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2016 James R. Browning Symposium Keynote

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2016 JAMES R. BROWNING SYMPOSIUM KEYNOTE

Montana Attorney General Tim Fox*

Thank you, Brandon, for the introduction, and thank you to my Alma Mater, my law school, the Montana Law Review, Dean Kirgis, and Anthony Johnstone, who was a colleague of mine. We worked on a number of cases before, and I wish he was back in the Attorney General's office, but I have a wonderful solicitor general who is in the room today. I am going to introduce him. Dale Schowengerdt is my solicitor general and Stuart Segrest is one of our assistant attorneys general. They are interviewing for an intern job if any of you students in the back are interested, and that is my pitch for coming to work for Department of Justice.

But anyway, thank you for being here. I really want to thank all those for taking time out of their busy day to come and listen. I should also point out Madison Mattioli is here, too. She is one of my assistant attorneys general and matriculated from this law school, as did Stuart. But, I want to thank each and every one of you for taking the time to come here and to listen and learn and ask questions and be a part of really the solutions going forward on these important issues.

As Brandon mentioned, I have really strong ties to Missoula. Like John Belushi, I had many years of school, only mine were not wasted. I have deep affection for this community. This is a wonderful community, the broader Missoula County community. And that is, as Brandon mentioned, why I took a real deep interest in the important legal dispute between the Missoula County Attorney's Office and the U.S. Department of Justice.

I want to stop for a moment before I get into any more about that, to thank my colleague Mike Cotter, US Attorney for the District of Montana, for his fine work in making sure that these issues were addressed properly in Missoula County, and in fact, all across the State of Montana. So thank you, Mike.

At the core of the dispute were questions about how the County Attorney's Office has handled sex assault cases and, even more deeply, whether or not the federal government could be involved in prosecutorial discretion. The Department of Justice was interesting because I met with the Civil Rights Division in Washington D.C. shortly after becoming attorney general to see how I might help on this issue, and they informed me about all of the work they had done across the country in identifying campus sexual

* Tim Fox was elected as attorney general on November 6, 2012, and was sworn in as Montana's 24th attorney general on January 7, 2013. He was reelected to a second four-year term on November 8.

assault as being an issue.¹ And they had focused on Missoula Montana and the University of Montana campus for various reasons, not the least of which is all the media and attention that we were getting here. Obviously at the time, there was a lot of cooperation, and I have to say I am very proud of my Alma Mater, the University of Montana, for working through very difficult times on very difficult issues.

I met with the Civil Rights Division in Washington D.C., and they explained to me the broader issue across the country, and also why they had selected the University of Montana in Missoula, Montana. That was the beginning of my investment in this particular issue in this community, but not the beginning of my interests in these issues of sexual assault, sex crimes, human trafficking, and the like. This is something I had campaigned on in seeking to become attorney general, and we had worked to make sure that the prosecution services training that we had provided at the Department of Justice to the county attorneys across the state was state-of-the-art and was something that would benefit all of our state in making sure that sexual assault prosecutions were done well.

This also presented an opportunity here in Missoula that I felt was very important because the county attorney strongly disagreed with the U.S. Department of Justice on its approach.² There were emotions running very high, fingers being pointed in the community, but unfortunately, a lot of progress was not being made, which was the initial emphasis for the Department of Justice to come in and to try and make a difference, obviously. Although the campus, the University, and the city police were making strides forward, there were still issues that needed to be addressed. Fortunately, in State law, there is a provision that provides that the attorney general is to have a supervisory authority over county attorneys.³ So when meeting with Mike Cotter and the staff of the Civil Rights Division, we were able to come to a very important agreement that allowed our office to supervise some very important issues with the County Attorney's Office here in Missoula. And we avoided, in doing that, a very protracted legal battle against the county who sued the federal government, and there was a potential for a counter suit.⁴ I think everyone decided that it was better to move forward and try to actually address some of these issues. And it was

1. See, e.g., Vanita Gupta, *Understanding the Threat of Sexual Violence on College Campuses*, U.S. DEP'T OF J. (Jan. 25, 2016), <https://perma.cc/4GEN-8ART>.

