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## Commentary

## Title IX and “Trauma-Focused” Investigations: The Good, The Bad, and the Ugly



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Beginning in earnest during the Obama era, campus, state, and federal authorities have struggled to find Title IX rules, regulations, and investigatory procedures that would balance the needs and rights of those who allege sexual harassment or assault against those of the accused. The “dear colleague” letter issued in 2011 (US Department of Education, 2011) reminded campuses of requirements under Title IX and issued guidelines for their enforcement, including those concerning the nature of campus policies, the operation of Title IX offices and officials, and the process of resolution of complaints. Although the letter specified—as does Title IX itself—that “equitable” procedures should be used, it did not require that due process protections be adopted (such as allowing lawyers to participate, access to all evidence), but merely stated that if allowed at all, both parties must be able to use them. It specified that due process must be provided for the accused, but at the same time, these protections must not restrict or unnecessarily delay Title IX protections for the complainant. It also required that the relatively lax “preponderance of the evidence” standard of proof be employed to assess any claim, thereby making it easier to find in favor of the complainant.

In September of 2017, Education Secretary Betsy DeVos rescinded Obama era regulations. In November of 2018 DeVos proposed changes designed to eliminate restrictions in the investigations, to bolster the rights of the accused, to encourage more equitable investigations, and to allow the option to choose a higher standard of proof for allegations (such as “clear and convincing” rather than “preponderance of evidence”). Changes included options that either had not been mentioned or not required in Title IX regulations or DOE guidance, or not adopted or permitted in specific campus regulations. These included the

previously absent or restricted right to cross-examine the witnesses during mandatory live hearings, equal opportunity to present witnesses and to examine evidence, and separation of those who investigate the complaint from those who make the ultimate finding. Even as DeVos proposed such changes, some courts had begun to order colleges to offer due process protections for the accused, such as the right to question accusers (Watanabe, 2018).

Title IX itself, the “dear colleague” guidance, and subsequent efforts to revise relevant regulations and procedures have evoked considerable controversy and criticism. Reflecting this dissatisfaction, our society has seen a growing number of individual and class action lawsuits brought against universities by alleged perpetrators who claimed that their rights were violated by unfair campus regulations and investigatory procedures, and by biased execution of these procedures (Watanabe, 2019). While some are ongoing, nearly half of these plaintiffs have won their suits or settled their claims with the schools (Gersen, 2019). Apparently, the DOE (2011) Title IX guidance has had the unintended effect of spawning procedures that violated many of its own dictates regarding equity and fairness. We regard the widespread discussion, airing of divergent views, and efforts to continually revise and improve the relevant regulations and processes as “the good” associated with Title IX. But despite these efforts, as we write this article, Title IX campus investigatory rules and procedures are still hotly debated.

Campus Title IX offices have scrambled to comply with new guidance, regulations, and court rulings, and to offer increasing due process protections to defendants while still offering support and protection to alleged victims. On the one hand, there is no question that alleged victims of sexual assault have

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historically faced extraordinary scrutiny and doubt of their claims, greater than that faced by victims of any other crime (see [Berick, Livingston, & Davis, in press](#), for review). This fact has been brought home once again by a recent lengthy investigation documenting the widespread, and—in some jurisdictions—almost complete failure of law enforcement to take claims of rape seriously. “Seriously” means enough even to test rape kits or to otherwise pursue thorough investigation of reported rapes ([Hagerty, 2019](#)). Hagerty suggested such failures reflect an “epidemic of disbelief” of victims of rape that has led to an overwhelming societal failure to catch and convict rapists. Likewise, the social science literature has documented the many factors contributing to failure of victims to report rape, disbelief of victims who do report, and failure to convict perpetrators (e.g., [Allison & Wrightsman, 1993](#); [Reddington & Kreisel, 2017](#); [Ward, 1995](#)). Here we do not question these realities, nor do we suggest that the problems facing real victims of sexual assault have ceased.

