

## COMMENTARY

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### SEXUAL HARASSMENT IN ELEMENTARY AND SECONDARY EDUCATION: A COMPARATIVE ANALYSIS OF SOUTH AFRICA AND THE UNITED STATES\*

by

RIKA JOUBERT, PH. D.<sup>1</sup> AND WILLIAM E. THRO, M.A., J.D.<sup>2</sup>

South Africa has one of the highest rates of violence against women in the world.<sup>3</sup> The South African Government regards the rape and sexual abuse of children as a “grave concern.”<sup>4</sup> “[O]n a daily basis in schools across the nation, South African girls of every race and economic class encounter

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1. Rika Joubert is the Director Interuniversity Centre for Education Law and Policy and a Senior Lecturer, Department of Education Management and Policy Studies at the University of Pretoria, South Africa. In addition to providing training programs for educational administrators throughout South Africa, Dr. Joubert regularly speaks throughout Africa, Europe, Asia, and the United States. She is the author of four books, seven book chapters, and ten articles. She has published on four continents. Dr. Joubert may be reached at rika.joubert@up.ac.za
2. William E. Thro is the State Solicitor General of Virginia and an adjunct professor at both Christopher Newport University and Regent University School of Law. As State Solicitor General, he is responsible for the Virginia State Government’s United States Supreme Court litigation (except capital cases) as well as lower court appeals involving a constitutional challenge to a statute or involving a politically sensitive issue. In the United States Supreme Court, he presented two oral arguments, supervised another argument, and was on brief for two other cases. A recipient of a NATIONAL ASSOCIATION OF ATTORNEYS GENERAL BEST BRIEF AWARD, he has co-authored eight amicus briefs on the merits and more than forty briefs at the petition stage.

Prior to becoming State Solicitor General in 2004, he practiced education law as General

Counsel for Christopher Newport University, Interim General Counsel for Old Dominion University, and as litigation counsel for Colorado State University and the Colorado Department of Education. In addition to co-editing three books, Mr. Thro has authored or co-authored three monographs, nine book chapters, thirty-five law review articles, and four book reviews in scholarly journals. A FELLOW OF THE NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS, he is serving or previously served on the Editorial Advisory Committee of the EDUCATION LAW REPORTER, the Advisory Board of the ENCYCLOPEDIA OF HIGHER EDUCATION LAW, the Editorial Board of the ENCYCLOPEDIA OF EDUCATION LAW, the Authors’ Committee of the EDUCATION LAW REPORTER, the Editorial Board of the JOURNAL OF COLLEGE & UNIVERSITY LAW, and as a Contributing Author to the YEARBOOK OF EDUCATION LAW.

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3. N. Taylor, *Prohibiting the Ongoing Sexual Harassment of and Sexual Violence against Learners, Education Rights Project*, issue paper four (2002) (available at <http://www.erp.org.za/html/issue4-2.htm>).
4. Human Rights Watch, SOUTH AFRICA: SEXUAL VIOLENCE RAMPANT IN SCHOOLS: HARRASSMENT AND RAPE HAMPERING GIRLS’ EDUCATION (1997) (New York: Human Rights Watch) (available at <http://www.hrw.org/english/docs/2001/03/27/safric324.htm>).

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sexual violence and harassment at school that impedes their realization of the right to education.”<sup>5</sup> A 2002 research report showed that one out of three black students<sup>6</sup> in the Johannesburg area experienced sexual violence in their schools.<sup>7</sup> At a majority of the predominately black schools, there was little or no monitoring of what happened on school premises during and after school hours.<sup>8</sup> This report led to a campaign in all nine provinces of South Africa to investigate the prevalence of sexual violence in schools.<sup>9</sup> As the National Government admitted, “[C]ulturally there is a problem with reporting sexual abuse, because victims are afraid of being victimized or stigmatized”<sup>10</sup> and “[a]mongst boys it is not acceptable to admit sexual abuse.”

