S133805

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NICOLE TAUS

Plaintiff and Respondent,

vs.

ELIZABETH LOFTUS, MELVTN GUYER, SHAPERO INVESTIGATIONS, THE COMMITTEE FOR THE INVESTIGATION OF CLAIMS OF THE PARANORMAL (CSICOP) SKEPTICAL INQUIRER, AND THE CENTER FOR INQUIRY WEST

Defendants and Appellants,

Appeal of an Order of Solano County Superior Court
Honorable James F. Moelk, Judge

Review After Judgment of the Court of Appeal,
First Appellate District, Division Two Justice
Paul R. Haerle, Acting Presiding Justice

BRIEF OF AMICUS CURIAE, THE LEADERSHIP COUNCIL ON CHILD ABUSE & INTERPERSONAL VIOLENCE

IN SUPPORT OF THE POSITION OF THE PLAINTIFF/RESPONDENT

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APPLICATION TO FILE BRIEF OF AMICUS CURIAE AND STATEMENT OF INTEREST OF AMICUS CURIAE

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT, AND TO THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to California Rules of Court, Rule 29.1(f), The Leadership Council on Child Abuse & Interpersonal Violence ("The Leadership Council") respectfully requests permission to file its concurrently-lodged Amicus Curiae Brief in support of the Plaintiff and Respondent, Nicole Taus.

A. Description of Amicus Curiae

The Leadership Council is a non-profit, scientific organization based in Bala Cynwyd, PA, with supporters nationwide, including many in California. The Leadership Council regularly appears as amicus curiae in cases raising important issues regarding the scientific and ethical issues regarding the rights of abuse survivors. The Leadership Council supports peer-reviewed research, hosts conferences, and has submitted amicus briefs in various state and federal appellate courts across the country. Members of the Leadership Council are nationally recognized experts and leaders in the scientific and legal community who work with victims of child abuse and interpersonal violence. For example, several of our board members teach at Harvard Medical School. Our president and founder, Dr. Paul Fink, is a past president of the American Psychiatric Association. He is also

the former president of the American College of Psychiatrists, the National Association for Psychiatric Healthcare Systems, the Philadelphia County Medical Society, and the American Association of Chairmen of Departments of Psychiatry. More information about our board members can be found in Appendix A.

The Leadership Council has reviewed the principal briefs of the parties in this Court and the Court of Appeal. It believes its participation in this case can assist the Court by bringing an additional perspective to the issues before it. As scientists who care not only about the advancement of science, but also the rights of research subjects, we offer a position that is relevant to the disposition of this case and is not adequately represented by either party. The Leadership Council will focus its brief on the public policy ramifications of the current case on the rights of California citizens who are the subject of behavioral or medical research. We will examine these rights in the context of: (1) professional standards and ethics; and (2) existing federal and state regulations.

B. Interest Of Amicus Curiae

In denying summary judgment to the Defendants, the Leadership Council believes that the Court of Appeal reached the correct result. We believe all private citizens have a right to be informed of any research that is being conducted on them. Further, we believe they have the right to decline to participate in research, to have their records kept confidential, and to have their Constitutional right to privacy protected. Moreover, as an abused child who only recently aged out of the foster care system, Ms. Taus is the epitome of a vulnerable individual in need of

the types of protections enacted by the federal and state governments regarding human research. If this Court overturns the lower court's decision, we believe it will be creating a detrimental exception to critical safeguards and procedures that have been put in place to protect the rights of human subjects. Because of the vulnerable position that research subjects are placed in, public policy along with ethical, legal and regulatory requirements dictate that when the rights of a research subject conflict with those of a researcher, the rights of the research subject must take precedence.

First, the Defendants do not deny that they intentionally invaded the privacy of a young woman who had been the subject of research while a minor. In their defense, they argue that somehow Ms. Taus waived any right that she had to privacy or legal recourse by allowing Dr. Corwin to present his research on her case in scientific forums. This argument flies in the face of public policy, along with federal regulations governing the treatment of human subjects. Federal regulations clearly state that human subjects do not waive <u>any</u> legal rights when they agree to participate in research.

In addition, it is the current scientific norm for researchers, after obtaining proper consent, to share research findings with their colleagues in order to add to their profession's knowledge base. If the Court accepts the Defendants' argument that Ms. Taus rendered herself a public figure by allowing Dr. Corwin to present the results of his research to his colleagues, than all citizens who participate in human subjects research would risk losing their privacy rights for the remainder of

their lives merely by agreeing to participate in a scientific study. This raises a factual issue not addressed by any trial court. Namely, did Ms. Taus waived her privacy rights by giving consent for presentation of anonymous research results in professional forums? Ms. Taus should be entitled to a day in court to defend against any waiver argument.

Second, the Defendants do not deny that they failed to follow federal, state, and ethical guidelines. Instead, they seek exemption from regulatory and ethical oversight of their research by claiming to have been acting as "journalists" rather than in their professional capacity as researchers. We believe such conduct should not be allowed to go unchallenged. Because of abuses in the past, our society requires strict oversight of research activities involving human subjects. In addition, during the last several decades, codes of ethics and statutory protections for research subjects have been strengthened, rather than weakened. Accepting the Defendants' position of this matter would carve out a large exception to the statutory protections currently afforded research subjects in California. The Defendants' position would necessitate changes in informed consent practices as potential research subjects would need to be informed of this new threat to the protection of their privacy and confidentiality.

Third, society has granted scientists a conditional privilege to perform research on human beings. In return, scientific investigators have a fundamental responsibility to safeguard the rights, welfare, and privacy of the people participating in their research activities. Since, human research is wholly

contingent on the public's trust; we are concerned that excusing the Defendants from having to follow ethical and regulatory guidelines would work to the detriment of not only research subjects but also to the scientists who are reliant on private citizens to volunteer to participate in their studies.

Fourth, the Defendants claim exemption from regulatory oversight by suggesting that their research was critical to the advancement of science. As scientists with expertise in the area of trauma, we have factual evidence that this is not the case. In truth, it is hard to find any evidence that the Defendant's conduct toward Ms. Taus served any legitimate scientific purpose. Moreover, there is no law immunizing any group from responsibility to obey criminal law and the law of torts, nor should there be any.

For these reasons, The Leadership Council respectfully requests this Court to accept the accompanying brief for filing in this case.

Dated March ___, 2006

By: _____

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I

ISSUES PRESENTED FOR REVIEW

The following issues were presented by the Defendants for review by this Court:

1. Does the Plaintiff's consent to publication of intimate details of her alleged childhood abuse by an advocate on one side of the public debate over "repressed memories," including a consent given to counter arguments by advocates on the other side of the debate, render the Plaintiff a limited purpose public figure?

2. Can Plaintiff hold a reasonable expectation of privacy in information held by Plaintiff's foster-mother about Plaintiff's activities as a teenager, giving rise to a claim for invasion of privacy based on Defendants obtain that information, allegedly by misrepresentation?

3. Can Plaintiff meet her burden under the anti-SLAPP statute of establishing the that Defendants invaded Plaintiff's privacy by allegedly learning the identity of Plaintiff's foster-mother by obtaining purportedly confidential Solano County juvenile records, by relying exclusively on a declaration stating a co-defendant "copied voluminous public records" in Solano County, where at least seven publicly-available files exist in that County unrelated to the juvenile file, consisting of hundreds of pages and featuring dozens of mentions of the Plaintiff and her foster mother?

