *See infra* notes 93-200 and accompanying text (examining how courts consider policy factors when faced with expanding physician liability).

29. *See infra* notes 201-87 and accompanying text (arguing that policy considerations

II. Recovered-Memory Therapy: A Controversial Treatment

A. Ramona v. Isabella

In early 1990, Gary Ramona embodied the American dream. He had a beautiful wife and three loving daughters.[30] As sales and marketing vice president[31] for the Robert Mondavi winery,[32] Ramona earned $500,000 annually and was building a $3 million dream house.[33] But, on March 15, Ramona's life began to fall apart.[34] On that day, Ramona's daughter, Holly, in the company of her mother, Stephanie Ramona, and her therapist, Dr. Marche Isabella, accused Gary of sexual abuse.[35] Holly claimed that she had recovered memories of this abuse with Isabella's assistance.[36] In the years that followed, Ramona's wife divorced him, his daughters refused to see him, and the Robert Mondavi winery fired him.[37]

Holly did not remember any abuse before the fall of 1989.[38] At that time, Holly began receiving therapy from Isabella for depression and bulimia.[39] Isabella, who suggested a link between bulimia and sexual abuse, asked codefendant Richard Rose to give Holly a dose of sodium amytal[40] and

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support extending psychotherapist liability to nonpatient family members in *Ramona*-type cases).

30. *See* Butler, *supra* note 9, at 12 (describing Ramona's life before accusations arose).

31. *See id.* (same).

32. The *Ramona* case is, perhaps, better-known as "the Mondavi wine trial," regardless of the winery's relatively minor connection to the trial. *See* Victoria Slind-Flor, *On Trial: He Says 'Recovered' Memories Ruined Him*, NAT'L L.J., Apr. 18, 1994, at A10 (depicting winery's tenuous, but well-known, connection to *Ramona*).

33. *See* Butler, *supra* note 9, at 12 (describing Gary Ramona's life before case).

34. *See id.* (discussing result of daughter's accusations).

35. *See id.* at 36 (describing conflicting views of confrontation on March 15, 1990).

36. *See id.* (discussing Holly's claims of recovered memories).

37. *See id.* at 12 (discussing results of accusations for Gary Ramona). The Mondavi winery denied that they based Ramona's discharge from the company on the charges of sexual abuse. *See* Slind-Flor, *supra* note 32, at A10 (discussing Mondavi winery's explanation of Ramona's departure). Instead, they claim that they fired Ramona because he "represented a style of management that could not accommodate to the changing of the guard when Tim and Michael Mondavi took over the reins of the winery from patriarch Robert Mondavi." *See id.* (explaining conflict of management style).

38. *See* Butler, *supra* note 9, at 12 (discussing Holly's lack of memory of any abuse).

39. *See id.* (describing Holly's treatment beginning in fall of 1989); *see also* YAPKO, *supra* note 12, at 20 (1994) (describing recovered-memory therapists' tendency to use checklists of symptoms of sexual abuse).

40. *See* People v. Bynum, 556 P.2d 469, 470 (Colo. 1976) (explaining use of sodium amytal). "Sodium amytal is popularly misnomered as a 'truth serum,' and . . . the drug acts

began utilizing recovered-memory therapy.[41] As a result of this treatment, Isabella claimed that Holly uncovered previously buried memories of sexual abuse by her father.[42] Holly and Isabella continued the treatment until Holly confronted her father in March 1990.[43] One year later, Gary Ramona filed suit against Isabella, Dr. Richard Rose (the hospital's administrator), and the hospital where Holly received treatment.[44] Ramona alleged that the doctors had implanted false memories of sexual abuse into his daughter's mind.[45]

The court's willingness even to allow Ramona to maintain the suit was ground-breaking.[46] In most cases, courts only permit nonpatients to sue physicians for injuries resulting from the patient's subsequent conduct, not from the physician's treatment itself.[47] *Ramona v. Isabella* was also the first case that put the validity of recovered-memory therapy itself on trial.[48] Even more amazing was the suit's outcome — a Napa Valley jury awarded Gary Ramona $500,000 in damages.[49] Although the jury's decision was vague,[50] the implication was clear: Psychotherapists who use recovered-memory therapy owe, at least in some instances, a duty of care to nonpatients.[51]

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as a depressant which is sometimes used as a diagnostic tool by psychiatrists to reduce a patient's inhibitions so that his subconscious impressions might be more deeply probed." *Id.*

41. *See* Butler, *supra* note 9, at 34 (discussing Isabella's use of sodium amytal in recovered-memory therapy).

42. *See id.* (discussing Isabella's recollection of results of treatment).

43. *See id.* (describing Holly's confrontation of her father).

44. *See id.* at 12 (noting Gary Ramona's suit against Marche Isabella, Dr. Richard Rose, and Western Medical Center of Anaheim).

45. *See id.* at 34 (recognizing Ramona's allegation that Isabella had "suggested sexual abuse" to his daughter).

46. *Cf.* Christina Bannon, Comment, *Recovered Memories of Childhood Sexual Abuse: Should the Courts Get Involved When Mental Health Professionals Disagree?*, 26 ARIZ. ST. L.J. 835, 850 (1994) (stating that *Ramona* could open door for more nonpatient lawsuits).

47. *See* Butler, *supra* note 9, at 12 (recognizing *Ramona* as first time court has allowed nonpatient to sue for something other than suicide or wrongful death).

48. *See* B. Drummond Ayres, Jr., *Father Who Fought 'Memory Therapy' Wins Damage Suit*, N.Y. TIMES, May 14, 1994, § 1, at 1 (referring to *Ramona* as first case in which nonpatient challenged therapists who treat patients with recovered-memory therapy).

49. *See* Smolowe, *supra* note 11, at 51 (noting 10-to-2 vote and jury award of $500,000).

50. *See* Butler, *supra* note 9, at 12 (characterizing jury verdict and award of only $475,000 of $8 million sought as "complex" and "ambiguous"). However, statements from jury members have made it clear that they did not believe that the therapists were malicious in their actions. *See* Smolowe, *supra* note 11, at 51 (quoting jury foreman Thomas Dudum as saying: "We felt there was nothing done [by the therapists] that was malicious").

51. *See* Smolowe, *supra* note 11, at 51 (stating fact that jurors held therapists negli-

The responses to nonpatient suits against therapists understandably have been diverse. On one side are those who criticize extensions of physician liability like *Ramona* because they believe that such verdicts will stymie much-needed medical research into new therapeutic techniques,[52] that individuals will be unable to receive much-needed treatment,[53] and that the decisions impermissibly ignore the traditional requirement that a physician-patient relationship exist before liability can attach.[54] In the opposite camp, the wrongfully accused and therapists wary of recovered-memory therapy have praised *Ramona* for its recognition of the enormous risks[55] that this allegedly uncertain method of treatment creates.[56]

Recovered-memory therapy lies at the heart of this matter. The technique has divided mental health professionals, which has made it difficult to justify either the imposition of, or the immunization from, liability.[57]

B. Recovered-Memory Therapy and the Underlying Medical Controversy

Recovered-memory therapy, as the name implies, is a technique psychotherapists utilize to help patients recover memories that they, for one reason or another, have repressed as a defense mechanism.[58] Full understanding of the controversy surrounding this therapy and the propriety of imposing liability on negligent psychotherapists requires an understanding of the methodology employed by recovered-memory therapists.

While techniques vary among therapists, recovered-memory therapy almost always arises in the same way. A patient seeks treatment from the

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gent).

52. *See* TARKY LOMBARDI, JR. WITH GERALD N. HOFFMAN, MEDICAL MALPRACTICE INSURANCE: A LEGISLATOR'S VIEW 23-24 (1978) (stating claim of many doctors that threat of malpractice suits limits medical research).

53. *See* Cole, *supra* note 8, at A3 (noting concern that *Ramona* verdict will make therapists overly cautious in treating patients).

54. *See infra* notes 85-86 and accompanying text (outlining traditional medical malpractice rule requiring physician-patient relationship to maintain action).

55. *See* Tom Philp, *Recovered-Memory Debate: Quackery or Crime Solver?*, SACRAMENTO BEE, July 24, 1994, at A1, A21 (quoting mental health expert as stating that recovered-memory therapy makes lobotomy look like trivial error by comparison).

56. *See* Barall, *supra* note 2, at 1479 (pointing out that modern psychologists are neither as skeptical as Freud nor uncritically accepting of reliability of recovered memories).

57. *See* YAPKO, *supra* note 12, at 27-29 (describing how recovered-memory therapy divides the mental health profession).

58. *See* Ayres, *supra* note 48, at 1 (stating that goal of recovered-memory therapy is to "prod patients into recalling events that were so traumatic that their minds repressed them").

therapist, perhaps for a problem that the patient believes to be unrelated to sexual abuse.[59] Most therapists have a checklist of symptoms that indicate past sexual abuse and will compare the list with the patient's complaints.[60] If the patient exhibits some or all of the telltale symptoms of childhood sexual abuse, the therapist probably will confront the patient directly and ask the patient about past sexual abuse.[61] If the patient denies being molested, the therapist then will attempt to have the patient recover memories of any abuse that may have occurred.[62]

The psychotherapist has many tools to aid the patient's recovery of these memories, including drugs,[63] hypnosis, guided fantasy, automatic writing, strategic use of support groups, suggestion, interpersonal pressure, and appeal to authority.[64] Patients often are very susceptible to these techniques, and it is possible for the therapist to implant false memories into the patient's mind.[65] Proponents of recovered-memory therapy claim that, after extensive therapy, the patient can recall instances of abuse long buried in the recesses of the mind.[66] Critics of this technique, however, emphasize the suggestibility of a patient who is seeking to uncover the causes of his or her emotional problems.[67] These detractors also allege that many proponents of recovered-memory therapy misunderstand the way that memory actually works, which the critics claim further flaws this method.[68]

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59. *See* Butler, *supra* note 9, at 12 (noting that Holly Ramona did not seek treatment for sexual abuse). For example, Holly Ramona initially sought treatment for depression and bulimia. *See id.* (discussing Holly's treatment).

60. *See* YAPKO, *supra* note 12, at 107 (describing how some therapists use checklists in making diagnoses).

61. *See id.* at 20 (noting that patients are sometimes told that their symptoms suggest childhood abuse).

62. *See* Ofshe & Watters, *supra* note 15, at 4 (discussing therapist's attempts to recover any memories of abuse).

63. *See supra* note 40 and accompanying text (describing how psychotherapists use sodium amytal).

64. *See* Ofshe & Watters, *supra* note 15, at 7 (discussing techniques that recovered-memory therapists employ). "Automatic writing" refers to the hypnotic technique whereby "the patient engages in writing her unconscious thoughts while performing some other activity." Jacqueline Kanovitz, *Hypnotic Memories and Civil Sexual Abuse Trials*, 45 VAND. L. REV. 1185, 1262 (1992) (discussing use and recognizing risk of hypnosis).

65. *See* Loftus & Rosenwald, *supra* note 13, at 70 (relating some researchers' claims that therapists inadvertently may plant false memories through suggestive questioning).

66. *See* TERR, *supra* note 2, at 40-41 (claiming that victim can recall traumatic childhood experiences in adulthood without much blurring).

67. *See* YAPKO, *supra* note 12, at 92-111 (outlining phenomenon of human suggestibility).

68. *See id.* at 69-81 (outlining how memory does, and does not, work).

