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THE MANIPULATION OF LEGAL REMEDIES TO DETER SUITS BY SURVIVORS OF CHILDHOOD SEXUAL ABUSE

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This is an Essay about social change and legal backlash. In the past decade, adult survivors of childhood sexual abuse have begun to confront their abusers in court and to demand civil damages for the injuries resulting from that abuse. Because of changes in the statutes of limitations applied to civil sexual abuse cases, these lawsuits can now be brought long after the events transpired, and even in circumstances where the memories of abuse have not been continuous. Thus, for example, children who were subjected to abuse by family members, priests, or teachers, and who for a complex variety of reasons, including repression or dissociative amnesia, did not speak out at the time of the abuse, are now able to hold their abusers accountable. Given the traditional silence about sexual abuse and children's widely-held fear that they would not be believed or would be punished if they "told," this marks a substantial turning of the tables.

Civil damage suits not only allow survivors to tell their stories; they also enable them to obtain compensation for continuing injuries, including funds to cover therapy and the other assistance survivors need to recover from the psychological damage inflicted. From the point of view of the community, these lawsuits can expose those who have long escaped accountability, punishing past abusers and hopefully preventing those individuals from perpetrating further abuse. These lawsuits put all abusers on notice that they may be called to account for their actions, thus presumably resulting in more general deterrence. Finally, the publicity generated by many of these lawsuits educates the public, helping to dispel the myths that child abuse is either rare or confined to marginal groups in the population. Hopefully, heightened public awareness of child sexual abuse will encourage greater vigilance and increase protective measures against such abuse.

As the assertion of newly obtained legal rights by other previously oppressed groups has been met with organized legal resistance, we should not be surprised at the current campaign to prevent child sexual abuse survivors from using the legal system to vindicate their rights. The False Memory

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Syndrome Foundation ("FMSF") of Philadelphia has led a counter-litigation campaign to prevent lawsuits by adult children who have accused their parents or other family members of sexual abuse. The FMSF has principally focused on discrediting and preventing legal claims by women who have recovered memories of their abuse in the course of psychotherapy. After drawing an analogy to the use of the legal system to prevent the exercise of new rights by an historically oppressed class in the wake of the Supreme Court's decision in *Brown v. Board of Education*, this Essay will focus upon three novel legal actions designed to deter suits by survivors of childhood sexual abuse: malpractice suits against their therapists, loss of consortium (or society) claims brought against therapists treating survivors, and malpractice suits against attorneys bringing civil suits for past child abuse. These three approaches have the same fundamental effect: they punish and thus deter therapists and attorneys who have helped survivors in their quest for recovery, compensation, and historic truth. In so doing, these legal approaches also punish abuse survivors for asserting their legal claims and deter them from filing civil damage suits, and perhaps even from confronting their abusers in private as well. In short, these novel legal actions threaten to return the long-buried reality of child sexual abuse to the silence and secrecy that has traditionally shrouded the whole subject of sexual abuse, thus restoring the balance of power in favor of the very persons who have abused that power in the past.

I. SOCIAL AND LEGAL BACKLASH

The "discovery" of childhood sexual abuse in recent decades has led both to the increased enforcement of child welfare laws and to the development of legal claims for adult survivors. Because most personal injury lawsuits are subject to a two-year statute of limitations, however, the viability of survivor suits depended upon the judicial application of a "discovery rule" to this category of cases, tolling the limitations period until the plaintiff discovered her injury. "Discovery" in the sexual abuse context can occur in one of two ways, depending upon whether the plaintiff's memory of the abuse was continuous or recovered. Courts and commentators have styled these "Type I" and "Type II" situations: in Type I cases, the victim never forgot the sexual abuse, but either failed to understand the connection between the abuse and her injuries or was not psychologically able to sue until much later; in Type II cases, on the other hand, the victim's memory of the abuse was repressed and then later recovered.[1] In both of these situations, most victims of abuse had no legal remedy in the past, and consequently most perpetrators were never held accountable for their actions unless they were caught and criminally prosecuted at the time of the abuse—a vast minority of all cases.

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[1] *See, e.g.*, Mary R. Williams, *Suits by Adults for Childhood Sexual Abuse: Legal Origins of the "Repressed Memory" Controversy*, 24 J. PSYCHIATRY & L. 207, 215-18 (1996).

Reacting to this perceived injustice, the majority of states now provide by statute some form of delayed discovery rule for victims of childhood sexual abuse.[2] As a result, numerous suits have entered the legal system that previously would have been barred by the statute of limitations. This represents a substantial legal and social change; for the first time, large numbers of perpetrators of child sexual abuse may now be held accountable for their past conduct. At the same time, or perhaps in a complex relation of cause and effect, a great deal of publicity has suddenly focused upon survivors' claims—popular and scholarly articles and books, appearances on talk shows, movies,[3] and the like. Organizations to assist survivors have also formed,[4] and the therapeutic community now pays far greater attention to treating survivors' injuries.

"Type II" cases, based upon recovered or delayed-recall memories, have been particularly controversial. There is substantial debate within both the scientific and legal communities as to the existence and reliability of delayed-recall memories. While a detailed discussion of this debate is beyond the scope of this Essay, it suffices to say that there is solid evidence to support the reliability of recovered memories of childhood sexual abuse. A recent review of the scientific literature reveals that there are more than thirty studies documenting repression (or "dissociative amnesia").[5] There are also verified accounts of accurate and multiply corroborated repressed and recovered memories, such as that involving Father Porter, who molested a number of children during the 1960s.[6] Longitudinal studies have also tracked women whose histories of sexual abuse in childhood were documented in court and hospital records, and found that substantial numbers "forgot" the abuse during some period.[7] Moreover, recent research

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[2] At least 25 states provide by statute for some type of delayed accrual of a sexual abuse action, of which 16 permit Type I discovery. *See id.* at 216. Other states provide an extended period of time to sue with no delayed accrual. *See* CONN. GEN. STAT. ANN. § 52-577d (West 1991); GA. CODE ANN. § 9-3-33.1 (Michie Supp. 1995); IDAHO CODE § 6-1701-1705 (1990); LA. REV. STAT. ANN. § 2800.9 (West Supp. 1997); TEX CIV. PRAC. & REM. CODE ANN. § 16.0045 (West 1997).

