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2016 James R. Browning Symposium Keynote

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KEYNOTES

2016 JAMES R. BROWNING SYMPOSIUM KEYNOTE

U.S. Attorney Michael W. Cotter*

Good morning, everyone. It's great to be here in Missoula and thanks very much for that kind introduction. Vanita Gupta who is the head of the Civil Rights Division could not be here today, and she sends her regrets. I am her substitute, and I hope I can measure up to her energy. I know many of you know her, and her energy, and her depth of understanding.

I want to thank President Engstrom. I have got to know you quite well over the past several years. You are a consequential leader in this area. I want to thank you for your unwavering commitment to the people of Montana, to the students, the University of Montana, and your historic leadership that you've demonstrated for the last several years, modifying the culture at the University as well as in the local community. It has been significant. You joined the community leaders here: Mayor John Engen; Police Chief Mike Brady; Chief Marty Ludemann of the University of Montana Police Department, along with the County Attorney Kirsten Pabst, to alter the manner in which things, the way sexual assault is being addressed. And also, I believe that the University Counsel Lucy France has played a tremendous role in bringing the University along to the point that it is today. The changes that have been made will be long-term. They are systematic changes, and they will protect and ensure the safety for generations to come in Missoula.

And Dean Kirgis and the law school, I want to thank you for hosting the Browning Symposium. You all have a rich history of addressing issues

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of national importance, and the issue of sexual assault on college campuses is one of national importance. Currently, there are at least 200 other colleges and universities that are being investigated for compliance as well as other matters dealing with sexual assault.¹ These investigations are being conducted by the Department of Justice along with the Department of Education.

In 2014, President Obama set up a White House Task Force to examine this issue.² And since our involvement from the Department side back in 2012, the University of Montana has made great progress and has become the standard followed by other educational institutions facing this very public issue.

Judge Browning was a Montana guy. He grew up in Belt. Belt, Montana, for you who are not from here, Belt, Montana has a population of probably about 800 or 900 people on a good day, and that might be a rodeo. He went to public school. He found his way to the University of Montana. He came here and became an editor—one of the first editors—of the Montana Law Review. He spent his entire life, except for a very brief period, a couple of years, in public service. He started out serving during World War II in the military. He started out as a private and wound up as a 1st Lieutenant when he was in the Pacific Theater. He eventually found his way into the antitrust division of the Department of Justice when he was in Washington, D.C.³

There is a picture that hangs in the Department of Justice, in the Attorney General's Advisory Committee's conference room. Chief Judge Earl Warren asked Judge Browning to be the United State Supreme Court's clerk of court, which he was.⁴ In 1961, Judge Browning held the Bible when Jack Kennedy was sworn in by Chief Judge Earl Warren as President of the United States. He was actually the last Supreme Court clerk to hold the Bible.⁵ He then, of course, went on to work in the circuit. He has a great history there.⁶

That picture, I see every time I am in D.C. in the AG's conference room. It's there. He was also the first director of the Executive Office of

1. *Title IX: Tracking Sexual Assault Investigations*, CHRONICLE OF HIGHER EDUC. (2016), <https://perma.cc/AQG2-KFE6>.

2. White House Task Force to Protect Students from Sexual Assault, *Preventing & Addressing Campus Sexual Misconduct: A Guide for University & College Presidents, Chancellors, & Senior Administrators* 2 (Jan. 2017), available at <https://perma.cc/3ULS-PB85>.

3. See generally Sidney R. Thomas, *James R. Browning: His Legacy for Montana & the Future of the Federal Judiciary*, 76 MONT. L. REV. 207, 208–11 (2015).

4. *Id.* at 213.

5. *Id.*

6. See generally Montana School of Law, *A Tribute to James R. Browning*, 73 MONT. L. REV. 1 (2012) (celebrating Judge Browning's fifty years on the bench).

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United States Attorneys.⁷ We still have that program at the Office of Justice. It helps U.S. Attorneys work through various issues as well as budget.⁸

I also want to thank Professor Johnstone and also Caitlin Williams and Brandon Shannon for putting this together. Last evening, I had a chance to meet many of the individuals who are going to be on campus today and they are subject matter experts. And I believe my IQ went up a couple of points just being in the same room as them, and I feel very fortunate for that.