Critics of the technique say that the validity of recovered-memory therapy largely relies on an outdated conception of how memory works.[69] Previously, the mental health profession believed that memory worked much like a tape recorder: The mind stores all events and their surrounding details, and an individual can review these events and details with complete accuracy by merely pressing the mental "Play" button.[70]

However, scientists now believe that memory works more like a file cabinet.[71] When an individual experiences an event, the mind divides the occurrences into tiny bits.[72] Next, the mind parcels these fragments to various areas of the brain, much like a filing system.[73] Finally, the brain "tags" the pieces so that these pieces will remain linked together.[74] When the individual tries to remember the event, the mind must reassemble the bits and pieces to form a coherent memory.[75] This job belongs to the limbic system of the brain.[76]

The difference between the filing system theory and the tape recorder model is that the filing system theory recognizes that the mind can take many accurate, but unrelated, pieces of memories and put them together, a process that may result in a false memory.[77] For example, consider a witness to a car accident who claims (and honestly believes) that the defendant driver ran a red light.[78] Quite possibly, the witness's mind took actual memories of the accident and put them together with other actual, though unconnected, memories of cars failing to heed traffic signals.[79]

The implications of the "filing cabinet" conception of memory are enormous.[80] An already impressionable patient can take actual memories,

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69. *See* Ofshe & Watters, *supra* note 15, at 4, 5-7 (claiming that scientific studies have shown recovered-memory therapists' understanding of how memory works to be incorrect).

70. *See id.* at 5-6 (noting that basis of recovered-memory therapy emerges from belief that human mind records and stores everything perceived).

71. *See* Sharon Begley with Martha Brant, *You Must Remember This*, NEWSWEEK, Sept. 26, 1994, at 68 (describing how memory is thought to work).

72. *See id.* (describing experience as "bits and pieces").

73. *See id.* (describing parceling out of pieces into different areas of brain, such as the visual and auditory cortexes).

74. *See id.* (discussing role of limbic system in gathering pieces into cohesive whole).

75. *See id.* (same).

76. *See id.*

77. *See id.* (recognizing inevitability that "people will 'remember' things that never happened").

78. *Cf. id.* (illustrating possibility of "false memory").

79. *Cf. id.* (describing incorrect assembly of memory pieces into "false memory").

80. *See* YAPKO, *supra* note 12, at 92-111 (discussing phenomenon of human suggest-

such as being hugged as a young child by her father and, at the suggestion of a negligent psychotherapist, connect them with other actual memories, such as an early traumatic experience, to "recall" instances of sexual abuse that never occurred.[81] Thus, an overzealous therapist can further complicate the already tenuous system of memory recall.

Because of the danger of memory implantation, recovered-memory therapists must take caution in their treatment, especially given the devastating injuries that may result.[82] Though proponents of the technique claim that critics overstate the danger,[83] even some recovered-memory therapists admit that some risk does exist.[84]

III. Should Courts Extend Psychotherapist Liability to Nonpatient Family Members Injured by Negligent Recovered-Memory Therapy?

A. Why is Ramona *Legally "Groundbreaking"?: A Precedential Explanation*

Generally, a plaintiff in a medical malpractice action must prove the existence of a physician-patient relationship[85] between the physician and the allegedly injured party.[86] Although some courts have permitted nonpatient

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ibility).

81. *See* Slind-Flor, *supra* note 32, at A10 (describing how, in *Ramona*, plaintiff's counsel argued that Holly Ramona's alleged memories of sexual abuse were misplaced recollections of unanesthetized cystoscopic examination performed when she suffered chronic bladder infections at young age).

82. *See* Philp, *supra* note 55, at A21 (quoting mental health expert as stating that recovered-memory therapy makes lobotomy look like trivial error by comparison).

83. *See* TERR, *supra* note 2, at 40-41 (claiming that firsthand, traumatic memory does not appear to undergo much weakening or blurring over time).

84. *See* Mark Bowden, *Repressed-Memory Syndrome Splits Psychiatrists*, PHILADELPHIA INQUIRER, May 23, 1994, at B2 (describing recovered-memory therapy advocate's alleged admission that some recovered memories are false).

85. *See* Neil J. Squillante, Comment, *Expanding the Potential Tort Liability of Physicians: A Legal Portrait of "Nontraditional Patients" and Proposals for Change*, 40 U.C.L.A. L. REV. 1617, 1632 (1993) (defining traditional physician-patient relationship). "The hallmarks of a 'traditional' [physician-patient] relationship are: (1) affirmative treatment of an individual; or (2) a benefit bestowed upon the individual, such as medical advice." *Id.*

86. *See* Weaver v. University of Mich. Bd. of Regents, 506 N.W.2d 264, 266 (Mich. Ct. App. 1993) (noting that physician-patient relationship is necessary in order to maintain medical malpractice action); Gallion v. Woytassek, 504 N.W.2d 76, 79 (Neb. 1993) (recognizing that physician's duty to exercise required skill or standard of care must arise out of physician-patient relationship); Heller v. Peekskill Community Hosp., 603 N.Y.S.2d 548, 549 (App. Div. 1993) (noting that physician-patient relationship is necessary in order to maintain medical malpractice action).

suits against doctors, these rare cases generally have involved a nonpatient who seeks reparation for injuries resulting from the conduct of the doctor's patient, not the physician's conduct.[87] For example, courts have held health care providers liable to nonpatients in cases in which a physician who knew or should have known of his patient's intent to harm a nonpatient failed to warn the subsequently injured nonpatient.[88] Courts also have held doctors accountable to injured nonpatients for failing to instruct patients about the side-effects of certain drug treatments before driving,[89] for failing to warn identifiable nonpatients about the contagious nature of the patients' diseases,[90] and for releasing mentally disturbed patients.[91]

The history of the physician-patient relationship requirement and the unwillingness of courts to allow nonpatient suits for injuries caused directly by a doctor's conduct jointly illuminate why *Ramona*, though only a trial court decision, incited such a furor in the legal and medical communities. *Ramona* not only permitted a nonpatient suit against a psychotherapist, but also allowed recovery for nonpatient injuries caused by a mental health professional's treatment of a patient.[92] Thus, if *Ramona* signals a new

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87. *See infra* notes 88-92 and accompanying text (discussing exceptions to physician-patient relationship requirement).

88. *See* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 353 (Cal. 1976) (finding that therapist failed to exercise reasonable care to protect nonpatient from psychiatric patient).

89. *See* Gooden v. Tips, 651 S.W.2d 364, 370 (Tex. Ct. App. 1983) (holding that nonpatients injured in car accident by patient stated cause of action against physician who allegedly prescribed drug to patient and failed to warn patient about drug's intoxicating effect). "[I]t is apparent that, under proper facts, a physician can owe a duty to use reasonable care to protect the driving public where the physician's negligence in diagnosis or treatment of his patient contributes to plaintiff's injuries." *Id.* at 369.

90. *See* Bradshaw v. Daniel, 854 S.W.2d 865, 872 (Tenn. 1993) (holding that physician owed nonpatient duty to warn about contagious nature of disease). "We, therefore, conclude that the existence of the physician-patient relationship is sufficient to impose upon a physician an affirmative duty to warn identifiable third persons in the patient's immediate family against foreseeable risks emanating from a patient's illness." *Id.*

91. *See* Wofford v. Eastern State Hosp., 795 P.2d 516, 520 (Okla. 1990) (holding that psychiatrist has duty to exercise reasonable professional care in discharge of mental patient). In *Wofford*, the court stated:

> [A] psychiatrist has a duty to exercise reasonable professional care in the discharge of a mental patient . . . [w]hen in accordance with the standards of his profession the therapist knows or should know that his patient's dangerous propensities present an unreasonable risk of harm to others. The duty extends to such persons as are foreseeably endangered by the patient's release.

Id.

92. *See supra* note 49 and accompanying text (noting that Ramona received substantial verdict against psychotherapist who had treated Ramona's daughter).

extension of physician liability to nonpatients, then the case warrants an examination of the justifications for broadening doctors' legal duties.

B. *Important Factors in Imposing Tort Liability*

A medical malpractice suit is essentially a tort action against a physician for negligence.[93] Thus, for a plaintiff to successfully maintain a malpractice cause of action, the plaintiff must prove, by a preponderance of the evidence,[94] the four traditional elements of a negligence suit:[95] (1) a duty owed by the doctor to the plaintiff,[96] (2) a breach of that duty by the physician,[97] (3) injury to the plaintiff,[98] and (4) a causal relationship between the doctor's breach and the plaintiff's injury.[99] Together, the first two elements constitute the alleged negligence of the physician.[100]

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93. *See* Welke v. Kuzilla, 375 N.W.2d 403, 406 (Mich. Ct. App. 1985) (recognizing that medical malpractice action is essentially tort claim of negligence).

94. *See* Palmer v. Biloxi Regional Medical Ctr., Inc., 564 So. 2d 1346, 1354 (Miss. 1990) (acknowledging that recovery by plaintiff in negligence action requires proof by preponderance of evidence of conventional tort elements).

95. *See* Caughell v. Group Health Coop. of Puget Sound, 876 P.2d 898, 906 (Wash. 1994) (listing duty, breach, proximate cause, and injury as four traditional elements of negligence).

96. *See infra* notes 201-87 and accompanying text (discussing justifications for imposing on recovered-memory therapists duty of care to nonpatient family members in *Ramona*-type cases).

97. *See* Snyder v. Cobb, 638 N.E.2d 442, 445 (Ind. Ct. App. 1994) (listing standard of care with which physician must comply). "A physician treating a patient is required to possess and exercise that degree of skill and care ordinarily possessed and exercised by a reasonably careful, skillful and prudent practitioner in the same class to which he belongs treating such maladies under the same or similar circumstances." *Id.* This Note does not describe how a recovered-memory therapist could fall below the above-described standard. For an example of how a psychotherapist could be negligent in utilizing recovered-memory therapy, see Kanovitz, *supra* note 64, at 1187-90 (describing therapy involving suggestive questioning).

98. *See* RESTATEMENT (SECOND) OF TORTS § 7 (1965) (defining "injury"). Injury is "the invasion of any legally protected interest of another." *Id.* For a description of the injuries caused by negligent recovered-memory therapy, see *infra* notes 241-47 and accompanying text (describing nonpatient injuries caused by negligent recovered-memory therapy).

99. *See* Richard R. Orsinger, *Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress in Connection with Divorce*, 25 ST. MARY'S L.J. 1253, 1282 (1994) (defining "proximate cause"). Proximate cause is "that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred." *Id.*

100. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30,

The key issue is whether a duty of care to the plaintiff exists.[101] Courts define a legal duty as nothing more than a decision that, based upon relevant considerations of public policy,[102] a plaintiff deserves judicial protection.[103] Public policy concerns are most visible — and most controversial — when a court overrules an established precedent.[104] In any event, policy forms the basis for imposing tort liability on individuals.[105]

Many factors underlie public policy, and various commentators have given different accounts of the elements that courts do — or should — consider.[106] For example, two prominent torts scholars have suggested that courts impose a duty based upon the need for compensation in a particular case,[107] the historical development of the proposed duty,[108] the moral aspect of the defendant's conduct,[109] the convenience of administration,[110] the capacity of the defendant to bear or distribute the loss,[111] and the prevention of and pun-ishment for the conduct that caused the plaintiff's injuries.[112] On the other hand, the *Restatement (Second) of Torts* simply states that courts should weigh the magnitude of the risk of injury against the utility of the conduct.[113]

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at 164 (5th ed. 1984) (stating that duty and breach constitute negligence).

101. *See infra* notes 201-87 and accompanying text (arguing that courts should impose duty of care to nonpatient family members on recovered-memory therapists).

102. *See* KEETON ET AL., *supra* note 100, § 3, at 15 (claiming that torts is battleground of social theory).

103. *See* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976) (defining legal duties as "conclusory expressions that, in cases of a particular type, liability should be imposed for damage done").