[3] A most recent example is the movie made from Jane Smiley's award-winning book, A THOUSAND ACRES (Touchstone Pictures 1997), which sets the story of King Lear into the context of repressed memories of childhood sexual abuse in modern-day Iowa.

[4] Examples of organizations that focus on these issues are, among others, the Marilyn Van Derbur Institute, Inc., the National Coalition against Sexual Assault, Survivor Connections, Inc., and the Linkup (Survivors of Clergy Sexual Abuse, Inc.).

[5] *See* DANIEL BROWN ET AL., MEMORY, TRAUMA TREATMENT AND LAW 154-211 (1997).

[6] When one of Father Porter's victims began to remember the abuse in 1989, he was able to obtain confirmation not only from the perpetrator himself but also from other victims who came forward after the case received media attention. *See* ELINOR BURKETT & FRANK BRUNI, A GOSPEL OF SHAME: CHILDREN, SEXUAL ABUSE, AND THE CATHOLIC CHURCH 3-9, 11-21 (1993). A similar case involved Brown University Professor Ross Cheit and other victims of abuse by a boys' choir camp director, of which multiple corroboration was obtained 25 years after Cheit remembered the events. *See* Miriam Horn, *Memories Lost and Found*, U.S. NEWS & WORLD REP., Nov. 29, 1993, at 52.

[7] A total of 75 of the 129 women in one study recalled the details of the abuse during follow-up interviews 17 years after it had occurred, and of those 75, 16% reported a significant period of time during

shows that recovered memories of abuse can be as accurate as continuous memories in some instances.[8] In short, it is clear that memories of childhood sexual abuse may be either continuous or recovered. It is also clear that both accurate and inaccurate memories of abuse are possible, a fact that the legal system, having changed the rules to allow these memories into court, must confront—as it is required to deal with the credibility and validity of memories in all types of cases.

One result of these legal developments has been to help break adult women's silence about the sexual abuse that they suffered as children and to challenge the accepted social order with regard to men's treatment of women. What has been the reaction to this major departure from the status quo? Commentators have described the social backlash resulting from the assertion of women's rights during the last few decades.[9] Parts II through IV of this Essay describe a subcase of this larger backlash: the retaliatory development of legal claims designed to eviscerate newly created legal remedies for abuse survivors.

This legal backlash is a typical strategy of those who are threatened by legal and social change in our society, and has been especially apparent in the area of race discrimination. Just as the analogy between race and sex dominated the development of antidiscrimination standards, analogous legal strategies developed to counter and prevent litigation designed to assert each group's newly won rights. The massive resistance to *Brown v. Board of Education* took the form not only of social reaction and civil disobedience (George Wallace in the schoolhouse door) but also of well-organized legal campaigns designed to deter the exercise of the newly interpreted right to equality in education (then defined as desegregation). Since most of the desegregation cases were brought by a single organization, the National Association for the Advancement of Colored People ("NAACP"), a central offensive tactic was to prevent the NAACP from instituting lawsuits. In Mississippi, for example, the legislature enacted a statute making it a crime for an organization to file a desegregation suit in state court.[10] Virtually all the Southern states passed legislation attacking the NAACP in a variety of ways and seeking to prevent it from filing desegregation suits in their jurisdictions.[11] State attorneys general also filed legal actions seeking to enjoin

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which they had forgotten the abuse and then later recovered the memory. *See* Linda Meyer Williams, *Recall of Childhood Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse*, 62 J. CONSULTING & CLINICAL PSYCHOL. 1167 (1994).

[8] *See, e.g.*, Constance Dalenberg, *Accuracy, Timing and Circumstances of Disclosure in Therapy of Recovered and Continuous Memories of Abuse*, 24 J. PSYCHIATRY & L. 229 (1996).

[9] *See, e.g.*, SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN (1991).

[10] *See* ALBERT P. BLAUSTEIN & CLARENCE CLYDE FERGUSON, JR., DESEGREGATION AND THE LAW: THE MEANING AND EFFECT OF THE SCHOOL SEGREGATION CASES 249 (2d ed. rev. 1962).

[11] *See, e.g.*, MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, at 283-300 (1994).

the NAACP, as a foreign corporation, from any activities in their states.[12] Perhaps because this backlash involved race rather than sex, or perhaps because we are temporally removed from it, we have no trouble seeing the anti-*Brown* legal campaign as a way to continue historic racial oppression by preventing formerly oppressed groups from exercising legal rights intended to redress that oppression. Today, an analogous campaign is at work to impede the exercise of legal rights by survivors of childhood sexual abuse.

The organizational fulcrum of this campaign is the False Memory Syndrome Foundation of Philadelphia, a group founded in 1992 by parents accused by their children of sexual abuse.[13] Among its numerous activities, which include local support groups, national lobbying campaigns, and promotion of research, the FMSF coordinates an organized, proactive litigation campaign in this area. Its monthly newsletter publicizes litigation strategies to counter survivor claims and advertises pleading and brief banks that are available for a modest fee, presumably to encourage the filing of lawsuits in other states based upon these models.[14] Moreover, in various states the FMSF has filed lengthy amicus curiae briefs that attack the existence and reliability of recovered memories, aligning itself with the accused perpetrators of childhood sexual abuse in cases concerning, for example, the applicable statutes of limitations,[15] third-party liability of therapists,[16] and the admissibility into evidence of testimony based upon recovered memory.[17] In short, the FMSF legal activity is directed not only at defending suits against alleged abusers, but also at preventing and deterring claims of childhood sexual abuse from ever receiving a hearing on the merits in court.

Among the weapons developed in this campaign are several tort actions essentially designed to punish those who confront perpetrators of sexual abuse that has been remembered belatedly, to deter abuse survivors from filing lawsuits for damages, and to warn off both the therapists and attorneys who might help abuse survivors by exposing both groups to liability based upon novel legal theories. In this Essay, I describe and evalu-

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[12] *See* BLAUSTEIN & FERGUSON, *supra* note 10, at 248.

