

MISSOULA: JON KRAKAUER’S STORY OF COLLEGE SEXUAL VIOLENCE THAT IS BOTH COMPLEX AND ENTIRELY COMMON

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INTRODUCTION

Perhaps the most notable thing about Jon Krakauer’s 2015 book *Missoula: Rape and the Justice System in a College Town*³ is how standard the stories Krakauer describes will seem to higher education attorneys and student affairs professionals. The situations he describes are certainly terrifying, and often frustrating, but ultimately not entirely surprising. *Missoula* is not a story about events unique to one college or university town, one state, or one time period. In some ways, the book could have had many titles: Tallahassee, South Bend, Charlottesville, Los Angeles, Manhattan, or frankly the

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3. JON KRAKAUER, *MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN* (2015) [hereinafter KRAKAUER].

name of nearly any college or university town or city.⁴ The book could have taken place in the 1990s, 1970s or 1950s. But Krakauer concentrated on modern-day Missoula, Montana, and he weaves together individual stories with societal and cultural information that paints a devastating picture of the way people were treated when they reported sexual and interpersonal violence.⁵

A. A NEW TAKE ON A MUCH-COVERED SUBJECT

Journalism surrounding sexual and interpersonal violence on college campuses has had its share of troubles, which have done as much damage to the search for facts in this area as they have raised issues. In December 2014, Rolling Stone retracted a terrifying story about an alleged gang rape at the University of Virginia after it was revealed that the magazine did not fact-check the information from the main source, made no attempt to contact the accused individuals, and included misstatements of fact about timing and other logistics.⁶

When *Missoula* came out, the media story was about the mistakes made by the University of Montana.⁷ But anyone reading the book will find the story much more complicated and more devastating. While the University of Montana's actions were not perfect, Krakauer's descriptions of the actions of local law enforcement and especially certain members of the District Attorney's office revealed all but an intentional attack on people who report these crimes and incidents. The University of Montana's responses to sexual and interpersonal violence were, in most cases, more comprehensive than those of local law enforcement and the District Attorney's office.

4. Krakauer quotes with approval a story itself quoting a twenty-year-old drug dealer in Missoula who "lamented 'People think we're the 'rape capital' of America now,' before immediately noting, 'but we're not. Missoula is just like any other college town.'" *Id.* at 9.

5. Sexual and interpersonal violence is a term used throughout New York State Education Law Article 129-B to encompass sexual assault, domestic violence, dating violence, and stalking. This language had input from domestic violence and sexual assault advocates in the state of New York.

6. See e.g. Will Dana, *A Note to Our Readers*, ROLLING STONE (Dec. 5, 2014), <http://www.rollingstone.com/culture/news/a-note-to-our-readers-20141205>; Sheila Coronel, Steve Coll, and Derek Kravitz, *Rolling Stone's investigation: 'A failure that was avoidable'*, COLUM. REV. OF JOURNALISM (Apr. 5, 2015), http://www.cjr.org/investigation/rolling_stone_investigation.php.

7. See e.g. Emily Bazelon, *Jon Krakauer's 'Missoula,' About Rape in a College Town*, N.Y. TIMES (Apr. 28, 2015), http://www.nytimes.com/2015/05/03/books/review/jon-krakauers-missoula-about-rape-in-a-college-town.html?_r=0; Jake New, *Missoula's Mistakes*, INSIDE HIGHER EDUC. (Apr. 24, 2015), <https://www.insidehighered.com/news/2015/04/24/new-book-details-u-montanas-citys-mishandling-sexual-assault>.

The book's structure can be a challenge to those unfamiliar with the author's writing style. Krakauer writes about at least six women, but goes into a different level of detail with each, perhaps because of a varying level of access to documents and to the students themselves.⁸ He mentions, and even makes up pseudonyms for, people who are unnecessary to his story. There are enough people that the back of the book contains a "dramatis personae" identifying and explaining individual roles, but it does not help that many of the names (real and pseudonymous) are similar.⁹ Still, readers familiar with campus sexual assault prevention efforts and legal compliance will find *Mis-soula* to be a great issue-spotting exercise. Put on your audit hat and think about Title IX, the Violence Against Women Act, the First Amendment, attorney ethics, and best practices in talking to victims of trauma. Then, embrace your role as a human, remember the role you can play in teaching our students how to prevent violence and respect each other, and, when violence occurs, how to treat victims with respect and dignity, while maintaining a firm but fair and evenhanded approach to students who violate law and policy.

B. GETTING INTO THE BOOK

In a field in which almost every article and statement is written from just one point of view with no acknowledgement or discussion of the other side, where single incidents are taken to be completely representative of all students, or all institutions, or all fact patterns, and where many people who have no experience in the area of campus safety or response to those who have experienced trauma hold themselves out as experts to criticize policies, legislation, and regulation from all sides,¹⁰ nuance is important. While no

8. For example Kelsey Belnap, Kerry Barrett, and Kaitlynn Kelly.

9. KRAKAUER, *supra* note 3, at 351.

10. For example, the *Chronicle* covered a "debate" about sexual assault and a campus versus criminal justice response that featured four law professors, none of whom appear to have anything beyond theoretical knowledge and their own opinion. Sarah Brown, *Can a Debate About Who Should Decide Campus-Rape Cases Change Minds?*, CHRON. OF HIGHER EDUC. (Sep. 18, 2015), <http://chronicle.com/article/Can-a-Debate-About-Who-Should/233207>; See also Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), <http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html>; KC Johnson, *Rebalance the campus sex assault scales: After the University of Virginia rape hoax, we must put the brakes on the crazed crusade against campus sexual assault*, N.Y. DAILY NEWS (Mar. 29, 2015), <http://www.nydailynews.com/opinion/kc-johnson-rebalance-campus-sex-assault-scales-article-1.2164945>; Paul H. Robinson, *The Legal Limits of 'Yes Means Yes'*, THE CHRON. OF HIGHER EDUC. (Jan. 10, 2016), http://chronicle.com/article/The-Legal-Limits-of-Yes/234860?cid=at&utm_source=at&utm_medium=en&elq=c9cc519f817e46899202a800d07014c6&elqCampaignId=2218&elqaid=7518&elqat=1&elqTrackId=0ebdd0f0d74846feb92cd288e96a6ad; Editorial, *A Big Maybe About 'Yes'*, N.Y. DAILY NEWS (Dec. 3, 2014), <http://www.nydailynews.com>

one should mistake Krakauer for an unbiased observer, his points and arguments are made slowly, building note on note, rather than in a blithe sound bite or a quick op-ed. He weaves first-person narrative with detailed statistical and sociological discussions, focusing on showing instead of telling. Although the book can sometimes be choppy as it weaves between stories, Krakauer bolsters the work's credibility with his extensive reliance on direct quotes and primary sources.¹¹

The book is divided informally into sections that cover problems in reporting sexual violence, problems in the societal view of such violence and those who report it, and problems with the criminal justice system. We say informally as aspects of these three problems appear in all parts of the book.

If *Missoula* represents any argument, it's the basis for why the federal government has tasked colleges¹² to promptly respond to known incidents and reports of sexual assault, despite the media, legislators, and even some

ews.com/opinion/editorial-big-yes-article-1.2030960; Andy Thomasen, *What's So Controversial About Saying the Police Should Handle Campus Rape?*, THE CHRON. OF HIGHER EDUC. (Jan. 12, 2016), http://chronicle.com/blogs/ticker/whats-so-controversial-about-saying-the-police-should-handle-campus-rape/107780?cid=pm&utm_source=pm&utm_medium=en&elq=568f71636be04ebbb1e018886d28c5da&elqCampaignId=2214&elqaid=7512&elqat=1&elqTrackId=fc63b90ba0944c73923d5000a0300bea; New York Post Editorial Board, *Will Any University Stand Up to the Bogus 'Rape Epidemic' Hype?*, N.Y. POST (Sep. 27, 2015), <http://nypost.com/2015/09/27/will-any-university-stand-up-to-the-bogus-rape-epidemic-hype/>; Naomi Schaefer Riley, *The Myth of the College 'Rape Culture'*, N.Y. POST (Sep. 27, 2015), <http://nypost.com/2015/09/27/the-myth-of-the-college-rape-culture/>; Ashe Schow, *American Bar Association Jumps on Campus Sexual Assault Bandwagon*, WASH. EXAMR. (Aug. 5, 2015), <http://www.washingtonexaminer.com/american-bar-association-jumps-on-campus-sexual-assault-bandwagon/article/2569608>.