104. *See* KEETON ET AL., *supra* note 100, § 3, at 15 (discussing influence of public policy on tort law when overruling established precedent).

105. *See infra* notes 117-200 and accompanying text (demonstrating how courts weigh policy factors to determine whether to impose duties).

106. *See infra* notes 107-13 and accompanying text (discussing factors addressed in determining imposition of tort duty).

107. *See* KEETON ET AL., *supra* note 100, § 4, at 20 (recognizing need for compensation as "a powerful factor influencing tort law").

108. *See id.* at 20-21 (noting influence of precedent, as well as influences of social, economic, and political forces at time of these decisions).

109. *See id.* at 21-23 (discussing moral guilt or blame attached to defendant's actions).

110. *See id.* at 23-24 (recognizing limitations on ability to remedy all wrongs).

111. *See id.* at 24-25 (noting court's examination of ability of different parties to bear loss).

112. *See id.* at 25-26 (discussing court's desire to prevent future harm and to punish offender).

113. RESTATEMENT (SECOND) OF TORTS § 291 (1965).

Courts that have considered extending physician liability to nonpatients also have weighed policy concerns.[114] Indeed, courts expanding doctor accountability beyond the traditional physician-patient relationship have candidly acknowledged their methodology.[115] Although *Ramona* is the first case of its kind, a perusal of other physician-nonpatient case precedent is instructive on the types of policy considerations that factor into the judicial extension of liability.[116]

1. Tarasoff v. Regents of University of California: *A Methodological Point of Departure*

One particularly illuminating example is *Tarasoff v. Regents of University of California*.[117] *Tarasoff*, a controversial decision,[118] represented a marked departure from precedent that based physician liability on a physician-patient relationship[119] and, according to one commentator, signaled a new era in tort law.[120] In *Tarasoff*, the California Supreme Court imposed an obligation on physicians to notify nonpatients of impending danger from the doctors' patients.[121] A brief examination of *Tarasoff* demonstrates that

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114. *See infra* notes 117-200 and accompanying text (examining policy factors courts consider to determine whether to impose duties).

115. *See infra* notes 117-200 and accompanying text (outlining how courts openly weigh policy factors).

116. *See infra* notes 117-200 and accompanying text (examining physician-nonpatient case law).

117. 551 P.2d 334 (Cal. 1976).

118. *See* Chris M. Kallianos, *Psychiatrists' Liability to Third Parties for Harmful Acts Committed by Dangerous Patients, Survey of Developments in North Carolina Law, 1985*, 64 N.C. L. REV. 1534, 1541 (1986) (describing *Tarasoff* as controversial decision); Vanessa Merton, *Confidentiality and the "Dangerous" Patient: Implications of* Tarasoff *for Psychiatrists and Lawyers*, 31 EMORY L.J. 263, 275 (1982) (referring to *Tarasoff* as controversial and unprecedented); Walter E. Johnson, Note, *Tort Liability in Georgia for the Criminal Acts of Another*, 18 GA. L. REV. 361, 361 (1984) (describing *Tarasoff* as controversial). *But see* D.L. Rosenhan et al., *Warning Third Parties: The Ripple Effects of* Tarasoff, 24 PAC. L.J. 1165, 1224 (1993) (stating that *Tarasoff* may be considered legal embodiment of many therapists' ethical convictions).

119. *See* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 353 (Cal. 1976) (allowing nonpatient to state cause of action against therapists for failure to warn).

120. *See* Peter F. Lake, *Revisiting* Tarasoff, 58 ALB. L. REV. 97, 98 (1994) (claiming that courts have used *Tarasoff* to reconceptualize nature and source of duty and tort liability). "[*Tarasoff*] is more than just a 'policy' case . . . . Instead, *Tarasoff* is the *Palsgraf* of its generation, a case with meta-significance which endures beyond its jurisdiction, time, place, and perhaps its particular holding." *Id.* (footnote omitted).

121. *Tarasoff*, 551 P.2d at 353.

the California Supreme Court's decision provides a workable methodology under which to examine the extension of physician liability to nonpatient family members for the negligent utilization of recovered-memory therapy.

Prosenjit Poddar was a patient of Dr. Lawrence Moore, a psychologist employed by the University of California.[122] During a treatment session, Poddar confided to Moore that Poddar intended to kill Tatiana Tarasoff.[123] Moore informed campus police of Poddar's disclosure, but officers only briefly detained, then released, Poddar because he appeared "rational."[124] Moore, at least in part because of commands from his superiors, took no further action with regard to Poddar's threat.[125] Two months after his initial admission, Poddar killed Tarasoff.[126]

Tarasoff's parents brought suit against Moore and several others[127] and claimed that the defendants had breached a duty to warn Tarasoff of Poddar's plan.[128] The defendants claimed that they did not owe a duty to Tarasoff in the absence of a physician-patient relationship.[129] The California Supreme Court ruled that the therapists did owe Tarasoff a duty of reasonable care, despite the absence of a therapeutic association.[130]

In determining that the therapists owed a legal obligation to Tarasoff, the court acknowledged that courts impose duties to serve public policy.[131]

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122. *Id.* at 339.

123. *Id.*

124. *Id.* at 339-40.

125. *Id.* at 340. Tarasoff's parents, the plaintiffs in *Tarasoff*, claimed that Dr. Moore's superior, Dr. Harvey Powelson, the chief of the department of psychiatry at Dr. Moore's hospital, directed the staff to take no further action to confine Poddar. *Id.* at 340 & n.2.

126. *Id.* at 339.

127. *Id.* at 340 n.2. Besides Dr. Moore, the Tarasoffs brought suit against Dr. Moore's superior, two of Dr. Moore's colleagues — psychiatrists at the same hospital, who concurred in Moore's decision that the staff should commit Poddar — and various police officers. *Id.* As used henceforth, "defendants" will refer to the therapists and not the police officers.

128. *Id.* at 340. The Tarasoffs' complaint also based liability on the defendants' failure to confine Poddar pursuant to a statute. *Id.* As to that second ground, the California Supreme Court concluded that the defendants enjoyed the protection of statutory immunity. *Id.* at 351-53.

129. *Id.* at 340. Defendants also claimed that they enjoyed statutory immunity. *Id.* The court found that immunity protected the defendants for their failure to confine Poddar. *Id.* at 351-53. However, the *Tarasoff* court ruled that the defendant therapists did not enjoy immunity from liability for the therapists' failure to warn Tarasoff. *Id.* at 349-51.

130. *Id.* at 353.

131. *Id.* at 342. The *Tarasoff* court noted that duty "is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." *Id.* (quoting Dillon v. Legg, 441 P.2d 912,

The *Tarasoff* court stated that courts presume a duty of care whenever two parties are so situated that one person would injure another person if the former did not use reasonable care.[132] The court noted that the defendant may rebut this presumption only by a "balancing of a number of considerations."[133] The court recognized "foreseeability" as chief among those factors.[134]

A reader of *Tarasoff* naturally would expect the California Supreme Court to determine first whether the presumption of a duty of care applied to the therapists.[135] Then, if the court did presume that the therapists had a duty to Tarasoff, one would assume that the court would balance pertinent policy considerations to decide if these factors rebutted the presumption and thus did not justify imposing a duty on the therapists and similarly-situated psychologists.[136] However, the *Tarasoff* court failed to continue in such an organized fashion. After setting forth a relatively coherent and flexible analytic structure, the California Supreme Court instead relied on a technical rule from the *Restatement (Second) of Torts*.[137] The court recognized that individuals generally have no duty to control the conduct of others.[138] However,

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916 (Cal. 1968) (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 332-33 (3d ed. 1964))).

132. *Id.* The California Supreme Court acknowledged that "whenever one person is by circumstances placed in such a position with regard to another . . . that if he did not use ordinary care and skill in his own conduct . . . he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." *Id.* (quoting Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968) (quoting Heaven v. Pender, 11 Q.B.D. 503, 509 (1883))).

133. *Id.*

134. *Id.* The court identified the general principle that a "defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous." *Id.* (quoting Rodriguez v. Bethlehem Steel Corp., 525 P.2d 669, 680 (Cal. 1975)).

135. *See supra* note 132 and accompanying text (describing when presumption of duty arises).

136. *See supra* note 133 and accompanying text (noting that balancing of policy considerations can rebut presumption of duty).

137. Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 343 (Cal. 1976) (citing RESTATEMENT (SECOND) OF TORTS § 315 (1965)). According to the American Law Institute,

> [t]here is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.

RESTATEMENT (SECOND) OF TORTS § 315 (1965).

138. *Tarasoff*, 551 P.2d at 343.

the California court also noted that courts have created an exception to this rule when the defendant has a special relationship with the person whose actions need to be controlled or with the foreseeable victim of those actions.[139] Under this rule, the *Tarasoff* court held that Moore had a duty of care because of his special relationship with Poddar.[140] The court then considered policy only as a justificatory afterthought.[141]

Notwithstanding the court's disappointing treatment of policy considerations, *Tarasoff*'s policy discussion is representative of the types of policy factors that courts consider before extending physician liability.[142] The *Tarasoff* court enumerated the "major" policy factors that a court should consider:

> [1] the foreseeability of harm to the plaintiff, [2] the degree of certainty that the plaintiff suffered injury, [3] the closeness of the connection between the defendant's conduct and the injury suffered, [4] the moral blame attached to the defendant's conduct, [5] the policy of preventing future harm, [6] the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and [7] the availability, cost and prevalence of insurance for the risk involved.[143]

The court labeled foreseeability as the most important factor.[144] Although foreseeability was important to the court, the policy section of the opinion dealt mainly with two other factors — the prevention of future harm[145] and the consequences to the defendant and society in extending physician liability.[146]

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139. *Id.* The *Tarasoff* court noted that a relationship between the defendants and either Poddar or Tarasoff would establish a duty of care because "a duty of care may arise from either '(a) a special relation . . . between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation . . . between the actor and the other which gives to the other a right of protection.'" *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 315 (1965)).

140. *Id.* The court stated that, while similar California cases required that the defendant be in a special relationship with both the victim and the dangerous party for an affirmative duty for the benefit of a third person to arise, it did not think that such duties should be constrained to such situations. *Id.* at 344.

141. *See id.* at 344-48 (dealing with policy objections of defendants and amicus curiae).

142. *See infra* notes 169-200 (describing policy factors that courts consider when determining whether to impose duty).

143. Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976) (quoting Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968)).

144. *Id.*

145. *See id.* at 346-48 (arguing that imposing duty of care on therapists who know or should know that their patients pose serious danger of violence to others furthers public interest of protecting potential victims).

146. *See id.* at 344-48 (dealing with arguments that imposing duty of care on therapists to third parties would have adverse consequences for therapists and society).

The court's responses to four arguments illustrate how physician liability may expand without impinging on the physician-patient relationship.[147]

First, the California Supreme Court considered the defendant's contention that expanding physician liability would be unworkable because mental health professionals cannot correctly predict violence in the majority of cases.[148] The court conceded the difficulty in making an accurate prediction of violence,[149] but noted that, under the traditional standard of due care imposed on physicians,[150] the physician need not make a flawless forecast.[151] In that sense, the court felt that a duty of reasonable care toward endangered nonpatients was no different than the duties that doctors otherwise have.[152] In reply to a related amicus curiae argument, the court stated that courts should not exonerate a physician who accurately predicts patient violence yet fails to act.[153]

Next, the *Tarasoff* court considered the amicus argument that the court's decision was inconsistent with precedent recognizing the uncertainty of therapeutic predictions.[154] In *People v. Burnick*,[155] the California Supreme Court held that the state could not commit an individual as a mentally disturbed sex offender in the absence of proof beyond a reasonable doubt.[156]

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147. *See infra* notes 148-64 and accompanying text (discussing how *Tarasoff* court expanded liability without impinging on physician-patient relationship).

148. Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 344-45 (Cal. 1976). Amicus arguments claimed that, when it comes to predicting violence, therapists are more often wrong than right, with therapists tending to overpredict violence. *Id.* at 344.

149. *Id.* at 345.

150. *See id.* (outlining standard of care by which courts judge therapists' conduct). In determining whether a patient presents a serious danger of violence, "the therapist need only exercise 'that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional specialty] under similar circumstances.'" *Id.*

151. *Id.*

152. *Cf. id.* (pointing out that therapist predictions of violence are similar to judgments that physicians must make regularly under rules of responsibility).

153. *See id.* at 345-46. The court noted that, when a therapist knows or should know that a patient presents a serious threat of violence to others, social policy supported placing the interests of the potential victim above the interests of the patient. *Id.*

154. *Id.* at 346.

155. 535 P.2d 352 (Cal. 1975).

156. People v. Burnick, 535 P.2d 352, 354 (Cal. 1975). In *Burnick*, the California Supreme Court considered the proper standard of proof in mentally disordered sex offender proceedings. *Id.* Appellee allegedly had sexual contact with two male minors, for which conduct appellee was criminally charged. *Id.* at 355. At appellee's hearing, three psychiatrists gave widely differing conclusions as to appellee's status as a mentally disordered sex offender. *Id.* at 355-56. The state presented no other witnesses or evidence at the hearing.

That court based its decision partly on the uncertainty of therapeutic predictions.[157] Thus, the amicus argued that, by imposing on therapists a duty of care to accurately predict violence, the court's decision was inconsistent with precedent.[158] However, the *Tarasoff* court distinguished *Burnick* on the ground that, while the earlier case involved the extreme measure of incarceration, *Tarasoff*'s ruling merely requires that the therapist take *some* steps, which can include less drastic alternatives to incarceration.[159] Furthermore, the court noted that the chance of a superfluous warning could not warrant negating liability, especially given the importance of protecting the lives of potential victims.[160]

Finally, the California Supreme Court confronted the defendant's policy argument that imposing liability would threaten the free and open communication essential to psychotherapy.[161] The court recognized the strong public interests both in treating mental illness and in preserving the confidentiality of that treatment.[162] However, the court weighed these interests against the public interest in avoiding violent assault and decided that the scales tipped in favor of the latter.[163] Having considered these policy issues, the court

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Id. at 356. The trial court found, by a preponderance of the evidence, that appellee was a mentally disordered sex offender. *Id.* The California Supreme Court held that the state and federal due process clauses required that such a finding be justified by proof beyond a reasonable doubt. *Id.* at 369. The court based this decision on the loss of liberty and the stigma attached to being labeled a mentally disordered sex offender. *Id.* at 360-64.

157. *See id.* at 364-67 (dealing with state's argument that "predictive" nature of sexual psychopath proceedings warrants lower standard of proof than "beyond a reasonable doubt"). The *Burnick* court felt that "the inherently speculative nature of psychiatric predictions, resulting in confinement not for what one has done but for what one will do, demands more than minimal procedures, particularly when such confinement is accomplished outside the traditional criminal process, with its right to jury trial and other ancient safeguards." *Id.* at 367 (quoting Sarzen v. Gaughan, 489 F.2d 1076, 1086 (1st Cir. 1973)).

158. Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 346 (Cal. 1976).

159. *Id.* Indeed, the *Burnick* court heavily emphasized the drastic nature of involuntary confinement. *See Burnick*, 535 P.2d at 360 (describing commitment to state hospital). In describing the California state hospital that housed mentally disturbed sex offenders, the court stated, "Let us not deceive ourselves as to the nature of that institution." *Id.* According to the court, even the California Medical Association felt that the institution was more like a prison than a hospital, at least in its physical appearance. *Id.* at 360-61 & n.10.

160. *Tarasoff*, 551 P.2d at 346.

161. *Id.*

162. *Id.*

163. *Id.* at 346-47. The *Tarasoff* court based its conclusion on two factors that lessened the decision's seemingly adverse impact on psychotherapy. First, the legislature had established an evidentiary exception to the psychotherapist-patient privilege when the psychotherapist reasonably believed that the patient posed a danger to the patient or others

reaffirmed its expansion of therapist liability to nonpatients.[164]

Tarasoff is thus useful for two purposes. First, the case offers a useful methodology for approaching the extension of physician liability.[165] Second, the decision demonstrates how some courts deal with policy considerations.[166] But one should not overstate *Tarasoff*'s value to the current endeavor. Although the decision suggests an analytical framework for other courts to follow, the facts in the case necessitated reference to policy considerations that are somewhat — although not altogether — different from those in *Ramona*-type cases.[167] Therefore, one also should consider cases more factually similar to *Ramona* for a more fruitful comparison.[168]

2. *Negligent Misdiagnosis Suits by Family Members: A Similar Line of Precedent*

The scenario with which courts have dealt that is most analogous to recovered-memory situations involves individuals who have sued physicians for the negligent misdiagnosis of sexual abuse.[169] In these cases, a family member who allegedly has sexually abused a young child brings suit against

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such that disclosure was necessary to prevent the danger. *Id.* Second, the court noted that disclosure of a patient's propensity for violence does not violate professional ethics, which allow physicians to compromise a patient's confidence when such disclosure is necessary to protect an individual or the community. *Id.* at 347.

164. *Id.* at 348.

165. *See supra* notes 132-33 and accompanying text (outlining methodology to determine whether to impose duty).

166. *See supra* notes 142-64 and accompanying text (describing policy argument section of *Tarasoff*).

167. *See infra* notes 201-87 and accompanying text (weighing policy considerations relevant to *Ramona*-type cases).

168. *See infra* notes 169-200 and accompanying text (examining negligent misdiagnosis suits by family members).

169. *See, e.g.*, Chatman v. Millis, 517 S.W.2d 504, 505 (Ark. 1975) (considering whether nonpatient could sue for misdiagnosis of parental abuse); Montoya v. Bebensee, 761 P.2d 285, 288 (Colo. Ct. App. 1988) (examining expansion of physician duty to alleged child molester); Bird v. W.C.W., 868 S.W.2d 767, 772 (Tex. 1994) (considering whether parent has cause of action against mental health professional for negligent misdiagnosis). *But see* Sullivan v. Cheshier, 846 F. Supp. 654, 660 & n.7 (N.D. Ill. 1994) (holding that parents could not sue therapist for negligently implanting false memories into child's mind). The court, failing to weigh policy factors, simply held that parents can sue for damages to a parent-child relationship only when the alleged malpractice caused the death of the child. *Id.* Because of the later *Ramona* decision and the *Sullivan* court's failure to weigh policy considerations, the negligent misdiagnosis cases offer a more fruitful analogy to *Ramona*-type cases.

the physician who had made the diagnosis of sexual abuse.[170] Not surprisingly, little case precedent exists, and most of the cases are fairly recent.[171] Moreover, these cases generally analyze the problem similarly, even though the resolutions differ wildly.[172]

Only one of the cases predates *Tarasoff*, and, perhaps only coincidentally, the case does not weigh policy factors. In *Chatman v. Millis*,[173] the Arkansas Supreme Court considered whether a nonpatient could sue a psychologist who diagnosed parental abuse of the nonpatient's young son.[174] The *Chatman* court held that the nonpatient could not maintain such a suit.[175] The Arkansas court followed a line of overwhelming legal precedent to rule that a physician-patient relationship must exist in order to maintain a malpractice suit against a physician.[176]

The next case, *Montoya v. Bebensee*,[177] came twelve years after *Tarasoff*. *Montoya* illustrates a methodology for courts considering the expansion

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170. *See infra* notes 173-200 and accompanying text (describing negligent misdiagnosis cases).

171. *See infra* notes 173-200 (describing limited line of recent negligent misdiagnosis cases).

172. *See, e.g.*, *Chatman*, 517 S.W.2d at 506 (requiring physician-patient relationship in order to maintain malpractice suit); *Montoya*, 761 P.2d at 289 (finding therapist owed duty of care to nonpatient accused of sexual abuse); *Bird*, 868 S.W.2d at 770 (denying existence of duty of mental health professional not to misdiagnose condition of child).

173. 517 S.W.2d 504 (Ark. 1975).

174. Chatman v. Millis, 517 S.W.2d 504, 505 (Ark. 1975). In *Chatman*, the Arkansas Supreme Court considered whether a nonpatient accused of sexually molesting his child could bring a malpractice suit against the psychologist who accused the nonpatient of sexual abuse. *Id.* Appellant's ex-wife, fearing that appellant had "subjected [their] child to homosexual conduct," sought the help of appellee, a psychologist, in determining whether appellant had sexually molested the child. *Id.* After speaking with the child, appellee formed the opinion that appellant had sexually abused the child and wrote appellant's ex-wife's attorney, relating this diagnosis and appellee's willingness to testify in court. *Id.* Appellant filed suit against appellee, claiming, among other things, malpractice. *Id.* The *Chatman* court held that appellant could not bring such a suit. *Id.* at 505-06. First, the court stated that malpractice suits do not require a contractual agreement between the doctor and the patient. *Id.* at 506. However, the court said that a plaintiff could not bring a malpractice suit in the absence of some physician-patient relationship. *Id.* Because appellant was not appellee's patient and appellee's diagnosis was not for appellant's benefit, the *Chatman* court found that the requisite physician-patient relationship did not exist. *Id.* Consequently, the court held that appellant could not bring a malpractice action against appellee. *Id.*

175. *Id.*

176. *See id.* (requiring existence of doctor-patient relationship before negligence can be found); *see also supra* notes 85-86 and accompanying text (discussing requirement of physician-patient relationship in order to maintain medical malpractice action).

177. 761 P.2d 285 (Colo. Ct. App. 1988).

of physician liability to alleged child molesters.[178] The Colorado Court of Appeals held that courts confronted with this problem should weigh the risk, the foreseeability, and the likelihood of the injury against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury or harm, and the consequences of imposing a duty on the actor.[179] In the *Montoya* court's opinion, the scales tipped in favor of imposing liability on the mental health provider.[180] The court recognized the social utility of having therapists report suspected child abuse.[181] However, the Colorado court noted the significant risk of severe injury to one falsely labeled a child molester.[182] Furthermore, the court found that the foreseeability of the injury, coupled with the fact that the burden is no greater than the duty of reasonable care normally required of doctors, warranted the expansion of physician liability.[183]

The next three reported opinions concerning this difficult issue came from Texas courts and followed *Montoya*'s model of policy consideration.

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178. *See* Montoya v. Bebensee, 761 P.2d 285, 288-89 (Colo. Ct. App. 1988) (listing factors that courts should consider when determining whether one party owes duty of care to another party). In *Montoya*, the Colorado Court of Appeals considered whether a mental health care provider owes a duty to a nonpatient to use due care in formulating an opinion upon which a public report or other adverse recommendation concerning the nonpatient is based. *Id.* Appellant's ex-wife had engaged appellee, the unlicensed associate of a licensed psychologist, to render an opinion on whether appellant had sexually abused their child. *Id.* at 287. On the basis of appellee's opinion that appellant had sexually abused the child, she filed a report of suspected child abuse with the county, advised appellant's ex-wife to restrict appellant's visitation rights with the child, and testified at a hearing that appellant undoubtedly sexually abused his child. *Id.* Asserting negligence, appellant brought suit against appellee. *Id.* at 288. The *Montoya* court concluded that appellee owed appellant a duty of care. *Id.* First, the Colorado court recognized the public interest of having therapists report suspected child abuse. *Id.* However, the court also noted the risk of severe injury to individuals who are falsely accused of being child abusers. *Id.* Moreover, the *Montoya* court acknowledged that the harm to appellant was readily foreseeable. *Id.* Finally, the court pointed out that the burden of due care placed on therapists is similar to the duty that courts place upon substantially all professionals. *Id.* at 289. On the basis of these factors, the Colorado Court of Appeals held that appellee owed appellant a duty of care. *Id.*

179. *Id.* at 288 (quoting Smith v. Denver, 726 P.2d 1125 (Colo. 1986)).