[13] On the history of the FMSF and its founding members, see MOIRA JOHNSTON, SPECTRAL EVIDENCE: THE RAMONA CASE: INCEST, MEMORY AND TRUTH ON TRIAL IN NAPA VALLEY 200 (1997).

[14] For example, soon after the verdict in the *Ramona* case, discussed in Part II *infra*, readers were able to purchase for $50 the complaint, motions, legal arguments pertaining to duty to a third party, expert testimony, and verdict forms from the case, and were also instructed about obtaining trial transcripts. *See, e.g.*, FMS FOUND. NEWSL. (False Memory Found., Philadelphia, Pa.), Apr. 1995, at 8. A recent newsletter summarizes nineteen cases for which motions and unpublished decisions are available from the FMSF Brief Bank. *See* FMS FOUND. NEWSL. (False Memory Found., Philadelphia, Pa.), Jan.-Feb. 1998.

[15] *See* M.E.H. v. L.H., 685 N.E.2d 335 (Ill. 1997).

[16] *See* Brief of Amicus Curiae, False Memory Syndrome Foundation, in Support of Appellee, Doe v. McKay (Ill. Dec. 24, 1997) (No. 83094).

[17] *See* State v. Hungerford, 697 A.2d 916 (N.H. 1997).

ate three such developments—malpractice suits by accused parents against their child's therapist, the use of loss of consortium (or loss of society of child) claims by an accused parent against his child's therapist, and lawsuits brought by accused parents against lawyers who file civil actions for sexual abuse on behalf of their children. As to each, I discuss the relationship of the proposed remedy to the traditional interpretation of the common law and evaluate the wisdom of extending the causes of action in these unprecedented ways. I conclude that significant social policy concerns dictate rejecting each of these unprecedented legal actions.

II. THIRD-PARTY MALPRACTICE SUITS AGAINST THERAPISTS

The first of the three novel claims was asserted in a 1994 California case, *Ramona v. Isabella*, in which a father sued seeking $8.5 million in damages against his adult daughter's therapists for "implanting or reinforcing" false memories of childhood sexual abuse, thereby allegedly causing his daughter to accuse him of abuse and ultimately to file a suit for damages against him. Ramona also claimed that the therapists' actions caused his wife to divorce him, his other daughters to become estranged from him, and his employer to terminate his extremely lucrative employment as vice-president for marketing of the Mondavi Brothers winery.

The primary defendant in the *Ramona* case was a therapist whom Holly Ramona, Gary Ramona's oldest daughter, had consulted for treatment of bulimia while she was a freshman in college. After a number of months in therapy, which did not focus upon sex but did, as does most therapy, inquire into the circumstances of her childhood, Holly began to have flashbacks of sexual abuse by her father; the flashbacks continued and grew more detailed as the months went on. She recounted them first to her mother and then to her therapist, and became determined to confront her father with her emerging memories.[18] The confrontation took place on March 15, 1990, and Ramona denied the allegations; later that year Holly also filed a civil suit for damages against her father. Apparently as a result of Holly's memories, Ramona's wife finally left what seems to have been a long-troubled marriage, taking the couple's two other daughters with her. Gary was placed on a six-month paid leave to deal with his personal and legal problems, and ultimately was fired by Mondavi Brothers.[19]

After Holly filed her suit against her father, he responded by filing a lawsuit as well. However, rather than suing his daughter for the damages consequent upon her allegations against him, Gary instead sued her therapist, arguing that the therapist was liable for damages foreseeably caused by

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[18] In the interest of brevity, the sodium amytal interview administered to Holly Ramona after her flashbacks but prior to confrontation of her father will not be considered here. *See* JOHNSTON, *supra* note 13, at 96-99.

[19] For an extended discussion of the history of problems in the Ramona marriage and of Gary Ramona's difficulties at the winery, see *id.* at 13-75, 134-40, 151-54.

what he alleged to be malpractice. The trial of these charges included a battle of nationally known experts concerning the existence and reliability of recovered memories and the possibility of implanting false memories in the mind of an adult. It ended in a rather puzzling verdict in favor of Gary Ramona: the jury found that the defendants had reinforced but not implanted false memories of sexual abuse, and awarded Ramona only $475,000 in damages for lost wages, disallowing the millions of dollars he had claimed for emotional distress, destruction of his family, and the like.

My focus in this Essay is neither the specific merits of the *Ramona* case nor the scientific debate over the reliability of recovered memory,[20] but rather the novelty, inappropriateness, and negative impact of the cause of action allowed in *Ramona* and subsequently proposed by the FMSF as a model for legal actions in other states. An action filed by a third party to the therapy relationship against a therapist that is against the express opinion, wishes, and sworn testimony of the therapist's client not only diverges substantially from tort law in California, where this case was brought, but also is without precedent in other jurisdictions. Most states are hesitant to allow third-party claims in the tort context, and allow third-party claims against medical personnel only in extremely limited circumstances, if at all.[21] While California has gone the furthest in developing third-party tort claims—permitting, for example, claims by bystanders for their children's injuries,[22] by third parties damaged by misdiagnoses acknowledged by the primary patient,[23] and by persons injured by dangerous psychiatric patients[24]—the California Supreme Court was, by the time of the *Ramona* case, in the process of cutting back and strictly limiting these expansive developments.[25] Yet in the context of a sexual abuse survivor case, the complaint survived a motion to dismiss on the grounds that the therapist had entered into a quasi-patient relationship with Mr. Ramona because she was present at the confrontation between Holly and her father at the therapist's office.

In addition to being unprecedented, third-party actions such as that brought in the *Ramona* case are also inappropriate on policy grounds. Third-party actions have not been extended in California and other states because, among other reasons, they open the "floodgates" to virtually unlimited liability and require substantial judicial involvement in issues that courts are ill-suited to resolve. If therapists are held liable to a parent in-

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[20] Professor Elizabeth Mertz and I have covered these issues at some length in Cynthia Grant Bowman & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy*, 109 HARV. L. REV. 549 (1996).

[21] *See id.* at 572 n.138, 574.