On the other hand, it is also clear that in an effort to counter these problems for the victim, Title IX investigatory rules and regulations—and how they are enacted—have placed many accused in jeopardy. In practice, there is a presumption of truth in claims of rape, and an adoption of investigatory training and procedures that may bias findings in favor of the complainant and against the accused, to the point that some schools’ investigators or adjudicators have been trained to “start by believing” the complainant ([Gersen, 2019](#)). While we recognize the many challenges facing real victims of sexual assault in having their claims taken seriously and prosecuted fairly, we also suggest that a system that tends to presume guilt of the perpetrator is no better than one that refuses to recognize valid claims of the victim. And, as [Meissner and Lyle \(2019\)](#) note, any presumption of guilt or other bias toward one party can set in motion confirmatory processes leading to biased collection and interpretation of evidence.

In the sections to come, we discuss the basis of these concerns, with focus on Title IX investigations, including (a) some flawed assumptions that may directly promote judgments of guilt; (b) investigatory procedures that can produce evidence biased in favor of complainants; (c) incorrect assumptions regarding memory and behavior that encourage *interpretation* of available evidence as favoring the complainant (but nevertheless may produce biases against them in some cases); and (d) omission of information in training and in collection of evidence in investigations that would importantly inform judgments. We devote considerable attention to the nature of trauma-focused interviewing and the way in which these four categories of concerns are reflected in the training for such interviews and in the interviews themselves.

### **Title IX Investigations and the Presumption of Guilt**

There has long been an argument among prosecutors and victim advocates that the base rate of guilt among those accused of sexual assault is extraordinarily high. That is, many in the legal system make the assumption that almost no allegations are false, and trial testimony by purported experts citing statistics

to this effect is common (despite fundamental methodological flaws in studies attempting to establish rates of false allegations). In effect, just as Carl Sagan famously asserted that extraordinary claims require extraordinary evidence, ([Sagan & Druyan, 1997](#)), prosecutors invite jurors to presume a false allegation to be extremely unlikely (extraordinary), and therefore to require extraordinary evidence of innocence to vote to acquit.

Notwithstanding admonitions to conduct fair and equitable investigations, we suggest that Title IX regulations and procedures reflect this assumption of low base rate innocence among the accused, and that they may well infuse this assumption into the minds of those who must investigate and judge rape or sexual harassment complaints. There are numerous reasons for such a claim. First, the renewed emphasis on Title IX concerns was inspired in part by widely publicized statistics on campus rapes. The DOE “dear colleague” letter (2011) stated at the outset that “the statistics on sexual violence are both deeply troubling and a call to action for the nation” and proceeded to report statistics indicating that 20% of college women and 6% of college males have experienced sexual assault (p. 2). Though the methodologies for assessing rates of sexual assault and the accuracy of such rates have been contested (see [Krause et al., 2018](#); [Muehlenhard, Peterson, Humphreys, & Jozkowski, 2017](#) for reviews), they continue to be presented in multiple contexts, including in Title IX training.

The evolution of Title IX regulations and procedures has continued in the context of the #metoo movement. The movement emphasizes the pervasive nature of sexual harassment and sexual assault and the extent to which reporting these actions has long been discouraged, and disbelieved when reported. Widespread media coverage and discussion related to #metoo encourages a cultural zeitgeist suggesting claims are to be believed and perpetrators brought to a long overdue reckoning.

Second, though even the Obama era DOE letter (2011) emphasized the importance of fair and equitable procedures at one level, it and subsequent regulations have simultaneously emphasized the importance of student safety on campus, and in doing so have disadvantaged the accused. Their specific statements regarding safety and associated rules and procedures concern the safety of alleged victims, not of the accused. For example, an accused may be subject to exclusion from any contact with the accuser (including being removed from dormitories and classes, or being suspended) even prior to any determination of guilt. Due process protections for the accused must not interfere with provision of safety for the accuser. Active measures must be taken to prevent revenge of the accused against the accuser. Moreover, remedies for the complainant can include escorts to ensure safety from the accused, counseling or medical services, academic support services such as tutoring, ensuring that class withdrawals do not affect the complainant’s academic record, and reviewing the complainant’s disciplinary history to assess whether any problems may have been caused by the actions of the accused. But none of these apply the other way around (DOE, 2011). These reflect an assumption that the accuser is indeed a victim, though it is clearly also possible that the accused may be the victim of a false allegation.