180. *See id.* at 289 (holding that mental health care provider owed duty to nonpatient to use due care in formulating opinion upon which public report or other adverse recommendation regarding nonpatient is based).

181. *See id.* at 288 (stating that court considered "the great social utility of having therapists make reports of suspected child abuse").

182. *See id.* (noting that court recognized "the significant risk of substantial injury that may occur to one who is falsely accused of being a child abuser").

183. *Id.* at 288-89.

In *Vineyard v. Kraft*,[184] the Texas Court of Appeals for the Fourteenth District decided that a nonpatient could not sue a physician who determined that the nonpatient had sexually abused the nonpatient's child.[185] The *Vineyard* court focused on the growing awareness of, and concern over, parental sexual abuse of children and the strong need for doctors to evaluate and alert courts of such abuse without fear of liability.[186] Thus, the social utility of the diagnosing physician's conduct weighed against extending liability to nonpatients.[187] However, in *W.C.W. v. Bird*,[188] the Texas Court of Appeals for the First District looked at the same policy factors[189] and found

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184. 828 S.W.2d 248 (Tex. Ct. App. 1992).

185. Vineyard v. Kraft, 828 S.W.2d 248, 254 (Tex. Ct. App. 1992). In *Vineyard*, the Texas Court of Appeals for the Fourteenth District considered whether a legal duty arises between a nonpatient parent and a mental health professional who makes an evaluation that the nonpatient parent has sexually abused his or her child. *Id.* at 252. While involved in divorce and custody proceedings, appellant's wife took their child to appellees to see if appellant had sexually abused the child. *Id.* at 249-50. Appellee DeAlmeida, testifying at the divorce and custody trial, recommended to the court that appellant not be the child's primary caretaker. *Id.* at 250-51. Appellant brought suit against appellees for negligent misdiagnosis. *Id.* at 251. The *Vineyard* court recognized that appellant's harm was a foreseeable result of appellees' opinion that appellant may have sexually abused his daughter. *Id.* at 253. However, the Texas court found that several factors weighed against the appellant's right to sue, including society's growing awareness of child sexual abuse, the inability of small children to report such abuse, the protection of children from such abuse, the need for professionals to evaluate sexual abuse allegations without fear of civil liability, parents' needs to have professionals to evaluate sexual abuse allegations without fear of civil liability, parents' needs to have professionals evaluate their children, and courts' needs to know all opinions concerning whether a parent sexually abused a child. *Id.* at 253-54. According to the court, allowing appellant to sue appellees would undermine these social utility factors. *Id.* at 254. Thus, the *Vineyard* court held that appellees owed appellant no duty. *Id.*

186. *Id.*

187. *Id.*

188. 840 S.W.2d 50 (Tex. Ct. App. 1992).

189. W.C.W. v. Bird, 840 S.W.2d 50, 55 (Tex. Ct. App. 1992) (quoting Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1983)), *rev'd*, 868 S.W.2d 767 (Tex. 1994). In *Bird*, the Texas Court of Appeals for the First District considered whether a nonpatient parent has a cause of action against a psychologist for the negligent misdiagnosis of sexual abuse by the parent. *Id.* at 51. Appellant's former wife sought psychological counseling for their son after he had claimed that appellant had sexually abused him. *Id.* After interviewing the son, appellee Bird executed an affidavit that contained appellee's conclusion that appellant had sexually abused the child. *Id.* at 51-52. On the basis of appellee's opinion, a police officer in the juvenile sex crimes division filed charges against appellant for sexually assaulting the child. *Id.* at 52. Appellant then filed suit against appellee for negligent misdiagnosis. *Id.* at 51. The Texas court of appeals first noted that the underlying basis of liability in all negligence cases is foreseeable harm. *Id.* at 55. The court then noted that appellant's harm was foreseeable. *Id.* at 55-56. The *Bird* court also recognized that precedent rejected the

that the social utility of diagnosing child abuse was not enough to exonerate physicians whose negligent diagnoses lead to false accusations of sexual molestation.[190] In the court's opinion, the foreseeability of the risk and the severity of the injury to the alleged child abuser was too great.[191] The Texas Supreme Court disagreed, however, in *Bird v. W.C.W.*,[192] and reversed the Texas court of appeals.[193] The court based its reversal and refusal to extend physician liability to nonpatients in part on the inexact nature of the mental medical sciences.[194] Also, like the *Vineyard* court, the Texas Supreme Court put great weight on the social utility of discovering child abuse and believed that courts must allow physicians to conduct examinations without fear of liability.[195]

The final case, *Caryl S. v. Child & Adolescent Treatment Services, Inc.*,[196] did not specifically enumerate the six factors relied upon by the other four courts.[197] However, the *Caryl* court considered many of the same

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claim that a physician owes no duty to nonpatients. *Id.* at 55. Thus, the *Bird* court held that appellant stated a cause of action for negligent misdiagnosis against appellees. *Id.* at 56.

190. *See id.* (holding that appellant's petition alleged duty of psychologist to nonpatient parent).

191. *See id.* at 55-56 (finding that harm to parent arising from negligent misdiagnosis was foreseeable and could cause alleged abuser "emotional trauma, the loss of relationships, and problems with the parent's employment").

192. 868 S.W.2d 767 (Tex. 1994).

193. Bird v. W.C.W., 868 S.W.2d 767, 772 (Tex. 1994), *rev'g* 840 S.W.2d 50 (Tex. Ct. App. 1992). In *Bird*, the Texas Supreme Court considered whether a mental health professional owes a duty to a parent not to negligently misdiagnose a condition of the child. *Id.* at 769. In reversing the Texas court of appeals, the Texas Supreme Court first acknowledged that the harm to a parent accused of sexual abuse is foreseeable. *Id.* However, the court stated that foreseeability alone is not sufficient to create a new duty. *Id.* The *Bird* court then noted the social utility of eradicating sexual abuse and how evaluating children is essential to that goal. *Id.* On that basis, the Texas Supreme Court held that mental health professionals do not owe a duty to parents not to negligently misdiagnose children as having been sexually abused. *Id.* at 770.

194. *See id.* at 769 (recognizing risk of false accusations as result of inexact nature of psychology).

195. *See id.* (finding that mental health professionals should be able to exercise professional judgment in diagnosing sexual abuse without duty to third parties).

196. 614 N.Y.S.2d 661 (Sup. Ct. 1994).

197. *See* Caryl S. v. Child & Adolescent Treatment Servs., Inc., 614 N.Y.S.2d 661, 664-67 (Sup. Ct. 1994) (determining whether professional counselor owed duty to nonpatient grandmother in formulating opinion whether grandmother sexually abused grandchild). In *Caryl S.*, the Supreme Court of Erie County, New York, considered whether a nonpatient could bring a negligent misdiagnosis action against a professional counselor whose diagnosis included allegations that the nonpatient sexually abused the nonpatient's grandchild. *Id.* at

factors.[198] The Supreme Court of Erie County focused on the potential harm to the alleged abuser and noted that the label of "child abuser" is one of the most "loathsome" with which society can brand an individual.[199] Because of this potential stigma, the New York court ruled that a medical professional owed a duty of reasonable care to a nonpatient alleged abuser.[200]

Thus, these cases, though not exactly analogous to *Ramona*-type cases, offer examples of the types of policy considerations that courts consider when contemplating the expansion of physician liability to nonpatients accused of sexually abusing children. In conjunction with the methodology suggested in *Tarasoff*, these cases present a coherent way in which to determine whether courts should expand physician accountability to nonpatients injured by doctors' negligent application of recovered-memory therapy.

C. *Should Psychotherapists Be Liable to Nonpatient Family Members in* Ramona*-type Cases?: A Review of Relevant Policy Considerations*

As noted above, in determining whether to expand physician liability to nonpatients, courts have weighed the magnitude of the nonpatient's harm against the social utility of the physician's conduct.[201] If the magnitude of

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664. Appellee Jones, a professional counselor, examined appellant's granddaughter and concluded that appellant had sexually abused her granddaughter. *Id.* at 663. Subsequently, appellee Jones recommended that appellant only have supervised visitation with her granddaughter. *Id.* Appellant brought suit against appellee Jones and others, claiming, among other things, negligent misdiagnosis on appellee's part. *Id.* The *Caryl S.* court first noted that courts should determine the existence and the scope of a duty on the basis of "larger social consequences." *Id.* at 664-65. In keeping with this methodology, the New York court acknowledged that the sexual abuse of children by family members had become a major social concern. *Id.* at 665. The court also acknowledged, however, that the efforts to protect children from familial sexual abuse had had some "unfortunate downside effects," including the suffering of innocent parents. *Id.* The *Caryl S.* court further noted that the label of "child abuser" is one of the worst that an individual can wear. *Id.* at 666. Because of the dangers of severe harm to the accused nonpatient, the New York court concluded that

> where the determination of sexual abuse is made by a professional treating a child, with subsequent actions taken based upon that determination and aimed, whether in whole or in part, at shaping not only the conduct and well-being of the child but also the conduct of the suspected abuser, or the relationship between them, a duty of care is owed not only to the child but also to the alleged abuser.

Id. at 667.

198. *See id.* at 664-67 (considering public policy in determining whether duty exists).

199. *Id.* at 666-67 (quoting Rossignol v. Silvernail, 586 N.Y.S.2d 343, 345 (App. Div. 1992)).

200. *Id.* at 667.

201. *See* Montoya v. Bebensee, 761 P.2d 285, 288 (Colo. Ct. App. 1988) (stating that

the harm outweighs the social utility of the conduct, then the court will impose a duty of care on the physician.[202] On the other hand, if the social utility of the conduct has more force, then the court will refrain from imposing a legal burden on the physician.[203]

Determining the magnitude of the nonpatient's harm requires a court to consider three factors: (1) the foreseeability of harm to the nonpatient;[204]

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courts should weigh risk, foreseeability, and likelihood of injury against social utility of actor's conduct, magnitude of defendant's burden in avoiding harm, and consequences of burden) (quoting Smith v. Denver, 726 P.2d 1125, 1127 (Colo. 1986)); Bird v. W.C.W., 868 S.W.2d 767, 769 (Tex. 1994) (determining that court must consider "risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury and the consequences of placing that burden on the actor") (citing Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1983)), *rev'g* 840 S.W.2d 50 (Tex. Ct. App. 1992); W.C.W. v. Bird, 840 S.W.2d 50, 55 (Tex. Ct. App. 1992) (same), *rev'd,* 868 S.W.2d 767 (Tex. 1994); Vineyard v. Kraft, 828 S.W.2d 248, 253 (Tex. Ct. App. 1992) (same); *cf.* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976) (stating that courts should consider foreseeability, certainty of harm, closeness of connection between defendant's conduct and plaintiff's harm, defendant's moral blame, policy of preventing future harm, burden on defendant, consequences to community of imposing burden, and insurance considerations). According to the American Law Institute,

> [w]here an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

RESTATEMENT (SECOND) OF TORTS, *supra* note 113, § 291. Many courts have adopted a similar test. For example, one court, in determining whether a mental health provider owed a duty to a nonpatient, said that the question involves "consideration of many factors including, for example, the risk involved, the foreseeability and likelihood of injury as weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against injury or harm, and the consequences of placing the burden upon the actor." *Montoya*, 761 P.2d at 288 (quoting Smith v. Denver, 726 P.2d 1125, 1127 (Colo. 1986)). Other courts, while not explicitly recognizing a "harm vs. utility" dichotomy, balance similar policy factors, such as

> the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.