[22] *See* Dillon v. Legg, 441 P.2d 912 (Cal. 1968) (en banc).

[23] *See* Molien v. Kaiser Found. Hosps., 616 P.2d 813 (Cal. 1980).

[24] *See* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976) (en banc).

[25] *See* Bowman & Mertz, *supra* note 20, at 567-74, 577-79.

jured by his or her child's allegations of sexual abuse, what is to prevent family members from suing therapists whenever the process of therapy introduces intolerable tensions into a family system or when accusations regarding past injuries emerge? Under what legally sound argument could we then foreclose an unhappy spouse from suing the other spouse's therapist, or a child from suing the couple's marital therapist, when the therapy ends in divorce rather than reconciliation? If the operative legal principle is the duty of the therapist to third parties for foreseeable injury resulting from therapy, there is no sound legal argument for distinguishing alienation based on remembered sexual abuse from alienation based on anything else that might be discussed in therapy. The numbers of potential cases boggle the mind. Permitting this type of remedy would open the preponderance of psychodynamically oriented therapists to suit by disgruntled family members whenever a therapist encouraged a client to explore sources of dissatisfaction or pain in family relationships.

Some commentators argue that third-party malpractice suits are nonetheless necessary to police incompetent, untrained, or unscrupulous therapists now practicing in the sexual abuse field. Yet even assuming the prevalence of this problem, it is appropriately addressed by existing legal remedies. Even if the possibility of tort liability might deter some irresponsible therapists, the issues involved in these cases are best left to professional self-regulation, on the one hand, or to malpractice suits by the client herself, on the other hand, because she is the party most directly affected by and knowledgeable about the therapy. Moreover, intrafamily conflicts aroused or exacerbated by the psychotherapeutic process are best resolved in the private sphere. The courts are ill-equipped to reach decisions about the nuanced interpretive processes and family dynamics involved in psychotherapy. For all of these reasons, suits for malpractice are appropriately limited to the person best situated to determine whether malpractice has occurred—the therapist's client.

A particularly important consideration is the impact of allowing third-party actions on the woman alleging that she was sexually abused. First, of course, it reduces her to a cipher, neither to be confronted directly nor to be held responsible for the consequences of her actions. Gary Ramona could have sued his daughter for the damages that he alleged resulted from her accusations; the traditional remedies provided by the common law include suits for defamation, intentional infliction of emotional distress, and malicious prosecution (or abuse of civil proceedings).[26] Leaping over her and suing her therapist instead portrayed Holly Ramona as a malleable dupe, and denied her agency, accountability, and voice. The implicit message is that Holly was totally gullible, mere clay in the hands of a suggestive therapist, and that her own memories of abuse were not to be trusted—indeed, that her own role in what transpired was not significant enough even to

[26] *See id.* at 585-86.

name her as a party to the litigation. Second, and perhaps of broader importance, the effect of such a suit is surely to deter women in Holly's situation from confronting their abusers and holding them accountable; in fact, the third-party action serves as a perfect offensive weapon for a current or potential defendant in a child abuse case. Third, given the substantial repercussions of therapist suits, the abuse survivor may well be reluctant to enter into a trusting and confiding relationship with a therapist at all—either for fear of the betrayal of confidences if the therapist is haled into court or for concern about the potential harm that may be inflicted upon the therapist who is seeking to help her.

Allowing third-party suits also places therapists who treat abuse survivors in an extremely difficult position. They may be deterred from accepting any clients with a claimed or verified history of abuse, because of the risks of litigation arising from the legal duty these suits would impose upon the therapist to any third party injured by the client's allegations. At the very least, the imposition of such a duty places them in a conflict of interest (bearing duties to both the client and her alleged abuser) of a type both the law and professional ethical regulations seek to prevent.[27] Even where the client's best interest seems to dictate a confrontation with her abuser, a therapist abreast of the latest legal developments may be reluctant to encourage a confrontation or to be present if it does take place (as happened in the *Ramona* case), and may counsel against the filing of any legal action.

The impact upon the availability of therapy for abuse survivors, its effectiveness, and economic accessibility in the face of rising malpractice insurance rates poses obvious problems of social policy. Professor Mertz and I have argued elsewhere that these and other reasons of public policy militate against the extension of third-party tort claims of this sort. My particular interest here, however, is the impact of these claims upon the assertion of the newly recognized legal claims against perpetrators of past sexual abuse. Since the *Ramona* case was publicized by the media and the FMSF, actions against therapists have been filed in other states *prior to* the filing of any civil action against the alleged abuser.[28] This is, as I have noted, the perfect preemptive weapon. The accused becomes the accuser and is armed with the machinery of the law, exposing the survivor to its power and its ability to invade even the confidentiality of the therapy process. If the survivor proceeds to file her own suit, her therapy records are open to discovery, and may be used as the basis of a malpractice action against her therapist. Even without discovery of those records, of course, the survivor's own credibility, reality, private life, and emotional state—indeed, her sanity—are placed on trial though she is not a party to the lawsuit.

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[27] *See id.* at 587-90.

[28] *See, e.g.*, Lindgren v. Moore, 907 F. Supp. 1183 (N.D. Ill. 1995); Sullivan v. Cheshier, 846 F. Supp. 654 (N.D. Ill. 1994).

The professional ethical rules for psychotherapists, the Supreme Court, and most practitioners agree that confidentiality is crucial to the psychotherapeutic relationship.[29] Imposing upon the therapist a duty to a third party would seriously threaten the confidentiality of therapist-patient communications. Most states prohibit therapists from testifying about therapist-patient communications unless the client waives the privilege, although some states provide that therapy records may be disclosed by a therapist in order to defend herself in a malpractice action by the patient.[30] This creates substantial due process problems for a therapist attempting to defend herself against a third-party suit, for she is unable to use therapy records or other privileged communications as evidence that the therapy did not constitute malpractice. The patient, in turn, is then placed in a double bind: she may either keep her therapy records confidential, as she is entitled to do, or waive the privilege and come to the defense of the therapist she believes has helped her. Moreover, if states were to respond to the due process problems created by suits against the therapist by allowing an exception to the therapist-patient privilege for third-party suits, therapy records would be discoverable without the patient's consent. Loss of the therapist-patient privilege in this way would substantially erode the confidentiality essential to the therapy process—and would also impermissibly intrude upon the patient's right to privacy.

