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## Protecting Scientists, Science, and Case Protagonists: A Discussion of the Taus v. Loftus Commentaries

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# Protecting Scientists, Science, and Case Protagonists: A Discussion of the *Taus v.* *Loftus* Commentaries

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## Abstract

This article is a discussion of the articles by Nicole Taus Kluemper, Erna Olafson, Frank Putnam, Laura Brown, Ross Cheit, and Gerald Koocher. The papers center on the issues raised by a decision by two psychologists to break the confidentiality of a case study published by David Corwin and Erna Olafson to gather information to support an alternative theoretical view of the case. The article reviews best understandings of the justifications proposed by the psychologists, who saw themselves as investigative reporters, discusses the papers that have been submitted, and proposes enhanced ethical guidelines and increased professional discussion of these issues.

## Keywords

*Taus v. Loftus*, case studies, ethics, confidentiality, privacy

I have been asked to take on the difficult task of integrating and extending the discussion of *Taus v. Loftus* and the issues that it raises. The story at the center of this controversy has been repeated throughout this set of articles, partly so

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that each manuscript could stand alone. I will repeat it only briefly here, and refer the article to Kluemper (in press) and Olafson (in press) for the pertinent perspectives of a case study protagonist (Kluemper/Taus) and a colleague and co-author of the professional who conducted the case study (Olafson).

Briefly, Taus was interviewed as a child by Olafson's colleague, David Corwin, and interviewed again in adolescence when she had requested to view the original videotape of her own disclosures as a child. Before doing so, and while the camera was again rolling, Taus had an experience that some would label a "recovered memory." Because this phenomenon was controversial at the time, Corwin asked Taus's consent to show the videotape at various conferences, and the tape was also the centerpiece of a discussion in a scientific journal, including articles by psychologists specialized in trauma, memory, recognition of facial cues of deception, and so on (Corwin & Olafson, 1997; Ekman, 1997; Neisser, 1997).

Thus far, the story is an old one. A professional witnesses a therapeutic or symptom-related event that she or he believes would be of scientific interest to the community of scholars, and does his or her best to describe it in the academic literature. But here, the account takes an unusual turn. Loftus, a well-known memory researcher from the University of Washington (UW), is concerned that the story has or will be used to support the concept of recovered memory in courts of law. She therefore hires a private investigator to locate other witnesses to the events of Taus's life, and travels to meet them and interview them. The investigator also comes into possession of other private information describing Taus and her personal and medical history. (Whether and to what degree deception was used here is apparently in dispute.) Loftus and a colleague, Melvin Guyer, compile this information and publish an alternative history of Taus's experience, contradicting and expanding upon that offered in Corwin and Olafson's (1997) manuscript. Taus, feeling violated and betrayed, tries to stop the publication, noting to the UW Institutional Review Board (IRB) that she had not given permission for this discussion. After much time and internal debate, UW decides to allow the publication of Loftus and Guyer's manuscript. The document contained much personal information about Taus and her family that she found upsetting and humiliating. She sues Loftus, Guyer, UW, and other entities. In the end, after an extremely protracted legal battle, she settled an invasion of privacy claim for less than US\$10,000, but was legally assessed with the cost of the plaintiff's attorney fees (approximately a quarter of a million dollars) because she lost other portions of her suit.

Most of the commentaries you have read thus far in this volume have clear sympathies in Taus's camp. This is understandable. Taus was an adolescent when she agreed to be the protagonist of Corwin's case study. She would

have had no way to predict at the time of her assent to Corwin that her personal life would be subject to further evaluation that she could not control, or that other articles would be written without her permission that were critical of her life and family. She was a single individual with very limited resources fighting multiple entities with highly paid legal staff, and many of us question the legal advice that she was given. In the end, she lost most of the counts of her case, and was devastated personally and bankrupted financially. Many of us feel a vicarious guilt that an individual who was asked to serve as a case study protagonist paid such a high price for her contribution to psychology. How can our sympathies not be in her favor?

Loftus and Guyer were asked to contribute to this series, but each wrote professional and courteous refusals, citing both other time commitments and personal priorities. Dr. Loftus did forward supporting material for me to read that described her perspective on the case, and a list of supporters who had signed an amicus brief submitted on her behalf. I used this brief to choose reviewers for the papers you have read, to try to enhance the representation of these viewpoints. One advocate of the false memory position agreed to write a piece in the series, but withdrew the piece just before publication (again, citing personal reasons). I therefore feel that this series is not well balanced in terms of the perspectives of Loftus and Guyer. The first part of this article is therefore my attempt to present some of the arguments they have made elsewhere for their position, and also some of the statements made by Loftus regarding the facts of the case. The second part of this article is my discussion and summary of the papers.