Although the problem in the United States is not so grave,<sup>11</sup> sexual harassment<sup>12</sup> of students by their teachers and/or by other students remains a significant problem.<sup>13</sup> Yet, regardless of whether it is prevalent in South

5. Human Rights Watch 2001, SCARED AT SCHOOL: SEXUAL VIOLENCE AGAINST GIRLS IN SOUTH AFRICAN SCHOOLS (2001) (New York Human Rights Watch) (available at <http://www.hrw.org/reports/2001/safrica/>).
6. As used in this Article, the term “black” refers to those South African citizens whose ancestry is primarily, if not exclusively, from the African continent. It does not include those South African citizens whose ancestry is primarily from the European or Asian continents. Such a definition is consistent with current South African governmental policies.
7. Community Information, Empowerment, and Transparency International, SOUTH AFRICA: SEXUAL VIOLENCE AND HIV/AIDS: EXECUTIVE REPORT ON THE 2002 NATIONAL SURVEY (2004) (available at [http://www.ciet.org/en/documents/projects\\_library\\_docs/2006316174822.pdf](http://www.ciet.org/en/documents/projects_library_docs/2006316174822.pdf)).
8. For example, learners were being abused in toilets or secluded classrooms where there was no supervision at the time. Alcohol and drug abuse and the unmonitored presence of alcohol and drugs on school premises also contributed to the problem of sexual violence (Human Rights Watch 2001, *supra* note 5).
9. The media in South Africa, on a regular basis, reports incidents of sexual violence. For example, girls live in utter fear because a “male teacher carries a cane and uses it liberally to girls refusing to perform sexual favors.” *Abuse at Schools Examined*, SOWETAN SUNDAY WORLD, 6 May 2001. *Sexual Assault Claims Hit School*, THE DAILY NEWS, May 2003, reports that a senior teacher at a Cape Town Primary School has been arrested and charged with sexually abusing ten young girls. *Living in utter fear*, THE SOWETAN, 16 September 2002, reports that 12% of black male students admit that they have had sex with girls without their consent. In low socio-economic communities, the problem of sexual abuse occurs because educators are unable to cope with students. *Sexual Abuse*, THE CITY PRESS, 1 June 2005. Students have no self-respect. The teachers lose control and the resulting lack of discipline lead to boys harassing and abusing girls.
10. The comments of the Government were in response to SEXUAL ABUSE IN SCHOOLS: SUBMISSION BY THE DEPARTMENT OF EDUCATION TO TASK GROUP ON SEXUAL ABUSE IN SCHOOLS 11 MARCH 2002 (SOUTH AFRICAN GOVERNMENT INFORMATION) (AVAILABLE AT [HTTP://WWW.INFO.GOV.ZA/OTHERDOCS/2002/SEXUAL.HTM](http://www.info.gov.za/otherdocs/2002/sexual.htm)).
11. American discussions of the subject tend to focus on sexual harassment rather than examples of sexual violence. Apparently, sexual violence is rare in American schools.
12. The term “sexual harassment” is a mere subset of “sexual abuse” and “sexual violence.”
13. Some advocacy groups have suggested “[a]pproximately 15% of students will be sexually abused by a member of the school staff during their school career. In a survey of high school graduates, 17.7% of males and 82.2% of females reported sexual harassment by faculty or staff during their school careers.” *Sexual Harassment in Education, Sexual Harassment Support* (available at <http://www.sexualharassmentsupport.org/SHEd.html>). See also American Association of University Women’s study, HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL (2002) (survey results indicating that eight in ten students experience some form of sexual

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Africa<sup>14</sup> or merely a significant problem in the United States, any instance of sexual harassment, abuse, or violence is unacceptable.<sup>15</sup> A democratic government has a responsibility to ensure that students have a safe learning environment.<sup>16</sup>

The purposes of this Article are to compare South African and American laws concerning sexual harassment in K–12 education and to review both nations’ approaches. These twin purposes are accomplished in three distinct sections. The first section offers an overview of South African law. The second section offers a similar treatment of the United States. The final section offers a critique and policy recommendations. In undertaking this effort, our aim is not to condemn South Africa, to praise the United States, or vice versa. Rather, our intention is to contrast the approaches and suggest ways to improve the law in both nations.

### I. SOUTH AFRICA

#### A. The National Constitution

When the white minority in South Africa voluntarily surrendered its control of the government to the black majority in the early 1990’s,<sup>17</sup> all segments the multi-racial society<sup>18</sup> negotiated a Constitution.<sup>19</sup> The National

harassment during their school lives. Six in ten experience physical sexual harassment).

14. For a South African perspective on solving the problem, see A. Dawes, R. Bray, & A. Vander Merwe (Eds.), *Monitoring Child Well-Being: A South African Rights-Based Approach* (2007) (Cape Town: HSRC Press).

15. See generally William E. Thro, *The Duty to Discipline: The Constitutional and International Obligations of American and South African Schools to Maintain Order*, in *PERSPECTIVES ON LEARNER CONDUCT* 273 (I.J. Oosthuizen, J.P. Rossouw, C.J. Russo, J.L. Van Der Walt, & C.C. Wolhuter, eds., 2007) (Potchefstroom, South Africa, Platinum Press).