Tarasoff, 551 P.2d at 342 (quoting Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968)).

202. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 113, § 291 (stating that act is negligent if magnitude of risk outweighs legal utility of act).

203. *See id.* (same).

204. *See* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976) (listing

(2) the certainty of harm;[205] and (3) the risk involved.[206] Courts usually regard foreseeability as the most important factor,[207] although some courts disagree about foreseeability's persuasive force.[208] The certainty of the harm refers to the court's confidence that the conduct in question has caused injury.[209] Finally, courts considering the risk involved will look to at least three factors: (1) the plaintiff's desert;[210] (2) the qualitative harm;[211] and (3) the quantitative harm.[212] The plaintiff's desert is the social value that the law (or society) attributes to the plaintiff's imperiled interests.[213] The qualitative harm refers to the nature of harm that the actor's conduct will cause to

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"foreseeability" as factor for courts to consider) (quoting Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968)); Montoya v. Bebensee, 761 P.2d 285, 288 (Colo. Ct. App. 1988) (same) (quoting Smith v. Denver, 726 P.2d 1125, 1127 (Colo. 1986)); Bird v. W.C.W., 868 S.W.2d 767, 769 (Tex. 1994) (same), *rev'g* 840 S.W.2d 50 (Tex. Ct. App. 1992); W.C.W. v. Bird, 840 S.W.2d 50, 55 (Tex. Ct. App. 1992) (same), *rev'd*, 868 S.W.2d 767 (Tex. 1994); Vineyard v. Kraft, 828 S.W.2d 248, 253 (Tex. Ct. App. 1992) (same) (quoting Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1983)).

205. *See Tarasoff*, 551 P.2d at 342 (listing "certainty of harm" as factor for courts to consider) (quoting Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968)); *Montoya*, 761 P.2d at 288 (same) (quoting Smith v. Denver, 726 P.2d 1125, 1127 (Colo. 1986)); *Bird*, 868 S.W.2d at 769 (same); *Bird*, 840 S.W.2d at 55 (same); *Vineyard*, 828 S.W.2d at 253 (same) (quoting Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1983)).

206. *See Montoya*, 761 P.2d at 288 (listing "risk involved" as factor that courts should consider) (quoting Smith v. Denver, 726 P.2d 1125, 1127 (Colo. 1986)); *Bird*, 868 S.W.2d at 769 (same); *Bird*, 840 S.W.2d at 55 (same); *Vineyard*, 828 S.W.2d at 253 (same) (quoting Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1983)).

207. *See* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976) (stating that "foreseeability" is most important consideration in establishing duty); *see also* Mitchell v. Amarillo Hosp. Dist., 855 S.W.2d 857, 873 (Tex. Ct. App. 1993) (same), *cert. denied*, 115 S. Ct. 510 (1994).

208. *Compare Tarasoff*, 551 P.2d at 343 (leaving open possibility that foreseeability alone could be sufficient justification for creating duty) *with Bird*, 868 S.W.2d at 769 (stating that foreseeability alone is insufficient basis for creating new duty).

209. *See Tarasoff*, 551 P.2d at 342 (noting that courts determining whether to impose duty consider the degree of certainty that plaintiff suffered injury).

210. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 113, § 293 (stating that social value that law attaches to plaintiff's imperiled interests is factor courts consider in determining magnitude of risk).

211. *See id.* (listing extent of harm to plaintiff's imperiled interests as factor courts consider in determining magnitude of risk).

212. *See id.* (listing number of persons likely harmed by conduct as factor courts consider in determining magnitude of risk).

213. *See infra* notes 240-42 and accompanying text (describing value that law and society in general attribute to nonpatient's imperiled interests).

the plaintiff.[214] Deciding the quantitative harm question requires a computation of the total number of persons whom the defendant's action will potentially damage.[215]

Calculating the social utility of the physician's conduct compels the court to appraise at least three factors: (1) the social value of the actor's conduct;[216] (2) the magnitude of the burden on the defendant to avoid the injury to the plaintiff;[217] and (3) the societal costs of assessing a legal burden on the defendant.[218] Determining the social value of the actor's conduct requires a court to weigh the public interest that the defendant advances,[219] the likelihood that the conduct actually will advance the interest,[220] and the availability of less dangerous alternatives that will protect the societal interest adequately.[221] The

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214. *See infra* notes 243-47 and accompanying text (describing qualitative harm).

215. *See infra* notes 248-49 and accompanying text (describing quantitative harm).

216. *See* Montoya v. Bebensee, 761 P.2d 285, 288 (Colo. Ct. App. 1988) (listing "the social utility of the actor's conduct" as factor that courts should consider) (quoting Smith v. Denver, 726 P.2d 1125, 1127 (Colo. 1986)); Bird v. W.C.W., 868 S.W.2d 767, 769 (Tex. 1994) (discussing social utility of actor's conduct as factor for consideration) (citing Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1983)), *rev'g* 840 S.W.2d 50 (Tex. Ct. App. 1992); W.C.W. v. Bird, 840 S.W.2d 50, 55 (Tex. Ct. App. 1992) (same), *rev'd*, 868 S.W.2d 767 (Tex. 1994); Vineyard v. Kraft, 828 S.W.2d 248, 253 (Tex. Ct. App. 1992) (same); RESTATEMENT (SECOND) OF TORTS, *supra* note 113, § 292 (stating that courts determining utility of defendant's conduct consider conduct's value to society).

217. *See* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976) (stating that courts should consider "the extent of the burden to the defendant") (quoting Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968)); *Montoya*, 761 P.2d at 288 (listing "the magnitude of the burden of guarding against injury or harm" as factor that courts should consider) (quoting Smith v. Denver, 726 P.2d 1125, 1127 (Colo. 1986)); *Bird*, 868 S.W.2d at 769 (considering magnitude of burden of guarding against injury) (citing Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1983)); *Bird*, 840 S.W.2d at 55 (same); *Vineyard*, 828 S.W.2d at 253 (same).

218. *See Tarasoff*, 551 P.2d at 342 (stating that courts should consider "consequences to the community" of imposing duty) (quoting Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968)); *Montoya*, 761 P.2d at 288 (listing "the consequences of placing the burden upon the actor" as factor that courts should consider) (quoting Smith v. Denver, 726 P.2d 1125, 1127 (Colo. 1986)); *Bird*, 868 S.W.2d at 769 (stating that courts should consider consequences of placing burden on actor) (citing Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1983)); *Bird*, 840 S.W.2d at 55 (same); *Vineyard*, 828 S.W.2d at 253 (same).

219. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 113, § 292 (stating that courts determining utility of actor's conduct consider social value that law attaches to interest that defendant's conduct advances).

220. *See id.* (stating that courts determining utility of defendant's conduct consider extent of chance that defendant's conduct actually will advance interest that conduct allegedly forwards).

221. *See id.* (stating that courts determining utility of actor's conduct consider extent of

magnitude of the burden on the defendant to avoid harm to the plaintiff's interests involves considerations of the defendant's ability to bear the imposed duty, as well as the defendant's ability to bear or distribute the costs of this duty.[222] Finally, calculating the societal consequences of imposing a duty requires a court to consider the possible harm to the community that making the actor accountable would cause.[223] Using these factors, courts can determine whether to expand psychotherapist liability to include nonpatient family members injured by the psychotherapist's negligent utilization of recovered-memory therapy.

1. The Magnitude of the Nonpatient's Harm

a. The Foreseeability of Harm

The foreseeability of the harm to the nonpatient is the most important factor in determining whether to impose a duty on the negligent psychotherapist,[224] but foreseeability alone generally will not warrant the imposition of a duty of care.[225] In *Ramona*-type cases, the nonpatient family member's harm usually will depend on whether the patient believes the implanted memories and on the degree to which the allegations become public knowledge.[226] If the patient believes the memories of sexual abuse, then the nonpatient's relationship with the patient will suffer and the nonpatient will suffer some degree of emotional distress. For example, Gary Ramona's daughter, who believed her recovered memories of sexual abuse, refused to associate with her father.[227]

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chance that less dangerous conduct could adequately advance alleged interest).

222. *See* KEETON ET AL., *supra* note 100, § 4, at 24 (recognizing courts' consideration of ability of respective party to bear loss). According to Prosser and Keeton, the relative ability of the respective parties to bear a loss

> is not so much a matter of their respective wealth, although certainly juries, and sometimes judges, are not indisposed to favor the poor against the rich. Rather it is a matter of their capacity to avoid the loss, or to absorb it, or to pass it along and distribute it in smaller portions among a larger group.

Id.

223. *See* Bird v. W.C.W., 868 S.W.2d 767, 769 (Tex. 1994) (considering possible adverse consequences to community if court imposes duty), *rev'g*, 840 S.W. 2d 50 (Tex. Ct. App. 1992).

224. *See supra* note 207 and accompanying text (describing foreseeability as most important factor).

225. *See supra* note 208 and accompanying text (demonstrating how foreseeability is not clearly sufficient by itself to impose duty).

226. *Cf. supra* note 199 and accompanying text (noting how society loathes child abusers).

227. *See supra* note 37 and accompanying text (noting how Gary Ramona's daughter refused to associate with him).

Understandably, Gary Ramona grieved over this loss.[228] In addition, to the extent that these allegations become public, the accusations will damage the nonpatient's reputation and ties with other family members, employers, and society in general. For example, after his daughter's allegations, Gary Ramona's wife divorced him, his other daughter refused to see him, and his employer fired him.[229]

These nonpatient injuries are foreseeable if the psychotherapist, being an individual of ordinary intelligence and prudence, reasonably should anticipate these nonpatient injuries.[230] Under this standard, the nonpatient's injuries are foreseeable. As noted earlier, the label of "child molester" brands an individual with one of the most loathsome titles that society can give.[231] Neither this stigma nor the damage that such a character taint can wreak on an individual's relationships, emotional stability, and reputation is obscure.[232] More particularly, the physician can foresee an injury to nonpatient family members. Because of the prevalence of intrafamily sexual abuse, family members are foreseeable victims of implanted memories of sexual abuse,[233] particularly when the psychotherapist suggests the family member's guilt to the patient through leading questions.[234] Thus, the foreseeability of the harm weighs in favor of extending psychotherapist liability.

b. The Certainty of Harm

In calculating the certainty of harm, courts must distinguish between determining whether the nonpatient suffered harm and deciding whether the

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228. *See* Cole, *supra* note 8, at A3 (describing how Ramona claimed that therapists destroyed his family).

229. *See* Butler, *supra* note 9, at 12 (describing effect of accusations on Ramona's family and job); Slind-Flor, *supra* note 32, at A10 (same).

230. *Cf.* BLACK'S LAW DICTIONARY 649 (6th ed. 1990) (defining "foreseeability"). According to *Black's*, harm is foreseeable if the "actor, as [a] person of ordinary intelligence and prudence, should reasonably have anticipated danger to others created by his negligent act." *Id.*

231. *See* Caryl S. v. Child & Adolescent Treatment Servs., Inc., 614 N.Y.S.2d 661, 666 (Sup. Ct. 1994) (quoting Rossignol v. Silvernail, 586 N.Y.S.2d 343, 345 (App. Div. 1992)).

