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Two Steps Forward

Lucy France

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FOREWORD

TWO STEPS FORWARD

Lucy France*

I. INTRODUCTION

The editors of the Montana Law Review and the organizers of the 2016 Browning Symposium: *Sexual Assault on Campus: Conflicts Between Campus and Courts*, are to be commended. They have identified an issue of national significance which recently has had a major impact on the local community. For the past six years, barely a month has passed without a major news story about sexual assault on college campuses. On the local level, the United States Departments of Education and Justice launched investigations into the handling of sexual assaults by the University of Montana, the University and City Police Departments, and the County Attorney.¹ The topic of sexual assault involving college students made consistent headline news in the local media between December 2011 through May 2015. Much to the chagrin of many who recognize that the town of Missoula is not unusual with regard to the occurrence of sexual assault, a national author wrote a book about the subject and titled it *Missoula: Rape and the Justice System in a College Town*.² On the national level, since 2011, the U.S. Department of Education's Office for Civil Rights ("OCR") has investigated 369 colleges and universities for their handling of sexual

* General Counsel, University of Montana.

1. Michael Cotter, *2016 James R. Browning Keynote* (Sept. 30, 2016), in 78 MONT. L. REV. 9 (2017).

2. JON KRAKAUER, *MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN* (2015). The book cover also featured the University's beloved Main Hall.

assaults.³ Both Congress and the White House have supported efforts to combat sexual violence on college campuses.⁴

The topic of sexual assault is complex. A comprehensive exploration of the topic involves a review of broader complex topics such as the evolution of women's rights, feminist legal theory, and gender and racial equality.⁵ Colleges and universities have been struggling to adapt to the increased expectations that they will proactively address the problem of sexual assault involving students.⁶ Consideration must be given to the intersections between criminal law and the role of police and campus disciplinary processes. These issues are now playing out in civil litigation involving students and their colleges and universities.⁷

3. *Title IX Tracking Sexual Assault Investigations*, THE CHRONICLE OF HIGHER EDUCATION, <https://perma.cc/P2E8-NFNK> (last visited Feb. 26, 2017).

4. The United States Department of Education's Office for Civil Rights issued its "Dear Colleague Letter" on Sexual Violence in April 2011. This built upon the OCR's "Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties, issued in 2001. In 2013, Congress passed the Campus Sexual Violence Elimination Act, or Campus SaVE Act. This was passed as part of the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, which extended and expanded on the provisions of the Violence Against Women Act of 1994, Pub. L. No. 103-322 (VAWA). As part of VAWA reauthorization, the Campus SaVE Act amended the Clery Act, 20 U.S.C. § 1092(f), by expanding campus crime reporting requirements, specifying institutional training and notice obligations for employees and students. In October 2014, the U.S. Department of Education issued final regulations on implementation of the Campus SaVE Act, amending the Clery Act regulations at 34 C.F.R. § 668.46. 79 Fed. Reg. 62,752 (2014). These regulations became effective on July 1, 2015. At the beginning of 2014, President Obama established the White House Task Force to Protect Students from Sexual Assault. This task force was co-chaired by the Office of the Vice President and the White House Council on Women and Girls. The Task Force issued its first report, titled *Not Alone*, on April 29, 2014. See *Protecting Students from Sexual Assault: Not Alone*, Office on Violence Against Women, <https://perma.cc/URJ3-CM67>. In April 2014 the Office for Civil Rights issued additional guidance: *Questions and Answers on Title IX and Sexual Violence*. This helped clarify the OCR's position about schools' obligations under Title IX to address sexual violence as a form of sexual harassment.

5. See Deborah Brake's discussion of race and campus discipline. Deborah Brake, *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard*, 78 MONT. L. REV. 109 (2017).