4. Can Plaintiff assert a claim for public disclosure of private facts based on (a) Defendant's disclosure of Plaintiff's initials during a disposition that occurred after Plaintiff filed this lawsuit using her own name, or (b) Defendant's revelation that "Jane Doe" serves in the Navy, notwithstanding that (a) Plaintiff repeatedly consented in writing for her alleged sexual abuse as a child to be used by an advocate in the debate over "repressed memories," rendering information about the Plaintiff newsworthy; (b) Plaintiff's full name can be found in numerous public records; and (c) Plaintiff's employment in the Navy is newsworthy because of its relevance to this public debate?

II

INTRODUCTION

The foundation of public support for science, or for any public endeavor, is trust. However, the Defendants have argued that the Jane Doe study is of such scientific significance that extraordinary measures were justified to attempt to refute it. These extraordinary measures appear to include misrepresentation, defamation and invasion of privacy. The Defendants appear to argue that not allowing psychologists to violate the ethical guidelines of their profession or to circumvent the restrictions imposed by scientific review boards not only violates their First Amendment Rights but will stifle research necessary to advance the field of memory and trauma. In short, the Defendants are claiming a personal immunity from tort laws and ethical standards. We vigorously disagree for a number of reasons.

First, we would argue that there are no issues so fundamental to science that the rules of science must be violated in order for these issues to be researched. We agree with The National Institutes of Health, when it states, "Sound ethical practices go hand in hand with scientifically valid research involving human subjects."[1] We, like the National Institutes of Health and other reputable scientific organizations, recognize that the foundation of public support for science, or for any public endeavor, is trust--in this case, trust that scientists and research institutions follow their ethical codes in an honest and dispassionate search for truth.

Society has granted scientists a conditional privilege to perform research on human beings. In return, scientific investigators have a fundamental responsibility to safeguard the rights, welfare, and privacy of those participating in their research activities. The Defendants in this case violated the public trust by undertaking a course of conduct designed to circumvent the protections afforded subjects of scientific research for the Defendants' own personal gain. Loftus, for example, is a highly paid defense expert in cases having to do with repressed memory. Guyer also works as a paid defense expert in this area. Consequently, they both have a personal stake in discrediting any research that appears to conflict with their own positions on this subject matter.

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[1] Department of Health and Human Services, Public Health Services, National Institutes of Health. *Guidelines for the Conduct of Research Involving Human Subjects at the National Institutes of Health* (2004) at 3 (hereafter HHS, *Guidelines for Conduct*).

Second, this case is not, as the Defendants suggest, about freedom of expression and First Amendment rights. The First Amendment does not absolve scientists from following federal, state and professional guidelines on the treatment of human subjects. Nor is the case about scientific debate. While a scientific discussion about memory provides the backdrop for the events giving rise to this case, scientific issues are irrelevant to the resolution of this litigation. It is the *conduct* of the Defendants that has been challenged by the Plaintiff, not their *beliefs* about the science of memory. This Court is not being asked to resolve, or even inquire into, the scientific controversies surrounding traumatic memories. Instead, this Court is being asked to evaluate whether the law of torts and the codes of ethics should be suspended in the name of an alleged scientific pursuit. Here, the Plaintiff alleges that the Defendants invaded her personal life and disseminated information about her without first obtaining her consent, or even informing her that she was the subject of their research. Consequently, this case involves simple torts; namely the right of privacy, which is enshrined in the California Constitution; misrepresentation; and the law of defamation.

III

STATEMENT OF FACTS

Regarding the factual circumstances of this case, we adopt in their entirety the facts as presented by the Plaintiff and Respondent in her brief.

IV

ARGUMENT

1. RESEARCH SUBJECTS DO NOT WAIVE THEIR RIGHT TO PRIVACY OR ANY OTHER LEGAL RIGHTS BY PARTICIPATING IN RESEARCH, NOR CAN SUCH RIGHTS BE WAIVED.

The California Constitutional right to privacy is independent from, broader than, and more protective of privacy than the federal Constitutional right to privacy.[2] Research subjects are afforded even more stringent privacy rights, as few people would be willing to participate in behavioral or medical research if the information collected was not kept strictly confidential.[3] The Defendants in the instant case suggest that somehow Ms. Taus waived any right that she had to privacy or legal recourse by signing a consent form that allowed Dr. Corwin to present his research on her case in scientific forums. The Defendants argue that this action rendered Ms. Taus a public figure. Such an assertion is not supported by either the facts or the law.

First, the record is clear that the Plaintiff placed a high premium on her anonymity and that Dr. Corwin was very conscientious about safeguarding her privacy.[4] Plaintiff is a private person. She did not accompany Dr. Corwin to any

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[2] *Johnson v. Calvert* (1993) 19 Cal. Rptr. 2d 494, 505.

[3] Institute of Medicine, *Protecting Data Privacy in Health Services Research*, National Academy Press (2000). In addition, the federal government's increasing sensitivity to the privacy rights of citizens led to the passage of the Health Insurance Portability and Accountability Act (HIPAA), 45 CFR Part 160 and Part 164. HIPAA protects the rights of individuals – including research subjects -- to keep confidential information about themselves and their health private.

[4] AA 0030.

professional presentations, she did receive any personal gain from Corwin's research, and she did not stake out a position on any legal or scientific issue related to the clinical study of her case. Nor has the Plaintiff ever made a claim that she had "repressed memories" or asserted herself into the debate now described by defendants.[5] Dr. Corwin followed established scientific norms when he presented her case in scientific and educational forums.

It should be remembered that an integral part of all research is communicating the results to the professional community. Moreover, scientific ethics suggest that research on humans should not be undertaken unless it is expected to be of scientific and social value. A judgment that the nature of the proposed research meets the requirement of scientific and social value presupposes that the research results will be publicly disseminated.[6] Consequently, some academics consider the failure to present or publish significant findings to their colleagues to be a form of scientific misconduct.[7] In actuality, rather than Dr. Corwin, it appears that it was the Defendants that sought to make Ms. Taus part of a public debate about repressed memory. They are the ones who hired a private detective to track her down, invaded her private life, copied her legal and mental

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[5] AA 1120-1121.

[6] B. Freedman, *Scientific Value and Validity as Ethical Requirements for Research: A Proposed Explication*, 9 IRB 7-10 (1987).

[7] *See e.g.*, E. H. Winslow, *Failure to Publish Research: A Form of Scientific Misconduct*, 25 Heart & Lung 169-171 (1996).

health records,[8] and published and discussed information about her in public venues.[9]

Second, a finding that Ms. Taus rendered herself a public figure flies in the face of established federal law, which expressly prohibits such a ruling. Federal regulations state that human subjects cannot be studied without their consent, and that research subjects do not waive and cannot even be asked to waive their legal rights by signing a consent form. Federal regulations are quite clear on this point.

> "No informed consent, whether oral or written, may include any exculpatory language through which the subject or the representative is made to waive or appear to waive any of the subject's legal rights, or releases or appears to release the investigator, the sponsor, the institution or its agents from liability for negligence."[10]

If the Court accepts the argument that Ms. Taus rendered herself a public figure by allowing Dr. Corwin to share the de-identified results of his research with his colleagues, than all citizens who participate in human subjects research would risk losing their privacy rights for the remainder of their lives merely by agreeing to participate in a scientific study.