I think it's going to be exciting, I think it's going to be educational, I think there are going to be many matters that will be discussed, and there will be answers that will be developed that will help the universities and colleges and the departments move through this difficult area of sexual assault on college campuses.

I've broken my comments into five different areas. It will be an overview of all the panels that you will see throughout the day. I thought, at first, it would be appropriate to talk about the Department of Justice and the Department of Education's authority to do the work that we do on college campuses, and in particular, here in Missoula. I think I will also talk about an overview of the Missoula investigation, the four aspects of our investigation. One was the University of Montana, the other was the University of Montana Police Department, the Missoula Police Department, and also the County Attorney's office. The third area will be Title IX enforcement and how that implicates free speech. Also, Title IX enforcement and the due process implications, and then also jurisdictional confusion between campuses and state authority. I want to leave time for questions at the end. I hope my comments aren't going to be too long.

I think the first thing we do as parents when we send our kids off to school, whether they go off to kindergarten, first grade, middle school, high school, or college, we believe that it is the safest place they could be. But, unfortunately, it is not. When we think about some of the horrific things that have occurred in Sandy Hook, Columbine—there are dangerous things that occur. The—and I'm going to hone in on sexual harassment and sexual violence—too often, a student's experience at school, in institutions, are marred and impaired. With respect to sexual violence first, what we have as the best available research, based on surveys of students, suggest that 20% of college women and roughly 6% of college men are victims of attempted

7. Thomas, *supra* note 3, at 210.

8. *Executive Office for United States Attorneys*, U.S. DEP'T OF J. (Aug. 17, 2016), <https://perma.cc/QN5M-2QVK>.

or completed sexual assault.⁹ The rate for gay, lesbian, bisexual, or transgendered, is estimated by some to be even higher.¹⁰

I think the general public believes and thinks that most sexual assaults occur by strangers. The fact is that three out of four rapes are committed by someone known to the victim.¹¹ Sexual harassment is also present in schools. And this is a 2005 survey of college students between the ages of 18-24, found that about two-thirds of students experience some type of sexual harassment,¹² and less than 10% of these students told a college or university employee about their experience.¹³

The reality of it is campus sexual assault is a civil rights issue. What sexual assault does, it denies the students a right to live and learn in a safe environment and it is a form of sex discrimination that is disproportionately perpetrated against women. The U.S. Department of Justice is committed to using all of the tools that are available in our arsenal to combat sexual harassment and sexual assault in the community.

I thought it would be good to discuss with the authorities that we have. Our authorities include Title IV of the Civil Rights Act and also Title IX. Title IX of the Civil Rights Act, what that basically does is prevent discrimination among other things, on the basis of sex in public schools and colleges. Title IX of the Education Amendment of 1972 as it was amended prohibits discrimination on the basis of sex by recipients of federal funds.¹⁴ So that's the authority that allows us to do things that we do at the Department of Justice.

These statutes protect all students. They cover colleges and universities, regardless of their sex and sexual orientation, from hostile educational environments created by sexual assault. What allows us to take a look at law enforcement, including a prosecutor's office, is Section 14141 of the Violent Crime Control and Law Enforcement Act of 1994¹⁵ and the Omnibus Crime Control and Safe Streets Act.¹⁶ That is a dated issue. For one, if authority extends to a prosecutor's office, then clearly it does to law enforcement. And what the Division does is we take a look at how these mat-

9. Letter from Russlynn Ali, Assistant Secretary, the Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter* (Apr. 4, 2011), available at <https://perma.cc/9DCF-H77S> [hereinafter *Dear Colleague Letter*].

10. See *Sexual Violence & Individuals who Identify as LGBTQ*, National Sexual Violence Resource Center (2012), available at <https://perma.cc/6ATX-RNVM>.

11. *Sexual Violence: Facts at a Glance 2012*, NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION 1 (2012), available at <https://perma.cc/D3YJ-U2HP>.

12. Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, AM. ASS'N OF UNIV. WOMEN 13 (Dec. 2005), available at <https://perma.cc/3GXC-2UCM>.