11. KRAKAUER, *supra* note 3, at xiv. In an interview with the Columbia School of Journalism, Krakauer recounted that, aside from Cecelia Washburn who is represented pseudonymously and was not interviewed, all other victims participated openly, were interviewed, and were given a chance to review the chapters where they appeared, but that, except for total withdrawal or repair of clear errors, they would not have control over how he wrote those chapters. Brendan Fitzgerald, *Krakauer's "Missoula" and the Scrutiny of Reporters Who Cover Rape*, COLUM. JOURNALISM REV. (Aug. 2015), http://www.cjr.org/analysis/the_scrutiny_of_reporters_who_cover_rape.php

12. Alexandra Brodsky and Elizabeth Deutsch, *No, We Can't Just Leave College Sexual Assault to the Police*, POLITICO (Dec. 3, 2014), <http://www.politico.com/magazine/story/2014/12/uva-sexual-assault-campus-113294>; Robin Wilson, *Should Colleges Be Judging Rape?*, CHRON. OF HIGHER EDUC. (Apr. 12, 2015), http://chronicle.com/interactives/assault_judging.

student affairs professionals¹³ who seek to leave sexual assault complaints to be handled only by the police.¹⁴

The overwhelming dysfunctionality of the local police department and District Attorney's office dominates *Missoula*. There are almost too many missteps to name, but in Office for Civil Rights (OCR) parlance, the investigations were not timely, prompt, thorough, impartial, or trauma-informed.¹⁵ At one point a former prosecutor appears as an attorney for a charged defendant soon after leaving state service. Such representation would surely violate New York's ethics laws.¹⁶ It's difficult to tell if misogyny, a love of college football, or a distaste for hard work fuels this inept and often intentionally negative response to reports of sexual assault; perhaps it is a combination of all three.¹⁷

C. FALSE ALLEGATIONS

Krakauer spills significant ink working through the myth of false sexual assault reports, providing studies and expert statistics that show the small number of false reports. A number of individuals with whom Krakauer spoke

13. See Clea Mitchell and Trent Lott, *Rethinking How We Deal with Campus Sexual Assault*, WASH. POST (Oct. 4, 2015), https://www.washingtonpost.com/opinions/rethinking-how-we-deal-with-campus-sexual-assault/2015/10/04/8b69c744-6aa3-11e5-9bfe-e59f5e244f92_story.html; Philip N. Cohen, *College Sex-Assaults Trials Belong in Court, Not on Campus*, CHRON. OF HIGHER EDUC. (Dec. 11, 2014), <http://chronicle.com/article/College-Sex-Assault-Trials/150805/>; Editorial Board, *Editorial: Police Should Handle Campus Sex Assaults*, THE DETROIT NEWS (June 13, 2015), <http://www.detroitnews.com/story/opinion/editorials/2015/06/12/let-police-handle-campus-rape/71137180/>; Editorial Board, *Editorial: Cops Should Handle Campus Sex Assaults*, THE DETROIT NEWS (Aug. 11, 2015), <http://www.detroitnews.com/story/opinion/editorials/2015/08/10/edit-cops-campus-sexual-assault/31424025/>; Lee Burdette Williams, *The Dean of Sexual Assault*, INSIDE HIGHER EDUC. (Aug. 7, 2015), <https://www.insidehighered.com/views/2015/08/07/how-sexual-assault-campaign-drove-one-student-affairs-administrator-her-job-essay>; Dahlia Lithwick, *The University of Virginia Finally Confronts Its Rape Problem*, SLATE (Nov. 24, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/11/university_of_virginia_gang_rape_investigation_rolling_stone_reveals_limits.single.html.

14. Katherine Mangan, *Should Colleges Be Forced to Swiftly Report Rapes to the Police?* CHRON. OF HIGHER EDUC. (Feb. 2, 2015), <http://chronicle.com/article/Should-Colleges-Be-Forced-to/151581>.

15. See Office for Civil Rights, *Dear Colleague Letter on Sexual Violence*, U.S. DEP'T. OF EDUC. (April 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>, at 5 [hereinafter DCL].

16. See, e.g., N.Y. State Public Officers Law §73(8)(a)(i)-(ii), available at <http://www.jcope.ny.gov/about/ethc/PUBLIC%20OFFICERS%20LAW%2073%20JCOPE.pdf>.

17. From January 2008 through April 2012, under the direction Kirsten Pabst, the District Attorney's Office received 114 referrals for rape from the Missoula Police (itself a small sample of all crimes reported) but only filed charges in 14 of those cases. KRAKAUER, *supra* note 3, at 250-251.

discussed the belief that a woman who makes a report of sexual assault is merely trying to cover up the fact that she is cheating on a boyfriend.¹⁸ Others simply believe the reporting individual is just making it up.¹⁹ At best, only 20% of all rapes are ever reported to police.²⁰ The actual percentage of false reports of sexual assault range from as low as 2%, an FBI statistic consistent with false reports of other violent crime,²¹ and as high as 8% to 10% of reports recanted, a term that can differ significantly from false reporting as people recant for a variety of reasons (including falseness of report, pressure from friends and family, self-blaming, worry about being charged with other crimes, etc.).²² Krakauer cites studies showing false reporting in 2% to 10% of cases.²³ That being said, Krakauer relates a discussion with Mark Muir, Missoula Chief of Police where Muir cites a well-known (but debunked) study that found the rate of false claims of rape to be approximately 50%.²⁴ Krakauer gives voice to several individuals falsely accused of sexual assault and describes the devastation of a false accusation of such a heinous crime, but balances that against the reality that false reporting of such crimes is a very rare exception, far from the rule.²⁵

Many people who think about sexual assault on college or university campuses worry about the role that fear of reporting a crime while drunk or after using drugs plays in lowering willingness to report, and this fear plays

18. Keely Williams reported that when she told an ex-boyfriend she was raped he accused her of trying to cover up sex with other men. KRAKAUER, *supra* note 3, at 21; Kelsey Belnap was asked by officers investigating an accusation of sexual assault by multiple individuals whether she was dating anyone. When she responded yes, she recalled, “the way he reacted made me feel like he assumed I had cheated on my boyfriend and then lied about being raped to cover it up, even though that wasn’t the case at all.” *Id.* at 40; Kerry Barrett recalled that the police officer taking her statement when she reported an attempted rape said, “Oh, and one more thing: Do you have a boyfriend?” When she said no and asked why, he stated words to the effect that “Well, sometimes girls cheat on their boyfriends, and regret it, and then claim they were raped.” *Id.* at 53–54.

19. *Id.* at 154–155.

20. *Id.* at 5.

21. Kimberly Lonsway, Joanne Archambault and David Lisak, *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, THE VOICE, Vol. 3, No. 1,

22. *Id.*

23. KRAKAUER, *supra* note 3, at 109.

24. *Id.* at 103–106. *See also* Shaun King, *No Wonder Campus Sex Assault is a Problem When Some College Police Chiefs Think Women Are Lying*, N.Y. DAILY NEWS (Nov. 13, 2015). <http://www.nydailynews.com/news/national/king-campus-police-chief-thinks-women-lie-sex-assault-article-1.2433898>.

25. KRAKAUER, *supra* note 3, at 103–110.

a role in reporting in *Missoula*.²⁶ New York²⁷ and California²⁸ have specific legislation offering amnesty from drug and alcohol use charges for those reporting violence, and such amnesty is being considered by Congress as a provision of the Campus Accountability and Safety Act.²⁹

D. THE STORIES

Missoula details several reports of sexual assault that led to varying outcomes. Some victims, reporting individuals, and respondents/defendants are named while others are represented by pseudonyms.

In September 2010, Allison Huguet reported to law enforcement that Beau Donaldson, a childhood friend and football player for the University of Montana, raped her while she was sleeping.³⁰ The two were at a party, and Huguet reported that she felt no risk in sleeping by herself near him, since they had been longtime friends. She woke up to him raping her. Because of the size advantage, she reported that she did not fight back, but when it was over, she ran out of the house calling her mother, with Donaldson in chase. She underwent a forensic exam that gathered evidence of the assault. At first, Huguet did not go to police and instead met with Donaldson to confront him and elicit a promise that he would undergo treatment for alcohol use and not offend again. He admitted committing the crime. Unbeknownst to him, Huguet was recording the admission. However, due to Montana law, that recording would not be admissible in court. After observing that he was not making changes, and acknowledging her own trauma, Huguet reported to police, who took her report seriously and investigated. They arranged for a recorded call between Huguet and Donaldson, wherein he admitted to raping her.³¹ Donaldson was arrested and again confessed to raping her on a video recorded interrogation.³² A prior incident where he had attempted to assault a woman came to light and that victim, although hesitant, agreed to participate.³³ Even with a confession and strong evidence, the District Attorney's office was hesitant to take a rape accusation against a popular football player to trial, and significant time in the book is spent on the plea negotiations and

26. In *Missoula* Kaitlynn Kelly reported that she hesitated in reporting a sexual assault since she was underage and worried she might get in trouble for alcohol use. *Id.* at 66.

27. See N.Y. EDUC. LAW § 6442 (2015).

28. See S. 967, 2014—15 Reg. Sess. (Cal. 2014).

29. Campus Accountability and Safety Act, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/590/text>.

30. KRAKAUER, *supra* note 3, at 3–34, 44–48, 151–175, 191–222 (detailing Huguet's story).

31. *Id.* at 45.

32. *Id.* at 46–47.

33. *Id.* at 152–157.

the interplay between the parties.³⁴ A plea was reached, which led to an emotional and difficult hearing on an appropriate sentence, where the judge sentenced Donaldson to ten years in prison—a thirty year sentence with twenty years suspended.³⁵ Although Donaldson in his plea agreement had agreed not to appeal the sentence, his lawyers still sought a sentence review, requiring Huguet to go through the process again; his sentence was upheld.³⁶

In December 2010, Kelsey Belnap was sexually assaulted while she attended a party with a friend at which they consumed alcohol and marijuana until, while incapacitated, she was assaulted by multiple individuals.³⁷ After the assault, she went to get a forensic exam which showed that she had a high level of blood alcohol and that there was evidence of injury and sexual contact with multiple individuals. Belnap reported the assault to police and indicated that she wanted to press charges. She stated that she was clear in statements such as “I don’t want to,”³⁸ but that she was forced to engage in oral and vaginal sex against her will. Belnap observed later that she was interviewed by two male police officers shortly after the trauma, not told she could have a victim advocate accompany her to the interviews, and ran into significant skepticism from the officers who interviewed her and who seemed to believe that “she was just another drunk girl” and she “began to feel like [she] was the perp.”³⁹ She did not have the support of the friend with whom she had attended the party, and who was dating the host, and police waited nearly two months to interview any of the suspects (some longer). The suspects reported to police that Belnap was “moaning” during the encounter and, based on that, police determined the suspects would have believed the sex was consensual and therefore concluded that there was not probable cause.⁴⁰ The District Attorney’s Office agreed.⁴¹ Krakauer details some issues with their analysis of the evidence and interpretation of Montana law on incapacitation.⁴²

In September 2011, Kerry Barrett reported that after an evening spent at a bar where she met a man with the pseudonym Zeke Adams, Adams attempted to rape her.⁴³ Both Barrett and Adams agreed that she stated to him that she did not want to have sex and fell asleep fully clothed. She reported that she woke up to find him naked, her pants pulled down, and him rubbing

34. *Id.* at 158.