2. 1DR.'S LOFTUS AND GUYER VIOLATED THE CODE OF ETHICS FOR PSYCHOLOGISTS IN CALIFORNIA

[8] AA 0274, ¶¶ 8, 9.

[9] AA 0043.

[10] Department of Health and Human Services. Regulations for the Protection of Human Subjects (45 CFR 46), Section 46.116: General Requirements for Informed Consent.

California Business & Professions Code Sec. 2936 establishes the *Ethical Principles and Code of Conduct* published by the American Psychological Association (APA) as the accepted standard of care in all licensing and disciplinary cases in California. Further, Sec. 2960 states grounds for denial, suspension and revocation of licenses, including being found "guilty of unprofessional conduct." Unprofessional conduct includes (among many enumerated examples), "violating any rule of professional conduct promulgated by the board and set forth in regulations duly adopted under this chapter."[11]

The APA Ethics Code (2002) requires all psychologists to follow state and federal regulations. In addition, it states "If this Ethics Code establishes a higher standard of conduct than is required by law, psychologists must meet the higher ethical standard."[12]

According to the allegations in Ms. Taus's complaint, Dr.'s Loftus and Guyer violated numerous sections of the APA Ethics Code. For instance, Ms. Taus has presented evidence that the Defendants used fraudulent means to obtain private information from Taus's friends and relatives, including misrepresenting their identities, and befriending Taus's biological mother. The Court of Appeals' decision noted that Ms. Taus's contention that Dr. Loftus conducted interviews by fraudulent means is supported by the declaration of private investigator and Defendant, Harvey Shapiro, and Taus's foster mother, Margie Cantrell. Shapiro

[11] *Id* at § 2960(i).

[12] American Psychological Association, *Ethical Principals of Psychology and Code of Conduct,* Introduction and Applicability (1992, 2002)..Available on the Internet at http://www.apa.org/ethics/code2002.html

admitted in his declaration that he facilitated a meeting between Cantrell and Loftus by misleading Cantrell as to the reason for his interest in her. [13] Ms. Cantrell stated that Loftus contacted her in late 1997, told her she was working with Corwin to help Taus, and requested that Cantrell come to an office to answer some questions. Cantrell stated that she accepted the invitation because she knew Corwin and she knew that Taus trusted him and because she wanted to help Taus. Cantrell further stated that, when she met Loftus, Loftus welcomed her, "saying again that she was working with Dr. Corwin and was actually his supervisor in connection with his study of [Taus]." According to her declaration, Cantrell agreed to a recorded interview in reliance on Loftus's representation that she worked with Corwin. However, as the questions that Loftus asked her became "increasingly hostile," Cantrell became concerned and sought assurance that Loftus worked with Corwin. When that assurance was not provided, Cantrell asked for the tape of her interview--which Loftus refused to provide. The Appellate Court found that Cantrell's declaration to be undisputed evidence.[14]

Loftus' conduct in this case violates multiple ethical principles and codes set forth by the APA Ethics Code. For example, the use of subterfuge and misrepresentation would violate Principle C which states:

> "Principle C: Integrity - Psychologists seek to promote accuracy, honesty, and truthfulness in the science, teaching, and practice of psychology. In these activities psychologists do not steal, cheat, *or engage in fraud, subterfuge, or intentional misrepresentation of fact*." (Emphasis added).

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[13] Op. at 34.

[14] Op. at 31.

Plaintiff Taus also alleges that she was studied without her consent. This would violate APA Ethics Code Section 3.10.

> "Section 3.10 Informed Consent (a) *When psychologists conduct research* or provide assessment, therapy, counseling, or consulting services in person or via electronic transmission or other forms of communication, *they obtain the informed consent of the individual or individuals* using language that is reasonably understandable to that person or persons except when conducting such activities without consent is mandated by law or governmental regulation or as otherwise provided in this Ethics Code. (Emphasis added).
>
> Such conduct also violates APA ethics code section 8.02.
>
> 8.02 Informed Consent to Research (a) When obtaining informed consent as required in Standard 3.10, Informed Consent, psychologists inform participants about (1) the purpose of the research, expected duration, and procedures; (2) their right to decline to participate and to withdraw from the research once participation has begun; (3) the foreseeable consequences of declining or withdrawing; (4) reasonably foreseeable factors that may be expected to influence their willingness to participate such as potential risks, discomfort, or adverse effects; (5) any prospective research benefits; (6) limits of confidentiality; (7) incentives for participation; and (8) whom to contact for questions about the research and research participants' rights. They provide opportunity for the prospective participants to ask questions and receive answers.

Dr.'s Loftus also violated APA ethics code Section 3.06 regarding conflicts of interest. The investigation into Ms. Taus' background appears to have been motivated by the financial interests of Dr.'s Loftus and Guyer both of whom are highly paid experts hired to discredit testimony based on recovered memories. Corwin's case study of Jane Doe (i.e., Ms. Taus) provided supportive evidence that recovered memories could be valid. This study countered Dr.'s Loftus and Guyer's position that no such evidence exists. Thus, the desire to study Ms. Taus appears to have been biased from the start and motivated by ideological and financial

interests.[15] Loftus further violated the APA code of ethics by forming a personal friendship with Ms. Taus' mother. Dual relationships with research subjects are warned against by ethical guidelines because such relationships can impair both scientific and clinical objectivity. 1Under Ethical Standards, Section 3.06, entitled "Conflict of Interest" it states:

> "3.06 Conflict of Interest Psychologists *refrain from taking on a professional role when personal, scientific, professional, legal, financial, or other interests or relationships could reasonably be expected to (1) impair their objectivity*, *competence, or effectiveness in performing their function as psychologists* or (2) expose the person or organization with whom the professional relationship exists to harm or exploitation." (Emphasis added).

In summary, Dr.'s Loftus and Guyer conduct toward Ms. Taus was unethical per se as it violated numerous principles and codes within the APA codes of ethics.1

3. DR.'S LOFTUS AND GUYER VIOLATED BOTH FEDERAL AND STATE CODES GOVERNING THE BEHAVIOR OF RESEARCHERS TOWARD HUMAN SUBJECTS.

A. Regulatory Oversight Of Human Research Is Required By Law.

Because of abuses in the past, our society currently requires strict oversight of research activities involving human subjects. This oversight is provided to Universities by The U.S. Office for Human Research Protections (OHRP), which

[15] AA 0030.

requires researchers at universities that receive federal funding to comply with the Code of Federal Regulations (CFR) on human subjects. Any institution that is engaged in human subjects research (not otherwise exempt) that is conducted or supported by any agency of the U.S. Department of Health and Human Services, must have an OHRP-approved assurance of compliance with the federal regulations (45 CFR 46.103) for the protection of human subjects.[16] State universities, including those which employed Loftus and Guyer, are required to comply with these regulations -- as are their employees.