13. *Id.* at 4.

14. 20 U.S.C. § 1681 (2012).

15. 42 U.S.C. § 14141.

16. *Id.* § 3789d.

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ters are being handled across the continuum of law enforcement. From the time a sexual assault is reported, how a sexual assault is investigated, and then ultimately how the sexual assault is prosecuted.

There's a longstanding definition of sexual harassment. The unwelcome conduct of a sexual nature can include unwelcome sexual advances, sexual favors, as well as other non-verbal conduct of a sexual nature, such as sexual assault or acts of sexual violence.¹⁷ This definition has been in Title IX guidance for over two decades, and across three administrations. A number of different acts fall into the category of sexual violence and that would include rape, sexual assault, sexual battery, sexual abuse, and sexual coercion.¹⁸

The Supreme Court, Congress, and Departments of Education and Justice have long recognized that sexual harassment, including the sexual violence of students, can create a hostile learning environment and schools must rectify to meet their obligation to not discriminate on the basis of sex.¹⁹

The core mission of any school is to educate the students. This necessarily includes ensuring the students are safe to learn in classes and school facilities on their campuses and in all their educational programs and activities. And a school will violate Title IX and Title IV when sexual harassment is sufficiently serious to limit or deny a student's ability to participate in or benefit from a school's educational program or activity that creates a hostile environment.²⁰ And the school, upon actual or constructive notice, fails to take strong and effective steps that will reasonably calculate to end the sexual harassment and eliminate the hostile environment, prevent this recurrence, and, as appropriate, remedy its effects.²¹

In determining whether sexual harassment is creating a hostile environment, to which the school must respond, consistent with the Supreme Court decision *Davis v. Monroe County Board of Education*,²² the Department of Education, OCR, and DOJ, consider the conduct in question from a subjective and objective perspective. The standards that our offices apply require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances.²³

17. *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS 2 (Jan. 2001); *Dear Colleague Letter*, *supra* note 9, at 2.

18. *See id.* at v–vi.

19. *Id.*

20. Office for Civil Rights; *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034, 12041 (March 13, 1997).

21. *Id.* at 12042.

22. 526 U.S. 629 (1999).

23. *See Revised Sexual Harassment Guidance*, *supra* note 17, at 5.

If the schools fail to adequately respond to harassment, including sexual violence, they may be forcing the affected student to attend school in a sexually hostile environment. Such an environment deprives a student of equal opportunities of their peers. There was a survey that is part of the White House Task Force, it was reported out in January of 2016. Victims of sexual assault suffer physical and emotional trauma that can linger for years. Nineteen percent of female victims either dropped or considered dropping their classes. Seven percent changed where they lived. Thirty-one percent said academic performance suffered and 22% considered taking time off or dropping out of school.²⁴ It's interesting, and I think the students are probably aware of it more so than somebody my age—that freshman female students face the greatest risk in the first few months of the academic year, September and October being the months where the highest sexual assaults are reported on college campuses.²⁵

You know, in this time what I've learned is the majority of rapes are committed by actually a small number of perpetrators. They are serial offenders.²⁶ The age group can go as low as 13, 14, 15 years of age and proceed upwards. It is, I think, well-documented and well-known, certainly by many, many people that sexual assault is an underreported crime. One reason that it's underreported is that the victim has fear of retaliation in their assault claim. Statistically, only 2% of college students who suffer sexual assault while incapacitated, and only 13% of other college students who are rape survivors, report the crime.²⁷

I would like to show a video, this just very brief video, it's only 60 seconds.²⁸ And this is what happened to a rape victim. Four male students raped her and the system absolutely failed her across all aspects of it: the reporting, the investigation, and the prosecution. And I think it describes the dark place a victim and survivor of sexual assault can find herself.

Next I will give an overview of the Missoula investigation and the results that were reached. We reached the agreement with the University of Montana in May of 2013.²⁹ That followed comprehensive investigation that found that the University students faced a hostile environment in which

24. Christopher Krebs et al., *Campus Climate Survey Validation Study Final Technical Report*, BUREAU OF JUSTICE STATISTICS 114 (Jan. 2016).