Third, we suggest that a presumption of guilt is reflected in the very notion of “trauma focused” or “trauma informed” interviews and investigations. As Meissner and Lyle (2019) note, the *First Report of the White House Task Force to Protect Students From Sexual Assault* (2014) tasked the Justice Department’s Center for Campus Public Safety with the development of a “trauma-informed” training program for investigation of allegations of sexual misconduct. This focus on trauma was further encouraged during the Obama administration and later the Task Force’s second report in 2017. This focus is reflected in the Forensic Experiential Trauma Interview (Strand & Heitman, 2017) and in many statements and training materials for law enforcement, statements posted on campus websites, those of victim advocate organizations, and others (e.g., Webb et al., 2018). Though there is much “good” about the recommended process of the interview and many accuracies in portrayal of memory processes, the “bad” consists of additional incorrect and unstated assumptions and specific assertions about how the nature of interviewee memory reports informs judgments of the reality of their claims, and the “ugly” consists of the way in which these fallacies can mislead judgments: mostly favoring the complainant, but in some cases inappropriately favoring the accused. It is worth noting at this stage that training for FETI encourages the assumption that the accuser is traumatized (and therefore was raped), and encourages the interpretation of all responses as consistent with that trauma.

### **Problematic Investigatory Tools: The Case of FETI (Forensic Experiential Trauma Interview)**

As Meissner and Lyle (2019) discuss, the *procedures* of FETI are largely empirically supported, in that they essentially adopt elements of the widely tested Cognitive Interview, developed by Fisher and Geiselman (1992; 2010) and since shown to be effective in eliciting true information and minimizing false. These include developing rapport and demonstrating empathy, developing the interviewee’s interest in the interview, use of open-ended prompts, active listening, and avoidance of leading or suggestive questions, for example. Differences lie primarily in FETI’s emphasis on asking about emotions and sensory memories, though such questions are also used with the Cognitive Interview.

We find little fault with the recommended interview procedure itself, though we do note that there is much less attention paid in campus procedures and by promoters of FETI to what is the appropriate way to interview the accused. Instead, we focus here on several problematic assumptions and on questionable assertions concerning the meaning of responses obtained through use of FETI and the way in which they may mislead judgment, primarily in favor of the complainant.

### **Problematic Assumption 1: Sexual Assault Necessarily Produces Trauma Sufficient to Disable Cognition**

FETI training suggests that sexual assault will be experienced as severely traumatic (see Strand & Heitman, 2017; and presentation of Strand posted at <https://vimeo.com/117832921>), as does the general exhortation of Title IX guidance to

conduct trauma-informed investigations. From this assumption, the training goes on to discuss how memory works when experiencing trauma and what this will mean for the nature of traumatized persons’ accounts. Derivations concerning memory and the meaning of memory reports are based on the presumption that cognition will be profoundly affected. Such claims raise the question of the extent to which the experiences of all or most victims of sexual assault (nevermind sexual harassment) include negative emotions rising to the level presumed in FETI training. That is, the training materials present effects of extreme trauma on stress hormones, cognition, behavior, and memory rising to the level of disabling frontal lobe executive functions and exerting debilitating effects on memory formation. If the event in question does not create such extreme emotions, what does this mean for the remainder of the training specifying what to expect victim accounts to look like and for the implications of either conforming or not conforming to those expectations?