232. *See* Vineyard v. Kraft, 828 S.W.2d 248, 253 (Tex. Ct. App. 1992) (acknowledging that harm to family relationship and mental anguish are foreseeable result of mental health professional's opinion that parent may be "culprit of a repugnant sexual crime").

233. *See* Carolyn L. Mueller, *Ohio Homeowners Beware: Your Homeowner's Insurance Premium May Be Subsidizing Child Sexual Abuse*, 20 U. DAYTON L. REV. 341, 341 n.2 (1994) (quoting study on child abuse that found that 70% of reported child sexual abuse cases involved intrafamily abuse).

234. *See* Kanovitz, *supra* note 64, at 1189 (showing example of therapist's leading questions to patient concerning whether family member abused patient).

psychotherapist reached the wrong result.[235] The question is not whether the psychotherapist's conduct injured a *blameless* nonpatient, but whether the nonpatient actually *suffered harm*.[236] Requiring a nonpatient to prove his or her innocence to show injury not only seems unjust, but also would be impossible in some instances, given science's limited knowledge of the functioning of memory.[237]

However, courts can evaluate with certainty that the psychotherapist's conduct has injured the nonpatient. While the court cannot look into the nonpatient's mind to discover emotional distress, the court can presume that alleged child abusers naturally suffer emotional distress.[238] Furthermore, nonpatients can empirically prove damaged relationships and lost jobs.[239] Thus, an examination of the certainty of harm weighs in favor of extending psychotherapist liability in *Ramona*-type cases.

c. The Risk Involved

In order to determine the risk to nonpatient family members, the court must look at three factors. First, the court must consider the value that the law and society in general attribute to the nonpatient's imperiled interests.[240] *Ramona* demonstrated that accusations of incest can damage an individual's reputation, familial relationships, job stability, and emotional well-being.[241] Both society and the law highly value each of these interests, especially the

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235. *Cf.* Cole, *supra* note 8, at A3 (noting that jury that awarded Gary Ramona damages could not determine veracity of allegedly recovered memories).

236. *Cf.* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976) (listing factors courts should consider when determining whether to impose duty on defendant). While the *Tarasoff* court listed "the degree of certainty that the plaintiff suffered injury" as a factor for courts to consider, the California Supreme Court did not state that courts should consider the moral blame of the plaintiff. *Id.* Thus, because the *Tarasoff* list of factors included "the moral blame attached to the defendant's conduct," the court arguably did not believe that courts should consider the plaintiff's innocence in determining the certainty of the plaintiff's harm. *Id.*

237. *See supra* notes 69-84 and accompanying text (describing tenuous system of memory recall).

238. *Cf.* Vineyard v. Kraft, 828 S.W.2d 248, 253 (Tex. Ct. App. 1992) (acknowledging that mental anguish is foreseeable result of mental health professional's opinion that parent may have abused parent's child).

239. *Cf. supra* note 37 and accompanying text (describing how Gary Ramona lost his job and family after his daughter accused him of molesting her).

240. *See supra* notes 210, 213 and accompanying text (outlining policy consideration of plaintiff's desert).

241. *See supra* note 37 and accompanying text (demonstrating damage that can result from incest allegations).

sanctity of the family.[242] Thus, the social value of the nonpatient's imperiled interests weighs in favor of expanding psychotherapist liability.

Second, the court must calculate how much the psychotherapist's conduct will harm the nonpatient.[243] Because of the loathsome position of child molesters in society, few doubt that the recovered-memory therapist's negligence can severely damage the nonpatient's interests.[244] Gary Ramona's wife divorced him, and his daughters refused to have contact with him.[245] Given the place of family unity in our society, it is difficult to imagine how Ramona could have suffered greater injury.[246] Ramona also lost his job — an extreme injury to his financial status.[247] Thus, if the patient makes false accusations and the public widely believes those allegations, the nonpatient can suffer severe injury.

Finally, the court must consider the total number of persons potentially injured by the psychotherapist's actions.[248] The quantitative harm is particularly relevant to *Ramona*-type cases because the nonpatient necessarily suffers his or her injuries with others. For example, Gary Ramona's wife and daughters had to endure the same traumatic family division that Gary did.[249] The nonpatient is not the only one who suffers when the patient falsely accuses the nonpatient. Therefore, the broad reach of the injury, coupled with the severe damage to the nonpatient's socially and legally recognized interests, tips the scales in favor of extending psychotherapist liability.

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242. *See* Linda R. Crane, *Family Values and the Supreme Court*, 25 CONN. L. REV. 427, 428-29 (1993) (noting that family unit is fundamental social institution that always has concerned state lawmakers).

243. *See supra* notes 211, 214 and accompanying text (describing policy consideration of qualitative harm).

244. *See supra* note 199 and accompanying text (noting that "child molester" is one of worst labels individual can have).

245. *See supra* note 37 and accompanying text (noting how incest allegations divided Ramona from his family).

246. *See* Crane, *supra* note 242, at 428-29 (noting that family unit is fundamental social institution that always has concerned state lawmakers).

247. *Supra* note 37 and accompanying text (noting that Ramona lost his position as sales and marketing vice president for Mondavi winery after incest allegations).

248. *Supra* notes 212, 215 and accompanying text (describing policy consideration of quantitative harm).

249. *See* Katy Butler, *Memory Case Loser Hires Gloria Allred*, S.F. CHRON., July 27, 1994, at A1 (noting that Gary Ramona's daughter sued Ramona in sexual abuse lawsuit); *supra* note 37 and accompanying text (noting that Ramona's wife divorced him).

2. *The Social Utility of the Psychotherapist's Conduct*

a. *The Social Value of the Psychotherapist's Conduct*

Given society's growing recognition of, and concern over, the existence of parental sexual abuse of children, few would argue that society does not have an interest in preventing the molestation of children by the child's family members.[250] Sexual abuse can have devastating psychological consequences for the abused child.[251] Insofar as society strives to lessen the harm caused to innocent individuals, measures designed to prevent parental sexual abuse of children and to relieve the adverse mental health effects of incest clearly promote the public interest.[252] Psychotherapists who utilize recovered-memory therapy thus have a socially desirable goal — helping incest victims recover from the psychologically adverse effects of sexual abuse. Therefore, to the extent that recovered-memory therapists help their patients, these psychotherapists act in the public interest.

But, while recovered-memory therapists admittedly engage in a commendable endeavor, two factors undermine the force of this conclusion. First, most physicians who treat patients engage in socially useful behavior.[253] Yet, as discussed earlier, courts have extended physician liability beyond the physician-patient relationship.[254] Thus, the fact that an activity involves medical treatment is not by itself determinative. Second, unlike the physicians in the negligent misdiagnosis cases, recovered-memory therapists in *Ramona*-type cases generally do not discover current child abuse and therefore do not prevent further incest.[255] As the name "recovered-memory therapy" implies, the psychotherapist attempts to recover patient memories

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250. *See* Vineyard v. Kraft, 828 S.W.2d 248, 253 (Tex. Ct. App. 1992) (noting growing public awareness of parental sexual abuse of children).

251. *See* Brian D. Gallagher, Note, *Damages, Duress, and the Discovery Rules: The Statutory Right of Recovery for Victims of Childhood Sexual Abuse*, 17 SETON HALL LEGIS. J. 505, 521-523 (1993) (describing unique injurious effects of child sexual abuse). As Gallagher notes, the victim of child sexual abuse "may sustain psychological damage far more severe than any physical injury." *Id.* at 521.

252. *Cf. In re* Welfare of J.A., 417 N.W.2d 696, 698 (Minn. Ct. App. 1988) (recognizing that child abuse prevention is important public policy interest).

253. *Cf.* Leonard M. Fleck, *Just Health Care Rationing: A Democratic Decisionmaking Approach*, 140 U. PA. L. REV. 1597, 1602 (1992) (claiming that access to health care is in public interest).

254. *See supra* notes 87-91, 117-68, 177-83, 188-91, 196-200 and accompanying text (outlining cases in which courts have held physicians liable to nonpatients).

255. *See* Bird v. W.C.W., 868 S.W.2d 767, 769 (Tex. 1994) (stressing importance of eradicating sexual abuse in determining that mental health professional had no duty to nonpatient).

of *past* abuse.[256] Unless the alleged abuser currently is molesting another young family member, the psychotherapist will not prevent further incest. Thus, the therapist does not further the social interest that those courts that have refused to allow nonpatient suits for negligent misdiagnosis cited as of overriding importance.

Even conceding that recovered-memory therapy *could* further important public interests does not answer the question of whether recovered-memory therapy *does* advance these social goals. Critics of recovered-memory therapy claim that an erroneous conception of how memory actually works underlies recovered-memory therapy.[257] Naysayers also warn that the techniques that recovered-memory therapists use, coupled with the mind's suggestibility, can implant false memories into patient's minds.[258] Furthermore, even the American Psychiatric Association has issued warnings about the possible creation of false memories through repeated questioning.[259] Therefore, although recovered-memory therapy theoretically may advance the public interest, serious doubts remain as to the extent that recovered-memory therapy theoretically actually does advance those interests.

Moreover, less dangerous methods may be available to the psychotherapist. While corroboration does not seem to be a sufficient alternative because of inadequate reporting,[260] the careful, reasonable application of recovered-memory therapy is a viable option.[261] Plaintiffs in *Ramona*-type cases are not asking courts to hold psychotherapists responsible for *attempting* to uncover memories, but for *negligently* utilizing recovered-memory therapy.[262] Although the standard of conduct by which courts should judge

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256. *See supra* note 58 and accompanying text (describing goal of recovered-memory therapy).

257. *Supra* notes 68-69 and accompanying text (noting belief of some that recovered-memory therapy relies on outdated conception of memory functioning).

258. *Supra* notes 65, 67 and accompanying text (noting that patient suggestibility can lead to false memories).

259. *See* Sandra G. Boodman, *The Professional Debate Over an Emotional Issue*, WASH. POST, Apr. 12, 1994, (Health), at 13, 14 (noting that American Psychiatric Association issued five-page policy statement warning that repeated questioning may implant memories).

260. *Cf.* Steven F. Shatz et al., *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1, 32 (1991) (noting estimate that four out of five cases of child abuse go unreported).

261. *Cf.* RESTATEMENT (SECOND) OF TORTS, *supra* note 113, § 291 (defining when act is negligent). According to the American Law Institute, an act is unreasonable "if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of *the particular manner in which it is done.*" *Id.* (emphasis added).

262. *Cf.* Diane Curtis, *"Memories" Trial in Hands of Jurors*, S.F. CHRON., May 12, 1994, at A17 (noting that Ramona was suing therapists for negligence).

recovered-memory therapists is not the subject of this Note, one can imagine conduct that clearly falls short of reasonable care.[263]

In summary, the social utility of the recovered-memory therapist's conduct does not have overwhelming force. First, although the psychotherapist seeks to advance the important public interest of dealing with parental sexual abuse of children, in most cases the psychotherapist will only address past wrongs and not prevent new ones.[264] Second, even assuming the social utility of the recovered-memory therapist's conduct, the likelihood of furthering that societal interest is speculative, given the inherent danger of implanting memories.[265] Finally, imposing a duty on psychotherapists in *Ramona*-type cases would not preclude psychotherapists from attempting to uncover instances of sexual abuse; the duty would hold liable only those recovered-memory therapists who take the more dangerous route of suggestive questioning.[266]

b. The Magnitude of the Burden on the Psychotherapist to Avoid the Harm

In determining the magnitude of the burden on the psychotherapist to avoid injuring the nonpatient, a court usually looks at two things. First, the court analyzes the defendant's difficulty in abiding by the imposed duty.[267] Courts typically have recognized a distinction between those duties that require affirmative action (positive duties)[268] and those duties that merely require that the defendant refrain from taking certain action (negative duties).[269] Courts more commonly impose liability in cases in which the duty

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263. *Cf.* Kanovitz, *supra* note 64, at 1187-90 (describing arguably negligent recovered-memory therapy).