16. To be sure, the law in both America and South Africa provides substantial protections to the accused. See Rika Joubert & Joan Squelch, *LEARNER DISCIPLINE IN SCHOOLS* 41-49 (2nd ed. 2005) (Center for Education Law & Policy) (discussing South Africa’s protections); Charles J. Russo, *THE LAW OF PUBLIC EDUCATION* (5th ed. 2006) (Foundation Press) (discussing the United States’ protections).

17. For a comprehensive account of those events, see Allister Sparks, *TOMORROW IS ANOTHER COUNTRY* (1994).

18. For a discussion of those negotiations, see I.J. Rautenbach & E.F.J. Malherbie,

*CONSTITUTIONAL LAW* 17-21 (4th ed. 2004); Ziyad Motala & Cyril Ramaphosa, *CONSTITUTIONAL LAW: ANALYSIS & CASES* 1-11 (2002).

19. The South African Constitution embodies deference to the will of democratic majorities. This is expressed in a number of constitutional provisions. First, Constitutional Court—the highest judicial body—is commanded to “promote the values that underlie an open and democratic society based on human dignity, equality, and freedom.” S. AFR. CONST. Bill of Rights § 39(1). Second, a two-thirds majority of the National Assembly can amend the most provisions of the Constitution at any time. *Id.* at § 74(3). Since one party—the African National Congress—currently holds more than two-thirds of the seats, revision of the nation’s fundamental law can be accomplished a single political party. Third, the National Assembly—the legislature—is elected by proportional representation, which allows parties with low levels of support to obtain seats. *Id.* at § 46(1)(d). Fourth, because the President is the leader of the party or the coalition that has a majority in the National Assembly, see *id.* at § 86, there is neither a legislative check on the executive nor an executive check on the legislature. Fifth, although South Africa is nominally a federation, see *id.* at §§ 103-141, the individual provinces are subordinate to the will of the National Government, which, as explained above, is controlled by democratic majorities.

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Constitution of South Africa contains several provisions that independently or collectively establish a right to be free from sexual harassment. First, unlike the United States, there is an affirmative right to an education.<sup>20</sup> If the right to an education includes the right to education in a specific language and special measures to redress the results of past racial discrimination, then it arguably includes a right to an educational environment that is free from sexual harassment.<sup>21</sup> Second, South Africa's right to equality<sup>22</sup> implicitly provides guaranteeing basic educational rights at least with respect to race, gender, and sexual orientation discrimination.<sup>23</sup> Third, South Africa's guarantees concerning children<sup>24</sup> can be viewed as suggesting a right to be free from sexual harassment. If a child's education is disrupted by instructor's sexual harassment or by peer sexual harassment, then the child's "best interests" are not advanced.<sup>25</sup> "The general principle that a child's best interests are of paramount importance in every matter concerning the child, is now a separate constitutional right."<sup>26</sup> Fourth, the National Constitution places a premium on the recognition and protection of the right of every person to be free from all forms of violence.<sup>27</sup>

Of course, South Africa does have a comprehensive Bill of Rights and the Constitutional Court vigorously enforces those rights. Indeed, the Constitutional Court invalidated the initial Constitution. *See In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) (S. Afr. 1996). However, this judicial check is the only real check on the power of a democratic majority. For South Africa, the Bill of Rights creates limits on government rather than merely confirming the limits that are implicit in the structure.

20. *See* S. AFR. CONST. Bill of Rights § 29. As two of South Africa's leading constitutional scholars described the constitutional right to an education:

Everyone has the right to a basic education, including adult basic education. Everyone has the right to further education that the state, through reasonable measures, must make progressively available and accessible. Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to give effect to this right, all reasonable educational alternatives, including the single medium institutions, must be considered, taking into account equity, practicability, and the need to redress the results of past racial discrimination.

I.M. Rautenbach & E.F.J. Malherbe, CONSTITUTIONAL LAW 348 (4th ed. 2004) (Lexis-Nexis Butterworths).

21. *See* SAFE SCHOOLS 52-68 (I.J. Oosthuizen, ed., 2nd 1999) (Center for Education Law & Policy).