It is highly unlikely that all sexual assaults result in such extreme emotional reactions (particularly in many disputed cases of acquaintance rape) and even more unlikely that all sexual harassment does so. The level of negative emotion that will disable cognition to the extent proposed by FETI training is a relatively high standard. Many of the same considerations raised in the repressed memory literature are relevant in cases of rape as well (e.g., Clancy, 2009; McNally, 2003). How extreme were the emotions *at the time it occurred* (even when blunted by alcohol), versus experienced later upon reflection, for example? When do negative emotions cross the line to become sufficient to disable cognition to the extent FETI training suggests? We suggest that the extreme trauma assumption itself and related theories regarding effects of trauma on memory and behavior are both problematic, and, as we explore below, can lead to inappropriate inculpation of the accused as well as inappropriate disbelief of the alleged victim.

### **Problematic Assumption 2: Trauma Is a One-Way Street**

Generally, Title IX investigations are tasked with being “victim-centered” and “trauma-informed.” This exhortation directs much of the effort toward care and handling of the alleged victim (including greater victim-focus in interview training). The theory and training of FETI, for example, focuses on how to interview the alleged victim. Where the alleged assailant is mentioned in the training, it is to contrast the presumed status of the victim and assailant brains and processing status (disabled by emotion vs. calm and rational), and therefore the likely types of memory reports they will be able to offer (disorganized, fragmentary and difficult to access vs. organized and more accessible). The import of the discussion is to suggest that the assailant will not likely experience intense emotions and therefore will not experience impairments of cognition or memory—at least not impairments approaching those experienced by the alleged victim. Purportedly, the perpetrator will be calm and unemotional, in part because most are repeat offenders who plan assaults and find them habitual and enjoyable in most instances (<https://www.bwjp>).

[org/resource-center/resource-results/the-forensic-experiential-trauma-interview-feti.html](https://www.bwjp.org/resource-center/resource-results/the-forensic-experiential-trauma-interview-feti.html)).

But in a fair process, shouldn't consideration of emotion and trauma extend to the accused? If a person is innocent, strong negative emotions are not likely relevant until an accusation is made. But once an accused becomes aware of the accusation, they are undoubtedly common. One of us (Loftus) worked on the famous case of Cardinal Bernardin of Chicago, who himself was accused of sexual misconduct by a former seminarian, Stephen Cook. Writing in his memoir, the Cardinal talked about his initial reaction: He was "startled and devastated" (Bernardin, 1997, p. 19). He would also tell others that the false accusation and the cancer that ultimately killed him were the worst things that had happened to him in his life. Fortunately, before Bernardin died Stephen Cook dropped the case, making clear by his comments that he was convinced of Bernardin's innocence. But how might the terrible emotional devastation Bernardin felt because of the accusation have affected his reports during relevant interviews?

Strong emotions can affect the encoding of events. But they also impair retrieval. FETI training notes that the potential for intense emotions and re-traumatization is present for alleged victims, even during a supportive FETI interview—and these may affect memory reports. A more everyday experience is when people cannot remember something while nervous in front of an audience or while taking a test, but remember as soon as they leave the stressful situation. Such processes likely also affect memory reports for respondents. In addition to effects of strong emotion, an innocent accused may also be distracted by the struggle for answers. He may be confused by the unexpected accusation and struggle to understand why the accusation was made, or how his behaviors might have been misreported or misinterpreted.

To the extent that a FETI interviewer expects the accused to be able to provide a linear "who, what, where, when, and how" account and the accuser to provide a disorganized, incomplete and sometimes inconsistent account (as suggested by FETI training: e.g., Strand webinar presentation: <https://www.bwjp.org/resource-center/resource-results/the-forensic-experiential-trauma-interview-feti.html>), that interviewer may inappropriately interpret normal failures of memory as indicators of deception by the accused, while interpreting similar disorganization or mistakes as indicators of truth for the accuser. In short, there are many potential explanations for failures of frontal lobe executive functions, and for memory disorganization, errors and omissions of the sort anticipated by FETI for victims. These include alcohol or drug impairment, stress during recall, and lying. Such report characteristics cannot be assumed to reflect the validity of either party's account.