6. United Educators (UE), which provides insurance coverage to colleges and universities, conducted a study of sexual assault claims filed between 2011 and 2013 by the institutions it insures. The study examines 305 claims from 104 colleges and universities involving sexual assault and a student victim. The findings highlight the complexities of these cases. 60% of sexual assaults occurred on campus; 41% of sexual assaults involved off-campus parties; 90% of victims knew their perpetrators; 78% of sexual assaults involved alcohol; 1 in 3 victims were drunk, passed out, or asleep; 84% of perpetrators were students; 99% of perpetrators were male, 20% of perpetrators were repeat offenders. United Educators Risk Management, *Sexual Assault Claims Study*, available at <https://perma.cc/8SX9-X64U> (last visited Feb. 15, 2017). A United Educators survey found that reports of sexual assault claims among its nearly 1,300 clients doubled from 2011 to 2013. United Educators Report, <https://perma.cc/J387-PAZF> (last visited Feb. 26, 2017).

7. See, e.g., Jake New, *Out of Balance*, INSIDE HIGHER ED. (April 14, 2016), <https://perma.cc/MG8J-HC7U> (discussing increase of lawsuits by students who have been disciplined); *How to Pursue a Title IX Lawsuit*, KNOW YOUR IX: EMPOWERING STUDENTS TO STOP SEXUAL VIOLENCE, <https://perma.cc/>

This issue of the Montana Law Review is not only timely but also sustainable. The selections present scholarly explorations of difficult practical issues. The common thread is the premise that sexual assault—particularly that occurring on college campuses—continues to be a problem. The authors, through different lenses, agree that the concept of fundamental fairness is necessary to effectively make headway towards decreasing the incidents of sexual assault. One who reads this entire volume will be rewarded with a deeper understanding of the topic and with well-grounded suggestions for advancing the law to better combat the problem of sexual assault.

II. SYMPOSIUM KEYNOTES

The transcripts from the keynote presentations at the symposium give the context for the deeper dive into the complexities of the topic offered by the scholarly articles. The keynotes provide the trailer for consideration of important issues, including: the adequacy or inadequacy of current criminal definitions; the evolution of societal morals; and the limitations and benefits of campus adjudication processes. They emphasize that despite the local focus on the Missoula community, Missoula's experience is not unique. United States Attorney Mike Cotter notes that over 200 other colleges and universities, at the time of his keynote address, were being investigated.⁸ He explains the basis for federal jurisdiction and for viewing criminal sexual assault on college campuses as a civil rights issue.⁹

Montana Attorney General Tim Fox discusses how the difficulties of navigating the U.S. Department of Justice's investigation into local law enforcement and local prosecutorial discretion issues ultimately resulted in positive reforms.¹⁰ Attorney General Fox also gives an important nod to the work of state legislators such as Diane Sands¹¹ and Kimberly Dudick¹² for their work in advancing laws to more effectively respond to sexual assault as well as human trafficking, and he discusses measures the State may take to ensure that the reforms reach rural communities.

In the end, U.S. Attorney Cotter and Attorney General Fox agree that the federal involvement has resulted in a safer community. Missoula should be a model for other communities. One cannot help but celebrate this posi-

WUT9-BW4A (last visited 2/26/17) (non-profit organization instructing victims how to file a private lawsuit against their college or university if they feel they are not complying with Title IX).

8. Cotter, *supra* note 1.

9. *Id.*

10. Reforms cited in his keynote address include: Developing clear policies and procedures and guidelines for prosecuting sexual assault cases; special training for sexual assault investigation, prosecution, and victim treatment; formation of a special victims unit in the County Attorney's Office; improving communication with law enforcement agencies and community partners.

11. Tim Fox, *2016 James R. Browning Keynote* (Sept. 30, 2016), in 78 MONT. L. REV. 21 (2017).

12. *Id.*

tive spirit of cooperation at this time in U.S. history, when bipartisan conflict threatens to impede other efforts at meaningful reforms.

III. THE 2011 DEAR COLLEAGUE LETTER

In her article *Institutional Failure, Campus Sexual Assault & Danger in the Dorms: Regulating Limits & the Promise of Tort Law*, Andrea Curcio observes that although laws cannot solve the fundamental problem of on-campus sexual assault, they can influence institutional behaviors.¹³ She begins with a chilling narrative of personal experience at college.¹⁴ She notes that sexual assault on college campuses has been occurring for decades and remains a serious problem, exploring the relatively limited impact some federal laws have had in combatting the problem. Professor Curcio argues, for example, that laws requiring the collection and publication of data should focus on the fact that a majority of these crimes occur in college residence halls. The fact that such data is not collected and publicized limits the ability of colleges to notify incoming students that it is more likely that they will be assaulted in a residence hall room by someone they know as opposed to walking outside and having a stranger jump at them from the bushes.