## Factual Disagreements and Context

To my knowledge, most of the facts that are the basis of this discussion and the lawsuit are not in dispute. Loftus and Guyer have presented their *Skeptical Inquirer* articles as investigative journalism, rather than psychological research that is subject to IRB approval. If we accept that premise, then the fact that Taus was not asked for her permission for the story to be told as Loftus and Guyer perceived it is normative. Even the use of deception and subterfuge to gain information is more readily understandable. It is also important to note here that although Taus's former foster mother testified that Loftus misrepresented herself (stating that she was a supervisor of Corwin) to gain information, Loftus has stated that she "unequivocally den[ies]" that she ever represented herself "to [foster mother] or anyone else as working with Dr. Corwin, M.D." (Geis & Loftus, 2009, p. 154). She argued that "many persons interviewed by a reporter are convinced that the interviewer got it wrong and that they would like to do it all over again, especially if its

publication had caused them difficulty” (Geis & Loftus, 2009, p. 155), noting that journalists refer to this as “source remorse.” Once Taus’s foster mother learned of Taus’s reaction to the interview, and learned Taus’s feelings about Loftus, Geis and Loftus argue, she might have changed her testimony to mend her relationship with her foster daughter.

To provide context for Loftus’s actions, it should also be noted that Loftus had an extensive research, forensic, and academic history defending those who had been accused of sexual abuse crimes based on evidence that she felt was “junk science” (Loftus, 1993; Loftus & Ketcham, 1994). If recovered memory was a “myth” (Loftus & Ketcham, 1994), then many people were being charged and at times convicted for crimes that they did not commit. Furthermore, if in fact all such memories were false, then thousands or even millions of men and women were being tortured with “memories” of violations that changed their views of their perpetrators (often relatives) and themselves, and were being sustained in these “memories” by researchers and therapists who were at times incompetent and at times simply mistaken. Loftus believed that the Taus case study was an important piece of “evidence” that was being increasingly cited in court (Loftus, 2003), but the one-sided nature of a blinded case study prevented true cross-examination of the heart of the case study evidence. She and her colleagues were “being sued simply for exercising their constitutional right to speak out on matters of grave public concern” (Loftus, 2003, pp. 85-86). An amicus brief filed by a group of 21 powerful news organizations (including CBS Broadcasting and Radio and *The New York Times*) argued that upholding Taus’s claims would “chill freedom of expression on many of the important issues of the day” (Loftus, 2008, p. 14).

Loftus and Guyer also paid a personal cost for her involvement in this case. According to Geis and Loftus (2009), Guyer contacted his own IRB to solicit an opinion about the upcoming *Skeptical Inquirer* article (i.e., whether it could be seen as journalism or research). The IRB chair and administrative director first stated that his work with Loftus was exempt, but then, a month later, without requesting further information, “informed him that the project was not exempt, that it had been disapproved, and that IRB was recommending that he be reprimanded.” Ultimately, after almost a year, Guyer was told that his project was exempt. Loftus also informally asked her IRB for their thoughts, and was told that she “might send them a proposal with the questions I wanted to ask Jane” (Loftus, 2004, p. 32). However, Loftus and Guyer then decided not to interview Jane (because Corwin had stated that Jane would like him to be present). Therefore, relying on the University of Michigan decision, Loftus did not pursue further IRB approval at UW. I should add here that in my own experience with more than 100 research projects, it is not unusual for a decision at an IRB at one institution to be sufficient

for approval for multiple authors at many other institutions. However, Geis and Loftus (2009) note that the UW director for the Office of Scholarly Integrity states that had Loftus requested permission, she would have been asked to provide a list of questions that she was planning to ask and to explain potential risks to the subjects of her interviews.

Loftus's institution had received an email from Taus, notifying them that she believed that her privacy was being invaded. In response, as part of their investigation, UW seized Loftus's research files. The ensuing battle between Loftus and her institution over an accusation of scientific misconduct lasted almost 2 years (Geis & Loftus, 2009). The UW exonerated Loftus after 21 months. She left UW, where she had taught for over a decade, for University of California, Irvine, a decision that must have taken a personal toll. She reports receiving threatening letters, organizations rescinding their invitations for her to speak, and other organizations hiring bodyguards for her due to threats they had received (Loftus, 2004).