Other inequities regarding interviews or their interpretation are also important. For example, given that the accused may also be traumatized, the same considerations of safety and acceptance should apply as for accusers. Moreover, as FETI trainers suggest, asking open-ended questions about what the person was thinking or feeling during an event can trigger important information for the investigation. These techniques should be used to give respondents the best chance to retrieve potentially exculpatory information, just as they are recommended

to give the accuser the chance to retrieve accusation supportive information.

### **Problematic Assumption 3: Reliable Differences Exist in Characteristics of Memory Reports for Traumatic versus Non-Traumatic Events**

FETI materials outline the way in which trauma is expected to affect the manner of encoding, and therefore memory reports, for traumatic events. Space does not permit full exploration of the validity of all such claims. However, many are correct: for example, claims that intense emotion can impair frontal lobe function, reduce control of attention, focus attention more strongly on the perceiver's central concerns or the most salient aspects of the event, reduce attention to peripheral concerns, and others. As a result, the accounts of victims of trauma will purportedly be disorganized, focus on feelings and sensations, be inaccurate regarding timing, order, and other contextual details, and be inconsistent within and across tellings. Normal pathways of retrieval are expected to be impaired due to peritraumatic dissociation, which prevents normal associative pathways between elements of the event from being formed and makes retrieval of relevant memories more difficult. In contrast, the accused is expected to provide much more organized accounts, better able to satisfy demands of investigators for "who, what, when, where, how" information.

As Meissner and Lyle (2019) review, however, evidence does not support the predicted stark differences in accounts of traumatic versus non-traumatic memories, or between accused and accuser. The FETI training fails to acknowledge the many pathways to any given failure or characteristic of memory. Moreover, there is almost no mention in FETI training of the way in which alcohol may alter the emotional experience of sexual assault or the interaction of alcohol and emotion on memory processes.

### **Problematic Assumption 4: Characteristics of Memory Reports Can Be Taken as "Evidence" of Whether Trauma Did Occur**

An issue of considerable importance is that of whether memory reports taken with FETI procedures and judged under FETI claims regarding traumatic and non-traumatic memories and victim-perpetrator differences in memory characteristics will lead to more accurate conclusions regarding the truth of the claims. Several issues are relevant to this question.

**Is there really a "profile" of a true report?** The unfortunately "ugly" result of FETI-related mistaken assumptions of whose memory reports should look how and under what conditions is the risk of mistaken judgments. A particularly ugly feature of FETI training is that it specifically suggests that if memory reports of alleged victims fit the "profile" of those expected from a trauma victim, this fit should serve as evidence that the report is true: "good solid neurobiological science routinely demonstrates that, when a person is stressed or traumatized, inconsistent statements are not only the norm, but sometimes strong evidence that the memory was encoded in the context of severe stress and trauma" (Strand & Heitman, p. 2). Clearly, given that evidence does not show that trauma is the

unitary cause for such memory reports (see next section), such an assumption poses considerable risk of an overly confident attribution of truth to an accusation.

FETI developer Strand made other such claims in his webinar (<https://www.bwjp.org/resource-center/resource-results/the-forensic-experiential-trauma-interview-feti.html>). One such claim might disadvantage actual victims. That is, Strand stated that he would be suspicious of alleged victims who were able to remember too much peripheral detail (because trauma should narrow attentional focus to central aspects of the event). It is notable, though, that he also made the contradictory claim that because victims often dissociate during rape, they may be focusing on peripheral details to avoid focus on what is happening. Strand also claimed that when alleged victims report expected emotional/behavioral reactions (e.g., terror, freezing), these reactions (which he clearly presumes true) can provide support for required elements of proof for prosecution of rape claims, such as fear, force, or nonconsent. In other words, the victim's reported reactions are considered proof that nonconsensual or forcible sex did occur.