35. *Id.* at 191–222.

36. KRAKAUER, *supra* note 3, at 313–321

37. *Id.* at 34–44 (detailing Belnap’s story).

38. *Id.* at 39.

39. *Id.* at 40.

40. *Id.* at 42.

41. *Id.* at 43.

42. KRAKAUER, *supra* note 3, at 41–44.

43. *Id.* at 51–62 (detailing Barrett’s story).

up against her. She left and reported the incident to her parents, and to Missoula police. She recounted that the officer asked her “what do you want to come of this?”⁴⁴ The question surprised her. She recalled that the officer continued, “I’m not a lawyer or anything. . .but since no one saw you, and you were fooling around before it happened, it’s hard to really prove anything.”⁴⁵ Barrett was interviewed by a detective twenty days after the incident; Adams was interviewed the day after Barrett. Although he was briefly questioned the night of the report, he was intoxicated and did not answer questions coherently. The detective asked Adams if he had ever been arrested. He falsely stated no, but the detective did not check this or follow up.⁴⁶ Adams denied attempting to assault Barrett and the detective believed him, stating she believed the incident to be a “misunderstanding” and stating to him that “We have a lot of cases where girls come in and report stuff they are not sure about, and then it becomes rape. And it’s not fair. It’s not fair to you.” She continued that “You guys both went into this together. . .She came home willingly with you. The fact that she changed her mind and went home on her own. . .that’s not your fault.”⁴⁷ The detective told Adams she had to interview him because if she had “just flushed the case, [Barrett would] say the police don’t do anything,” and “That’s not the message we want to send to people.”⁴⁸

In September 2011, Kaitlynn Kelly met a friend of a friend, with the pseudonym Calvin Smith, while sitting on a bench outside her residence hall after a night of drinking.⁴⁹ She invited Smith up to her room for sexual activity, although when she arrived at the room with Smith and saw that her roommate was present, she changed her mind, told him so, and they went to sleep without engaging in sexual activity. She reported that she awoke to Smith violently penetrating her vagina and told him “stop, no” numerous times. She reported that he forced her to perform oral sex and she was in pain and gagging. She then reported that he got on top of her and tried to have sex with her, she was in pain and said she had to use the bathroom. Smith then followed her into the bathroom and looked over the stall. Then he left taking a pair of her jeans with him. When Kelly came back to her room, she reported that her sheets were covered in blood.

Kelly underwent a sexual assault forensic exam and reported the incident to the University. She later reported the incident to campus police, who turned the case over to local police. Detectives asked Kelly why she used a quiet voice when asking Smith to stop, and whether he would have stopped

44. *Id.* at 53.

45. *Id.* at 53.

46. *Id.* at 57.

47. *Id.* at 57–60.

48. KRAKAUER, *supra* note 3, at 59.

49. *Id.* at 63–101 (detailing Kelly’s story).

if she had screamed instead of being quiet,⁵⁰ telling Kelly, “I can see that you’re upset. You are a strong gal, and you probably have very good judgment most of the time.”⁵¹ The detective informed Kelly that due to the role of alcohol, it would be very difficult to investigate, charge, or obtain a conviction, saying that is the “problem with these kinds of cases. . . You can’t give consent when you are so doped up, or high, or drunk that you have no idea. . . It is pretty simple, but it gets clouded when everyone is intoxicated.”⁵² The detective reasoned that simply questioning Smith would be enough; he would tell his friends that he would be going to the police station, and “they are going to know. . . that this is not okay. One bad thing can actually have a good and healthy ripple effect on people, and hopefully prevent this kind of thing from happening to others.”⁵³ Smith denied the charges, saying that if Kelly had said stop, he would have stopped.⁵⁴ The detective determined there was insufficient probable cause to charge anything (even stealing the pants that he admitted to taking and throwing away) and closed the case.⁵⁵ Reportedly, the Missoula Police Department declined to show Kelly a copy of her case file.⁵⁶

Kelly also reported the incident to the University. The Dean of Students charged Smith under the conduct code and wrote that if an investigation indicated he was responsible for the violation, the Dean would seek expulsion.⁵⁷ Smith initially met with the Dean without an attorney; after he had denied the charges, his family hired an attorney in anticipation of a hearing.⁵⁸ Smith declined the opportunity to voluntarily withdraw without a notation on his record, and the case proceeded to a hearing.⁵⁹ Smith’s attorney sought

50. *Id.* at 69.

51. *Id.* at 71.

52. *Id.* at 72–73.

53. KRAKAUER, *supra* note 3, at 73.

54. *Id.* at 74–76.

55. *Id.* at 76–77.

56. *Id.* at 78.

57. *Id.* at 78–79.

58. *Id.* at 79–80.

59. KRAKAUER, *supra* note 3, at 82–83. Voluntary withdrawals with student conduct charges pending may allow a student to enroll elsewhere as a transfer with a clean transcript, and no requirement that they face the student conduct charges. Allowing such voluntary withdrawal and a clean transcript has been controversial. *See* Tyler Kingkade, *How Colleges Let Sexual Predators Slip Away to Other Schools*, THE HUFFINGTON POST (Oct. 23, 2014), http://www.huffingtonpost.com/2014/10/23/college-rape-transfer_n_6030770.html. New York State’s Education Law 129-B addresses this by requiring that “For the respondent who withdraws from the institution while such conduct charges are pending, and declines to complete the disciplinary process, institutions shall make a notation on the transcript of such students that they “withdrew with conduct charges pending.” N.Y. EDUCATION § 6444 (6) (2015); Mary Ellen McIntire, *Spurred by Sex-Assault Concerns, Lawmakers Add Disciplinary Infractions to College Transcripts*,

to submit information to the hearing board about the district attorney's decision not to prosecute, but the request was denied by the Dean, citing the different standards and purposes of the criminal justice and college disciplinary systems.⁶⁰ Kirsten Pabst, the Assistant District Attorney who considered the charges (and who would play a prominent role in the remainder of the book)⁶¹ testified on behalf of Smith.⁶² The book contains significant detail on the testimony and colloquy which in and of itself is a worthwhile read for higher education attorneys. The section discusses the different standards of proof, factors used to determine consent (including a victim being awake), Pabst's decision not to speak with the reporting victim, the withdrawal of consent, and the role of trauma of a victim reporting a crime.⁶³ Smith exercised his right not to testify⁶⁴ and, after hearing a few other witnesses and considering other evidence, the panel unanimously found Smith responsible for the violation and, with a vote of 6-1, imposed a sanction of immediate expulsion and persona non grata status at the University.⁶⁵

Krakauer spends the most time of any single case on an allegation by Cecelia Washburn that in February 2012, she was raped by University of Montana football quarterback Jordan Johnson.⁶⁶ Washburn and Johnson were casual friends who had dated a bit. At a campus dance, Washburn told Johnson, "Jordy, I would do you anytime."⁶⁷ The next night, she was relaxing at home and received a message asking her to pick him up and go to her house to watch a movie. Johnson had been drinking and received encouragement from housemates to "get 'er done, buddy" as he left.⁶⁸ At Washburn's house, they were making out. Washburn reported that Johnson, who was much bigger than she, pulled off her clothing and sexually assaulted her even as she told him no and that she did not want to have sex.⁶⁹ She then drove

CHRON. OF HIGHER EDUC. (June 26, 2015), http://chronicle.com/article/Spurred-by-Sex-Assault/231171/?cid=at&utm_source=at&utm_medium=en; Tyler Kingkade, *Colleges Take a Step Toward Including Sexual Assault Punishment on Transcripts*, THE HUFFINGTON POST (Feb. 24, 2016), http://www.huffingtonpost.com/entry/college-sexual-assault-transcripts_us_56cdf7ffe4b041136f19256a?utm_hp_ref=college.

60. *Id.* at 84–85.

61. For further discussion of Krakauer's views on Pabst, see Keila Szpaller, *Jon Krakauer: Missoula County Attorney's Actions 'Egregious'*, THE MISSOULIAN (Apr. 18, 2015), http://missoulian.com/news/local/krakauer-missoula-county-attorney-s-actions-egregious/article_1991c385-feed-5771-a1f9-202ee3ff9465.html.

62. KRAKAUER, *supra* note 3, at 86–95.

63. *Id.* at 86–95.

64. *Id.* at 96.

65. *Id.* at 100.

66. *Id.* at 133–150, 176–187, 225–305 (detailing Washburn's story).

67. *Id.* at 134.

68. KRAKAUER, *supra* note 3, at 136.

69. *Id.* at 136–139.

him home. Krakauer writes of how Washburn was traumatized and, with the assistance of friends, sought a sexual assault forensic examination, which found injuries.⁷⁰

Washburn reported the incident to the University and to local law enforcement. The University conducted an investigation and held a hearing that initially led to his expulsion.⁷¹ Johnson then appealed to the State Board of Regents, which overturned the decision of the hearing board, which had been upheld by the President.⁷² Johnson then returned to play as quarterback on the football team.⁷³ In 2016, the University of Montana settled a lawsuit with Johnson by, among other things, paying him \$245,000.⁷⁴

Washburn also reported the incident to law enforcement and Johnson was charged criminally.⁷⁵ He was defended by two attorneys, one of whom was Kirsten Pabst, the former Assistant District Attorney who had testified on behalf of Calvin Smith.⁷⁶ It was a contentious trial at which Johnson was found not guilty.⁷⁷ At the trial, Dr. David Lisak testified about the role of trauma in victim reactions, as well as statistics regarding how sexual assault is very rarely committed by strangers.⁷⁸ The cross-examination relied on referring to Lisak as an outsider to Montana values, the “Boston professor” or

70. *Id.* at 141–142.