2. See, e.g., Jenna Cederberg, *Missoula County Attorney Refuses DOJ Requests*, MISSOULIAN (June 28, 2012), available at <https://perma.cc/KSJ6-YNDG>; Kathryn Haake & Kim Briggeman, *DOJ Accusations Spark Outrage at Missoula County Attorney's Office*, MISSOULIAN (Feb. 23, 2014), available at <https://perma.cc/TD2F-59TV>.

3. MONT. CODE ANN. § 2-15-501(5) (2015).

4. See Kathryn Haake, *Missoula County, State, DOJ Sign Agreements to Improve Handling of Sexual Assault Cases*, MISSOULIAN (June 10, 2014), available at <https://perma.cc/Q39S-NKUH>.

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not an easy deal to get through, was it Mike? It took a few months, but we got it done.

The agreement was signed by the U.S. Department of Justice Civil Rights Division, Mr. Cotter, the County Attorney's Office, the county commissioners, and myself as well.⁵ We were very fortunate here just recently, this summer, to announce that after several years of work in the Missoula County Attorneys Office, they had finished all of the requirements in the Memoranda of Agreement that they had with my office and, they had implemented everything that I had asked of them.⁶ They worked very closely with prosecutors in my office. We worked closely with the Missoula County Attorney's Office. We implemented significant changes in how sex assault cases are handled at the prosecutorial level. Of course, that augments what was being done both on campus and in the community at large with investigations, victim services, and the like.

Here are some of the things that we were able to accomplish together. And let me just say, too, that during the course of negotiations I had the great honor to speak to former U.S. Attorney General, Eric Holder, on the phone, and it was a very pleasant conversation given the circumstances and the dispute that was at hand. But I promised him that if he would allow our office to take the forefront on these issues, that we would not only do this for here in Missoula County, but working with the U.S. Attorney's Office and the County Attorney's Office here and the county attorneys across our state. We would bring these reforms all across the state of Montana because this is something that was affecting our entire state and still does.

So, we developed some very clear policies and procedures and guidelines for prosecuting sexual assault cases, and we did not have to fully reinvent the wheel; although we had a Montana solution, we used material and best practices from around the country, and we have very comprehensive guides that were created for use in Missoula and throughout the state.⁷ All of that information, by the way, is available on our website and is available to any prosecutor in the state, in fact, any prosecutor in the country that would like to take the time to use that information.

We also participated in special training for sexual assault investigation, prosecution, and importantly, victim treatment. We wanted to make sure that reforms that we were doing were very victim-centered. The incoming

5. Memorandum of Understanding Between the Montana Attorney General, the Missoula County Attorney's Office, Missoula County, and the United States Department of Justice (June 10, 2014), available at <https://perma.cc/2TUW-LV6L>.

6. See Dillon Kato, *Attorney General Ends Oversight of County Attorney's Handling of Sex Assault Cases*, *MISSOULIAN* (Aug. 17, 2016), available at <https://perma.cc/LZ4R-22TG>.

7. See, e.g., Missoula County Attorney's Office, *Sexual Assault Policy & Procedure Manual* (Dec. 2014), available at <https://perma.cc/53ST-BLKC>.

County Attorney, Kirsten Pabst, and others in her office, participated in all the special training locally and nationally, including training from the Montana's Attorney General's Office.⁸ They hired a victim witness coordinator, an investigator, and a trauma counselor to assist with the sexual assault cases and address the effects of secondary trauma on staff.⁹

I want to digress for just a moment. It is all fine and good for a county attorney's office the size of Missoula County, or maybe in Yellowstone County and in our largest cities—Billings, or in Bozeman—who may have the resources to have trauma-focused victim services, but these can be very expensive services. And the training, as many of you know, is required to be effective, and the time that has to be put in to providing the service to the victims, can be very intense. But we are a rural state. We have 56 counties, and each county has its own county attorney and many of those county attorneys are part time.¹⁰ They have their own civil law practices. What we need to do going forward, I believe, is we need to have somewhat of a traveling, if you will, or perhaps digitally- accessed trauma-focused victim services available in this state for those rural counties that do not have the resources to do these things, or community professionals to do these things. That's because the victims of crime in general, and certainly victims of sexual assault, do not all live in Missoula County, they do not live in Yellowstone County, they live all across the state. That will be something that will need to be addressed, I think, going forward—providing those kinds of either traveling or internet-based victim services. I am not sure how we do it, but I think we need to take a look at that going forward.