**What other explanations exist for memory features FETI training attributes to trauma?** The claims above adopt logic such as the following: If men have four appendages, then all creatures with four appendages must be men! Just as there are many other creatures with four appendages, there are also many factors potentially responsible for the types of memory accounts that FETI training offers as evidence of trauma (or against). Prominent among them is intoxication, which, at high levels tends to produce fragmentary memories, myopic focus impairing memory for periphery, and other effects similar to those specified by FETI training (see [Davis & Loftus, 2016](#), for review). Generally, one might ask how the purported memory effects of trauma might be different from what happens when one is asked about things (or is trying to remember things) that were never encoded clearly for any reason, or when one is lying. But even truth tellers may provide less coherent or complete reports when under the cognitive load imposed by the stresses of an accusation, the investigation, interviews, and worry over consequences. Modern studies of lie detection have focused, as [Meissner and Lyle \(2019\)](#) review, on what happens when one imposes a cognitive load on would-be deceivers. A liar will have trouble with peripheral details, and with unusual requests for information or unusual manners of retrieval (such as reverse order; see [Vrij, 2019](#); [Vrij, Hartwig, & Granhag, 2019](#)). Combined with the effects of other stressors, the cognitive load imposed by efforts to lie successfully can produce memory reports sharing many features with those FETI training attributes to trauma.

**Does sex-related trauma = sexual assault?** One thing to keep in mind while considering the issue of "traumatic" memories is that a person may experience fear, high stress, or "trauma" during a sexual encounter, even though objective judgment would not suggest the encounter should be viewed as sexual assault. This scenario might occur, for example, if the alleged victim found the encounter highly aversive, but provided no overt indicators of nonconsent, or engaged in overtly voluntary, but actually unwanted, sex. In such circumstances, the advice inherent to the FETI training ([Strand & Heitman, 2017](#)) to

consider evidence of trauma (in the form of memory characteristics and reports of emotions) as evidence of truth of the accusation can lead to misleading inferences that these feelings indicate assault.

One of us (Davis) served as expert witness in a case illustrating perfectly the problems with such an assumption. The participants, who we will call Jane and John, were both inexperienced: she a virgin and he a near virgin. They were both interested in one another, and arranged a late meeting at his apartment to watch a movie. Jane had told John early in the visit that she wasn't ready for sex yet (the primary argument for non-consent). Yet, as the evening progressed she engaged in many behaviors that suggest consent. Her cross-examination at trial consisted in essence of the following: Did you get in bed with John? [Yes.] Did you make out with him with clothes on? [Yes.] At some point, did he begin to remove your shirt [bra]? [Yes.] Did you say no or try to stop him? [No.] At some point, did he begin to remove your shorts [underwear]? [Yes.] Did you say no, tell him to stop, or try to physically stop him? [No.] Did you in fact raise your buttocks as he tried to remove them? [Yes.] Did he then move to position himself between your legs? [Yes.] Did you spread your legs voluntarily? [Yes.] Did you at any time tell him not to insert his penis, say no, or in any way try to physically stop him? [No.] Nevertheless, Jane immediately reported the incident as rape to authorities. She made a recorded phone call at their behest to attempt to get John to admit to the rape on the record. During the call she talked about her feelings and the fact that she had early on told him she wasn't ready for sex, and tried to get him to admit that he knew she didn't want it. For his part, John was obviously excited at first to hear from her, talked about when they could get together again, and clearly assumed the previous night was the beginning of a relationship. But as Jane disclosed her feelings, cried, and talked about how he had to have known she didn't want it, John exclaimed "Jane! Oh my god! Jane! I raped you! Oh my god! I didn't realize! Jane! I'm so sorry. I'm so sorry. What can I do? I didn't want to hurt you!"

Nothing could have been clearer from their accounts and their trial testimony. Jane really hadn't wanted to have sex. She experienced intense negative emotions, arguably trauma, as the result of the interaction. She exhibited strong distress, and cried often, in her initial report, hearings, and trial, and upon news of John's acquittal. And yet, John clearly had no clue that she felt this way until the call the day after their encounter. His surprise was clear. Jane had not overtly made clear her very real desire not to have sex.