Federal regulation of research followed revelations of human subject abuses, including those of the Nazi doctors who performed inhumane experiments during World War II, and revelations of human subjects abuse in the U.S. The 40-year Tuskegee study in which treatment was withheld from black men with syphilis, the injection of live cancer cells into elderly patients in the 1960s, and the recent disclosure of unethical Cold War-era radiation experiments, have demonstrated breakdowns in the protection of human subjects in scientific experiments. In these horrific instances the researchers claimed, as the Defendants do in the present case, that ethical rules and civil laws should be suspended for them so that their pursuit of knowledge is not stifled. This type of attitude shocked the public and convinced national policymakers that unregulated human research

[16] More information can be found on the Web site on Office for Human Research Protections (OHRP) Assurances at http://www.hhs.gov/ohrp/assurances/assurances_index.html

represented a clear threat to research subjects. As a result, lawmakers enacted legal protections for human subjects.[17]

Universities, research organizations, and the investigators who work for them are required to follow a set of regulations known as "The Federal Policy for the Protection of Human Subjects" when they receive federal support.[18] This policy requires universities and affiliated institutions establish and monitor protection of human subjects in research through a program of internal review boards (IRBs). Universities are also compelled to comply with all institutional policies and state laws.[19] Even when they are not receiving federal funds for their work, employees (such as Loftus and Guyer) of universities that receive federal funding, are required to follow all applicable state and federal guidelines.[20] In addition, psychologists are held to code of ethical conduct adopted by their professional organization. For psychologists, these include the American Psychological Association's *Ethical Principals of Psychology and Code of Conduct*.[21]

B. Defendants Loftus And Guyer Are Researchers --Not Journalists.

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[17] Code of Federal Regulations Title 45-Part 46 Protection of Human Subjects (45 CFR 46).

[18] *Id*.

[19] National Institutes of Health Office for Protection from Research Risks (OPRR), *Protecting Human Research Subjects, Institutional Review Board Guidebook* (1993).

[20] *Id*.

[21] American Psychological Association, *Ethical Principals,* supra.

Were Defendants Loftus and Guyer acting as journalists or scientists when they intruded into the Plaintiff Taus' private life? They appear to argue both sides of the issue depending on which casts their actions in the most favorable light at that moment. A review of the evidence, however, clarifies that Dr.'s Loftus and Guyer were doing research.

First, Dr.'s Loftus and Guyer investigation into Jane Doe was conceived as a scientific pursuit and presented to others as such. Loftus and Guyer were employed by state Universities during the time that they studied Taus. Guyer, was a psychology professor at the University of Michigan and Loftus was a psychology professor at the University of Washington. Apparently, both Guyer and Loftus submitted their proposed research to their respective institution's Internal Review Boards which review human subjects research. Loftus' proposal was not approved and there is some controversy as to whether Guyer's was ever reviewed or approved. According to a news article, Loftus had submitted a proposal to the University of Washington's IRB early on, but then failed to respond the board's follow-up questions.[22]

Second, Defendant Loftus apparently relied on her reputation and standing as a research psychologist and faculty member at the University of Washington to collect data on Ms. Taus' personal life and mental health. It appears that it was only after Plaintiff Taus complained about this unlawful intrusion into her private

[22] S. Kelleher, *Professor Questions Study, Then Others Question Her*, The Seattle Times, Associated Press. (March 17, 2003).Available on the Internet at http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=loftus170&date=20030317

life, that Loftus claimed that she was not really acting in her official capacity as a psychological scientist, and thus should be considered exempt from customary regulatory and ethical oversight.

Finally, after they finished their research, Loftus and Guyer apparently attempted to get the study published in a scientific journal.[23] When it was not accepted, Loftus apparently then called a contact at the *New Yorker* who told her the article was probably too academic for the magazine.[24] Overall, the evidence shows that the original actions by the Defendants were conceived as research not journalism.

C. Ms. Taus Was A Research Subject.

For the purposes of research, a "human subject" is defined as a living individual about whom an investigator obtains either (1) data through interaction or intervention with the individual, or (2) identifiable private information.[25] Based on this definition, it is clear that Ms. Taus was, in fact, a subject of research by the Defendants.

D. Informed Consent Is A Key Requirement Before Initiating Research On Human Subjects.

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[23] Based on statements made during a presentation by Dr. Elizabeth Loftus. "Illusions of Memory and the Hazards of Case Studies." Conference sponsored by False Memory Syndrome Foundation and Illinois-Wisconsin FMS Society in Glenview, Illinois, October 5-6, 2002.

[24] *See* Maura Dolan, Memory, *Pain and the Truth*, Los Angeles Times (June 21, 2005). Available on the Internet at http://www.rickross.com/reference/false_memories/fsm107.html

[25] HHS, *Guidelines for Conduct*, supra at 7.

Loftus and Guyer failed to obtain informed consent from Ms. Taus before intruding into her private life, thus violating the most important rule governing research on human subjects. Federal regulations at 45 CFR 46.111(a)(4) require that informed consent must be sought from each prospective subject or the subject's legally authorized representative, in accordance with and to the extent required by CFR 46.116.

CFR 46.116 lays out the basic elements of informed consent:

> (1) A statement that the study involves research, an explanation of the purposes of the research and the expected duration of the subject's participation, a description of the procedures to be followed, and identification of any procedures which are experimental;
>
> (2) A description of any reasonably foreseeable risks or discomforts to the subject;
>
> (3) A description of any benefits to the subject or to others which may reasonably be expected from the research;
>
> (4) A disclosure of appropriate alternative procedures or courses of treatment, if any, that might be advantageous to the subject;
>
> (5) A statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained;
>
> (6) For research involving more than minimal risk, an explanation as to whether any compensation and an explanation as to whether any medical treatments are available if injury occurs and, if so, what they consist of, or where further information may be obtained;
>
> (7) An explanation of whom to contact for answers to pertinent questions about the research and research subjects' rights, and whom to contact in the event of a research-related injury to the subject; and
>
> (8) A statement that participation is voluntary, refusal to participate will involve no penalty or loss of benefits to which the subject is otherwise

> entitled, and the subject may discontinue participation at any time without penalty or loss of benefits to which the subject is otherwise entitled.[26]

CFR 46.116 further states that an "investigator shall seek such consent only under circumstances that provide the prospective subject with sufficient opportunity to consider whether or not to participate and that minimize the possibility of coercion or undue influence."[27]

The genesis of the modern application of the duty of informed consent in California law was the case of *Cobbs v. Grant* (1972). In *Cobbs*, the Supreme Court employed several postulates: (1) That patients are generally unlearned in medical sciences, (2) an adult has the right, in the exercise of control over his own body, to determine whether or not to submit to medical treatment, (3) that a patient's consent must be informed, and (4) that the patient has an abject dependence upon and trust in his physician.[28] The Supreme Court recognized that, although the failure to inform is a "technical battery," it is usually more appropriate to apply the law of negligence. Accordingly, the Court established that the duty of care required that a physician must explain to a patient, in lay terms, the inherent and potential dangers of a proposed medical treatment. We believe that these same duties transfer to other professionals including psychologists who perform research on humans.

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[26] 45 CFR 46.116 General requirements for informed consent.

[27] *Id.*

[28] *Cobbs v. Grant* (1972) 8 Cal.3d 229, 242. 104 Cal.Rptr. 505.