The Missoula County Attorney's Office also formed a Special Victims Unit. This group has dedicated five attorneys and a paralegal to specialize exclusively in special victim's cases.¹¹ This is different legal work than you will find in any other criminal arena, obviously. These are very difficult cases to investigate and to try to conclude. So, it is important that we have people who have the training and specialization in these areas.

We also worked very hard at improving communication and coordination with law enforcement agencies and community partners. At the time, there were some somewhat outdated memoranda of understanding with the police department, but nothing in place with the Sheriff's Office. It was

8. See Montana Attorney General's Office, *Final Quarterly Report for Period Ending January 31, 2016* 5–8 (Feb. 2016), available at <https://perma.cc/4RCQ-Q789>.

9. Eric Whitney, *Fox, Pabst Talk Progress in Sexual Assault Prosecutions*, MONT. PUB. RADIO (Aug. 18, 2016), <https://perma.cc/Z85Y-S2SJ>.

10. See MONT. CODE ANN. § 7–4–2706 (2015) (establishing that counties with fewer than 30,000 residents may employ part-time county attorneys). In 2010, only eight Montana counties had more than 30,000 estimated residents. Montana Census & Economic Information Center, *Montana County Total Population Comparison* (April 2013), available at <https://perma.cc/6K37-7TR2>.

11. Missoula County Attorney, *Sexual Assault Prosecutions* (2017), <https://perma.cc/L7QH-2KPR>.

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very important that all of our law enforcement professionals on the campus, local, and county level be talking to one another, and also be talking to those who are actually prosecuting the crimes.

So now, the Missoula County Attorney's Office collaborates with community partners on local multi-disciplinary teams, and they have taken the lead in coordinating with law enforcement and other agencies in sexual assault investigations and prosecutions.¹² They have engaged in community outreach to build and foster relationships of trust and information sharing. Because ultimately the goal here is, obviously: Number one, to prevent individuals in our community and our state from becoming the victims of crime in the first place. But when they do, they have to have the confidence in their justice system to self-report, and that is a major hurdle in the life of any victim of violent crime. They have to have confidence in the system that they will be treated fairly, that they will be given justice, and that they can get on the road to healing sooner rather than later. And it's not something that they should be ashamed of. It's not something that they should be reluctant to do because they fear that they will not be treated well in our justice system. We have a lot of work to do in that area.

This is important work, and it's work that will continue to benefit all of Montana going forward. So while we were working closely with Missoula to implement these changes, we also worked at the state-wide level. It's a simple fact that sex assault cases can be the most difficult cases to prosecute. So my Prosecution Services Bureau¹³—I don't think there is anyone from the Prosecution Services Bureau here today—but they are amazing individuals who prosecute crime all across our state, and they have put more time and resources into training opportunities for our county prosecutors.

This, as I mentioned, is especially important for our smaller counties facing resource challenges. And, in fact, they travel all across the state prosecuting all sorts of crimes, particularly sexual assault crimes. We will continue to put an emphasis on that, and I was fortunate to bring a bill to the last legislature to create a dedicated Sexual Prosecution Unit in the Department of Justice that will be there long after I am gone.¹⁴ We have a Medicaid Fraud Unit,¹⁵ we have Workers Compensation Fraud Units,¹⁶ and we

12. See generally Missoula County Sexual Assault Safety & Accountability Audit, *How Does Our Community's Response to Sexual Assault Engage & Support Victims & Enhance Victim Safety & Offender Accountability* (2015), available at <https://perma.cc/HJ8F-6Y3H>.

13. Montana Attorney General, *Attorney General's Office & Legal Services Division* (2017), <https://perma.cc/9REZ-YDCG>.

14. MONT. CODE ANN. § 2-15-2033 (2015).

15. MONT. CODE ANN. § 53-6-157 (2015).

16. MONT. ADMIN. R. § 23.1.101(2)(h)(i)(B).

have dedicated prosecutors who only prosecute fish and game violations.¹⁷ But this is such an important issue, and we have such a problem in our state, that I felt that we needed to make sure we have a special prosecution unit for sexual assaults that will be in the Department of Justice long after I am gone, and hopefully for a long time yet to come.