71. *Id.* at 176–185.

72. *Id.* at 185–187.

73. *Id.* at 187, 301.

74. Michael E. Miller, *Montana Quarterback Receives \$245,000 Settlement for University's 'Unfair and Biased' Rape Investigation*, THE WASH. POST (Feb. 17, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/02/17/montana-quarterback-receives-245k-settlement-for-universitys-unfair-and-biased-rape-investigation/>.

75. KRAKAUER, *supra* note 3, at 225–305.

76. *Id.* at 226.

77. *Id.* at 299–300.

78. *Id.* at 252–259. Lisak is widely seen as one of the experts in the field and his work is widely cited in discussions of acquaintance sexual assault and victim response. See David Lisak and Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, *Violence and Victims*, Vol. 17, No. 1 (Nov. 1, 2002) (in a sample of college-aged men who were not incarcerated for rape, the authors found approximately 4% self-identify as repeat rapists, committing 28% of the violence in the set and averaging six rapes per offender). *But see* Nick DeSantis, *Study Challenges Idea That Many Campus Rapists Are Serial Offenders*, CHRON. OF HIGHER EDUC. (July 13, 2015), <http://chronicle.com/blogs/ticker/study-challenges-idea-that-many-campus-rapists-are-serial-offenders/101969>; Linda M. LeFauve, *Campus Rape Expert Can't Answer Basic Questions About His Sources*, REASON BLOG (July 28, 2015), <https://reason.com/archives/2015/07/28/campus-rape-statistics-lisak-problem>; Robby Soave, *How an Influential Campus Rape Study Skewed the Debate*, REASON BLOG, July 28, 2015 <https://reason.com/blog/2015/07/28/campus-rape-stats-lisak-study-wrong>; Jake New, *Paper on Campus Sexual Assault Called Into Question*, INSIDE HIGHER EDUC. (July 29, 2015), <https://www.insidehighered.com/quicktakes/2015/07/29/paper-campus-sexual-assault-called-question> (this criticism has its own issues and seems to be picking tiny, non-devastating, points in a survey more than a decade old for which Dr. Lisak did not have

the “professor from Massachusetts.”⁷⁹ Even a casual reader would note the difficulty for a reporting victim in bringing such a case against a prominent athlete.

E. LEGAL AND REGULATORY BACKDROP

In the spring of 2012, both the Office for Civil Rights and the Civil Rights Division of the Department of Justice commenced investigations of the University of Montana for its response to sexual harassment and sexual violence.⁸⁰ The events described in the book pre-date the reauthorization of the Violence Against Women Act (VAWA) with its amendments to the Clery Act⁸¹ but came after the April 4, 2011 sexual violence response and prevention guidance from OCR.⁸² Krakauer mentions the federal investigations that occurred at the University of Montana, but he does not focus on them or go into great detail; instead, he makes clear that many police and university investigations into claims of sexual assault on campus take place under the hazy spotlight of an audit and a perceived government crack-down.⁸³

Although Krakauer does not lay it out, the legal backdrop here would provide readers unfamiliar with higher education law with considerable context. Federal law requires colleges and universities accepting federal funds to prohibit certain crimes, including sexual assault, to provide written information to victims about options, remedies, and resources, and to provide prompt, fair, and impartial proceedings to resolve complaints.⁸⁴ Taking universities out of this role would require rewriting federal law; involvement right now by college administrators is required; it’s not a choice. Failure to

precise recall when called on it, but they are included here for thoroughness).

79. KRAKAUER, *supra* note 3, at 256.

80. See Letter of Findings from Anurima Bhargava, Chief of the Civil Rights Division of the U.S. Department of Justice, and Gary Jackson, Regional Director of the Office for Civil Rights of the U.S. Department of Education, to Royce Engstrom, President of The University of Montana, and Lucy France, University Counsel (May 9, 2013), *available at*, <http://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf>.

81. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, 127 Stat 54 (2013), *available at*, <https://www.govtrack.us/congress/bills/113/s47/text>. For a summary of the legislative changes, see Andrea Stagg and Joseph Storch, *Brief Analysis of the The Violence Against Women Act (VAWA) and Changes to the Clery Act & Title IX Compliance*, Mar. 2013, <http://www.nacua.org/documents/VAWASummary.pdf>.

82. DCL, *supra* note 15.

83. *Joint OCR/DOJ Resolution Agreement with University of Montana*, U.S. DEP’T. OF JUSTICE (May 8, 2013), <http://www.justice.gov/sites/default/files/crt/legacy/2013/05/09/montanaagree.pdf>.

84. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, 127 Stat 54 (2013).

follow the law and guidance could very likely lead to investigation and penalties by the federal government, either through the Departments of Education, Justice, or both.

The Department of Education's Office for Civil Rights is responsible for enforcing, among other things, Title IX of the Education Amendments of 1972.⁸⁵ Title IX prohibits sex discrimination in educational programs and activities; everything the college does is essentially an educational program or activity, even employing people.⁸⁶ OCR guidance says that an institution must work to prevent sex discrimination, promptly respond when it occurs, remedy and limit the effects of the discrimination, and prohibit retaliation. Sex discrimination is an umbrella term that includes sexual harassment, sexual assault, as well as unequal pay based on gender, pregnancy discrimination, and other types of sex- and gender-based harassment and discrimination.

OCR issued a guidance document on April 4, 2011 focusing on a school's⁸⁷ obligations to prevent peer sexual violence and to respond appropriately to complaints of such violence.⁸⁸ Much of the guidance was common sense: publish your process, provide training to the staff running the process, designate an employee as the point person to receive and track complaints of sex discrimination, and investigate and adjudicate in a timely fashion.⁸⁹ OCR followed up this letter with additional guidance in 2014 and 2015, mostly to clarify the 2011 guidance.⁹⁰

Another law in play in addition to Title IX is the Clery Act⁹¹ as amended by the Violence Against Women Act (VAWA)⁹² and its regulations.⁹³

85. Office for Civil Rights, *Title IX and Sex Discrimination*, U.S. DEP'T. OF EDUC. (Apr. 29, 2015), http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

86. *See id.* ("Some key issue areas in which recipients have Title IX obligations are: recruitment, admissions, and counseling; financial assistance; athletics; sex-based harassment; treatment of pregnant and parenting students; discipline; single-sex education; and employment.").

87. Title IX Dear Colleague Letters are addressed to post-secondary institutions as well as elementary and secondary institutions.

88. DCL, *supra* note 15 at 2.

89. *See id.* at 5, 12.

90. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEP'T. OF EDUC. (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; Office for Civil Rights, *Dear Colleague Letter and accompanying resources*, U.S. DEP'T OF EDUC., Apr. 24, 2015, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>.

91. 20 U.S.C. § 1092(f); 34 C.F.R. § 668.46 (2016)

92. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat 54 (2013), *available at* , <https://www.congress.gov/bill/113th-congress/senate-bill/47/text>.

93. 34 C.F.R. § 668 (2014).

Among its many rules, VAWA requires institutions to notify reporting individuals⁹⁴ of their option to notify law enforcement, and of their option *not* to do so.⁹⁵ The idea behind such a requirement is that in situations of sexual and other forms of interpersonal violence the person who experienced the crime or incident gets to decide how to proceed, whether that is with law enforcement, internal school procedures, with counseling and resources, or with a combination or none of the above.⁹⁶ *Missoula* discusses the natural tension between local law enforcement and municipal officials, who request or demand that all reports of crimes are forwarded to local law enforcement, and the wishes of colleges and students to give the reporting individuals the options of where to report such crimes.⁹⁷

A major distinction between an internal process of a company or a college and the criminal justice system is the standard of evidence,⁹⁸ which *Missoula* covers in some detail.⁹⁹ In the criminal system, the standard of evidence is beyond a reasonable doubt.¹⁰⁰ Guidance from OCR states that “preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.”¹⁰¹ Critics find fault with this standard because of the potential for innocent accused individuals to be punished.¹⁰² Prominent constitutional law scholar Alan Dershowitz interpreted a

94. There are many words that could be used to describe a reporting individual depending on the applicable law or policy, including victim, survivor, or complainant.

95. Violence Against Women Act Regulations, 34 C.F.R. § 668.46(b)(11)(ii)(C)(3) (2016)

96. Discussion or preamble to VAWA Regulations, 79 Fed. Reg. 62761 (2016).

97. KRAKAUER, *supra* note 3, at 130–132.

98. See *A Plain Language Explanation of Distinctions Between the New York State Penal Law and the College Disciplinary Processes*, STATE UNIV. OF N.Y. (Oct. 28, 2015) <http://system.suny.edu/sexual-violence-prevention-workgroup/College-and-Criminal-Resource/>, for an explanation of distinctions between the college reporting and criminal justice processes, developed pursuant to New York Education Law 129–B.