22. S. AFR. CONST. Bill of Rights § 9.

23. *See* W. Bray, HUMAN RIGHTS IN EDUCATION 43-54 (2nd ed. 2005) (Center for Education Law & Policy) (discussing the equality guarantee). *Cf.* Rautenbach & Malherbe, *supra* note 20 at 329-32 (discussing the right to equality as an equal protection component).

24. S. AFR. CONST. Bill of Rights § 28.

25. *See* Bray, *supra* note 23, at 66-67 (discussing best interests with reference to international treaties providing for safety and security in education).

26. Rautenbach & Malherbe, *supra* note 20, at 348. *See also* Minister for Welfare & Population Development v. Fitzpatrick, 7 BCCLR 713, 3 SA 422 (S. Afr. 2000).

27. S. AFR. CONST. Bill of Rights § 12(1)(c). The question now is whether this right imposes a duty on the State or individual to ensure that all students are free from all forms of violence. In this regard, S. AFR. CONST. Bill of Rights § 7(2) of the Constitution imposes a corresponding duty on the state to "respect, protect, promote and fulfill" the rights enshrined in the Bill of Rights. It imposes three distinct duties on the state. The duty to "respect" is negative. It requires the state to refrain from infringing these rights. The duty to "protect" is positive, it obliges the state to protect these rights from infringement by third parties. The duty to "promote and fulfill" is also

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The entrenchment of fundamental rights in the Bill of Rights enhances the protection of all people.<sup>28</sup> The vertical and horizontal applications of the Constitution can take place in a direct or indirect manner. Direct vertical application means that the State must respect the fundamental rights. Direct horizontal application entails that the courts must give effect to an applicable fundamental right by applying and, where necessary, developing common law to give effect to a right. In the case of an infringement of or a threat to a fundamental right, a prejudiced or threatened person is entitled to approach a competent court for appropriate relief. The infringement of a fundamental right *per se* constitutes a wrongful action. However, the requirements for a delict (tort) and a constitutional wrong differs.<sup>29</sup> Unlike a delictual remedy that is aimed at compensation, a constitutional remedy is directed at affirming, enforcing, protecting, and vindicating fundamental rights.

### B. International Law

The South African Constitution mandates that, in interpreting the Bill of Rights,<sup>30</sup> the courts must consider international law,<sup>31</sup> including international law that is not binding on South Africa.<sup>32</sup> The United Nations Convention on the Rights of the Child, which South Africa adopted in 1989, generally mandates that government take affirmative steps to ensure that children are safe and are able to obtain a meaningful education.<sup>33</sup> The Organization of African Unity's Charter on the Rights of the Child takes a similar approach.<sup>34</sup>

positive in that it requires the state to use its power to advance these rights and assist individual right-holders to realize them.

Based on the foregoing, the most effective application of S. AFR. CONST. Bill of Rights § 12(1)(c) would be achieved by interpreting it to impose similar positive and affirmative obligations on the South African state in relation to the eradication of violence against the person. The right thus requires not only effective legislative measures for dealing with violence but also effective administrative policies for enforcing legislation and for combating violence. Courts should similarly create remedies to achieve similar results, even where this may entail new legislation. However, it would be insufficient to enact legislation that is both unworkable and incapable of implementation. Budgets and support structures need to examine in the drafting of any legislation in order to give effect to the rights enshrined in the Constitution. In *Carmichele v. Minister of Safety and Security*, the Constitutional Court stated that the State is obliged "to provide appropriate protection to everyone through laws and structures designed to afford such protection." This may, in appropriate circumstances, imply "a positive obligation on the authorities to take preventative operational measures to pro-

tect an individual whose life is at risk from the criminal acts of another individual."

28. See S. AFR. CONST. Bill of Rights § 7.
29. Neethling, Potgieter, Visser, *LAW OF DELICT* 20 (2006) (Durban: LexisNexis Butterworths).
30. See S. AFR. CONST. § 39(1)(b).
31. In contrast, no such obligation exists for the American courts. *Breard v. Greene*, 523 U.S. 371, 377, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998) (*per curiam*). Indeed, the Supreme Court of the United States has refused to follow decisions of the International Court of Justice that involved the United States, See *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2684-85 (2006), or to allow the President to implement such decisions unilaterally. *Medellin v. Texas*, 128 S. Ct. 1346 (2008). Because of these different approaches, international treaties are far more significant in the South African context than in the American context.
32. See *State v. Makwanyane*, 6 BCCLR 665, 3 SA 391 (S. Afr. 1995). See also Rautenbach & Malherbe, *supra* note 20, at 42.
33. See Bray, *supra* note 23, at 66-67.
34. *Id. Cf. Joubert & Squelch*, *supra* note 16, at 14-15 (discussing the influence of international human rights norms on school discipline).