In California, laws regulating human experimentation were enacted under the Protection of Human Subjects in Medical Experimentation Act. California Health & Safety Code, §§ 24170-24179.5 mirrors federal regulation and is designed to provide minimal protection when research is not covered by federal regulations. This Act specifies that consent for participation in research "is voluntary and freely given by the human subject or the conservator or guardian, or other representative, as specified by Section 24175, without the intervention of any element of force, fraud, deceit, duress, coercion, or undue influence."[29] For the consent to research to be considered valid, the subject must be given a written statement that includes, among other things: information on "the nature and the purpose of the experiment";[30] "a description of the attendant risks and discomfort reasonably to be expected from the experiment";[31] and be given the opportunity to ask questions along with instructions that the patient can withdraw from the experiment at any time.[32] The written consent form is also required to include: "the name, institutional affiliation, if any, and address of the person or persons actually performing and primarily responsible for the conduct of the experiment";[33] "the name, address, and phone number of an impartial third party, not associated with the experiment, to whom the subject may address complaints about the

[29] *Id* § 24173(e).

[30] *Id* § 24172(a).

[31] *Id* § 24172(c).

[32] *Id* § 24172(g) & (h).

[33] *Id* § 24173(8).

experiment";[34] and "the material financial stake or interest, if any, that the investigator or research institution has in the outcome of the medical experiment."[35]

In *Daum v. Spinecare Medical Group*, Inc. the California Appellate Court held that juries should consider the federal and state informed consent requirements in deciding whether a patient had been provided fully informed consent.[36] Under this analysis, failure to adhere to regulatory standards for informed consent amounts to the tort of "research negligence."[37]

In professional circles it is well recognized that informed consent is an ongoing process.[38] Thus, signing a consent form at one point in time does not give researchers carte blanche. Nor does it cover future activities or researchers not memorialized in the original consent form.

In summary, ethical guidelines and state and federal laws recognize that informed consent is the most basic and important portion of any research protocol. Private Citizens have a right to be informed of any research that is being conducted on them and to be advised of any harm that may befall them if they agree to

[34] *Id* § 24173(10).

[35] *Id* § 24173(11).

[36] *Daum v. SpineCare Medical Group, Inc*., 52 Cal.App.4th 1285, 61 Cal.Rptr.2d 260 (Cal.App. Dist. 1997).

[37] *Id.*

[38] Office for the Protection of Research Subjects, University of California, Los Angeles. *Investigator's Manual for the Protection of Human Subjects* (1997); The Johns Hopkins Bloomberg School of Public Health Committees on Human Research, *Informed Consent: A Guide* (2002) ("Since human beings retain the right to withdraw from a study, consent must be considered an ongoing process.").

participate. In addition, patients should give their explicit consent for their records to be accessed.[39] None of the procedures outlined in this section appear to have been followed in the current case.

E. Defendants Loftus And Guyer Do Not Contest That They Failed To Comply With Appropriate Research Procedures.

Defendants Loftus and Guyer do not contest that they failed to obtain Ms. Taus' consent and failed to comply with regulatory guidelines and institutional procedures. For psychologists employed in universities, the usual process of gaining approval for a research study involves submission of a protocol to an IRB to assess the scientific merits of the proposed study and its potential impact on human subjects. IRBs are charged with protecting the rights and welfare of human research subjects and are responsible for ensuring that all approved research complies with the letter and spirit of the human subject research regulations and local laws. The IRB evaluates the proposed research protocols to ensure that the design of the study is consistent with sound scientific principles, ethical norms and regulatory requirements. A specific protocol may then be approved by the IRB, with a defined specific informed consent process as part of the study, usually memorialized by a signed consent form in which a subject indicates his/her

[39] Len Doyal, *Journals Should Not Publish Research to Which Patients Have Not Given Fully Informed Consent—With Three Exceptions*. 314 *BMJ* 1107-1111 (1997)

acceptance of the possible risks of the study, as enumerated in the protocol and the informed consent document.[40]

According to an article published in the *Seattle Times*, Loftus submitted a proposal to the IRB at the University of Washington early on, but then ignored the board's follow-up questions.[41] John Slattery, who was director of the University's Office of Scholarly Integrity at the time Loftus did her research, is cited as saying that had Loftus followed through with the IRB process she would have had to seek the university's permission before contacting people for interviews. In addition, it is likely that she would likely have been required to give the IRB a list of questions she planned to ask, and a fill out a form explaining the potential risks of being interviewed. Mr. Slattery also states that Loftus probably would have been required to contact Corwin for permission to review records and to interview the research subject (i.e., Ms. Taus).[42] Loftus circumvented these safeguards by pursuing her research without informing IRB of her actions.

F. Whether Or Not Loftus Was "Exonerated" By The University Of Washington Is Irrelevant To The Current Proceedings.

While Loftus admits that she did not obtain informed consent from Ms. Taus or follow through with the normal IRB review process, she claims that she did nothing wrong. As proof, she claims to have been "exonerated" by a review of

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[40] Office for Human Research Protections (OHRP), *IRB Guidebook*. Available on the Internet at: http://www.hhs.gov/ohrp/irb/irb_guidebook.htm.

[41] *See* Kelleher, supra.

[42] *Id.*

her conduct by her colleagues at the University of Washington. The *Boston Globe* reported that "In the end, a committee decided that Loftus wasn't engaged in 'generalizable' scientific research, and therefore the human-subjects rules didn't apply."[43] However, Loftus' claim that she was exonerated by the University of Washington is irrelevant to determining the validity of the current claims against her for at least three reasons.

First, the University of Washington has been found deficient in its protection of human subjects during the time period that Loftus' conduct was under review. HHS's U.S. Office for Human Research Protections (OHRP) oversees implementation of 45 CFR Part 46 in all domestic and foreign institutions or sites receiving DHHS funds. OHRP requires each institution that conducts or supports research involving human subjects to set forth the procedures it will use to protect human subjects in a policy statement called an "assurance of compliance."[44] When OHRP conducted an evaluation of the University of Washington's system for protecting human research subjects, including minutes of IRB meetings held from 1998 to 2005, the OHRP reported numerous deficiencies.[45]

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[43] Christopher Shea, *The Next Memory War, Boston Globe* (December 7, 2003). Available on the Internet at http://www.boston.com/news/globe/ideas/articles/2003/12/07/the_next_memory_war?mode=PF

[44] *See*, OHRP Web site at thttp://www.hhs.gov/ohrp/

[45] *See*, Office for Human Research Protections. *RE: Human Research Subject Protections Under Federalwide Assurance FWA-6878* (April 1, 2005). Available on the Internet at http://www.hhs.gov/ohrp/detrm_letrs/YR05/apr05a.pdf

Second, the University of Washington shared liability for Loftus' conduct and IRB members are often colleagues with those whose work they must judge. A review by the federal government found numerous factors that may compromise the independence of IRB reviews. These include the fact that IRB members often have close collegial ties with the researchers whose work they review, IRB members are often pressured by institution officials to attract and retain government research funding, and IRB members are often reluctant to criticize the work of leading scientists at their institution.[46] It was not in University of Washington's best interests to find that Dr. Loftus had violated the rights of a human subject; as such a finding could lead to the school's research funding being cut off.[47]

Finally, rather than completely "exonerating" her conduct, it appears that the University of Washington committee had serious concerns about Loftus' behavior toward Ms. Taus and her family. Apparently Loftus' professional colleagues had recommended remedial ethics education and informed her that publication of any of the data she had gathered on Plaintiff would constitute an ethical breach. AA 0041. According to an article published in the *Los Angeles Times*, "two of three members of a review committee suggested [Loftus] take a remedial ethics course."[48] The *Boston Globe* reported that "the committee told

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[46] U.S. General Accounting Office, *Scientific Research: Continued Vigilance Critical to Protecting Human Subjects* (1996) at 18.