99. KRAKAUER, *supra* note 3, at 83, 97–98, 100–101.

100. See *Criminal Cases*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases>.

101. DCL, *supra* note 15, at 11. See KRAKAUER, *supra* note 3, at 179–181, 344–347.

102. See, e.g., Alan Dershowitz, *Innocent Until Proven Guilty? Not Under ‘Yes Means Yes’*, WASH. POST (Oct. 14, 2015) <https://www.washingtonpost.com/news/in-theory/wp/2015/10/14/how-affirmative-consent-rules-put-principles-of-fairness-at-risk>; Letter from the American Association of University Professors to the Office for Civil Rights (June 27, 2011) <http://www.nacua.org/documents/AAUPLetterToOCRReSexualViolenceEvidence.pdf>; Tyler Kingkade, *Lawsuit targets Education Department Over Guidance on College Sexual Assault Policies*, THE HUFFINGTON POST (Apr. 19, 2016), http://www.huffingtonpost.com/entry/sexual-assault-lawsuit-education-department_us_57165996e4b0018f9cbb2a55; Letter from James Lankford, United States Senator, to John King, United States Secretary of Education (Jan. 7, 2016), <http://www.lankford.senate.gov/imo/media/doc/Sen.%20Lankford%20letter%20to%20Dept.%20of%20Education%201.7.16.pdf>; Letter from Catherine Lhamon, Assistant Secretary for Civil

common description of the preponderance standard, “51 percent likelihood that the assault occurred,” to mean that for every 100 students disciplined for sexual assault, 49 may be innocent,¹⁰³ although the statement confuses a standard where more than half of the evidence leads to a finding with a question of whether each decision is 51% right or 49% wrong. Regardless of theoretical criticism, institutions are subject to investigations and compliance reviews by OCR and that agency’s guidance says that “in order for a school’s grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard.”¹⁰⁴ Such statements leave little room for interpretation and are the reason why institutions across the United States have updated policies since 2011 to include the preponderance standard.

Imagine the driver of a delivery company was accused of sexually assaulting a junior trainee, and the complaint came to company management. No manager in their right mind would go along, business as usual, and allow the driver to continue to be alone in a vehicle with the junior trainee, or frankly, any other employee. It is also highly unlikely that the manager would promptly call the police and then wait (perhaps for months or years) for law enforcement to conclude its investigation before making any changes to the schedule or initiating an internal investigation. The most likely scenario is an immediate suspension pending fact-finding, which will lead to a determination about whether to keep that driver employed and with what, if any, limitations. The investigation or internal disciplinary process would probably use a standard that is or looks a lot like “preponderance of the evidence.”

Like companies responding to employee misconduct, colleges have long set their own standards for membership in the campus community. Students must have a certain grade point average or they may be academically dismissed. Students living in residence halls may forfeit their right to have candles in their rooms.¹⁰⁵ And codes of conduct are extensive and prohibit behavior that’s unwelcome, including some behaviors that constitute crimes.

Rights, United States Department of Education, to James Lankford, United States Senator (Feb. 17, 2016), <http://www.lankford.senate.gov/imo/media/doc/DEPT.%20of%20EDUCATION%20LANKFORD%20LETTER%202-17-16.pdf>.

103. Dershowitz, *supra* note 101, at 2.

104. DCL, *supra* note 15 at 11.

105. See, e.g., Vanderbilt Environmental Health & Safety, *Fire Safety Fact Sheet: Smoking & Candles Fires*, VANDERBILT UNIV. http://www.vanderbilt.edu/firesafety/factsheets/firefacts_smoking_candles.pdf (last visited Apr. 23, 2016) (“Don’t bring candles into your room, even as a decoration”); Residence Life & Housing, *Prohibited Items and Actions*, UNIV. OF DELAWARE, http://www.udel.edu/reslife/community_living/prohibited.html (“Possession of candles is prohibited.”); University Housing and Residential Life, *Spring 2016 Move-In*, TEMPLE UNIV., <https://housing.temple.edu/resources-and-services/fall-and-spring-move-your-new-home/what->

Krakauer does not deeply discuss the Clery Act or Title IX, but the situations he describes justify some of the guidance and legislation. The detailed recounting of Jordan Johnson's trial alone perfectly explains why a victim would not press criminal charges. At that trial, Cecelia Washburn was belittled and blamed, her mental health history going back about a decade was discussed at length,¹⁰⁶ and her counseling records were combed through. The adversarial system so familiar to criminal justice cases has a brutal impact on the reporting individual.¹⁰⁷ Johnson's defense team painted Washburn as a social climber seeking celebrity, not only by claiming she was raped, but also in trying to land Johnson—a star football player on the Grizzlies—as her boyfriend.

None of this would have been possible at a student conduct hearing at the State University of New York, where both authors advised and coordinated a system-wide working group to unify five dozen campuses under one policy to address sexual violence prevention and response.¹⁰⁸ Under SUNY policy, the reporting individual has the right to “be free from any suggestion that the [reporting individual] is at fault” in cases of sexual assault, or that the reporting individual “should have acted in a different manner” to avoid victimization.¹⁰⁹ A reporting individual also has the right to exclude prior sexual history and mental health diagnosis or treatment from admission into the college hearing process. These principles are also embedded in a recent state law based on SUNY's policies.¹¹⁰

bring/prohibited-items (last visited Apr. 23, 2016) (candles as a prohibited item); University Housing and Residential Life, *Prohibited Items*, BOSTON COLL., <http://www.bc.edu/offices/reslife/lifeinhalls/communityexp/safetyinfo.html> (last visited Apr. 23, 2016) (varying sanctions for possession of unlit v. used candles).

106. Many news outlets reported, as if surprised, that the University at Oregon accessed the mental health records of a student who had filed suit against the college, which led to a Congressional inquiry and a call from at least one advocate that no student should ever seek to access to on campus resources. Yet little mention is given to the fact that such access is routine and expected in the criminal justice system. While in Oregon it is alleged that attorneys looked at the records but did not share them, in the criminal justice system, they are released, looked through in detail, and the victim is subject to questioning about their details. See *Rep Bonamici Questions Gap in College Students' Medical Privacy*, U.S. REP. SUZANNE BONAMICI (Mar. 11, 2015), <http://bonamici.house.gov/press-release/rep-bonamici-questions-gap-college-students%E2%80%99-medical-privacy>; Katie Rose Guest Pryal, *Raped on Campus? Don't Trust Your College to Do the Right Thing*, THE CHRONICLE OF HIGHER EDUC. (Mar. 2, 2015), http://www.huffingtonpost.com/2015/03/11/privacy-therapy-records_n_6848984.html; Kathleen M. Styles, *Letter to Senator Wyden*, U.S. DEPT. OF EDUC., Office of Management (June 8, 2015) http://media.oregonlive.com/education_impact/other/wydenletter.pdf; KRAKAUER, *supra* note 3, at 290.

107. KRAKAUER, *supra* note 3, at 223, 242–243.

108. Sexual Violence Prevention Workgroup, THE STATE UNIVERSITY OF NEW YORK, <http://system.suny.edu/sexual-violence-prevention-workgroup/>.

109. N.Y. EDUCATION § 6443 (2015).

110. N.Y. EDUCATION § 6444 (5)(c)(vi) (2015).

The burden of proof in the conduct process is different from the one required in the criminal process; the standard is lower because the worst sanction is expulsion, not incarceration or even death. The rules of evidence, including limitations on witnesses and testimony, are completely different in a school's internal process from what they are in the criminal process. So long as those rules are fair, published, and applied equally, they may vary among institutions. A key point is that failure to convict or even a decision not to prosecute on the part of the state has no relationship to whether the college will investigate, hold a process, or find someone responsible. It's not clear to readers why UM reinstated Jordan Johnson after his not guilty verdict, whether it was because of the verdict, or an internal appeal that he won.

F. THE ROLE OF CAMPUS POLICE

Campus law enforcement plays a minor role in the book, although the University of Montana, like many public (and some private) colleges has sworn officers.¹¹¹ There is one mention of "campus security" when they provided security footage from cameras in one case (Barrett).

While there are always exceptions, strengths and weaknesses, the idea that sworn campus law enforcement are merely "security guards" is a very outdated concept. In general, even those institutions that, by law or policy, do not maintain sworn law enforcement, employ men and women with significantly more training than similarly situated private security in a corporate environment. Higher education as a sector has done a poor job in getting this information out to counter the popular culture stereotypes of campus safety officials, and in *Missoula*, with small exceptions, all of the major law enforcement based transgressions were committed by municipal officers, not campus law enforcement.

In the quarter century since passage of the Clery Act, the role of law enforcement on college campuses has increased significantly, and the officers themselves have professionalized to the point that it is usually hard to tell the difference between municipal and campus law enforcement; they are similar in their level of training, equipment and arms, vehicles, uniform and signage.¹¹² These officers may be required to have college degrees or military service before hire, receive more significant training in areas such as

111. See *UM Police Department*, UNIV. OF MONTANA, <http://www.umt.edu/police/> (last visited Apr. 1, 2016).

112. See, e.g., Ellen Mayer, *Campus police: real deal or rent-a-cops?*, WBEZ CHICAGO (Nov. 5, 2014), <http://www.wbez.org/series/curious-city/campus-police-real-deal-or-rent-cops-111071>; Daniel Engber, *Are Campus Police Like Regular Cops?*, SLATE (November 7, 2011), http://www.slate.com/articles/news_and_politics/explainer/2011/11/penn_state_scandal_should_campus_cops_have_reported_the_allegations_of_abuse_.html ("These sworn officers have the same authority as any other members of the police—they carry weapons, make arrests, and enforce local, state, and federal laws."); Scott Carlson, *Campus Cops' Contested Role*, (Oct. 18, 2015), CHRON. OF

trauma-informed investigations,¹¹³ have an incident response time that is a fraction of the surrounding municipality, and engage in community policing.¹¹⁴

G. THE ROLE OF ATHLETICS

Many of the assailants featured or referenced in *Missoula* are members of the celebrated Grizzlies football team.¹¹⁵ While the team is not a mainstay on ESPN or the Bowl Champion Series, and players rarely go on to play professionally, it is a successful team in its conference and division and players are honored and revered as much as players at bigger football colleges.¹¹⁶ Almost immediately upon hearing that one of their heroes is accused of sexual assault, fans of the football team took to social media to vehemently deny the accusations and others ostracized reporting individuals; they often reason that successful athletes would never need to rape anyone since, in their view, women “throw themselves” at these athletes and with so many offers of consensual sex, there is no need to engage in non-consensual sex.¹¹⁷ Others simply conflate success in playing a game or defending teammates with being an overall good person. They believe all athletes (at least on their favorite team) to be “good guys” rather than the mix of characters endemic to society as a whole.