FETI trainers and others may assume that Jane experienced intense fear as it became clear to her that John might attempt to have sex with her, and as a result experienced "tonic immobility" and the inability to marshal resistance, and indeed she reported that she wanted to resist and didn't know why she didn't or couldn't. But this does not justify a finding of rape when it was unambiguous that John received no cues of resistance, and he made a genuine "mistake of fact" regarding consent. Confusion, lack of experience, and a poorly developed repertoire for negotiating potentially sexual interactions among naïve young people can produce many similar scenarios among college students.

### **Problematic Assumption 5: FETI's Focus on Emotion Has Only Positive Effects**

The story of John and Jane raises another question regarding FETI. That is, great emphasis is placed on asking the accuser about the emotions and sensations she experienced during the event. The assumption is that such emotions and sensory memories are stronger than memory for “who, what, when, where, and why” details. Emotion and sensory-focused questions purportedly build rapport with the interviewee and can also trigger associative pathways by which the traumatized victim may be able to retrieve memories for other aspects of the event (Strand & Heitman, 2017; <https://www.bwjp.org/resource-center/resource-results/the-forensic-experiential-trauma-interview-feti.html>). We agree. But emotion focus, specifically, is likely to have other effects as well, raising the question of whether FETI's emotion focus may be a double-edged sword. In particular, two important issues deserve consideration.

**What of the effects of emotion priming?** Emotion related questions and prompts to relive emotions and sensations clearly serve a priming function. For a complex event, such priming could lead to preferential retrieval of emotion-consistent information at the expense of the contradictory, as shown by mood consistent retrieval effects. Moreover, as shown in the affective priming literature, emotion at retrieval can serve as context for the information that is retrieved, causing it to be interpreted in an emotion-consistent fashion (e.g. Bower & Forgas, 2001; Forgas, 2008; Gibbons, Seib-Pfeifer, Koppelheie-Gossel, & Schnuerch, 2018).

Finally, fuzzy trace theory (e.g., Brainerd & Reyna, 2005, p. 83) would predict that strong emotion memories, particularly in the absence of clear verbatim memories, would likely lead to constructive memory errors consistent with the emotion. The person might remember things that would be consistent with the emotion, even if they didn't happen (such as attempts to resist, or coercive actions by the accused), and fail to remember, or reinterpret actions that were inconsistent with the emotion. More generally, fuzzy trace theory suggests that when memories are unclear, one's general knowledge of what is likely in such circumstances will lead to memory errors consistent with general knowledge or expectations. In this way, if FETI training is correct regarding the lack of clarity in traumatic memories, this lack of clarity leaves open greater opportunity for memory to be distorted in the direction of expectations. Or, as Davis and Loftus (2016) put it, we tend to remember based on “who we think we are and what we think we did.” John and Jane were not intoxicated during their encounter. But how much more opportunity for expectation-based errors is imposed by alcohol, or other impairments to memory clarity?

**How good is memory for emotion itself?** The FETI theory underlying its recommended procedures implies that emotion memory will be accurate and strong. These emotion memories can be used as pathways to retrieve accurate event-related information. But what if the person remembers the emotions incorrectly? A substantial literature exists to document inconsistencies in memories for emotion over time, and sources of

distortion in memory for emotion comparable to those for other aspects of event memory. Notably, like other memories, memories for emotions are “functional,” and alter over time in ways to facilitate one's current needs or goals, and they generally change to be consistent with current beliefs and appraisals (see Levine, Lench, & Safer, 2009, for review). Given that emotion memories are malleable, and particularly toward consistency with current goals, it is quite possible that when interviewees are asked to start with how they felt during an event, the emotions they report (and that serve as associative cues or as primes) may not reflect those experienced during the event, and as such, will not serve to prompt accurate memories or interpretations of the event.