[47] Shea, supra.

[48] Dolan, supra.

[Loftus] that she could no longer contact Jane Doe's mother, who had become a friend, without its permission. And that she should take an ethics class."[49] Shortly thereafter, Loftus resigned her tenured position at the University of Washington and took a position at the University of California at Urvine.

In summary, rather than exonerating Loftus' conduct, it appears that the University of Washington recognized that Loftus violated federal standards on the treatment of human subjects. However, they absolved her --and thus themselves-- from liability by deciding that she was not conducting "generalizable" research. In other words, they decided her findings did not offer any real benefit to the scientific community.

G. The Defendants Are Not Free To Exempt Themselves From Customary Regulatory And Ethical Oversight.

The Defendants do not deny that they failed to follow federal, state, institutional, and ethical regulations in their treatment of Ms. Taus. Instead, they defend their conduct by arguing that they were not actually acting in their official capacity as psychological scientists and thus should be considered exempt from customary regulatory and ethical oversight. Amazingly, the Defendants now claim to be victimized by the Plaintiff's attempts to regain her privacy. They argue "This Court should bring to an end Plaintiff's admitted and persistent attempts to chill and punish Defendants' speech."[50] These arguments are both cynical and

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[49] Shea, supra.

[50] See *Defendants' Opening Brief* at 50.

unpersuasive. Are we to accept that in science the ends justify the means; that "free speech" entitles the Defendants to ignore the formal ethics codes, laws, and standards that otherwise apply to all researchers?

A hallmark of civilized nation is the willingness to protect the rights of those who may be vulnerable to exploitation. As an abused child who had only recently aged out of the foster care system, Ms. Taus is the epitome of a vulnerable individual in need of the types of protections enacted by the federal government regarding human research. In addition, because of the vulnerable position that research subjects are placed in, the rights of the research subject must take precedence over the rights of the researcher. Because of their special position of trust, researchers are held to a higher standard than other members of the public and thus should not be allowed to invoke the investigative freedoms afforded journalists or private citizens in order to avoid regulatory oversight of their research. Legal and scientific standards were specifically designed in order to protect human subjects from the types of rights infringements suffered by Ms. Taus in the current case.

The Leadership Council is stunned by the implications of both the Defendants' and the University's apparent conduct in the Taus case. It runs counter to the public interest to allow a professional to, on one hand, exploit their position and credentials to gather data that would otherwise be unavailable to them, and on the other, to claim they were acting as private citizens in order to avoid required professional and regulatory oversight. That the Defendants are

willing to trumpet their right to act illegally and unethically demonstrates how important it is for this Court to preserve the fundamental human rights that are supported by constitutional rights, ethical norms, and tort laws. In the end, we believe that the lawfulness of the Defendants' conduct is a factual issue that should be resolved by a jury.

4. THE DEFENDANTS FAIL TO DEMONSTRATE THAT THEIR STATEMENTS AND CONDUCT SERVED A LEGITIMATE SCIENTIFIC PURPOSE.

A. The Case of Jane Doe Is Not a Critical Case at the Epicenter of a Scientific Debate.

The Defendants claim that the case study of Jane Doe is at the epicenter of a scientific debate on "repressed memory" and thus is of such import that the rules of scientific conduct and California laws should be set aside for sake of science. In truth, Corwin's case study is but one of any number of research studies showing that trauma may in some instances lead to memory blockage and loss. For example, as of 1999, Brown, Scheflin, & Whitfield, reported on 68 studies supporting dissociative amnesia.[51] There are now almost 90 such studies. Moreover, in 1994, prior to the publication of Corwin's case report, the American Medical Association had already noted the existence of studies showing that there

[51] Brown, Scheflin, & Whitfield, *Recovered Memories: The Current Weight of the Evidence in Science and in the Courts*, 27 J. Psychiatry & L. 5-156 (1999).

are cases where "recovered memories proved to be correct."[52] Actually, the only thing remarkable about Dr. Corwin's case report was the level of detail that he had collected in the form of videotapes. This level of detail is important to advancing our theoretical understanding of how dissociative amnesia may work; however, in and of itself, Corwin's study of Taus was not so important as to constitute a major advance in the field.

In their arguments, the Defendants make much of the controversy over "repressed memory." In reality, the only real controversy about memory blockage is not whether it occurs (with the strong data available [Brown et al. 1999 above] we know that it does); rather, it is the exact cognitive mechanism causing the blockage and by what name this mechanism should be called that remains in question. Currently most scientists label the process whereby the mind avoids conscious acknowledgment of traumatic experiences as *dissociative amnesia*. Others use terms such as *repression*, *traumatic amnesia, psychogenic shock,* or *motivated forgetting*. Semantics aside, this phenomenon has been repeatedly documented in the aftermath of combat, natural disasters, and rape and other forms of violence. In addition, there is near-universal scientific acceptance of the fact that the mind is capable of avoiding conscious recall of traumatic experiences and may gain access to memories of these experiences at a later time. So while the

[52] American Medical Association, Council on Scientific Affairs, *Memories of Childhood Abuse* (1994).

mechanism of exactly how memory blockage occurs remains unknown, the phenomenon of dissociative amnesia is well established.[53]

The most comprehensive review of the scientific literature on dissociative amnesia was conducted by Brown, Scheflin and Hammond in their book, M*emory, Trauma Treatment, and the Law* (1998).[54] This book set the standard in the field after receiving the American Psychiatric Association's prestigious Manfred S. Guttmacher Award for best book in law and forensic psychiatry in 1999, as well as several other awards. Dr. Brown and his colleagues found that every study examining the question of dissociative amnesia in traumatized populations demonstrated that a substantial minority partially or completely forget the traumatic event and later recovered memories of the event. In fact, no study that has looked for evidence of traumatic or dissociative amnesia after child sexual abuse has failed to find it.[55] Taken as a whole, especially considering the range of populations studied and experimental designs utilized, the empirical research reviewed by Dr. Brown and colleagues constitute an irrebuttable conclusion as to the reality of dissociative amnesia.

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[53] *See*, H. Sivers, J. Schooler, & J. Freyd, *Recovered memories*. In V.S. Ramachandran (Ed.) Encyclopedia of the Human Brain, Volume 4, 169-184 (2002); David H. Gleaves, et al., *False and Recovered Memories in the Laboratory and Clinic: A Review of Experimental and Clinical Evidence*, 11 Clinical Psychology: Science and Practice, 3-28 (2004).

[54] Dan Brown, Alan Scheflin & Cory Hammond, M*emory, Trauma Treatment, and the Law* (1998).

[55] *Id* at 126.