For all of these reasons—the impact upon the abuse survivor, upon the therapist's ethical obligations, and upon the psychotherapeutic process—allowing third-party malpractice claims against therapists is unwise from the standpoint of public policy. The impact of such cases upon the balance of power between abuse survivors and their abusers is also clear: the threat of such lawsuits provides an extremely powerful disincentive for a survivor to confront her abuser in or out of court.

III. LOSS OF CONSORTIUM CLAIMS AGAINST THERAPISTS

In states whose tort law more clearly forecloses the possibility of third-party suits in the medical context than does that of California, persons accused of child sexual abuse, with the support of the FMSF, have sought to create even more novel tort remedies. Illinois is a case in point. In one relatively early case, a federal district court judge upheld a cause of action against a therapist in a case where the client had confronted her parents with the allegation that her brother had sexually abused her in childhood and that she had repressed the memories until recovering them during psychother-

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[29] *See, e.g.*, AMERICAN PSYCHOLOGICAL ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, STANDARD 5.02 (1992); Jaffee v. Redmond, 518 U.S. 1, 9-10 (1996); Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1255-58, 1261 app. (1962).

[30] *See, e.g.*, 735 ILL. COMP. STAT. 5/8-802 (Michie 1993).

apy.[31] Conceding that Illinois law does not permit negligence claims brought by third parties to a doctor-patient relationship, the district court judge nonetheless allowed the action—brought by third parties who were not even accused of the abuse—to proceed based upon an indisputably novel theory. He inferred a private right of action, in public nuisance, to enforce the Illinois law licensing therapists, doing so without even analyzing the question under the applicable standard for inferring a private right of action under a statute.[32] Thus the parents' action against their daughter's therapist proceeded to trial, where a jury found for the defendant therapist.[33] Even assuming that this legal theory has a future, it applies only in cases where a therapist is unlicensed. The case nonetheless demonstrates the circuitous arguments courts have accepted in order to uphold lawsuits against therapists in this context.

Another avenue pursued by opponents of claims by sexual abuse survivors in Illinois has been to extend a traditional tort remedy—the action for loss of consortium—in a fashion that makes a certain logical sense, but only if removed from the context of fact and policy. *Doe v. McKay*,[34] like *Ramona*, involved an adult daughter who accused her father of childhood sexual abuse, alleging that her memory of the abuse had been repressed until she entered therapy. Therapist McKay held a number of joint sessions with father and daughter, at the first of which the daughter made her initial allegations of abuse; thereafter, her father went into therapy with another therapist. Two years later he sued both therapists and the professional association for damages, alleging seventeen separate counts, the most viable of which was a count for loss of society of his child.[35]

The common law action for loss of consortium originated as an action by a master for the loss of services of his servant through the tortious act of a third party and was subsequently expanded to allow recovery for loss of services of a wife or child.[36] Its origins were primarily economic—compensation for loss of the material services of servant, wife or child—although in the case of a wife it came to include loss of companionship and sexual relations as well.[37] Until relatively recently, the tort remained bound by its patriarchal origins, denying the remedy to wives for the loss of their husband's consortium.

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[31] *See Sullivan*, 846 F. Supp. 654

[32] *See id.* at 658.

[33] *See* Heather Lalley, *Doctor Acquitted in Repressed-Memory Trial*, CHI. TRIB., Apr. 3, 1997, at B8.

[34] 678 N.E.2d 50 (Ill. App. Ct. 1997), *rev'd* 1998 LEXIS 913 (Ill. June 13, 1998).

[35] *See McKay*, 678 N.E.2d at 51-52.

[36] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 125, at 931 (5th ed. 1984).

[37] *See id.* at 931-32; Jacob Lippmann, *The Breakdown of Consortium*, 30 COLUM. L. REV.. 651, 653 (1930).

The twentieth century has seen a substantial extension of the loss of consortium beyond its common law origins—to allow wives an equivalent action for the loss of their spouses,[38] to allow children the right to sue in some jurisdictions for the loss of their parents' society,[39] and to apply the tort in cases of grievous but nonfatal injury.[40] Some courts then began to extend the tort to situations in which no physical injury was involved, and particularly to situations involving loss of custody of a minor child through the intervention of an ex-spouse, grandparent, or therapist.[41]

Absent all of these evolutionary turns in the development of the common law, a loss of consortium claim against an adult child's therapist would be inconceivable. Many jurisdictions jumped off the evolutionary trail at some point along the way. For example, California, despite its penchant for extending liability to third parties in a variety of circumstances, declined to extend the action from the spousal context to claims for loss of society in the parent-child context, for fear of the possible explosion of lawsuits that could result.[42] In Illinois, by contrast, the Supreme Court chose to extend the cause of action to allow claims both for loss of society of a child[43] and for non-fatal injuries.[44] It required an additional and unprecedented twist, however, to extend the cause of action to a situation where the "child" whose society was lost to the parent was in fact an adult—and where the loss of society resulted not from physical injury but from the now-adult child's choices while in therapy.

This entirely novel claim—in effect a resurrection of alienation of affection claims that have long since fallen into disfavor—was nonetheless upheld by the appellate court in *Doe v. McKay* in the context of therapy leading to the recovery of memories of childhood sexual abuse. It is not difficult to understand why this extension of the tort is inappropriate. Here we are dealing with an emancipated child in the context of therapy rather than physical injury. Unlike minor children, adults have the right to make major life decisions independently, and the wishes of an adult child often determine the nature of the parent-child relationship after the child has left the parental home. This differs significantly from the traditional loss of consortium suit, in which loss of society results from death or permanent physical injury. In traditional cases involving minor children, moreover, the parent-child estrangement or loss is involuntary on the part of the child, and the interests of parent and child are not adversarial. In the therapy

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[38] *See, e.g.*, Rodriguez v. Bethlehem Steel, 525 P.2d 669 (Cal. 1974).

[39] *See, e.g.*, Dymek v. Nyquist, 469 N.E.2d 659 (Ill. App. Ct. 1984).