25. *Id.* at 96.

26. David Lisak & Paul M. Miller, *Repeat Rape & Multiple Offending Among Undetected Rapists*, 17(1) VIOLENCE & VICTIMS 78 (2002).

27. Christopher P. Krebs et al., *The Campus Sexual Assault (CSA) Study* xvii (Dec. 2007), available at <https://perma.cc/BV8M-HH66>.

28. *Sexual Assault on Campus*, 60 MINUTES SPORTS PREVIEW (Nov. 13, 2014), available at <https://perma.cc/62FN-EULM>.

29. Memorandum of Agreement Between the United States Department of Justice & the University of Montana Regarding the University of Montana Office of Public Safety's Response to Sexual Assault (May 9, 2013), available at <https://perma.cc/64R3-AH9R>.

their reports of rape and sexual harassment were inadequately addressed. In our investigation into the response of sexual assault in Missoula, we used Title IX, Title IV, and § 14141 with respect to the University, the campus police, and the Missoula Police Department in that they were not meeting the federal civil rights obligations in responding to sexual assault.

Before we got involved in the fall of 2011, the University of Montana, under the leadership of President Engstrom, conducted its own investigation by requesting retired Supreme Court Justice Diane Barz to conduct an investigation into what was going on.³⁰ Through Justice Barz's investigation, the University received several reports of student-on-student sexual assaults that occurred between December 2010 and December 2011 that had not previously been reported.³¹ In her final report, she said that the University of Montana has a problem with sexual assault on and off campus and needs to take steps to address it to ensure the safety of all students as well as faculty, staff, and guests.³²

That information found its way to the United States Attorney's Office and was reported to us, and we learned also that many of the reported things had not been either referred by law enforcement investigation or onto a prosecutor's offices for prosecution purposes. So in 2012 we began, the Department began, its inquiry into the University of Montana and local law enforcement, including the Missoula County Attorney's Office.³³ There was, we found, to be tremendous gaps between each of the entities in terms of the handling of sexual assaults. And at the conclusion of that investigation, which was extensive—there were at least 40 witnesses that were interviewed, thousands of documents—the United States found that significant gaps existed in reporting of sexual assaults, the investigation ultimately leading to prosecution. And culturally, within the community, a victim was reluctant to report such events because in the mind of the victim, it was hopeless and nothing would be done.³⁴

So, I have to tell you that President Engstrom met with us and cooperated from the outset with respect to the investigation and voluntarily entered into an out-of-court agreement to resolve the significant issues here. And the University has made tremendous steps to be where it is today. There were two components at the University of the Montana that were addressed.

30. See Diane Barz, *Investigation Report* (Jan. 31, 2012), available at <https://perma.cc/Z9G2-WWJF>.

31. *Id.* at 2.

32. *Id.* at 1–2.

33. *Justice Department Announces Investigations of the Handling of Sexual Assault Allegations by the University of Montana, the Missoula, Mont., Police Department and the Missoula County Attorney's Office*, U.S. DEP'T OF J. OFFICE OF PUBLIC AFFAIRS (May 1, 2012), <https://perma.cc/VX65-6TEU>.

34. See Letter from U.S. Department of Justice, Civil Rights Division, to President Royce Engstrom & Lucy France (May 9, 2013), available at <https://perma.cc/E3VZ-9XGT>.

One was law enforcement side of that, an agreement that was reached in 2013.³⁵ And the significant things that the University of Montana Police Department has done. There are now standard operating procedures that are now in place—and Chief Marty Ludemann gets credit for that and the folks that worked on your team, President Engstrom—a sexual investigation policy so there's a consistent response and methodology of investigation with sexual assault now at the University of Montana.³⁶ An M.O.U. has been entered into between the University of Montana, Missoula Police Department, and Missoula Sheriff's Office, linking those law enforcement agencies together in the sharing of information.³⁷ Local law enforcement training is focused on trauma-informed and victim-centered investigation, and there also is the robust program of community engagement.³⁸