Although Krakauer does not focus on the athletics department staff, he always mentions when accused individuals are players or when certain other

HIGHER EDUC., http://chronicle.com/article/Campus-Cops-Contested-Role/233798?cid=at&utm_source=at&utm_medium=en&elq=d7e43c521fdd41048ae2b1740123d684&elqCampaignId=1635&elqaid=6608&elqat=1&elqTrackId=3fb443439d7e4ff0b188e7ed4a011d0d; Joseph Storch, *Campus Security and Local Criminal Enforcement Entities*, Cynthia Baker and Patricia Salkin, Ed. TOWN AND GOWN: LEGAL STRATEGIES FOR EFFECTIVE COLLABORATION, Chapter 8, p. 177–180 (2013).

113. See Rebecca Campbell, *The Neurobiology of Sexual Assault*, NAT. INSTITUTES OF JUSTICE (Dec. 3, 2012), <http://nij.gov/multimedia/presenter/presenter-campbell/Pages/welcome.aspx>, for a useful outline of trauma among victims and survivors of sexual assault. Krakauer spends significant time discussing the role of trauma in reporting and trauma-informed response and questioning. See KRAKAUER, *supra* note 3, at 62, 70, 94–95, 139, 201–202, 252–259, 293–295.

114. See, e.g., *Community Policing*, MIAMI UNIVERSITY, <http://www.miamioh.edu/police/community-policing/index.html> (last visited Apr. 1, 2016); *Community Policing*, BINGHAMTON UNIV., <https://www.binghamton.edu/police/community-policing.html> (last visited Apr. 1, 2016); *Community Policing*, TUFTS UNIV., <http://publicsafety.tufts.edu/police/community-policing/> (last visited Apr. 1, 2016).

115. KRAKAUER, *supra* note 3, at 7, 33–34, 62, 127–28, 307–08, 311–12. An internal University report had found that “investigations ‘indicated a disproportionate association’ between the sexual-assault crisis and ‘patterns of behavior of a number of student athletes.’” *Id.* at 128.

116. *Id.* at 7–8, 320–321.

117. *Id.* at 48, 125, 161–163, 168, 183, 228–230, 300, 320–321.

key participants—prosecutors, defense attorneys—are fans, boosters, or coaches. When Jordan Johnson received his letter from the Dean of Students charging him in the Cecelia Washburn sexual assault, his first thought was to contact his coach.¹¹⁸ The coach brought in the athletic director and, in Krakauer’s words, “the UM athletic department promptly mobilized to do everything possible to defend Jordan Johnson against Cecelia Washburn’s allegation.”¹¹⁹ Once news broke that Johnson could not practice with the team, fans began posting statements online.¹²⁰ Initially, Johnson could not practice because he was subject to a restraining order, but when that became a civil no-contact order, the coach allowed him to practice.¹²¹ Shortly thereafter, the University President fired the coach and athletic director.¹²² The team responded with an open letter questioning that decision and the motives of anyone who would allege the numerous sexual assaults committed by team members.¹²³ Almost inexplicably, a Vice President of External Relations sought to have the Dean of Students take action against a reporting individual for publicly airing her views about the process.¹²⁴ Revealingly, the Vice President, who traveled with the football team and spent extensive time with them, bristled at a reporter’s use of the phrase “gang rape” and “football players” to describe a sexual assault alleged against four football players; he believed it would be more accurately described as “a ‘date rape’ by multiple ‘students.’”¹²⁵ The University’s athletics department arranged for legal representation for Johnson in the University’s own disciplinary process.¹²⁶

The outsized role of athletics and athletes in sexual and interpersonal violence is not specific to a city in Montana, but echoes the treatment of athletes and athletics nationally at the professional, college, and secondary level.¹²⁷ An analysis of sexual assault claims by higher education insurance

118. *Id.* at 143.

119. *Id.* at 143.

120. *Id.* at 144–145, 148.

121. KRAKAUER, *supra* note 3, at 145.

122. *Id.* at 146.

123. *Id.* at 146–148.

124. *Id.* at 149. There is no law that prohibits participants from criticizing a public college for their experience, and FERPA has been interpreted not to be a law that can be used to silence participants in a process. *See* DCL, *supra* note 15, at 14.

125. *Id.* at 149.

126. *Id.* at 176.

127. Paula Lavigne, *Lawyers, Status, Public Backlash Aid College Athletes Accused of Crimes*, ESPN (June 15, 2015), http://espn.go.com/espn/otl/story/_/id/13065247/college-athletes-major-programs-benefit-confluence-factors-some-avoid-criminal-charges; Andrew Mytelka, “Athletes in Big-Time Programs Often Escape Prosecution, Report Says,” CHRON. OF HIGHER EDUC., <http://chronicle.com/blogs/ticker/athletes-in-big-time-programs-often-escape-prosecution-report-says/100663> (June 14, 2015); Paula

carrier United Educators in 2015 revealed that a disproportionate number of claims involving serial perpetration and multiple perpetrators implicated athletes or fraternity members.¹²⁸ The study provides examples of claims where the group mentality may lead to this behavior, including where teammates took turns sexually assaulting an unconscious student.¹²⁹ There is additional evidence that in Division I football colleges, sexual assaults increase when the team wins (more so when the team wins a home game, but also when the team wins prominent or rivalry away games).¹³⁰ Conversely, domestic violence increases when the favored team loses, especially when it loses a game in an upset.¹³¹

One problem is that skilled athletes, especially in revenue sports, are so desirable for athletic programs that the operators of those programs may decide to overlook violations at a past college¹³² in recruiting that student athlete. Sometimes these violations, including violent crimes, are chalked up to

Lavigne, *Baylor Faces Accusations of Ignoring Sex Assault Victims*, ESPN (Feb. 2, 2016), http://espn.go.com/espn/otl/story/_/id/14675790/baylor-officials-accused-failing-investigate-sexual-assaults-fully-adequately-providing-support-alleged-victims; Jake New, *Black Eye for Baylor*, INSIDE HIGHER EDUC. (Aug. 26, 2015), <https://www.insidehighered.com/news/2015/08/26/baylor-u-facing-questions-over-handling-sexual-assault-involving-football-player>; Joe Nocera, *After Settlement, Florida State Shows Sympathy for Victim: Itself*, N.Y. TIMES (Jan. 29, 2016), http://www.nytimes.com/2016/01/30/sports/ncaaf/football/florida-state-protects-the-brand-but-what-about-the-students.html?_r=1; Andy Thomasen, *Another Athletics Official at U. of Minnesota is Investigated*, CHRON. OF HIGHER EDUC. (Sep. 3, 2015), <http://chronicle.com/blogs/ticker/jp/another-athletics-official-at-u-of-minnesota-is-investigated>; Andy Thomasen, *Five Rutgers Players Are Charged with Assault as Coach is Investigated*, CHRON. OF HIGHER EDUC. (Sep. 3, 2015), <http://chronicle.com/blogs/ticker/5-rutgers-football-players-are-charged-with-assault-as-coach-is-investigated/104075>; Charles Huckabee, *Former Tennessee Player Says Coach Criticized Him for Helping Alleged Rape Victim*, CHRON. OF HIGHER EDUC. (Feb. 25, 2016), <http://chronicle.com/blogs/ticker/former-tennessee-player-says-coach-criticized-him-for-helping-alleged-rape-victim/108901>.

128. *Confronting Campus Sexual Assault: An Examination of Higher Education Claims*, UNITED EDUCATORS (Jan. 2015), https://www.bgsu.edu/content/dam/BGSU/human-resources/documents/training/lawroom/Sexual_assault_claim_study.pdf, at 3–4; See also Akane Otani and Jeremy Scott Diamond, “Every Time a Fraternity or Sorority Got In Trouble This Year,” BLOOMBERG (June 4, 2015), <http://www.bloomberg.com/graphics/2015-frat-sorority-offenses/>.

129. *Id.* at 3.

130. James M. Lindo, Peter M. Siminski, and Isaac D. Swensen, *College Party Culture and Sexual Assault*, NAT. BUREAU OF ECONOMIC RESEARCH, Dec. 2015, <http://www.nber.org/papers/w21828>.