Moreover, the reality of dissociative amnesia is accepted by all the major national scientific bodies regulating the practice of psychology and psychiatry, and thus is generally accepted in the relevant scientific community. For instance, the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) which is written and published by the American Psychiatric Association recognizes memory problems to be a common feature of five post-traumatic conditions: *Post-Traumatic Stress Disorder, Dissociative Amnesia, Dissociative Fugue*, *Dissociative Disorder Not-Otherwise-Specified*, and *Dissociative Identity Disorder*. [56] The term "dissociative amnesia" appears as follows in section 300.12:

> Dissociative amnesia is characterized by an inability to recall important personal information, usually of a traumatic or stressful nature, that is too extensive to be explained by ordinary forgetfulness. [57]

The DSM-IV also recognizes that dissociated memories may later return.

> The reported duration of the events for which there is amnesia may be minutes to years. . . . Some individuals with chronic amnesia may gradually begin to recall dissociated memories.[58]

In addition to acceptance by the American Psychiatric Association, dissociative amnesia is also recognized by the U.S. Department of Health and Human Services and the National Center for Health Statistics in their inclusion of

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[56] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders,* 4th Edition (DSM-IV) (1994) at 478-9

[57] *Id.*

[58] *Id.*

this disorder in the *International Classification of Diseases*, 9th Revision, Clinical Modification (ICD-9-CR); by the American Psychological Association in their *Final Report from the Working Group on Investigation of Memories of Childhood Abuse* (1996); and by the International Society for Traumatic Stress Studies (ISTSS) in their practice guidelines for the treatment of Post-Traumatic Stress Disorder (PTSD).

The California legislature has also accepted the doctrine of dissociative amnesia. As pointed out by Justice Sonenshine in *Tietge v. Western Province of the Servites, Inc*.: "Our Legislature was painfully aware that childhood sexual abuse by definition often leads to repressed memories" (concurring and dissenting opinion).[59]

Moreover, Loftus herself has recognized the reality of dissociative amnesia in some of her previous work.[60] In fact, Loftus was an author of the American Psychological Association's 1996 *Final Report from the Working Group on Investigation of Memories of Childhood Abuse* which acknowledged that "it is possible for memories of abuse that have been forgotten for a long time to be remembered."[61] Thus, as the judge in a case where Loftus served as a defense expert noted:

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[59] *Tietge v. Western Province of the Servites, Inc*. (4th Dist. 1997), 55 Cal.App. 4th 382, 64 Cal.Rptr.2d 53.

[60] Elizabeth F. Loftus, S. Polonsky, & M. T. Fullilove, *Memories of Childhood Sexual Abuse: Remembering and Repressing,* 18 Psychology of Women Quarterly 67-84 (1994) (finding that 19% claimed of abuse women forgot the abuse for a period of time, and later the memory returned).

[61] American Psychological Association, *Final Report,* supra.

> . . . even Dr. Loftus conceded upon cross-examination that the APA policy which she helped to create notes that "it is possible for memories of abuse that have been forgotten for a long time to be remembered . . ." The language of the APA report indicates that the challenge to recovered memories which is included therein concerns the mechanism by which the delayed recall occurs, rather than the fact of its occurrence . . . Furthermore, Dr. Loftus acknowledged that dissociation from a traumatic event is a recognized phenomenon.[62]

In sum, the case study of Jane Doe was but one study in a large body of evidence supporting dissociative amnesia. As such, it was not of such great import that California laws should be set aside and the Defendants granted immunity from tort laws and ethical standards.

B. Ethical Guidelines Not Only Safeguard The Safety Of The Public, They Also Protect The Integrity Of Scientific Inquiry.

Ethical guidelines not only serve to safeguard the safety of the public, they also serve to protect the integrity of the scientific process and the trustworthiness of scientific findings. As noted by guidelines released by the Federal Government's primary agency for advancing knowledge in the biomedical and behavioral sciences, the National Institutes of Health, "Sound ethical practices go hand in hand with scientifically valid research involving human subjects."[63] Unethical conduct, on the other hand, is the antithesis of good scientific practice.

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[62] *State v. Walters*, Nos. 93-S-2111-2112 (Superior Ct., Hillsborough Co., N.H. 1995) at 22-24.

[63] HHS, *Guidelines for Conduct,* supra at 3.

As other psychologists have pointed out, conscientious researchers are able to gather relevant scientific data without disobeying ethical standards.[64]

If Defendants Loftus and Guyer had doubts about the case presentation of David Corwin, there are a wide variety of scientific methodologies they could have pursued. The normal scientific procedure would have been to recruit their own research subjects and try and duplicate the results. Replication is the cornerstone of the scientific process and this is how dubious findings are usually tested. Alternatively, if they felt compelled to reinvestigate the specific case of Jane Doe, they could have asked Dr. Corwin if they could review his data. If they wanted to do follow-up research on the subject, the Defendants could have asked Corwin to contact the subject (Jane Doe) to see if she would be willing to be subjected to further study. All of these methods are established psychological procedures when questions arise about the validity of a scientific finding.

Finally, it should be remembered that American Psychological Association's *Ethical Principles of Psychologists and Code of Conduct* was written by scientists, is empirically based, and embodies the field's consensus.[65] The code is based on considerable research about which activities are harmful to individuals and should therefore be excluded as unethical. In addition, the code

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[64] *See* e.g., Kenneth S. Pope & Melba J. T. Vasquez, *Ethics in Psychotherapy and Counseling: A Practical Guide*, 2nd Edition (1998).

[65] Based in Washington, DC, the American Psychological Association (APA) is the main scientific and professional organization representing psychologists in the United States.

seeks to ensure good scientific practices by helping researchers avoid conflicts of interests and reliance on biased methodologies.[66]

C. The Research Conducted By Loftus and Guyer Did Not Further Scientific Knowledge.

Although Loftus and Guyer claim that their research was done to further scientific knowledge, the results served no such purpose and were never published in a scientific journal. Apparently they tried to get it published and their article was turned down by the *American Psychologist* --one of the foremost peer-reviewed journals in psychology.[67] Loftus and Guyer later published the article in the *Skeptical Inquirer*, which is not a scientific journal, and does not claim to be one. On its website, the editor refers to the *Skeptical Inquirer* as a "magazine" and provides a list of "fellows" for its organization of skeptics. Loftus is on the list, along with various professionals and nonprofessionals including stage magicians and science fiction writers. Moreover, the publication of their research in this magazine did not stimulate any advancement in scientific knowledge. It should also be pointed out Loftus' own employer, the University of Washington, decided her findings did not offer any real benefit to the scientific community.[68]

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[66] American Psychological Association, *Ethical Code*, supra.

[67] Based on statements made during a presentation by Dr. Elizabeth Loftus. "Illusions of Memory and the Hazards of Case Studies." Conference sponsored by False Memory Syndrome Foundation and Illinois-Wisconsin FMS Society in Glenview, Illinois, October 5-6, 2002.

[68] Shea, *supra.*

D. Even If This Court Believes That Defendant's Research Did Serve A Legitimate Scientific Purpose, It Was Still Unlawful.

The Defendants' conduct, as alleged by Ms. Taus, not only invaded the privacy of a private citizen, but relied on fraud and misrepresentation in order to do so. These are very serious charges and both lower Courts that reviewed her petition believed that there was likelihood that Taus will be able to prove these charges.

5. PROVIDING NO RECOURSE TO VICTIMS OF UNETHICAL AND FRAUDULENT BEHAVIOR BY RESEARCHERS WILL EXPOSE THEM TO HARM AND HAVE A CHILLING EFFECT ON THE WILLINGNESS OF PUBLIC CITIZENS TO PARTICIPATE IN SCIENTIFIC RESEARCH.