264. *See supra* notes 255-56 and accompanying text (noting that recovered-memory therapists usually will not prevent future sexual abuse).

265. *Supra* notes 257-59 and accompanying text (noting that it is at least somewhat speculative whether recovered-memory therapists actually engage in socially useful behavior).

266. *Supra* notes 261-63 and accompanying text (noting that duty of care would preclude only negligent utilization of recovered-memory therapy).

267. *Cf.* Montoya v. Bebensee, 761 P.2d 285, 288-89 (Colo. Ct. App. 1988) (stating that one factor in favor of imposing duty of care on therapists to nonpatients is fact that burden of due care placed upon therapists in making opinion about whether person sexually abused child is no greater than duty that most professionals must meet).

268. *See* A. D. Woozley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 VA. L. REV. 1273, 1294 (1983) (defining "positive duty" as duty to aid). Woozley takes "duty to aid to be a duty to make (if you can) things better for the other party than they would be if you had not been there." *Id.*

269. *See id.* (defining "negative duty" as duty not to harm). Woozley takes "a duty not

requires nonaction.[270] In *Ramona*-type cases, the duty will require only that the psychotherapist abstain from engaging in certain risky conduct, such as aggressive, suggestive questioning.[271] Thus, courts can more easily justify this duty to the nonpatient. Beyond the physical vigor required in carrying out the duty, courts also examine the financial burden that the duty places on the defendant.[272] If a court extends psychotherapist liability to *Ramona*-type cases, the psychotherapist's malpractice insurance premiums will increase.[273] Malpractice insurance is already quite expensive.[274] Thus, imposing a duty of reasonable care to nonpatients on recovered-memory therapists does impose monetary costs on psychotherapists.

Second, courts consider the defendant's ability to bear or distribute the costs imposed by the duty as a factor weighing in favor of imposing a duty.[275] Psychotherapists, in the operation of their practices, incur duty costs, such as malpractice insurance premiums.[276] A psychotherapist can distribute the

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to harm to be a duty not to make things (if you can) worse for the other party than if you had not been there." *Id.*

270. *See* Shlomo Twerski, Note, *Affirmative Duty After* Tarasoff, 11 HOFSTRA L. REV. 1013, 1015-16 (1983) (describing decisions that show courts' historic commitment to keep free of liability one's failure to act). Courts may be reluctant to impose affirmative duties because affirmative duties restrict liberty more than negative duties and because breaching affirmative duties carries a lesser certainty of harm than breaching negative duties. *See* Dinah Shelton, *The Duty to Assist Famine Victims*, 70 IOWA L. REV. 1309, 1317 (1985) (listing two traditional objections to positive legal duties). Shelton describes the objections to affirmative legal duties as "breaching negative duties carries a greater certainty of harm than breaching positive obligations" and "positive duties restrict liberty more than negative duties." *Id.*

271. *Cf.* Kanovitz, *supra* note 64, at 1187-90 (1992) (outlining type of conduct that psychotherapist arguably should avoid).

272. *Cf.* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976) (stating that courts considering whether to impose duty on defendant should consider "the availability, cost and prevalence of insurance for the risk involved").

273. *Cf.* Gary W. Kuc, Comment, *Practice Parameters as a Shield Against Physician Liability*, 10 J. CONTEMP. HEALTH L. & POL'Y 439, 450 (1994) (noting that increasing number of lawsuits filed has contributed to matching increases in medical malpractice insurance premiums).

274. *See* Nancy M. Simone, *Medical Malpractice Litigation: A Comparative Analysis of United States and Great Britain*, 12 SUFFOLK TRANSNAT'L L.J. 577, 581 (1989) (noting that medical malpractice insurance became increasingly unavailable and expensive in 1970s).

275. *Supra* note 222 and accompanying text (noting that courts consider whether defendant can distribute duty costs).

276. *See* Kuc, *supra* note 273, at 450 (noting that malpractice litigation leads to additional costs for physicians in terms of malpractice insurance premiums).

damage costs among his or her patients by raising fees.[277] Thus, because the psychotherapist would not have to bear personally the costs of compliance with the duty, the magnitude of the burden on the defendant is slight.

c. The Societal Consequences of Imposing a Duty on the Psychotherapist

Before imposing a duty of reasonable care on an actor, courts consider the consequences that the court's decision will have on society.[278] Three consequences seem particularly relevant to recovered-memory therapy. First, psychotherapists likely will raise their fees or stop providing recovered-memory therapy.[279] Second, society possibly will identify fewer child molesters.[280] Third, further advances in psychotherapy probably will occur more slowly, if at all.[281] While imposing duties on recovered-memory therapists to nonpatient family members in *Ramona*-type cases could have adverse effects, certain factors offset these negative consequences.

First, imposing duties on psychotherapists to nonpatient family members in *Ramona*-type cases might lead to higher health care costs and the unavailability of certain treatments.[282] These are serious consequences, especially given society's interest in access to affordable health care.[283] Thus, *Ramona*-type liability could have serious adverse consequences for society.

Second, society concededly might discover fewer child molesters. However, it is doubtful that this ignorance precludes society from preventing

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277. *See id.* at 450-51 (recognizing that physicians facing malpractice costs sometimes charge their patients higher fees).

278. *Supra* notes 218, 223 and accompanying text (noting how courts consider societal consequences of imposing duty on defendant).

279. *See* Kuc, *supra* note 273, at 450-51 (stating that physicians facing additional malpractice costs either charge patients higher fees or stop providing high-risk services completely).

280. *Cf.* Bird v. W.C.W., 868 S.W.2d 767, 769 (Tex. 1994) (stating importance of discovering sexual abuse in refusing to impose duty on mental health professional to nonpatient).

281. *Cf. supra* note 52 and accompanying text (noting claim of many doctors that threat of malpractice suits limits medical research).

282. *Supra* note 279 and accompanying text (noting that imposing duty on psychotherapists might cause psychotherapists to raise fees or to stop providing recovered-memory therapy).

283. *See* Theodore R. LeBlang, *Medical Malpractice and Physician Accountability: Trends in the Courts and Legislative Responses*, 3 ANNALS HEALTH L. 105, 121 (1994) (noting public interest in access to affordable health care).

continuing molestation. In *Ramona*-type cases, the children are no longer in danger from their abusive parents.[284] Thus, identification serves retributive, but not deterrent, goals.

Third, recovered-memory advocates argue that psychotherapy may make fewer advances.[285] These advocates claim that psychotherapists, if open to nonpatient suits, will be less likely to utilize innovative psychotherapeutic techniques.[286] However, the imposition of such duties will force psychotherapists to spend more time studying the validity of these methods before putting them into practice, thus deterring hasty, and possibly negligent, conduct.[287] So, although psychotherapy might advance more slowly, psychotherapy will be less likely to harm third parties. Thus, the imposition of a duty actually creates a positive result for society. Therefore, while requiring recovered-memory therapists to exercise due care with regard to nonpatient family members could have serious consequences for society, the goal of deterring harm to family relationships balances against those adverse effects.

IV. Conclusion

Three factors make *Ramona v. Isabella* a controversial case.[288] First, from the public's viewpoint, incest is a major concern.[289] Second, from the medical community's viewpoint, recovered-memory therapy is a controversial psychotherapeutic technique.[290] Third, from the legal community's viewpoint, courts rarely allow nonpatient suits against physicians.[291] Policy concerns underlie *Ramona*'s controversy, and courts must weigh policy considerations to determine the propriety of *Ramona*-type suits.[292]

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284. *See supra* notes 255-56 and accompanying text (recognizing that, in most cases, recovered-memory therapy occurs long after abuse has subsided).

285. *Cf. supra* note 52 and accompanying text (stating doctors' claim that threat of malpractice suits limits medical research).

286. *Cf. id.* (same).

287. *Cf.* Sharon E. Conaway, Comment, *The Continuing Search for Solutions to the Drinking Driver Tragedy and the Problem of Social Host Liability*, 82 NW. U. L. REV. 403, 419 (1988) (noting that one purpose of negligence liability is deterrence of tortfeasors).

288. *See supra* notes 30-57, 85-92 and accompanying text (describing *Ramona* case and why case was legally groundbreaking).

289. *See supra* note 186 and accompanying text (noting society's need to have doctors discover incest without fear of liability).

290. *See supra* notes 58-84 and accompanying text (describing recovered-memory therapy and underlying medical controversy).

291. *See supra* notes 85-92 and accompanying text (describing why *Ramona* is legally controversial).

292. *Cf. supra* notes 201-87 and accompanying text (outlining and weighing policy

More specifically, courts deciding whether to extend physician liability to nonpatients weigh the magnitude of the nonpatient's harm against the social utility of the physician's conduct.[293] Thus, courts should impose new duties on psychotherapists in *Ramona*-type cases only if the court finds that the magnitude of the nonpatient family member's harm outweighs the social utility of negligent recovered-memory therapy.[294] Based upon this standard, courts should allow *Ramona*-type suits.

First, the magnitude of the nonpatient family members' harm warrants extending psychotherapist liability. Not only is the nonpatient's injury clearly foreseeable,[295] but courts can determine with a high degree of certainty that the nonpatient actually suffered harm.[296] Furthermore, negligent recovered-memory therapy involves a great risk to important social interests, such as family relationships.[297] And false, implanted memories harm others besides the alleged abuser.[298] Thus, the magnitude of the nonpatient's harm warrants extending psychotherapist liability.

Second, while preventing child abuse and relieving its adverse psychological effects clearly further the public interest,[299] certain factors undermine the relative strength of negligent recovered-memory therapy's social utility.[300] Because of the uncertain validity of recovered-memory therapy, it is unclear when the technique uncovers true cases of incest, especially when the psychotherapist uses suggestive questioning.[301] Furthermore, imposing a duty of care on recovered-memory therapists would be a relatively small burden because the duty would require no affirmative action.[302] Finally, extending psychotherapist liability could have positive social consequences: When

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considerations relevant to *Ramona*-type cases).

293. *Supra* notes 201-03 and accompanying text (noting how courts weigh magnitude of nonpatient's harm and social utility of physician's conduct).

294. *See supra* note 202 and accompanying text (recognizing that courts impose duty if harm outweighs utility).

295. *Supra* notes 224-34 and accompanying text (discussing foreseeability of harm).

296. *See supra* notes 235-39 and accompanying text (discussing certainty of harm).

297. *See supra* notes 240-47 and accompanying text (examining risk involved).

298. *See supra* notes 248-49 and accompanying text (discussing quantitative harm).

299. *See supra* notes 250-52 and accompanying text (noting that recovered-memory therapists attempt to advance socially desirable goal).

300. *See supra* notes 253-56 and accompanying text (discussing factors that undermine relative strength of negligent recovered-memory therapy's social utility).

301. *See supra* notes 257-59 and accompanying text (discussing theoretical problems with recovered-memory therapy).

302. *See supra* notes 267-77 and accompanying text (examining magnitude of burden on psychotherapist to avoid harm).

psychotherapy does advance new techniques, these therapies will be less likely to harm innocent third parties.[303] Given the preceding policy conclusions, the magnitude of the nonpatient family members' harm outweighs the social utility of the recovered-memory therapist's conduct. Therefore, courts should extend psychotherapist liability in *Ramona* type cases.

303. *See supra* note 287 and accompanying text (noting that imposing duty on recovered-memory therapists may force therapists to spend more time on research of new techniques before implementation).