[40] *See, e.g.*, Dini v. Naiditch, 170 N.E.2d 881 (Ill. 1960).

[41] *See, e.g.*, Kunz v. Deitch, 660 F. Supp. 679 (N.D. Ill. 1987) (suing grandparents); *Dymek*, 469 N.E. 2d 659 (suing therapist).

[42] *See, e.g.*, Borer v. American Airlines, 563 P.2d 858, 866 (Cal. 1977) (en banc).

[43] *See, e.g.*, Bullard v. Barnes, 468 N.E.2d 1228 (Ill. 1984).

[44] *See, e.g.*, Renslow v. Mennonite Hosp., 367 N.E.2d 1250 (Ill. 1977).

context, by contrast, the adult child, whose competence must be presumed if the contrary has not been shown, has expressed opinions in direct conflict with those of the parent from whom she is estranged—both that a family member sexually abused her and that her therapist is competently helping her. The consequent alienation, in short, is a matter of the adult child's volition and control.

Claims for loss of the society of adult children also present problems in determining the appropriate measure of damages. Unlike actions for loss of a spouse who is a wage earner, caretaker or homemaker or for loss of parental support by a minor child, an adult child has no reciprocal support obligations toward the parent. The court deciding such a case would be saddled with the difficulty of assessing damages where the parties live separately and are not economically interdependent—at least not in any way that typically benefits the parent. The noneconomic damages in question would be extremely speculative and difficult to ascertain. How often would the adult child have been likely to visit or telephone? Can adult children be counted upon to support their parents emotionally or otherwise in old age and illness? Was this particular child likely to do so? Is it certain that the estrangement will last, or is it, like many family conflicts, temporary?

In cases like *Sullivan* and *Ramona*, moreover, where the daughter testified on behalf of the therapists, the court will be called upon to balance the contradictory testimony of parent and child on all of these issues. It will need to weigh their doubtless conflicting opinions about the current degree of alienation between parent and child and about any problems that may have existed between them prior to the child's entry into therapy. An additional question, ill-suited for judicial resolution, is whether the therapy, if allowed to proceed without the interruption of litigation,[45] would have resulted in resolution of the daughter's anger, healing of her injuries, and reconciliation among the parties. The difficulty of deciding the various damage issues simply confirms the inappropriateness of judicial intervention in conflicts over the causation of alienation between parent and child. Just as the courts have taken themselves out of the business of adjudicating alienation of affection among adults, they should be wary of becoming entangled in the questions of interpersonal dynamics and perception presented by third-party suits against therapists.

The use of consortium actions against an adult child's therapist also implicates the many policy concerns already noted in connection with the *Ramona* case. Extending liability to therapists in this context will have significant impact upon matters of public concern—both traditional worries about sprawling tort litigation due to overextension of tort duties and more recent public policy concerns about deterrence of childhood sexual abuse,

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[45] As the *Sullivan* case demonstrated, it is virtually impossible to continue a therapeutic relationship when its very substance has become the subject of public litigation. Sullivan v. Cheshier, 846 F. Supp. at 657-58.

the accountability of accusers, the accessibility and economic availability of therapy for survivors, and the effect upon the psychotherapeutic profession as a whole. Expansion of loss of consortium claims also creates the same problems regarding conflicts of interest and confidentiality/privilege discussed at length above. For all of these reasons, permitting loss of consortium claims in this context appears to be an unwise development in the common law.[46]

Finally, the core of the loss of society claim, like that of third-party suits, is the attribution of the consequences of an intrafamily conflict to a stranger to the family relationship, holding the therapist accountable for the daughter's choices. In this respect, the loss of consortium action has much the same impact upon an abuse survivor as the third-party malpractice suit described in Part II: it negates her agency and refuses to hear her voice. It is, moreover, susceptible to use as an instrument of continuing control by an abuser, as a preemptive weapon against the filing of damage claims by survivors, or as an effective counterattack if a suit for damages for the injuries of childhood abuse has already been filed. In sum, it is a powerful weapon in the developing arsenal against the assertion of legal claims by survivors.

IV. CLAIMS AGAINST ATTORNEYS WHO FILE LAWSUITS ON BEHALF OF SURVIVORS BASED ON RECOVERED MEMORIES OF ABUSE

Apparently as part of the FMSF strategy to deter the filing of damage claims by sexual abuse survivors, a third and unprecedented tort action was filed in Philadelphia in 1996.[47] In that case, Allen Feld, now a member of the FMSF staff, filed suit against his daughter's attorney a year after the sexual abuse complaint she brought against him had been voluntarily dismissed. His 27-year-old daughter, Amy Feld, had entered therapy in 1989 for treatment of an eating disorder. Several months into her therapy, she began to have flashbacks of sexual abuse by her parents, and in June 1989 she confronted her parents with her memories and severed her relationship with them.[48] In May 1990, Amy Feld consulted Nancy Wasser, a Philadelphia attorney experienced in the area of childhood sexual abuse litigation, to discuss suing her parents.[49] Wasser filed suit on Amy Feld's behalf the following November.[50] After discovery and several continuances, the *Feld* case was set for trial in February 1995. On the eve of trial, without retract-

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[46] The Illinois Supreme Court agreed with the position set forth in this Article – and previously in its author's amicus brief. *See* Doe v. McKay, 1988 WL 319488 (Ill. June 18, 1998).

[47] Complaint, Feld v. Wasser (Philadelphia County, Pa., Ct. of Common Pleas, Mar. 19, 1996) (No. 1374) [hereinafter Complaint, *Wasser*].

[48] *See id.* paras. 8-12.

[49] *See id.* para. 13.

[50] Complaint, Feld v. Feld (Lackawanna County, Pa., Ct. of Common Pleas, Nov. 19, 1990) (No. 90-CV-6667).

ing her allegations of abuse, Amy Feld voluntarily dismissed the lawsuit with prejudice.[51]

In March 1996, more than a year after the case against them had been dismissed, the Feld parents filed suit against their daughter's attorney, alleging, among other things, that she had failed adequately to investigate before filing suit against them and to withdraw the complaint after discovery, and thus was liable to them for the wrongful use of civil proceedings.[52] They sought damages for their litigation costs, lost earnings, emotional distress, the destruction of their family, and harm to their reputations, as well as punitive damages.[53] Although the Felds' case was voluntarily dismissed in 1997, it provides an exceptional example of the direct use of tort claims to deter and punish the filing of civil claims by survivors of childhood sexual abuse.