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Thus, South Africa has an implicit, if not explicit, obligation to ensure a safe learning environment for all students. This obligation forms the foundation of a right to be free from sexual harassment. That is, the international obligations impose an affirmative obligation to take action to prevent and stop sexual harassment.

### C. Statutory, Common Law, and Custom

#### 1. State-law pluralism in South Africa

In South Africa, “State law” consists of a Western component and an African component. The Western component comprises the common law, legislation, and juridical precedent. The African component comprises official customary law incorporated into legislation, or pronounced in juridical decisions as well as a body of substantive customary law that has not specifically been included in legislation or confirmed by the courts. The multicultural South African society demands a system of law that accommodates the needs of all sectors of society.<sup>35</sup>

#### 2. General principles of the law of delict (tort law)

In order to constitute a delict (tort), one person must have caused damage or harm to another person by means of an act or conduct. Although the law is hesitant to find that there was a legal duty on someone to act positively and so to prevent damage to another, conduct may be in the form of a commission or an omission. In terms of the common law and the law of delict, a person does not act wrongfully where he/she fails to act positively to prevent harm to another. A person is generally not liable for his/her failure to act (omission). Liability only follows if the omission is wrongful and there existed a legal duty or “duty of care” on the defendant to act positively to prevent harm from occurring.

In *K v. Minister of Safety and Security*,<sup>36</sup> a 20-year old female was stranded far from home after her boyfriend abandoned her. Three uniformed police officers offered to take her home. Her gratitude turned into horror when they subsequently raped her. In its judgment, the Constitutional Court said the opportunity to commit a crime would not have arisen but for the trust the applicant placed in the police officers and the nature of their employment. When the police officers in uniform raped the applicant, they were simultaneously failing to perform their duties to protect the applicant. Not only did they not protect her, they infringed her rights to dignity and security of the person.<sup>37</sup> The common-law principle of vicarious liability holds an employer liable for the delicts committed by its employees where the employees are acting in the course and scope of their duties as employees. Therefore, the respondent is vicariously liable for the conduct of the police officers. Similarly, a school is responsible for the care and welfare of its students. Teachers, especially the school principal, are entrusted with the care and safety of the students. Abusing the special position in which their

35. Bekker, Rautenbach & Goolam, INTRODUCTION TO LEGAL PLURALISM IN SOUTH AFRICA 14 (2006) (Johannesburg: LexisNexis).

36. See *K v. Minister of Safety and Security*, 2005 (6) SA 419 (S. Afr. 2005).

37. S. AFR. CONST. §§ 10, 12.

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employment places them by sexually abusing students would hold the school and the Department of Education liable.

The customary law of delict, actionable by individuals, gives redress for the violation of any right representing material value, capable of being acquired by a family head. This implies redress for injury to a woman insofar as a family head's rights in her have been violated. Sexual delicts in terms of customary law can only be properly understood against the background of the subordinate position that a woman occupies in customary law and the fact that her sexual integrity and childbearing capacity belong to a male person.<sup>38</sup> In terms of the Law of Evidence Amendment Act (1988), courts have discretion to apply either customary or common law. Various customary laws exist regarding sexual delicts.<sup>39</sup>

### 3. Law of personality

All people (legal subjects) are holders of subjective rights that arise when the law recognizes existing individual interests as being worthy of protection.<sup>40</sup> Different categories of subjective rights are distinguished of which personality rights is an example. Aspects of human personality such as good name, physical integrity, honor, privacy, dignity, and identity are connected with personality rights. The personality rights are:

- Right to body and the right to life<sup>41</sup>
- Right to physical freedom<sup>42</sup>
- Right to good name (reputation)<sup>43</sup>
- Right to dignity<sup>44</sup>

38. Bekker, *supra* note 35, at 83.

39. For example, defloration of a girl does not give rise to a delictual claim in all communities. As sexual activities normally take place in private, the courts are often confronted by the girl's evidence against that of the man. In *Mayer v. Williams*, 1981 (3) SA 348 (A) (S. Afr. 1981), the Appeal Court held that corroboration, required by customary law, is no longer required in sexual cases, but that the cautionary rule as applied in criminal cases is adequate. The customary law delict of adultery differs from the concept in South African common law. Adultery in customary law can only be committed by the wife, not the husband of a customary marriage. Thus, only the man can claim for compensation on the ground of adultery.