Both Professor Curcio and Erin Buzuvis¹⁵ argue that the 2011 Dear Colleague Letter (the “DCL”) affected positive change regarding campuses’ responses to the sexual assault problem. Since it was first issued, the DCL has caused quite a stir in the higher education world. Critics argue that the federal agencies overstepped their authority by issuing guidance which has not gone through the channels of regulatory review and comment.¹⁶ However, Professor Curcio argues that the DCL has been helpful in articulating the standards for victims to bring civil tort claims. She contends that civil litigation and federal enforcement actions are the key to motivating effective institutional change. She draws a comparison to the clergy sex abuse cases, noting that at first public sentiment believed the problem to be one of individual bad priests before it was recognized that the matter involved

13. Andrea A. Curcio, *Institutional Failure, Campus Sexual Assault and Danger in the Dorms: Regulatory Limits and the Promise of Tort Law*, 78 MONT. L. REV. 31 (2017).

14. *Id.*

15. *Id.*; Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONT. L. REV. 71 (2017).

16. The Department of Education describes the DCL as a “‘significant guidance document’ under the Office of Management and Budget’s Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).” DCL, fn.1. The guidance is not binding. *Examining the Use of Regulatory Guidance: Hearing Before the U.S. Senate Committee on Homeland Security & Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management*, 114th Cong. (2015), available at <https://perma.cc/6NG8-F54V> (last visited 2/26/17) (Statement of Amy McIntosh of the Department of Education).

widespread institutional failure. She postulates that the law will similarly evolve to recognize sexual assaults of college students as institutional failures.

In her article *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard*, Deborah Brake explores one of the most controversial aspects of the DCL, the preponderance of the evidence standard. She makes the case that the “controversy” over the use of the preponderance of the evidence standard in campus disciplinary processes involving student sexual assault is a misnomer. Campus adjudication processes must be fair to be effective. In the past, institutions applied the clear and convincing evidence standard, which tipped the balance in a campus adjudication process against a complainant by expressing skepticism of the complainant’s account.¹⁷ Professor Brake notes that by 2011 most universities had already adopted the preponderance of the evidence standard.¹⁸ She provides a persuasive explanation of the legal basis for using the preponderance of the evidence standard in campus sexual assault adjudications. Professor Brake engages in a research-based discussion of the difficulty of changing social norms, but she ultimately demonstrates how using the preponderance of the evidence standard plays a necessary role in positive reform.

IV. STRUGGLES TO IDENTIFY THE CORRECT ENFORCEMENT FRAMEWORK

All of the authors and the keynote speakers agree that the problem of sexual assault in the broader society, and particularly on college campuses, is an age-old problem and that society is still struggling to find an effective enforcement framework. At the core of the struggle is the tension inherent in attempts to balance the rights of victims against the rights of the accused. In her article *Title IX and Procedural Fairness: Why Disciplined Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*,¹⁹ Professor Buzuvis argues that student discipline litigation is important to ensure fair and balanced disciplinary processes. However, couching such litigation as “reverse discrimination” is harmful because it promulgates negative stereotypes and contributes to anti-feminist backlash.¹⁹ Professor Buzuvis notes that problems of fairness in campus disciplinary processes are not new. With reference to sexual assault, there are not now more problems with fair process issues in student disciplinary proceedings; rather, there are simply more cases because reports of sexual assaults on

17. Brake, *supra* note 5.

18. *Id.*

19. Buzuvis, *supra* note 15.

college campuses have increased.²⁰ Professor Buzuvis explores the various legal theories used by students who sue their colleges and universities after having been disciplined for sexual assault. In the end, neither government agencies nor the courts have endorsed any particular model for investigating and disciplining students in sexual assault cases. However, Professor Buzuvis points out that campuses should be mindful of some basic tenets of due process, administrative law, and contract law as they craft their own enforcement processes.

