Perils of Provocative Scholarship

May 01, 2008

In 2003, Nicole Taus filed a civil suit against me regarding an investigation that I conducted with Melvin Guyer, University of Michigan, into the accuracy of a published report by a court-appointed psychiatrist that Taus had recovered a memory of childhood sexual molestation by her mother. Over the ensuing years of litigation, a trio of California courts threw out 20 of the 21 allegations. The lone remaining claim was that I had misrepresented myself to Taus' onetime foster mother as a colleague and supervisor of the psychiatrist and thereby had been given information by her about Taus that otherwise would not have been disclosed. At one point in the litigation, Taus asked for $1.3 million in damages.

In my brief to the California Supreme Court, I categorically denied the allegation of misrepresentation and suggested that the foster mother might have come to regret what she had voluntarily told me because it had alienated her from the plaintiff. Journalists have a label for this phenomenon: "source remorse." I also noted that after my interview with her, the foster mother had posed for pictures with me and an investigator who had arranged the interview.

A majority of the California Supreme Court justices deemed the single remaining claim of invasion of privacy, which as a matter of law the court had to regard as possibly accurate, serious enough to be returned to a trial court for adjudication. On the other hand, the dissenting judges maintained that even if the claim were true, neither the information that had been obtained nor the alleged tactics were of sufficient significance to interfere with the right of scholars to gather information on an important topic and with the public's right to have the results of their investigation.
Not long afterward, Taus offered to withdraw her case against me in return for a payment of $7,500. I would have preferred to have a jury weigh the evidence so that there would (I believe) be complete vindication, but the insurance company decided that the cost of a trial would far outweigh the amount of the settlement offer. Insurance companies have a label for this: "Nuisance settlement."

The trial court, under an order by the state Supreme Court, then determined the exact amount that Taus herself would have to pay for attorney fees and court costs incurred by other defendants before the claims against them were dismissed. The co-defendants included, among others, Mel Guyer, my co-author; the *Skeptical Inquirer* where we published our essay; and Carol Tavris, whom we had thanked in a footnote for her help with the essay. Last November, Judge Scott Kays awarded them $241,872 in attorneys' fees, and an additional $4,354 in costs.

During this process, I learned a number of lessons that bear upon how scholarship can become entangled in the vagaries of Institutional Review Boards (IRBs), the legal system, and a university bureaucracy. A researcher might prevail in the end, but the pathway to that end can be very long and arduous, and involves great anxiety and, in some instances, considerable expense and possible damage to a person's professional standing.

Authorities at the University of Washington, where I was employed when I first began to investigate the

circumstances of the repressed memory attribution, held up our work for more than two years. Responding to a complaint from Taus, UW administrators warned me that we could not publish our work in any forum, even information gathered from public domain sources. At Michigan, Guyer's application for IRB approval seesawed between a ruling that it was a historical journalism endeavor exempt from IRB review to a subsequent disapproval and a recommendation that he be reprimanded. These recommendations were rejected by the Michigan University Research Office.

Taus' complaint set in motion a two-year investigation that involved seizure of my office files and included the discovery by my attorney of a critical review of the proposal that had been sent to the University of Washington by a Michigan faculty member. The faculty member was a clinician, and our proposed research sought to determine whether, in the case of Nicole Taus, a clinician had failed to attend adequately to clues that suggested that his report of a recovered memory was in error. Guyer had never been given access to the committee member's communication despite having filed an official request to obtain the records bearing on his IRB proposal.

The three-member investigative committee at the University of Washington ultimately decided that I was not guilty of scholarly misconduct and that our work did not require human subjects review. Nonetheless, two clinicians on the committee recommended a reprimand and a remedial course in professional ethics. They also maintained that I should not contact participants in the Taus case without their permission. If it were up to them, I would not even have been able to thank the falsely accused mother for the wonderful birthday cards she sent me each year. These recommendations were rejected by the University Dean who fully exonerated me. I could now freely thank the accused mother without fear of further retribution.

I believe that the actions taken against me and Guyer and numerous similar actions nationwide violate the First Amendment constitutional right of free speech by imposing prior restraint on the quest for information by academic investigators. In my court case, a brief on my behalf was filed with the California Supreme Court by 21 organizations known collectively as "Amicus Media," representing powerhouse news organizations such as the Copley Newspapers, *Time,* Gannett, the American Society of Newspaper Editors, CBS Broadcasting and Radio, and the *New York Times.* The brief argued that were the Court to uphold Taus' claims, its decision would have a palpable effect on the ability "to report on matters of significant public concern without the threat of tort liability" and would "chill freedom of expression on many of the important issues of the day." The media forces believed that failure by the courts to reject outright actions filed against scholars in cases such as mine could jeopardize media freedom as well. The amicus brief insisted that to permit a subject about whom unflattering information had been obtained from a third party to sue for invasion of privacy would produce a dampening effect on gathering and publishing significant material.

Law professor Philip Hamburger has pointed out that the creation of IRBs to pass judgment on proposed media investigative reporting obviously would be unconstitutional. Hamburger observes that this is so despite the fact that journalists at times employ deceit, engage in trespass and receipt of unlawfully obtained property, and that their investigations risk causing harm, including personal and financial ruin, suicide, divorce, imprisonment, and violence. Nonetheless, American courts have been sensitive about the right of television and news reporters to do things that never would be tolerated by academic IRBs. The courts are wary of tangling with the power of the press.

IRBs often subordinate the pursuit of knowledge to the financial stakes, real or imagined, of the institution in which they operate. In my case, they handed the file to the administration which harassed me and delayed a scholarly endeavor that the courts would declare to be protected by law. I believe that the legal system should take a very hard look at the powers and predilections of IRBs and Human Subjects committees and other authorities to interdict the pursuit of information by scholars. Psychologist Carol Tavris (a former co-defendant with me in this case) has written that professors increasingly back off work on important issues because they are wary of being harassed and harangued by IRBs. She notes that because of IRBs, scholarly work often is compromised: an offending paragraph is deleted, funny but sarcastic remarks are toned down, safer topics chosen, and proof of a person's malfeasance excised.

In the 1975 case of *Garrett v. Louisiana,* the United States Supreme Court declared that "speech concerning matters of public interest is more than self-expression; it is an exercise of self-government." Such a stirring pronouncement ought to be translated into arrangements that no longer impose prior restraint on the freedom of scholars to do their work. My experience convinced me that we require better ways to judge allegations of scientific misconduct. We need review boards (if they are to exist at all) that have no conflict of interest between the scholar and the institution, and are made up of members who are thoroughly conversant with First Amendment law. We need legislation and court decisions that erect strong barriers against frivolous lawsuits, and we need university administrators who are fiercely committed to the doctrine that scholars should be afforded the full protection of First Amendment guarantees. ?

Professor Gilbert Geis, a colleague of mine, greatly assisted in the preparation of this commentary.