Again, will be helping local prosecutors with prosecuting crimes, working through cases, making sure that they have the training that they need.¹⁸ Now I want to mention to you that in 2015, we worked with Missoula's very own Senator Diane Sands who is here today, who I have grown to know and respect in a great way the last four years. She is someone who is very dedicated to this issue, and to many other issues. She wanted to bring a bill in the legislature that would create an interim committee to study the issue of sexual assault from basically cradle to grave, if you will, to learn and understand and know where we are at now and where we should be.¹⁹ Senator Sands, I think you deserve a round of applause for your work (applause).

Obviously our legislatures, citizen legislators, do not make a lot of money, and I think they get a little per diem, but they do it because it is a labor of love. They do a lot of great work in the four months they have every other year. I think these interim committees are where a lot of the thoughtful work can be done in a way that is less hectic—more direct and more determined. The work this particular interim committee has done is something you all should be involved in going forward.

It looks like I have used a lot of my time here. We wanted people to have some time for Q & A as well. And so I think what I will do is just mention very briefly, and Brandon mentioned this: I formed a Sexual Assault Evidence Task Force²⁰ last year to study the issue of untested rape kits, as they are called in our state, and we did a census to find out how many there were. There were about fourteen hundred sitting around in evidence locker rooms across the state in law enforcement agencies.²¹ There are various reasons why these have not been tested, but let us suffice to say, it is an issue that has arisen all across the country.

I wanted to be very proactive, so I created a multidisciplinary task force that has professionals at many different levels who are engaged and

17. *Id.*

18. See MONT. CODE ANN. § 2–15–2033.

19. S.J. Res. 24, 64th Leg. (Mont. 2015). The Senate is now considering seven bills forwarded by the Law & Justice Interim Committee (“LJIC”) related to sexual violence. *SJ 24: Study of Sexual Assault in Montana*, MONT. LEG. (Nov. 2016), <https://perma.cc/N3MU-NNTD>.

20. See *Sexual Assault Evidence Task Force*, MONT. ATT’Y GEN.’S OFFICE & LEGAL SERVS. DIV. (2017), <https://perma.cc/D8A8-ARPG>.

21. Corin Cates-Carney, *Montana Task Force Meets to Act on Montana’s Untested “Rape Kits,”* MONT. PUB. RADIO (Feb. 16, 2016), <https://perma.cc/PE4W-34ZS>.

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interested in these issues. I asked them to study the issue and determine where we needed to go, and what further work we needed to do. I think this was mentioned: I was very fortunate yesterday to announce that the United States Department of Justice has granted us two million dollars to not only test these kits, but also to move forward to hire four professionals: an investigator, a victim advocate, and others to make sure we are doing everything we can to solve cold cases, to bring people to justice, to address the rights of victims of these crimes, and to put into place a system that prevents us from getting to this type of situation going forward.

We will be working the next three years, we will be testing all these kits. Fortunately, the Federal Bureau of Investigation will test 300 of them for us for free and the others will be paid for with the money.²² We were also given a grant from the Department of Justice, \$280,000, to put in a system to track future kits, to make sure we know where they are in the system, why they were taken, the victim (obviously), the perpetrator, all of the attendant information, so we can have these inventoried in real time, know where they are at, and not have them accumulate again. So that work is very important going forward.

I have used all my time. I want to say thank you again to everyone in the room who has engaged in these issues, and who are going to be working forward to make sure we make a difference in our state. I think Montana and Missoula County can be a real beacons of light on these issues, and help the entire country move forward. I think that is a great opportunity that we want to make sure we take advantage of.

Who do I ask if there is still any time for Q & A? Brandon?

[Brandon] Yeah, you have got at least forty minutes so. . .