Kevin Cole, in his article *Sex and the Single Malt Girl: How Voluntary Intoxication Affects Consent*, takes up the important subtopics of the role of alcohol and the various definitions of consent in sexual assault cases. Any enforcement framework, whether criminal or an institutional policy-based enforcement process, must begin with clear definitions. In many sexual assault cases, the issue of whether a victim had the capacity to consent is pivotal. Professor Cole discusses nuances between cases in which victims are not incapacitated by alcohol but are perhaps so impaired that they lack the capacity to consent. He explores whether there are, or should be, different definitions for voluntary intoxication and involuntary intoxication relative to the issue of consent. Professor Cole's article sparks reflection on the difficult work that various enforcers, including college and university officials, face every day as they strive to navigate complex facts involving students whose faculties are impaired by alcohol or drugs and who may or may not remember much about the sex or sexual assault of the night before.

In her article *Rape by Malice*, Kari Hong describes "rape as a failed offense."²¹ She explains that the crime of rape has not kept pace with social changes in the same manner that other crimes have.²² For example, homicide law has evolved to reflect social norms. However, sexism has stunted the evolution of the crime of rape. Professor Hong provides a sophisticated analysis of how history and context shape law. She argues that current criminal definitions are inadequate to capture the crime of acquaintance rape. The problem is that the law keeps the burden on the victim to prove that it was impossible for the perpetrator to have presumed consent.²³ On the other hand, she argues, affirmative consent laws are too broad and have the unde-

20. *Id.* Increased reports of sexual assault are a good thing. It is well-established: "The majority of rape incidents of college students are unreported by victims – in the 2016 Bureau of Justice Statistics (BJS) study, only 7% reported the incident to a school official." Zinzow, et al. (2011), Krebs, et al. (2016), and Fisher, B. S., Daigle, L. E., Cullen, F. T., & Turner, M. G. (2003). "Reporting sexual victimization to the police and others: Results from a national-level study of college women [external link]." *Criminal Justice and Behavior*, 30(1), 6-38 (cited in United States Department of Justice, *Not Alone*, available at <https://perma.cc/74TX-MFU3> (last visited 2/26/17).

21. Kari Hong, *Rape by Malice*, 78 MONT. L. REV. 187 (2017).

22. *Id.*

23. *Id.*

sirable potential to criminalize legal behavior.²⁴ She makes the effective case for substituting the current requirement that the prosecutor prove that the assailant acted despite his knowledge that the victim did not consent with a malice standard (wanton disregard for the rights of others). She argues that this change would advance the law by more effectively separating legal behavior (consensual sex) with criminal conduct (non-consensual sex).

V. CONCLUSION

The recent change in the White House has left people wondering to what extent federal agencies will continue to enforce civil rights laws, and whether the past Administration's guidance on addressing sexual assaults on college campuses is still relevant. The keynote addresses and all of the articles in this journal confirm that sexual assault on colleges campuses remains a problem. The robust discussions about how to best address the issue should in no way be viewed as an argument for not addressing the issue. Until students are no longer harmed by sexual violence while in college, institutions of higher education will continue to improve upon their efforts to combat the problem. They will continue to draw on the expertise of thoughtful scholars and practitioners such as those who have contributed to this Symposium.²⁵ The important work over the past six years, built upon the work done prior to 2011, by students, state and federal officials, grass roots organizations, advocates, scholars, law enforcement agencies, university officials, and many others has moved the nation two steps forward in the battle against sexual violence on college campuses.²⁶

24. *Id.*

25. See also Brake, *supra* note 5 at fn.1 (proposing that despite the likelihood that the Trump administration will reverse the Obama Administration policies, the discussion "will remain relevant as universities decide how to handle sexual assault")

26. At his farewell address in Chicago, President Obama provided an optimistic outlook to those who worry about the change of Administration: "For every two steps forward, it often feels we take a step back."