Finally, the invasion of privacy claim that Taus made was settled only against Loftus, not against Guyer. Geis and Loftus note that the Supreme Court decision against Loftus was reached because the Court believed that some of the misrepresentation and ruses that Loftus allegedly used (again, she denies this) went beyond those ordinarily used in news gathering. Guyer gathered information through public sources only, and fully prevailed in the *Taus v. Loftus* Supreme Court decision.

## **The Ethical and Moral Reasoning Behind Loftus and Guyer's Decision**

The moral reasoning behind the decision to publish the *Skeptical Inquirer* article is implied in some of the context statements made above. Loftus and Guyer believe that they are fighting for scientific approaches to memory. In various articles about the case, Loftus has consistently presented herself as a scientist daring to publish controversial opinions; one who has been stymied and obstructed by unreasonable IRB's, litigation-sensitive administrators, and occasionally by a money-hungry or oversensitive case study protagonist such as Taus. She quotes Tavis (2002), who describes that IRBs are frequently creating "byzantine restrictions and rules," some of which have become "fiefdoms of power—free to make decisions based on caprice, personal vendettas, or self-interest" (p. 41; quoted in Geis & Loftus, 2009). The lack of scientific basis for many IRB decisions, noted by Loftus and Tavis, is also bemoaned in dozens of articles by trauma researchers (see, for instance, Becker-Blease & Freyd, 2006, and Newman, 2008), many of whom have commented on the assumptions made by IRBs that are not scientifically

informed. Their concern that IRB assumptions instituted to “protect” traumatized individuals from the perceived harms of telling their stories will drive scientists away from these areas of study is shared by researchers on both sides of the memory debate. For a review of issues involved in IRB evaluation of trauma research, the reader might refer to the Division 56 position paper on the subject, available at the Division 56 website at [http://www.apa-traumadivision.org/resources/56\\_irb\\_guide.pdf](http://www.apa-traumadivision.org/resources/56_irb_guide.pdf) or from the author.

Loftus and Guyer also appear to believe that careful scrutiny of published histories of recovered memory is critical to scientific and social progress in the area. Vivid anecdotes are important to debates, and “debunking” the individual case study might therefore be as important as countering one scientific study with another (better or at least differently designed) study. Faced with an individual claiming to be too damaged by an accident to walk, for example, the typical juror is less likely to be persuaded by a physician citing a study that magnetic resonance imaging (MRI) findings like those of the defendant do quite well than by the evidence provided by the private investigator who filmed the individual playing racquetball.

## **My Role in the *Taus v. Loftus* Saga**

Consistent with my colleagues in earlier papers, I will briefly state my prior history and potential conflicts of interest regarding this case. Like Olafson, Corwin, and Loftus, I often serve as an expert witness in trauma cases. I have been involved in about 50 cases in some capacity where the issue of recovered memory arose. No one on either side on any of these cases raised the Corwin and Olafson (1997) case study as “proof” of recovered memory or the Loftus and Guyer (2002) discussion as “disconfirmation” of recovered memory. I therefore was unaware and am still unaware of the special power of these articles as proof/disproof, and certainly would agree with Olafson (in press) that this was not the purpose or appropriate use of the case study.

I was unaware of the lawsuit itself until it was in process and widely discussed, but was made aware of the private investigation by Loftus just after it had occurred. Corwin asked if I would interview Taus regarding meeting with Loftus personally, as he felt that he would be seen as having a conflict of interest. I did meet with her briefly, and remember little about it. I do recall that she was very fearful of Loftus, given other articles “debunking” case studies that Loftus had written that came across to her as mean-spirited (and that the prior case study protagonists had seen as unfair). Loftus states that she launched the investigation because the Corwin and Olafson account sounded fishy (Loftus, 2004), and Loftus had a long history of disbelieving other recovered memory accounts; therefore, there was reason for Taus to

fear that there would be disconfirmatory expectation if not bias going into the interview. I told Taus that I doubted if Loftus would want to publish anything without hearing her perspective, and we talked about bringing a supporter to have in the room. After that, I heard nothing more, and assumed that they had met. I did not learn until recently that Dr. Loftus felt that interviewing Taus with a supporter in the room was unacceptable (Loftus, 2004).