40. J. Neethling, J., J.M. Potgieter, & P.J. Visser, *LAW OF PERSONALITY 12* (2005) (Durban: LexisNexis Butterworths).

41. The physical-psychological aspect of human beings may be regarded as the most valuable interests they possess. Physical infringements necessarily affect the psyche, while psychological injuries often cause deterioration in physical health.

42. Physical freedom is of inestimable value to a human being. An environment that prevents students from walking alone or participating in educational activities because of their fear for sexual harassment or abuse unfairly limits the physical freedom of movement or action by students.

43. A person's good name is the respect and status he/she enjoys in society. Diametrically opposed to the right to a good name is the right to freedom of expression. S. AFR. CONST. Bill of Rights § 16. The communication of defamatory words, often linked to sexual harassment, constitutes infringement of a person's good name. Distributing defamatory words, pictures, or information of a sexual nature about a student impairs the student's good name.

44. The recognition of the right to human dignity as a fundamental right, S. AFR. CONST. Bill of Rights § 10, emphasizes the fact that dignity as a personality right is worthy of protection. Neethling, *LAW OF PERSONALITY*, *supra* note at 191. In *State v. Makwanyane*, 1996 (2) BCLR 665 (CC) (S. Afr. 1996), the constitutional Court highlighted the rights to life and dignity as the most important of all human rights. Dignity

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- Right to feelings<sup>45</sup>
- Right to privacy<sup>46</sup>
- Right to identity<sup>47</sup>

It is thus necessary to assess critically the safeguards and legal framework currently protecting students from sexual harassment.

### 4. *The common-law duty of care*

A breach of a legal duty is actionable in delict and based on the negligence of the defendant in complying with his/her duty of care. In order to determine whether a legal duty has been breached, the Courts generally have regard to the *boni mores* of the community. The Constitution influences the *boni mores* criterion because the community must now incorporate the constitutional values and norms and give effect to them. The founding values underpinning the Constitution namely equality, human dignity, and freedom must take precedence over existing *mores*.

The legal convictions of the community, articulated by the spirited purpose and objective of the Bill of Rights, demand that the State protect children from all forms of sexual violence and ensure that their right to education is not impeded in any way. The Bill of Rights embraces a substantive conception of equality and dignity, which demands of the State that those who are most vulnerable be afforded special protection. It places upon the State an enhanced duty to protect women and children against sexual violence and vests it with liability when it negligently fails to discharge that duty. Therefore, there is a duty on the State, through its employees, to take “preventative measures” and “reasonable steps” when dealing with sexual harassment and sexual violence of learners in schools.

Where a special relationship exists between parties such as teacher and student, a breach of legal duty would be viewed within the context of this special relationship. This is illustrated by the decision of *Rusere v. The Jesuit*

is infringed by addressing insulting words, improper sexual proposals or conduct. To determine whether the subjective feelings of dignity are wrongful, the behavior must not only infringe the subjective feelings of dignity, but also be of an insulting nature and in conflict with the legal convictions of the community or *contra bonos mores*.

45. The infringement of the subjective right to feelings should be approached in the same way as defamation. In other words, the conduct must not only infringe feelings, but also be in conflict with the convictions of the community. For example the infringement of a woman’s feelings of chastity or religious feelings. Neethling, *LAW OF PERSONALITY*, *supra* note 29 at 199. The question is whether the infringement causes the person distress and hurt mainly because of her religious beliefs.

46. The importance of privacy as an interest worthy of legal protection is emphasized by

the recognition of the right to privacy as a fundamental right. S. AFR. CONST. Bill of Rights § 14. Infringement of the right to privacy occurs through both intrusion into and disclosure of a person’s private personal facts. Intrusion includes intruding into a person’s home, secretly watching them, and eavesdropping on private conversations. A confidential relationship exists between a teacher and student.

47. Infringement of the right to identify occurs when information (e.g. photographs) are used in a way that does not reflect the person’s true personality. Forcing a person to make a false statement or using a person’s name in connection with matters to which he/she has no association or which he/she is associated in a way other than was presented results in a violation of a person’s right to identity.