With respect to the Title IX aspect, the agreement calls for a revision of the University's policies and procedures and investigative practices to provide a grievance procedure that ensures prompt and equitable resolution of sexual harassment and sexual assault allegations; provides for adequate investigation and response to allegations of retaliation by students of alleged sexual assault; also sufficient effective action to fully eliminate a hostile environment based on sex, prevent its recurrence, and address its effect; and ensure that individuals designated to coordinate Title IX efforts receive adequate training and coordinate these efforts.³⁹

And so, the University has replaced numerous confusing policies addressing sexual assault. They've conducted thorough training of their employees; they've conducted trainings and educational activities for all students; and engaged in efforts to increase student awareness and conduct a campus climate survey.⁴⁰ One of our kids goes to school here and has taken the online education for incoming students. It's very difficult when you have a university of this size—twelve thousand, thirteen thousand stu-

35. Memorandum of Agreement Between the United States Department of Justice & the University of Montana Regarding the University of Montana Office of Public Safety's Response to Sexual Assault, *supra* note 29.

36. See *Final Report of Sustained Compliance Regarding the Agreement Between the United States Department of Justice and the University of Montana in Relation to UMPD's Response to Sexual Assault*, UNIV. OF MONT. POLICE DEP'T 6–20 (June 30, 2015), available at <https://perma.cc/3BHQ-KL5N>.

37. Memorandum of Understanding Between the United States Department of Justice & the City of Missoula Regarding the Missoula Police Department's Response to Sexual Assault (May 15, 2013), available at <https://perma.cc/HHT2-79QB>.

38. See *Sustained Compliance Report*, MISSOULA POLICE DEP'T 4–6 (May 1, 2015), available at <https://perma.cc/R9HQ-767T>.

39. See *Memorandum of Agreement Between the United States Department of Justice & the University of Montana Regarding the University of Montana Office of Public Safety's Response to Sexual Assault*, *supra* note 29.

40. See, e.g., *AY 2015–2016 Annual Assessment of Effectiveness of Anti-Harassment Efforts, Including Proposed Recommendations for Improving the University's Anti-Harassment Program*, UNIV. OF MONT. (2016), available at <https://perma.cc/CC4D-JVZ7>.

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dents—many who live on campus and many who live off campus. And how can you corral all those students at one time, into one place to do the education phase to ensure that they fully understand Title IX, Title IV, sexual assault, and consent? Our daughter did take this, and her comments to me were that it is impressive—it was impressive in the outreach on the educational side of it. The University also improved its practice of handling reports, including providing guidance to mandatory reporters following up with students to provide interim measures of strength and with the community responders.⁴¹

The City of Missoula Police Department has made great strides as well. That was part of the Missoula investigation and agreement. The Missoula Police Department—with Mayor Engen, who came on board and voluntarily entered into an agreement—has made great strides in the handling of sexual assaults. They set up a special victims unit, which likewise is trauma-informed and victim-centered. They now they have a deputy county attorney assigned to a special victim unit.⁴² They have done extensive training; they have modified the manner in which they question victims.⁴³ The word that will put any victim on the defensive when somebody reports a sexual assault is the word “Why?” When you immediately put that individual defending what she or he did in that situation. And so the work that is being done with the investigators here in Missoula and the manner in which they are asking questions is no longer an interrogation. It is one of getting a sense of the perception of the victim, in the circumstance and the questions. “Why did you shower right away?”; “Why did you go home?”; “Why didn’t you go to the hospital?”; “Why didn’t you tell somebody?”; “Why did you wait around six hours?”—all those questions will not provide for a solid investigation. But to get to the questions of “What were you thinking?”; “When did you think it was safe for you to leave?”—those are things that are helpful. So that’s where the Missoula P.D. is in terms of its questioning of victims.

This town is a healthier town; it’s a better town. And I think the credit goes to the leaders, President Engstrom, Mayor Engen, Police Chief Mike Brady, the County Attorney Kristen Pabst, to get the community to where it is today. And this community is now a template for other communities, universities, and colleges facing this very difficult issue. And, I said it before, University of Montana is not alone. There are other universities that have the same issue. Many of them are in the top 20 and big flagship uni-

41. *Id.* at 6–9.