My most recent experience with Taus was during her tenure as a graduate student in my institution. Given that she has taken multiple research-oriented classes with me, I can state that her concern about the treatment of case study protagonists appears to be quite genuine, and appears to have little to do with any zealotry about recovered memory. In fact, in all of my conversations with her to date, she has yet to take a strong position about the accuracy of her own recovered memory, stating only that she found it plausible that it was a topic that was of interest to the professionals around her. Taus (now Kluemper) also completed a dissertation under my direction, which was recently accepted for publication in the *Journal of Trauma and Dissociation* (Kluemper & Dalenberg, in press). I would find it difficult to describe how much I admire her willingness to open her story again to our scrutiny, given the prior consequences. I ascribe this to her courage, intellectual honesty, and true concern for others in similar conditions in the future.

## Discussion of Papers

The critical discussants have raised a number of specific issues about how the process might have been handled better in the Loftus and Guyer (2002) investigation and publication. Cheit (in press) raises the reasonable question as to why, as a fair-minded investigative reporter, Loftus did not give Taus a chance to respond to her accusations. Olafson (in press) asks why she and Corwin were not given the chance to respond, and why they were presented as zealots in their presentation in 2002 when professionals on both sides of the question praised their openness in 1997. Koocher (in press) asks the more general question of why Loftus did not take any of a number of possible avenues to minimize harm to Taus. Taus herself (in press), however, raises some of the most important questions—asking what acceptance or nonacceptance of Loftus and Guyer's action might mean for the profession and to future case study protagonists.

**Should we try to control those who seek to break the confidentiality of case report?** Like Brown (in press), I concede that this case has had a profound impact on my own professional behavior. Since hearing about the Loftus and Guyer (2002) article, I have not published a case study on recovered memory, and would be concerned about publishing on any controversial



area. How would I even ask for informed consent at this point? Am I not required to say something like this?

If you agree to allow me to write up your case, one possible outcome is that you will be personally targeted by a researcher who does not believe in xxx. The researcher could hire private investigators, interview your friends and family, and publish his or her conclusions not only about xxx, but also about you and your ethics and mental health (and the ethics and mental health of your family and friends). They could also make their methods of finding you public, so that others with any negative feeling toward xxx could also locate you.

Like Brown, I have patients that would not survive such a public attack. Even if for some reason they agreed that I may write about them, am I ethically on sound ground to decide to do so with knowledge of these grave risks? Would the positive benefits of publishing any individual case study be worth the risk of such harm to that unique individual?

Brown calls the agreement to allow one's story to be told in a professional journal "a precious gift," and I agree. Case studies can offer glimpses of rare conditions, deep and detailed description of complex clinical issues that would allow recognition of important processes that cannot be adequately learned from manuals, and chances for the outcomes of our predictions to be followed and assessed over time with individual cases. True, they rarely "prove" anything. But do we want to render them impossible to publish? It is saddening to me in this case that some writers (e.g., Geis & Loftus, 2009; Tavris, 2002) discuss nonacceptance of the Loftus and Guyer investigative actions as equivalent to "silencing" Loftus and Guyer, but do not realize that acceptance of these actions is equivalent to "silencing" those of us who believe that we have seen instances of recovered memory in our practices. Olafson cites one of the false memory commentators on the original paper as welcoming the collegial open sharing of information (Lindsay, 1997). Until the profession takes a position that would protect case study protagonists, those days are gone.

Putnam presents one alternative proposal. He suggests that case study authors might sequester materials in support of their claims, and that these additional materials could be requested by the editor and submitted to outside parties chosen by the editor for review if challenged. This proposal addresses the issue of misrepresentation by the original case study author, including the very real concern about "phantom patients" created to support an individual's point of view. As a friendly amendment, I remained concerned about how to consent for the review of very private clinical materials by unknown persons in the future, particularly if the author and patient cannot review the

qualifications of the individual and veto a given reviewer choice. I therefore wonder if reviewers should be both editor and author-approved. It is true that such author-controlled reviewer choice would lead to biases in critical review, but the purpose of the material review is not to critically review, but instead to verify basic facts (e.g., the patient exists, the therapy lasted however long, the diagnosis in the record was x). In fact, as a stop-gap measure, it is possible for journals to institute their own informed consent requirement, for example, requiring that the patient in question be consented by the journal editor or associate editor before final publication, allowing verification that they had seen the article, agreed to its accuracy as far as the basic facts of the treatment and client history, and knew the risks of publication.