A. Participation In Research May Expose Private Citizens To Harm.

In the current case, Plaintiff Taus alleges that Defendant Loftus obtained private health information by misrepresenting herself as someone who was supervising Dr. Corwin, a researcher her family knew and trusted. This conduct, if proven, relied on deception and misrepresentation to circumvent accepted research procedures. Such conduct is the antithesis of good scientific practice which requires providing full disclosure of the purposes of one's research, along with obtaining signed consent from research subjects. In the current case, Ms. Taus

never provided her consent and her confidentiality was breeched. Ms. Taus' resultant mental and emotional distress is consistent with known hazards of research participation.

The federal regulations offer the following definition of *risk* in regards to the dangers of human research: "The probability of harm or injury (physical, psychological, social, or economic) occurring as the result of participation in a research study."[69] Thus, in human research, the concept of harm includes both physical and psychological risk.

Psychological risk can be defined as,

> Any experimental condition that induces personality change or intense changes in a subject's feelings or motivations, or that may induce such changes which extend beyond the experimental or debriefing period; *subjection to deceit*, to demeaning or dehumanizing procedures, to *humiliation and embarrassment*. (Emphasis added).[70]

It is well recognized in the scientific community that harm may be experienced when individuals are subjected to research without informed consent. In an article published in the *British Journal of Medicine*, Dr. Len Doyal notes that "to fail to respect the autonomy of competent people is to inflict harm on them that is just as morally unacceptable as direct physical or mental harm."[71]

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[69] OHRP, *IRB Guidebook*, supra.

[70] Office of Human Subjects Compliance, University of Oregon. *Investigator's Manual On Research With Human Subjects.* Available on the Internet at http://darkwing.uoregon.edu/~humansub/manual.html

[71] Mary Warnock. *Informed Consent--A Publisher's Duty,* In Len Doyal, J. S. Tobias, Mary Warnock, Lisa Power, and Heather Goodare, *Ethical Debate: Informed Consent in Medical Research,* 316 British Journal of Medicine 1000-1005 (1998).

In addition, a breach of confidentiality is recognized one of the greatest risks of harm to participants in behavioral and social sciences research.

> "*The major risks to subjects in HSR [human subject research] are not physical risks, such as unknown side effects of new drugs or invasive medical procedures, but psychosocial and financial risks resulting from improper disclosure of personally identifiable health information* from the databases. That is, the potential for harm comes about through possible breaches of confidentiality in handling private and identifiable health information. Examples of the kinds of psychosocial or financial risks that may occur include potential denial of health insurance coverage, difficulty obtaining employment, embarrassment, loss of reputation, legal liability, or anxiety about what the recipient of an unauthorized disclosure of information might do with it." (Emphasis added).[72]

Another potential source of harm to Ms. Taus, can be found in the Defendants' attempts to discredit her childhood disclosure of abuse. Child abuse survivors feel they are being victimized a second time if professionals react with disbelief or disregard for their ordeal.[73] Negative social reactions have also been shown to hinder recovery in rape victims and are related to greater PTSD symptom severity.[74]

B. Safeguards On The Treatment of Human Subjects Serve Both The Public Interest And The Interests Of Science.

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[72] HHS, *Guidelines for Conduct,* at 3; *See also* National Bioethics Advisory Commission, *Ethical and Policy Issues in Research Involving Human Participants Vol. 2*, (2001) at C-7 and C-8.

[73] L. Madigan & N. Gamble, *The Second Rape: Society's Continued Betrayal of the Rape Victim*. (1991).

[74] *See*, S. E. Ullman, *Social Reactions, Coping Strategies, and Self-Blame Attributions in Adjustment to Sexual Assault*, 20 Psychology of Women Quarterly 505-526 (1996).

An ethical approach that guarantees anonymity and provides safeguards for the welfare of human subjects serves the public interest and is essential to maintaining public support for the pursuit of scientific knowledge. Conversely, when researchers fail to adhere to ethical and scientific guidelines, the public's trust in all forms of scientific research is eroded. Confidentiality is particularly important in fields of study where subjects are selected because of sensitive or stigmatizing characteristics (e.g., persons who were sexually abused as children, sought treatments in a drug abuse program, or tested positive for HIV, etc.). To recruit subjects, researchers must be able to give them honest assurances of confidentiality and advise them of any potential risks or harm that could come from their participation. The current case before the Court raises important issues about this process. What kind of assurances of confidentiality can be provided if participation in research opens any subject up to surreptitious study by rival researchers? Will informed consent forms need to be rewritten to say "By agreeing to participate in research, you risk becoming a public figure and therefore nothing you say or do must be kept private or confidential"? If this is the case, than the ethics codes of most major scientific organizations will need to be revised to accommodate this disturbing conclusion.

If the Defendants' position is accepted, where does the suspension of laws and ethics stop? Should researchers be allowed to coerce individuals to subject themselves to certain risks merely to satisfy their intellectual curiosity? Is any enterprising researcher permitted to hire a private detective to obtain otherwise

secret or confidential data? Is any researcher who claims that a procedure or experiment would benefit society justified in overriding the rights of the individuals involved? Is misrepresentation to be considered part of the legitimate arsenal of scientific inquiry?

Allowing unlawful behavior by researchers would set a precedent that would promote lawlessness, bias, and intrusion on individual privacy by any investigators who feels passionately about his or her area of study. Unchecked, such tactics would place every research subject in California at risk and cast a taint on all legitimate efforts to study human behavior. Without the assurance of confidentiality and respect for their private lives few people will be willing to participate in scientific studies – particularly on sensitive and highly personal subjects.

V

CONCLUSION

This case is not, as the Defendants suggest, about freedom of expression and First Amendment rights; nor is about the validity of repressed memory, improper intimidation of scientific viewpoints, or stifling legitimate scientific methods and procedures**.** Rather, this case is solely about the Defendants' conduct. Specifically: Was the Defendants' behavior in violation of ethical norms and rules of law? Safeguarding the rights and welfare of individual human subjects in the conduct of human research projects is a matter of vital state concern. The Defendants' conduct, as alleged by Ms. Taus, not only invaded the privacy of a

private citizen, but relied on fraud and misrepresentation in order to do so. These are very serious charges. Such conduct, if proven, is not only reprehensible from a moral standpoint, it violated state and federal laws. Unchecked, such tactics would place every research subject in California at risk and cast a taint on legitimate efforts to study trauma.

Ethical conduct is essential if scientists are to retain the public's trust and if the bond between science and the society it serves are to remain strong. In the end, both the interests of science and the public welfare are best served by preserving the fundamental human rights supported by the Constitution, federal regulations, state laws, and ethical norms. For these reasons, we respectfully request that the California Supreme Court deny Defendants' Petition for Review and allow Ms. Taus her day in court.

CERTIFICATE OF WORD COUNT

Pursuant to CRC 14(c), the text of this brief, including footnotes and appendix, and excluding of the application to file, table of contents, table of authorities, and this Certificate, consists of 10,425 words as counted by the Microsoft Word 2005 word-processing program used to generate the text.

DATED: March __, 2006

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APPENDIX A

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