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

43. 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>.

versities.⁴⁴ I think that we should take great pride in what our leaders have done to make a pressing decision to make Missoula the place that it is today.

Title IX enforcement has to be consistent with the free speech implications. Words can be said that can be offensive, but they don't necessarily rise to a level where there is a violation of Title IX which would result in an enforcement action.⁴⁵ A person's claim that they're offended is not necessarily, by itself, sufficient to make a claim actionable under Title IX. But to create a hostile environment that requires the school to respond in ways that would eliminate and remedy a bad environment, the conduct has to be sufficiently serious to a reasonable person in that circumstance that limits or denies a student's ability to participate in or benefit from a school's educational programs.⁴⁶ So it is a balance. And the panels later today will address this and they will talk about both sides of the issue.

Title IX also has to be consistent and protect due process implications, and oftentimes colleges and universities don't take a look at both sides: the complainant, and what that individual's rights are, or what the accused's rights are. And the school has to ensure that the rights of both the complainant and the alleged perpetrator are protected.⁴⁷ So, during the investigation both have to have the opportunity to present witnesses and evidence, hearings. The standard is different, and this is where the conflict comes in as to the standard of what occurs on a college campus and what might occur downtown in a courthouse. The school's standard is the preponderance of the evidence as opposed to beyond a reasonable doubt, which we have in the downtown court.⁴⁸ If lawyers are allowed, both to be represented, not just one, there have been situations where just the accused gets to have one. If there's expert testimony, it's going to be presented by the school at a hearing, again both get to have that opportunity. And if there's an appeal, it should be available to both, so the record is being made, in court, in student court, so it can be reviewed by both.⁴⁹ And, finally, the notice requirement. Both should be aware of the outcome of the complaint. Again, for appeals.⁵⁰

I think one of the things we learned here in Missoula is there was confusion on part of the victims as to what occurs when they make a report

44. See *supra* note 1 and accompanying text.

45. See *Revised Sexual Harassment Guidance*, *supra* note 17, at 22–23.

46. See *id.* at 22; Letter from Gerald A. Reynolds, Assistant Secretary, the Dep't of Educ. Office for Civil Rights, *First Amendment: Dear Colleague Letter* (July 28, 2003), available at <https://perma.cc/4D2A-RJCV>.

47. See *Revised Sexual Harassment Guidance*, *supra* note 17, at 22.

48. *Dear Colleague Letter*, *supra* note 9, at 10–11.

49. *Id.* at 12.

50. *Id.* at 9, 13.

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of sexual assault. It may be reported to the college, but it wasn't necessarily translating to downtown to local law enforcement. And that issue can be resolved through the education of the students.

We have an obligation, the Department of Justice does, to ensure that universities are making their Title IX standards. That is our role. But, if there is a criminal act, in the criminal context, that has to be addressed in the criminal justice system and there has to be linkage. And I think, from what I understand, the University of Montana, is making the link with the law enforcement downtown. With respect to an assault here, it will find its way to the Missoula Police Department and it will ultimately find its way into the prosecutor's office for prosecution purposes, which I think that is important, that this was something missing years ago. And I believe that was also missing in other universities across the country. When we look at a campus like the University of Montana or any other campus, they are part of that community and the university police need to be talking with local law enforcement in order to identify those individuals who are perpetrators, and they need to be removed. And it meets one of the goals that President Engstrom talked about of having a safe environment here, finding those individuals who need to be removed from campus and removing them.

I think that what has been demonstrated here is that, when looking at sexual assault on college campuses, we have to look at all aspects of it. I mentioned reporting the event, the investigation of the event, and involvement of the prosecution, and you can't have a solution to a problem without addressing all three of those. Address one, and you fix the problem at that level, but if there are issues involved in the other two, then they have to be addressed. When gaps are found, they have to be closed. And ultimately, I think that the University has made great strides. And they are very close. And I think that the community, the University, the staff, everybody should take pride in what they have done. The University is a safe place, and the community is a safe place. And the University has worked countless hours with the Department of Education to get where they are. I think that it is important that we recognize that, and I believe that the things in place today will go forward in the future to ensure safety of the students, staff, and faculty.