### **Sexual Behavior and Sexual Consent Communications: A Glaring Area of Omission in Title IX Training**

Our story of John and Jane raises other issues that are crucial to judgment of sexual assault. That is, there is a large scientific literature on how sexual consent is conveyed and interpreted, gender differences in perception of the meaning of behaviors that might or might not indicate consent, sources of misunderstanding of consent, effects of alcohol use on consent processes and perceptions, and other individual differences in these respects (e.g., see Davis & Loftus, 2016; Davis & Villalobos, 2014; Rerick et al., in press; Villalobos, Davis, & Leo, 2016; Wood, Rikkonen, & Davis, in press, for reviews).

Whereas the case of John and Jane is relatively clear regarding whether Jane displayed cues of nonconsent once the making out began, and many others are similar, it is also often the case that the clarity of consent is more difficult to judge, and correspondingly, the defense of reasonable mistake of fact. In this respect, greater training concerning norms of how consent or nonconsent tends to be communicated and interpreted in practice would be very useful. Did the accuser fail to convey cues of nonconsent widely recognized among students as such, or did the accused fail to recognize them if they occurred? Did the accuser engage in behaviors that she felt had nothing to do with consent, but that are widely considered to indicate consent? To our knowledge such issues are not covered in Title IX trainings.

Unfortunately, issues of interpretation complicate the task of those who must judge even further. FETI advocates Strand and Heitman (2017) noted that “What many in the criminal justice field have been educated to believe people do when they lie (e.g., changes in body language, affect, ah-filled pauses, lack of eye contact, etc.) actually occur naturally when human beings are highly stressed or traumatized” (p. 2). It is indeed clear that there are many confusions regarding both what may or may not indicate accuracy, subjective truth, or lying, as well as how perceivers understand and use such cues. The issue of consent communications adds to this the task of judging whether such communications conveyed each person's intentions clearly and whether each interpreted the other correctly. It is truly a difficult and error-fraught enterprise to judge who interpreted events correctly in the first place, who remembers accurately, who is telling the truth as they know it, and who is lying.

## Conclusions and Caveats

Meissner and Lyle (2019) clearly lay out the case that much of what is taught to Title IX investigators—whether basic “facts,” recommended procedures, or the theory underlying such procedures—lacks empirical tests or is unsupported or directly contradicted by existing research. We agree.

We have pointed to some problems with the training of Title IX investigators and the specific procedure of FETI and other “trauma-focused” interviewing. This discussion leaves open the question of how the investigations tend to be performed in practice. As Meissner and Lyle (2019) review, there are no formal training or minimum qualifications for those tasked with enacting recommended procedures, although such training may occur voluntarily, and many Title IX officials and investigators may possess important relevant qualifications. Assuredly, however, there will be significant variability in the manner and competence with which investigations are carried out. Such problems have been manifest in lawsuits against many colleges and universities based on failures of due process. More development of specific guidelines for *how* to conduct the investigations or recommended procedures (versus broad instructions such as to interview both parties) is needed.

It is also safe to assume that few investigators have adequate training in the many relevant areas of scientific knowledge such as detection of deception, interviewing, suggestion, memory, sexual behavior, sexual consent communications, and the effects of trauma on thinking, memory and behavior. This missing knowledge makes the task of making sense of the many reports and claims more fraught with error.

Meissner and Lyle (2019) point to the need to develop and employ evidence-based best practices for interviewing. We would add to this the need to provide more comprehensive education to those who must judge the complaints. Such education should cover evidence-based recommendations about how to interpret the information elicited through improved interviewing practices. Additionally, such education should convey accurate information about trauma and memory, as well as provide needed information about sexual behavior, sexual consent communications, and other topics.

## Conflict of Interest

The authors declare no conflict of interest.

## Author Contributions

The authors discussed this and conceived it together.

**Keywords:** Sexual assault, Memory, Title IX, Forensic Experiential Trauma Interview, FETI, Rape

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