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*Fathers*<sup>48</sup> where an eight-year-old boy sustained an injury to his eye whilst playing a game on school premises. The Court held that

[t]he duty of care owed to children by school authorities has been said to be to take such care of them as a careful father would take of his children. This means no more than the schoolmaster, like parents must observe towards their charges the standard of care that a reasonable prudent man would observe in the particular circumstances.<sup>49</sup>

Similarly, in *Wynkwart NO v. Minister of Education and Another*,<sup>50</sup> a parent had instituted action on behalf of his son, who allegedly had been seriously injured when he fell off an unused, locked gate at his school. The trial court held that the degree of supervision to be exercised in a particular case would depend upon a great variety of circumstances and found in favor of the respondent, whereupon the appellants appealed against the decision. The question for consideration was whether the defendants were liable for the injuries sustained by his son. On appeal, the decision was reversed and the Court held that the degree of supervision required depended on the risks to which the students were exposed.<sup>51</sup> *Wynkwart* seems to suggest that the duty of care expected by schools goes further than simply holding that there is a duty to warn learners of potential dangers, and that a teacher would have to ensure that no harm occurs. In the context of sexual violence, it would thus be insufficient to warn or educate learners in relation to sexual abuse without taking steps to ensure that no such harm occurs while on school premises.

### 5. Education laws in South Africa

Under the Employment of Educators Act of 1998, an educator may be charged with misconduct.<sup>52</sup> The employer may, at any time, suspend that educator from duty on such conditions as the employer may determine.<sup>53</sup> However, the Employment of Educators Act is not preventative, but is punitive in nature.<sup>54</sup>

The Regulations for Safety Measures at Public Schools (amended in 2006) specifically addresses aspects such the supervision of students during educational activities and the prohibition of any alcohol and other illegal substances on the school premises.<sup>55</sup>

48. See *Rusere v. The Jesuit Fathers*, 1970 (4) SA 537 (R) (S. Afr. 1970).

49. *Id.*

50. See *Wynkwart v. Minister of Education and Another*, 2002 (6) SA 564 (CC) (S. Afr. 2002).

51. *Minister of Education v. Wynkwart*, No 2004 (3) SA 577 (CC) (S. Afr. 2004).

52. Employment of Educators Act of 1998, § 17 (1) (c).

53. Employment of Educators Act of 1998, § 20(1). Moreover, § 188 (1) of the Labor Relations Act No 66 of 1995 makes provision to dismiss an employee for misconduct.

54. Section 18(g) states that

“An educator shall be guilty of misconduct if the educator behaves in a disgraceful, improper or unbecoming manner, or, while on duty, is discourteous to any person, or commits sexual or any other form of harassment;” In the case of serious misconduct the employer may immediately suspend or transfer a teacher to another post and arrange to conduct a disciplinary hearing within one month of the suspension or transfer. In the case of sexual abuse, the teacher’s misconduct is also a criminal offence. The criminal procedure and the disciplinary procedure will continue as separate and different proceedings.

55. Section 18 of the Employment of Educators Act clearly defines teacher misconduct.

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The South African Council for Educators (SACE) was established by the terms of the South African Council for Educators Act in 2000.<sup>56</sup> The Code of Conduct of SACE specifically prohibits sexual relationships with students and emphasizes the duty of care obligation of the educators. The action of an employer to discipline a teacher should not be confused with the actions taken by SACE. SACE can only take action to protect the interests of the teaching profession in the event of a teacher breaches the code of professional ethics.

## II. UNITED STATES

### A. National and State Constitutions

Although there is nothing in either the text of the United States Constitution nor any State Constitution that explicitly imposes a duty to stop sexual harassment, such a duty may be inferred from two different constitutional sources.

First, the Equal Protection Clause<sup>57</sup> is “essentially a direction that all persons similarly situated . . . be treated alike.”<sup>58</sup> Because the Constitution protects “*persons*, not *groups*,”<sup>59</sup> the “rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.”<sup>60</sup> If the government treats everyone equally, there is no equal protection violation.<sup>61</sup> The “general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”<sup>62</sup> This general rule gives way in those rare instances when statutes infringe upon fundamental constitutional rights or utilize “suspect” or “quasi-suspect” classifications.<sup>63</sup> Gender classifications are tolerated only if the classification (1) serves important governmental objectives; and (2) is substantially related to the achievement of those objectives.<sup>64</sup> In applying this standard, the U.S.

duct as “fails to comply with any statute, regulation or legal obligation relating to education.”

**56.** SACE has three primary functions: (1) The registration of all persons entitled to teach in South Africa; (2) The professional development of educators; and (3) The regulation of the ethics of the profession through a Code of Conduct and its disciplinary measures.