Like the tort claims against therapists discussed above, the lawsuit against Amy Feld's attorney reflects both a novel and inappropriate extension of the law. Although not denominated as such, it is in effect a malpractice suit against an attorney by an adverse party, raising claims about the adequacy of the attorney's investigation, research, and the like, and attempting to make the attorney an insurer of her client's veracity. For sound reasons, suits against lawyers by adverse parties have been unanimously rejected by the courts.

Indeed, third-party claims of any kind against attorneys are permitted only in very limited circumstances. For example, where a third party is clearly the intended beneficiary of the transaction between the attorney and his or her client, such as the beneficiary of a will, some states do allow the third party to sue the attorney for malpractice.[54] Similar suits have been allowed to proceed either under a tort theory or, in some states, as an action by the third-party beneficiary of a contract.[55] However, the tort and contract standards converge upon the requirement that the attorney and client must have intended their action to benefit the third party. This is *never* the case when suit is brought against an attorney by the adverse party to litigation in which they have been involved. Indeed, unless a lawsuit is collusive in some fashion, civil litigation for damages, especially punitive damages, is *intended* to hurt the adverse party. For this and a variety of policy rea-

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[51] Complaint, *Wasser, supra* note 47, at para. 55.

[52] *See id.* at Counts I-IV. The complaint also included counts for intentional and negligent infliction of emotional distress and invasion of privacy, but the discussion in this Essay is limited to the allegations that sound in malpractice and malicious prosecution; other possible causes of action against attorneys in this situation are discussed by Professor Mertz and myself in *Attorneys as Gatekeepers to the Court: The Potential Liability of Attorneys Bringing Suits Based on Recovered Memories of Childhood Sexual Abuse*, HOFSTRA L. REV. (forthcoming 1999).

[53] *See id.* at paras. 62-70.

[54] *See, e.g.*, Lucas v. Hamm, 364 P.2d 685 (Cal. 1961) (en banc).

[55] *See, e.g.*, Pelham v. Griesheimer, 440 N.E.2d 96, 98-100 (Ill. 1982); Guy v. Liederbach, 459 A.2d 744, 749 (Pa. 1983).

sons that I discuss below, courts unanimously refused to recognize similar third-party claims when doctors' organizations attempted to deter medical malpractice suits by suing the malpractice plaintiffs' attorneys.[56]

Probably because of these precedents, *Feld v. Wasser* was pled as a case for malicious prosecution, or abuse of civil proceedings. This is an action that is clearly available, indeed, intended to be used by a former litigant against a previously adverse party and/or its attorney. Malicious prosecution requires, however, that three elements be satisfied: (1) termination of the previous action in favor of the malicious prosecution plaintiff; (2) lack of probable cause; and (3) malice.[57] The requirement that all three be met poses significant hurdles for suits against the attorney bringing a claim on behalf of a sexual abuse survivor.

First, the lawsuit by the survivor against the alleged abuser must have terminated in favor of the defendant. This requirement is straightforward enough in cases that go to trial and are decided by a judge or jury on the merits. But abuse cases, like so much litigation, often end more ambiguously than with a final resolution on the merits. Where a case is settled, for example, it is unclear how the fact of pretrial settlement relates to the merits of the case. Litigants settle cases for numerous reasons, especially in the abuse context—because they run out of money to pay legal fees, because they cannot withstand the emotional travail of litigation, because they are intimidated by the adverse party, or because they decide the lawsuit is not worth pursuing for a variety of reasons—and not merely to withdraw the complaint based on the merits. Even in that circumstance, however, typified by the withdrawal of the case against Cardinal Joseph Bernardin of Chicago,[58] one may question whether it is wise to discourage settlement by allowing for the imposition of substantial liability for having filed the lawsuit in the first place.

The second requirement in a malicious prosecution suit is that the previous lawsuit have been pursued in the absence of probable cause. The third requirement is somewhat similar—the presence of malice, a term of art involving not so much a malign state of mind as the fact of proceeding in a case with knowledge that it lacked merit.[59] As to both elements, how-

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[56] For a description of the doctors' campaign, see Sheila L. Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 FORDHAM L. REV. 1003 (1977).

[57] *See* I RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 6.10, at 419-22 (4th ed. 1996).

[58] On November 12, 1993, Steven Cook filed a lawsuit alleging he had been sexually abused by Cardinal Joseph Bernardin and another priest from 1975 to 1977. In February 1994, Cook retracted the charges against Bernardin, but reached an undisclosed settlement with the Archdiocese of Cincinnati and the other priest. Cook and Bernardin later met privately and Cook apologized for his accusations against Bernardin. *See* Andrew Herrmann, *Bernardin's Accuser Dies; Cook Charge May Have United Local Catholics*, CHI. SUN-TIMES, Sept. 22, 1995, at 9, *available in* 1995 WL 6672325.