131. *Id.*

132. Of course, efforts to assist students found responsible for sexual assault at one college in transferring to another college, overcoming any limitations on transferring after such behavior, are not limited to athletes and have themselves become a lucrative business. Katie J.M. Baker, *This Woman Gets Students Accused of Rape Back into School—For a Price*, BUZZFEED NEWS (July 28, 2015), <http://www.buzzfeed.com/katiejmbaker/this-woman-gets-students-accused-of-rape->

“off field distractions” or “off field concerns.”¹³³ Members of the media have responded to characterizing sexual assault in this way, finding the minimization offensive.¹³⁴ Facing criticism of this sort, in 2015 the Southeastern Conference adopted a policy that would not allow members to accept transfers who have a history of domestic or sexual violence,¹³⁵ but there are always schools in conferences that do not have such rules, or in other divisions, who will happily take a (second or third) chance on such an athlete.¹³⁶

The Campus Accountability and Safety Act, proposed legislation from Senators McCaskill (D-MO) and Gillibrand (D-NY), would require institutions to use the same policies and procedures for all students, regardless of team or club membership.¹³⁷ This rule is on the institutional response side—do not treat accused individuals differently because they are on a sports team. New York’s recent law is on the prevention side. It requires all athletes and club and organization leaders to complete training on preventing and responding to sexual and interpersonal violence.¹³⁸ In the past few years, the

back-into-school-fo#.gp6MQaD5D.

133. Mike Florio, *Buccaneers finally make it official, taking Jameis Winston first overall*, NBC SPORTS, Apr. 30, 2015, <http://profootballtalk.nbcsports.com/2015/04/30/buccaneers-finally-make-it-official-taking-jameis-winston-first-overall/>; Mike Freeman, *49ers Give Away Games to Bears – Did off-Field Distractions Play a Part?*, BLEACHER REPORT (Sept 15, 2014), <http://bleacherreport.com/articles/2198766-49ers-give-away-game-to-bears-did-off-field-distractions-play-a-part>; Brett Jensen, *Winston Excels even with off-Field Distractions*, FOX SPORTS (Dec 7, 2014), <http://www.foxsports.com/carolinas/story/winston-excels-even-with-off-field-distractions-120714>; Nancy Armour, *U.S. Soccer has Itself to Blame for Hope Solo’s Continued Distractions*, USA TODAY (June 7, 2015), <http://www.usatoday.com/story/sports/2015/06/07/hope-solo-domestic-violence-distraction-world-cup/28647987/>; Joshua Davis, *In the Crossfire: No. 5 Bears Deal with Distractions Amid off-Field Issues*, BAYLOR LARIAT (Sept 22, 2015), <http://baylorlariat.com/2015/09/22/in-the-crossfire-no-5-bears-deal-with-distractions-amid-off-field-issues/>

134. See Ali Safran, *Rape is Not an ‘Off The Field Distraction’*, THE HUFFINGTON POST (May 4, 2015), http://www.huffingtonpost.com/ali-safran/rape-is-not-an-off-the-field-distraction_b_7207972.html.

135. Jake New, *SEC Adopts Rule Barring Transfers with Violent Pasts*, INSIDE HIGHER EDUC. (June 2, 2015), <https://www.insidehighered.com/quick-takes/2015/06/02/sec-adopts-rule-barring-transfers-violent-pasts>; Jake New, *Black Eye for Baylor*, INSIDE HIGHER EDUC. (Aug. 26, 2015), <https://www.insidehighered.com/news/2015/08/26/baylor-u-facing-questions-over-handling-sexual-assault-involving-football-player>.

136. See Jake New, *Community College Faces Criticism After Football Player Convicted of Rape in High School Joins Team*, INSIDE HIGHER EDUC., Oct. 21, 2015, <https://www.insidehighered.com/news/2015/10/21/community-college-faces-criticism-after-football-player-convicted-rape-high-school>.

137. Campus Accountability and Safety Act, S. 590, 114th Congress (2015–2016).

138. N.Y. EDUCATION § 6447(5) (2015).

University of Michigan chose to train all athletes, calling them a group with “influence on campus.”¹³⁹

The prevalence of sexual and interpersonal violence and often inadequate response graduates from college into professional sports. When professional hockey player Patrick Kane was accused of sexually assaulting a woman in Buffalo, New York in 2015, the tweets and social media posts of fans of the player constituted an almost unending list of attacks on the unnamed victim.¹⁴⁰ Even after a video surfaced of Baltimore Raven Ray Rice knocking his fiancée unconscious in an elevator, domestic violence charges against Rice were eventually dropped.¹⁴¹

Certainly athletics is far from the only group that sees victim-blaming and unflinching belief in the innocence of those accused of sex crimes, even when there is an admission. In the Catholic Church pedophilia scandal, Church leadership in different locations blamed or partly blamed victims for their culpability.¹⁴² Members of ultra-Orthodox Jewish communities have named victims who have accused community leaders and posted their photos on the Internet.¹⁴³

139. Katherine Rosman, *On The Front Line of Campus Sexual Misconduct*, N.Y. TIMES (Sep. 26, 2015), http://www.nytimes.com/2015/09/27/fashion/on-the-front-line-of-campus-sexual-misconduct.html?_r=0.

140. Examples include: “‘Why would Pat Kane need to rape anyone? Good looking millionaire who plays hockey. Girls are crawling all over the guy’ . . . ‘Cause if Kane’s really being investigated for rape then we all know it’s a lie’” and posts claiming the victim is a “gold digger” or that a rich and successful hockey player would never rape anyone because so any people would consensually sleep with that player. See Maki Becker, *People Take to Twitter to Victim-Blame After Patrick Kane Allegations*, THE BUFFALO NEWS (Aug. 11, 2015), <http://www.buffalonews.com/city-region/people-take-to-twitter-to-victim-blame-after-patrick-kane-allegations-20150811>.

141. See Emmanuelle Saliba & Erin McClam, *Domestic Violence Charges Against Ray Rice Dismissed*, NBC NEWS (May 21, 2015), <http://www.nbcnews.com/story-line/nfl-controversy/domestic-violence-charges-against-ray-rice-dismissed-judge-confirms-n362581>; see also Bien, Louis, *A complete timeline of the Ray Rice assault case*, SB NAT. (Nov. 28, 2014), <http://www.sbnation.com/nfl/2014/5/23/5744964/ray-rice-arrest-assault-statement-apology-ravens>.

142. John O’Brien, *Child Victims Partly to Blame in Priest Sex-Abuse Cases, Syracuse Bishop Testified*, SYRACUSE POST STANDARD (Sept. 13, 2015), <http://www.syracuse.com/news/index.ssf/2015/09/victims-partly-to-blame-in-priest-sex-abuse-cases-syracuse-bishop-testified.html>; Sharon Otterman, *Priest Puts Blame on Some Victims of Sexual Abuse*, N.Y. TIMES (Aug. 30, 2012), http://mobile.nytimes.com/2012/08/31/nyregion/in-interview-the-rev-benedict-groeschel-says-abuse-victims-can-be-seducers.html?referrer=&_r=0.

143. Josh Saul, *Hasidic Leader Convicted After Repeatedly Forcing Himself on Girl He Was Counseling*, N.Y. POST (Dec. 10, 2012), <http://nypost.com/2012/12/10/hasidic-leader-convicted-after-repeatedly-forcing-himself-on-girl-he-was-counseling/>.

Even prominent researchers accused of sexual harassment receive penalties that some find less than satisfactory based upon their behavior.¹⁴⁴

H. THIS IS NOT A COLLEGE OR UNIVERSITY PROBLEM,

THIS IS A SOCIETAL PROBLEM

Missoula concentrates on assaults committed against college and university students, but Krakauer acknowledges that “young women who are not enrolled in college are probably at even greater risk”¹⁴⁵ of sexual and interpersonal violence. Although it is difficult to get a perfect assessment of prevalence of sexual and interpersonal violence on college and university campuses, a number of studies have coalesced around a prevalence somewhere between 20 and 25% for females and about seven percent for males.¹⁴⁶ Krakauer does not spend significant time on prevalence, nor does he discuss male victims with more than a passing mention.¹⁴⁷ While studies of prevalence of sexual violence on college and university campuses draw significant press reporting, the best federal statistics cover bands of ages (such as women aged 18-24), some of whom are in college, but many of whom are

144. Colleen Flaherty, *Is an Apology Enough?*, INSIDE HIGHER EDUC. (Oct. 12, 2015), https://www.insidehighered.com/news/2015/10/12/scientists-debate-conduct-prominent-berkeley-astronomer-found-have-sexually-harassed?utm_source=Inside+Higher+Ed&utm_campaign=ffb2aefcef-DNU201510012&utm_medium=email&utm_term=0_1fbc04421-ffb2aefcef-197439957.

145. KRAKAUER, *supra* note 3, at xiv, 346–347.

146. See Scott Jaschik, *New Survey Finds 1 in 5 College Women Have Experienced Sexual Assault*, INSIDE HIGHER EDUC. (June 15, 2015), <https://www.insidehighered.com/news/2015/06/15/new-survey-finds-1-5-college-women-have-experienced-sexual-assault>; Katherine Mangan, *1 in 4 Females Undergrads Experienced Sex Assault or Misconduct*, AAU Survey Finds, CHRON. OF HIGHER EDUC. (Sept. 21, 2015), <https://chronicle.com/article/1-in-4-Female-Undergrads/233281/>; Quick Takes, *Survey: 22% of Female Students at Michigan Sexually Assaulted*, INSIDE HIGHER EDUC. (June 25, 2015), <https://www.insidehighered.com/quicktakes/2015/06/25/survey-22-female-students-michigan-sexually-assaulted>; Jake New, *Differing Definitions*, INSIDE HIGHER EDUC. (Sep. 2, 2015), <https://www.insidehighered.com/news/2015/09/02/rutgers-survey-using-broad-definition-finds-1-5-female-students-have-experienced>; Christopher Krebs, Christine Lindquist, Marcus Berzofsky, Bonnie Shook-Sa, and Kimberly Peterson, *Campus Climate Survey Validation Study Final Technical Report*, BUREAU OF JUSTICE STATISTICS, Jan. 2016, <http://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf>. But see, Jake New, *Different Conclusions On Sex Assaults*, INSIDE HIGHER EDUC. (Sep. 1, 2015), <https://www.insidehighered.com/news/2015/09/01/survey-5-percent-kentucky-students-assaulted-past-year> (finding about 5% prevalence in a University of Kentucky survey); Libby Nelson, *Why Some Studies Make Campus Rape Look Like an Epidemic While Others Say It's Rare*, VOX (Dec. 11, 2014), <http://www.vox.com/2014/12/11/7378271/why-some-studies-make-campus-rape-look-like-an-epidemic-while-others> (discussing the role of different methods of asking about specific incidents of violence in leading to vastly different statistical outcomes).