Oh I do? You have a politician lawyer vying for forty minutes. Well you know, we can talk briefly about some of the work, all of these issues are somewhat inter-related: Human trafficking. When I became attorney general, Montana was ranked by a national organization that watches human trafficking laws and human trafficking issues with a “D” grade for the work that really we had not been doing in this state to address the issue of human trafficking, particularly, sex trafficking.²³

So, we worked very hard again with the legislature to really update our laws. Does anyone in here know Representative Kimberly Dudik from Missoula? She is another one of your rock star legislators in this state that really cares, in this community who really cares. I asked her to carry a bill to amend our human trafficking laws to make them victim-centered, and to

22. See *Montana Awarded \$2 Million Grant to Test, Track Unsubmitted Sex Assault Kits*, MONT. DEP’T OF J. (Sept. 29, 2016), <https://perma.cc/4MR2-ZWHA>.

23. *Protected Innocence Challenge: Montana Report Card 2013*, SHARED HOPE INT’L (2013), available at <https://perma.cc/JKM5-T2N3>.

make sure that we are addressing the rights of victims, particularly minor victims, who should not be treated as criminals, but need to be treated as victims, to provide services for them, asset forfeiture, the ability to get damages from the perpetrators of these horrendous crimes, and of course to raise the fines and penalties for those individuals that would traffic other human beings.²⁴

Just this year—excuse me—just last year, Montana was again given a new grade by Shared Hope International—they gave us an “A” grade, and they said that we were one of two states in the nation that are leading the charge in addressing the human trafficking issue.²⁵ We do this together; we do not do this alone. This is not something the Attorney General’s Office did by itself. This is something we have focused on, with community groups like the Soroptimist Clubs of Whitefish and Helena, a women’s group who have actually focused on human trafficking for many many years, and with private corporations. We like private and public partnerships. The Town Pump Foundation, Montana Truckers Association—these are all groups that have stepped up and have provided money and the ability for us to get the word out, for instance, with the Polaris Project’s hotline. But again, there is more work to be done.

We have stepped up the training at the Montana Law Enforcement Academy, so every law enforcement officer who receives training in Montana knows the signs of what to look for in human trafficking.²⁶ And we have done a lot of outreach and public education because, as you know, it is concerned individuals in our communities who can step up and report these things as well, so there is much to be done there.

We also house the Sexual or Violent Offender Registry at the Montana Department of Justice.²⁷ This is a useful tool for all of us to know and understand who is living in our neighborhoods, or maybe in our grandchildren’s neighborhoods, close to our schools, or what have you. That was an unfunded mandate from the Montana Legislature many years ago. I was fortunate because our former Attorney General, Steve Bullock, secured temporary funding for two investigators to go around the state and help local law enforcement to bring offenders into compliance with the reporting requirements. We were able to secure funding again with the help of the Montana legislature and make those permanent positions.

24. Keila Szpaller, *Montana Toughens Sex-trafficking Law, but Work Remains to Help Victims*, HELENA INDEP. R. (May 10, 2015), available at <https://perma.cc/JW2F-2YDZ>.

25. *Protected Innocence Challenge: Montana Report Card 2015*, SHARED HOPE INT’L (2015), available at <https://perma.cc/MH6S-VD3W>.

26. *Human Trafficking*, MONT. ATT’Y GEN.’S OFFICE & LEGAL SERVS. DIV. (2017), <https://perma.cc/RP8Q-K53V>.

27. *Sexual or Violent Offender Registry Montana*, MONT. DEP’T OF J., available at <https://perma.cc/H6J8-PLCN> (last visited Feb. 17, 2017).

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We have instituted the first-ever compliance checks where we are going from community to community and working with the U.S. Marshals Service, who has actually provided much of the funding for this, and with county attorney offices, police departments, Homeland Security, the FBI, and others to ensure that individuals are in compliance. We actually send agents out who go door-to-door, and when we find someone who is out of compliance, we bring them into compliance. We have actually been able to serve warrants, and also have arrested a number of individuals. These are things that we have really done to step up on the whole issue of not only sexual crimes, but crimes against individuals, minors in particular.

Again, we do this not alone. We do it with our partners. The U.S. Attorney's Office, led by Mike Cotter, has been instrumental in doing a lot of this work before I became attorney general, and certainly long after both of us are gone, they will be doing much of this work as well. We have a lot of issues that we need to continue to work on, and we hope that many of you will be engaged in them.