Putnam hopes that this controlled access might solve the problems we are discussing here, as those conducting the outside review would be required to protect patient privacy. It is very difficult to judge if this is the case. It is likely that these sequestered materials would not have contained the information that Loftus/Guyer needed to challenge the case. A statement to this effect is not a violation of confidentiality, and if such a statement is made by a reviewer, there is still the risk that other investigators would wish to invade client privacy to find the relevant material.

I am not arguing that the Loftus/Guyer position here is completely without merit. If a prolific author is recommending the use of a bogus cure for cancer (Crisco as a cancer cure was the Loftus and Guyer example), then three responses might take place. One response is the controlled scientific test to show that the proposed cure is in fact not effective. This might be the best response ethically and scientifically, but it is also time-intensive and expensive, and will not be undertaken in most instances of claims thought to be ridiculous by the scientific community. A second is widespread dissemination of educative articles, in which scientists might explain why cure x actually could not produce the changes seen in the descriptions. This is the typical first line approach, but we are all aware of instances in which scientific claims that seemed illogical (small invisible bugs cause disease?) that turned out to be valid, and this is virtually always the response of the innovator to scientific criticism. The third response is the investigative reporter's activity, which might be to find the individuals and prove that they did not have cancer, that they were knowledgeably claiming something that did not happen, or that they were not cured. This third response is effective, but often will violate the privacy of the claimant.

I would argue here that the investigative reporting response is appropriate to general public claims made on physician/therapist websites or advertisements or to individuals suing for the damage that was allegedly caused by some treatment. I wonder, though, whether scientific case studies should be

seen as an exception to this general ethical rule, particularly if some protection against phantom patients (such as Putnam's proposal) was in place. Koocher (in press) also eloquently covers this point, noting that published investigative accounts in scientific journals are often of well-known professionals who are deceased. The cost of invasion of privacy is too high to expect that individuals in controversial areas would knowledgeably consent to publication of their accounts, but these accounts, in my view, are critical to understanding the disorders themselves.

Some would argue that we can turn to the existing American Psychological Association (APA) ethical principles, and the admonition to "do no harm." But as Koocher (in press), a well-known ethics expert wrote, these aspirational provisions of the Principles are unenforceable, and the enforceable section (the Code of Conduct) does not include any language that clearly prohibits such action. Furthermore, as Koocher notes, many psychologists are not members of APA, and are therefore exempt from any enforcement action. Nonetheless, many behaviors that are not illegal are controlled by social convention. I suggest that we might begin a campaign to clarify that convention about acceptable scientific behavior in challenging case studies.

A beginning is offered by the guidelines already available in journalism, described in detail and applied to this case by Cheit in this volume. Cheit focuses most centrally on the violation of basic fairness encoded in journalistic ethical guidelines that would apply to the situation of portraying a specific individual in a negative light without the effort to allow the individual to respond. Most psychologists would not be aware of the guidelines that Cheit succinctly provides.

From my perspective, the considerations above justify some changes in the profession's approach to this problem. I therefore propose that the following activities should be encouraged:

1. Some version of Putnam's proposal should be discussed and implemented in major journals.
2. Widespread discussion of the limitations and benefits of case studies, and of the need to protect the privacy of case study participants should begin, such that we as a community can decide whether the inability of critics to access other data regarding these case histories has a greater or lesser "silencing effect" than the voluntary blocking of such case histories from the literature by frightened therapists and clients.
3. If the protection of privacy of case study participants is determined to be the greater value, then educative statements should be made by major scientific organizations citing the cost to science for breaking confidentiality of case studies. As recommended by Brown, APA, the

Association for Psychological Science, and other like organizations should be urged to develop or amend their ethical guidelines to more clearly state their approbation for this behavior.

## Summary

The articles in this volume describe the price that both professionals and a case study protagonist had to pay for the lack of confidentiality and privacy protection manifest in our current ethical guidelines applicable to the publication of case studies. I feel safe in assuming that unanticipated distress caused to a case study participant by agreement to serve science in this fashion is a negative value to any scientist reading this article. This discussion is a beginning of a search for solutions to this problem that serve both science and the community.

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