[59] *See* I MALLEN & SMITH, *supra* note 57, § 6.20, at 456-58.

ever, the overwhelming majority of courts agree that neither states a negligence standard.[60] The appropriate inquiry is not whether the attorney has adequately investigated or otherwise pursued the case; if it were, in the classic statement of one court, "the court-rooms are full of malicious attorneys."[61] Attorneys are entitled to believe their clients, to act as their advocates, and to perform on their behalf within generally acceptable standards; their role is not to sit in judgment upon them.[62]

Malpractice or malicious prosecution cases against attorneys rarely succeed.[63] Substantial reasons of public policy have led the courts to reject third-party suits against attorneys in this context. The primary concern is that the imposition of a duty upon an attorney to an adverse party would interfere with the lawyer's ethical obligations to his or her client—both the duty of undivided loyalty and the duty to represent the client zealously within the bounds of the law.[64] (The conflict of interest and potential confidentiality problems are quite similar to those raised by allowing third-party suits against therapists, but the courts are apparently much quicker to recognize these dangers when attorneys are involved.) The conflict in which the lawyer would be placed, between a duty to an adverse party and the duty to protect his client's interests, would also jeopardize the client's right to effective assistance of counsel and seriously impede the strong public policy of encouraging free access to the courts.[65] As one court noted, if attorneys could be sued for negligence by adverse parties, "lawsuits now justifiably commenced will be refused by attorneys, and the client, in most cases, will be denied his [sic] day in court."[66] Moreover, this impact would not be uniform but would vary with the type of case or even with the character of the defendant. Thus, for example, imposing a duty to adverse parties "might unduly inhibit attorneys from bringing close cases or advancing innovative theories, or taking action against defendants who can be expected to retaliate."[67] This would present grave problems in the context of

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[60] *See, e.g.*, Berlin v. Nathan, 381 N.E.2d 1367, 1372 (Ill. App. Ct. 1978); Spencer v. Burglass, 337 So. 2d 596, 599 (La. Ct. App. 1976). Apparently only Pennsylvania has altered the common law rule by statute in this respect. *See* 42 PA. CONS. STAT. ANN. § 8351 (West 1983 & Supp. 1997).

[61] *Spencer*, 337 So. 2d at 600.

[62] In the words of the Michigan Supreme Court, "[a] lawyer is entitled to accept his client's version of the facts and to proceed on the assumption that they are true absent compelling evidence to the contrary." Friedman v. Dozorc, 312 N.W.2d 585, 605 (Mich. 1981).

[63] *See* I MALLEN & SMITH, *supra* note 57, § 6.6, at 411; John W. Wade, *Frivolous Litigation: On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions,* 14 HOFSTRA L. REV. 433, 454 (1986).

[64] *See* Pelham v. Griesheimer, 440 N.E.2d at 100; *see also* ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1980) (duty to exercise independent professional judgment on behalf of a client); Canon 7 (duty to represent client zealously within the bounds of the law).

[65] *See, e.g.*, Weaver v. Orange County Superior Court, 156 Cal. Rptr. 745, 751-52 (Cal. Ct. App. 1979).

[66] *Id.* at 752.

[67] *Friedman*, 312 N.W.2d at 593.

survivor suits that rest upon recovered memories of childhood sexual abuse and pit the word of child against that of the allegedly abusive parent.

In sum, the courts have rejected lawsuits brought against attorneys by third parties in order to foster vitally important public policy goals. State legislatures have responded by passing legislation providing for sanctions, including attorney's fees, in the original action as a remedy for the filing of nonmeritorious litigation,[68] and the courts have deferred to this as a more appropriate solution to the problem. Since the passage of a strengthened Federal Rule of Civil Procedure 11 and its state counterparts, this route has provided the principal weapon against frivolous or harassing proceedings,[69] and it is not apparent why cases involving claims of recovered memories of abuse should be treated differently.

In short, the claims advanced in the *Feld* case were unprecedented and represented an extension of the common law in a direction contrary to important public policies. In this respect, it is important to consider the interests to be balanced in cases like *Feld*: (1) the right of the survivor to have effective access to the courts to state her claim of abuse and to demand compensation through the tort system, thus presumably also deterring similar abuse, and (2) the damages incurred in defending against the allegations of abuse. As in other types of cases, permitting a claim within the same lawsuit for reimbursement of the costs of defending a meritless suit represents an effective compromise among the interests involved.[70]

Suits against attorneys representing sexual abuse survivors are the most direct effort among those discussed in this Essay to prevent survivors from exercising their newly won right to claim damages for past abuse. Assuming that many, if not most, of their claims would be brought on a contingent-fee basis, the possibility of additional liability against the attorney would obviously raise the potential costs an attorney would consider before taking such a case. Many lawyers may prefer to avoid these clients rather than risk these costs. Moreover, an action for malicious prosecution is typically, and appropriately, directed not just at the attorney but at the client as well. If successful in this context, they will become a powerful deterrent to survivors seeking damages, making their newly recognized rights illusory.

V. CONCLUSION

In sum, each of the three actions described above—third-party suits against therapists, actions for loss of society of a child, and malpractice or malicious prosecution proceedings against attorneys—are unprecedented and inappropriate extensions of the common law. When evaluated in indi-

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[68] *See* Wade, *supra* note 63, at 457-68.

[69] *See* I MALLEN & SMITH, *supra* note 57, § 10.3, at 651.

[70] *See, e.g.*, Black v. Dallas County Child Welfare Unit, 835 S.W.2d 626, 629 (Tex. 1992) (affirming award of statutorily authorized attorneys' fees and expenses in a case involving removal of a minor child from the home based on allegations of abuse).

vidual instances, they may be seen simply as creative lawyering—arguments for a good-faith extension of the law to protect a client (the defendant accused of abuse). If we evaluate this question in a societal rather than individual context, however, it appears in a new guise: that of a legal community reaching for any far-fetched solution to recap the bottle out of which women's allegations of abuse, long overdue, have escaped. Put differently, legal doctrine seen as an autonomous structure provides no answer to the question of whether these novel actions should be allowed; instead we must decide what social policies we want to pursue and at what cost. As the discussion above makes clear, I am convinced that each of these unprecedented actions should be rejected on a variety of public policy grounds. Some of these policy grounds may vary with the context, be it an action against therapist or attorney, but they share a concern for protecting the voices of those who come forward with claims of abuse.

Finally, preemptive suits against therapists treating survivors and retaliatory suits against attorneys representing them are among the battery of legal maneuvers aimed at keeping childhood sexual abuse claims out of court. Each of these actions should be rejected because they are part of a concerted campaign to close the courts to a particular variety of cases, ones that involve allegations of abuse and noncontinuous memory. Given the fact of widespread abuse, on the one hand, and the vagaries of memory, on the other, some of these claims may prove to be "true" in a legal sense and others not; but broad generalizations about a category of cases will not sort out the differences between true and false claims of abuse. Instead, like other personal tort claims, they should be submitted to judicial scrutiny in all their fact-contingency.