147. KRAKAUER, *supra* note 3, at xiv.

not. For these women and men, law enforcement is one of their only options. While some communities offer significant free or low cost counseling and other services for victims and survivors, availability and quality is far from uniform.

A high school senior who graduates and takes a job rather than going to a college or university¹⁴⁸ has none of the labyrinth of protections guaranteed by the Clery Act, Violence Against Women Act, and Office for Civil Rights interpretations of Title IX. If they are assaulted in their apartment complex, there is no Title IX Coordinator to report to or to seek services from. Their landlord does not provide them with a Clery Act Annual Security Report detailing crimes occurring in relevant geography and establishing certain safety policies. Nobody asks whether they affirmatively consented to sexual contact, instead their option is limited to seeking assistance with law enforcement, which is not always the best option.¹⁴⁹

Lawmakers do not like to admit it, but the stories of college sexual assault they have reacted to, and the protections they have put in place or sought to pass to address assaults, do little or nothing for the millions of young men and women who do not go on to college. Yet sexual and interpersonal violence are *not* problems specific to higher education; they are societal problems. Addressing these crimes outside of the ivory tower is much harder than is addressing them on campus, where students and staff are a captive audience, and federal funding binds campuses to action. To make a real effort to ending sexual and interpersonal violence, all people—not just students—need prevention education and proper response to complaints.

There is precedent for such major societal shifts in a relatively short time. When the authors were young, the first question you would hear at any restaurant was “smoking or non?” Smoking in restaurants was *de rigeur*, and if you told a host or hostess in the 1980’s that they would never utter that line 15-20 years later, they would not have believed you. Initially bans on smoking in restaurants were controversial, and commentators said they would put bars and restaurants out of business. But people adjusted, and the inconvenience of going outside to smoke (not insignificant in a place like New York or Montana with cold winters) was also a boon to non-smokers who could visit these establishments and not leave smelling like smoke, or having inhaled second-hand smoke. Now it is hard to find a restaurant in most cities and towns that allows smoking at the table. Society has completely shifted on the presence of smokers in restaurants in less than a generation.

148. Mary Ellen McIntire, *Conversation About Sexual Violence is Often a New One for College Freshmen*, CHRON. OF HIGHER EDUC. (Aug. 26, 2015), <http://chronicle.com/article/Conversation-About-Sexual/232599>; Sarah Brown, *How One University Uses New-Student Orientation to Talk About Sexual Assault*, CHRON. OF HIGHER EDUC. (Aug. 26, 2015), <http://chronicle.com/article/How-One-University-Uses/232603>.

149. See, e.g., KRAKAUER at 326–347, in addition to the stories detailed elsewhere.

Drunk driving deaths have decreased significantly with the work of lawmakers and organizations such as Mothers Against Drunk Driving.¹⁵⁰ Gone are the days when police would slowly follow drunk drivers home to make sure they were safe; that now leads to mandatory arrest. Among other reasons, the bystander phrase “friends don’t let friends drive drunk” had a significant impact on societal views of drunk drivers.

While higher education can and should do much to address sexual and interpersonal violence on campus, society and lawmakers must ensure that such protections do not begin and end at the campus gates.

I. MOVING FORWARD

Krakauer’s book does a good job of identifying the problem, but it spends no time on solutions. The task of developing prevention programming to reduce the number of assaults on college campuses is for higher education, not an author. There are many solutions proposed, both on the prevention and response sides, including gimmicks and quick fixes with dubious effectiveness,¹⁵¹ but the field, for the most part, lacks data on what truly works.¹⁵² The Violence Against Women Act’s requirements of training and ongoing prevention and awareness campaigns¹⁵³ will bring significant attention (and resources) to bear in studying what works well and what falls flat. But there are no silver bullets or simple answers.

Institutions are likely to see a reporting curve like the one displayed below.¹⁵⁴ As an institution does a better job publicizing reporting options, numbers of reports are likely to spike. This will put significant pressure on first responders, Title IX coordinators, judicial and conduct professionals, and the counseling center. This pressure is a risk, as time spent responding to cases may draw attention away from the time and effort needed to get to the next level, prevention-programming. This programming can include bystander intervention, creative programming within the VAWA campaign, and other

150. See *History of Drunk Driving*, MOTHERS AGAINST DRUNK DRIVING, <http://www.madd.org/drun-driving/about/history.html> (last visited Apr. 2, 2016).

151. Tara Culp-Ressler, *Profit and Peril in the Anti-Rape Industry*, THINK PROGRESS (Sep. 10, 2014), <http://thinkprogress.org/health/2014/09/10/3564746/anti-rape-industry/>.

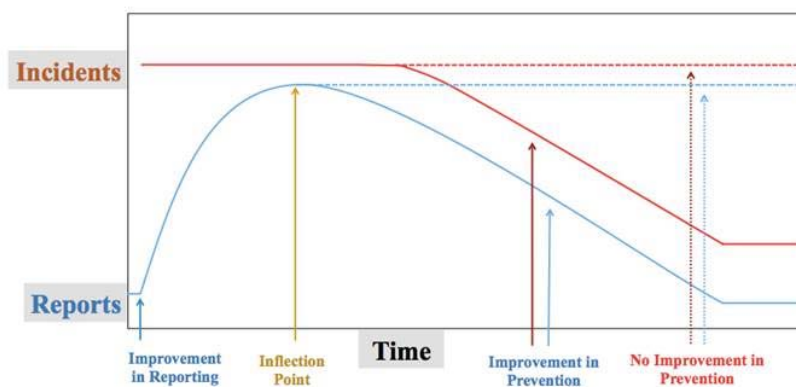
152. Sarah DeGue, *Preventing Sexual Violence on College Campuses: Lessons from Research and Practice*, CENTERS FOR DISEASE CONTROL (Apr. 2014), <https://www.notalone.gov/assets/evidence-based-strategies-for-the-prevention-of-sv-perpetration.pdf>.

153. 34 C.F.R. § 668 (2014); 79 FR §§ 62751, 62784–62785, 62788 (2016).

154. See Joseph Storch, *Sexual Violence: Responding to Reports Is Not Enough*, INSIDE HIGHER ED (Mar. 14 2016), <https://www.insidehighered.com/views/2016/03/14/colleges-must-not-only-respond-reports-sexual-violence-also-prevent-it-essay>.

efforts to change the culture¹⁵⁵ in order to lower the incidence of sexual and interpersonal violence. But these second-level efforts are absolutely critical to bringing the number of reports back down—not because the reporting will decrease, but because the incidents will decrease. This inflection point is where many institutions can become stuck, staff become overwhelmed, and morale can suffer. The curve below demonstrates how initially, incidents are high while reports are low. As an institution does a better job educating students about reporting options and resources, the number of reports will begin to climb (although it will never be as high as incidents occurring). It is at this point that the campus officials charged with response will be swamped with reports. And it is at this same inflection point that the need to keep developing prevention strategies can make the difference between reducing reports by reducing incidents (ideal, solid lines) and just continuing along with a higher number of incidents being reported, but not making a dent in the number of incidents occurring (dotted lines).

Theoretical Reporting Curve for Reports of Sexual Assault, Joseph Storch (2015).



It is important for institutions to be thoughtful in approaching response and prevention to ensure that positive momentum towards responding appropriately, increasing reporting, and then decreasing incidents of assault keeps moving forward.

155. See Stacey J.T. Hust et al., *Law & Order, CSI, and NCIS: The Association Between Exposure to Crime Drama Franchises, Rape Myth Acceptance, and Sexual Consent Negotiation Among College Students*, J. OF HEALTH COMM., 0:1-13 (Sep. 29, 2015), for an interesting analysis of the impact of television shows on the culture surrounding sexual assault and willingness to intervene to prevent an assault.

CONCLUSION

Although it is not his job as an author, Krakauer's book is long on identifying problems and short on proposing solutions. That task is for the higher education community. His book provides powerful insight into how sexual assault complaints were handled in that community both on and off campus, including how the legal, ethical, investigatory, and judgment failures made by many offices tasked with responding to these crimes negatively impacted reporting individuals and did little to prevent future violations. The book raises frightening statistics and tells horrifying stories, but offers no concrete advice on how to avoid these tragedies in the future.

Despite copious news stories to the contrary, our experience is that higher education is full of professionals seeking to continually build capacity in lowering incidents of sexual and interpersonal violence. While no one college has all of the answers, significant effort and resources are going towards developing effective prevention and response resources and methods, and gathering evidence regarding which methods work best. There are many state and federal legislators, regulators, auditors, activists, journalists, and others who try to tell colleges and universities how to address sexual violence on campus, yet the methods keep evolving. Most (although not all) have little experience on college campuses. For them, the issue is clear and binary. People who believe what they themselves believe are good; people who believe the opposite are evil. There is no room for middle ground or the possibility that people of good faith can have different methods for addressing these crimes. Truthfully, sexual assault prevention, like the issue of sexual assault itself, is far more nuanced than any press-release length analysis could bring to bear. Krakauer's book does not provide the solution, but it is an analysis of the problem that is well worth reading by anyone in higher education interested in developing solutions.