**57.** U.S. CONST. amend. XIV, § 1.

**58.** *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

**59.** *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (emphasis in original). See also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279-80, 106 S.Ct. 1842, 90 L.Ed.2d 260 [32 Ed.Law Rep. [20]] (1986)

(Powell, J., joined by Burger, C.J., Rehnquist, J.).

**60.** *Shelley v. Kraemer*, 334 U.S. 1, 22, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).

**61.** *Romer v. Evans*, 517 U.S. 620, 623, 116 S.Ct. 1620, 134 L.Ed.2d 855 [109 Ed.Law Rep. [539]] (1996).

**62.** *Cleburne*, 473 U.S. at 440, 105 S.Ct. 3249. See also *Schweiker v. Wilson*, 450 U.S. 221, 230, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981).

**63.** *Cleburne*, 473 U.S. at 440-41, 105 S.Ct. 3249. See also *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969).

**64.** *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724, 102 S.Ct. 1331, 73 L.Ed.2d 1090 [5 Ed.Law Rep. [103]] (1982). See also *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976).

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Supreme Court generally upholds statutes that seem to be a reasonable means of compensating one gender for past societal discrimination,<sup>65</sup> but has invalidated those statutes that appear to be based on a sexist stereotype.<sup>66</sup> Because the Equal Protection Clause prohibits differing treatment because of gender, schools have an obligation to stop harassment based on gender.

Second, although education is not a fundamental right under the United States Constitution,<sup>67</sup> “education is perhaps the most important function of state and local governments.”<sup>68</sup> Indeed, “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”<sup>69</sup> Because “Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government,”<sup>70</sup> every State Constitution has a provision mandating, at a minimum, that the State provide a system of free public schools.<sup>71</sup> The universality of state constitutional mandates for education makes education an American constitutional value even though the U.S. Supreme Court has rejected it as federal fundamental right. Because quality education is an American constitutional value, each student has a right to a quality education. Thus, state government

65. *See Califano v. Webster*, 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 360 (1977) (upholding a statute which allowed women to use a different method of calculating retirement benefits).

66. *See Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979) (invalidating statute which allowed alimony from men to women but prohibited alimony from women to men); *Califano v. Goldfarb*, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977) (invalidating a provision which exempted women from the requirement of proving dependency in order to collect survivor benefits). *But see Nguyen v. INS*, 533 U.S. 53, 121 S.Ct. 2053, 150 L.Ed.2d 115 (2001) (upholding a federal statute which treated the foreign-born children of male U.S. Citizens differently from the children of female U.S. Citizens).

67. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

68. *Brown v. Board of Educ.*, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954). *See also Wisconsin v. Yoder*, 406 U.S. 205, 213, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (“Providing public schools ranks at the very apex of the function of a State”).

69. *Brown*, 347 U.S. at 493, 74 S.Ct. 686.

70. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (Brennan, J., concurring). *See also Plyler v. Doe*, 457 U.S. 202, 221, 102 S.Ct. 2382, 72 L.Ed.2d 786 [4 Ed.Law Rep. [953]] (1982) (noting “the importance of education

in maintaining our basic institutions . . .”); *Rodriguez*, 411 U.S. at 29-30, 93 S.Ct. 1278 (“the grave significance of education both to the individual and to society cannot be doubted”).

71. *See* Ala. Const. art. 14; § 256; Alaska Const. art. VII, § 1; Ariz. Const. art. XI; § 1; Ark. Const. art. XIV, sec 1; Cal. Const. art. IX, § 5; Colo. Const. art. IX; § 2; Conn. Const. art. VIII; § 1; Del. Const. art. X, § 1; Fla. Const. art. IX; § 1; Ga. Const. art. VIII, § VII, para. 1; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 1; Ill. Const. art. X, § 1; Ind. Const. art. VIII, sec. 1; Iowa Const. art. IX, § 3; Kan. Const. art. VI, § 1; Ky. Const. § 183; La. Const. art. VIII, § 1; Me. Const. art. 8, § 1; Md. Const. art. VIII, § 1; Mass. Const. pt. 2, ch. 5; Mich. Const. art. VIII, § 2; Minn. Const. art. XIII, § 1; Miss. Const. art. VIII, § 201; Mo. Const. art. 9. § 1(a); Mont. Const. art. X, § 1; Neb. Const. art. VII, § 1; Nev. Const. art. XI, § 2; N.H. Const. pt. 2, art. 83; N.J. Const. art. VIII, § 4; N.M. Const. art. XII, § 1; N.Y. Const. art. XI, § 1; N.C. Const. art. IX, § 2; N.D. Const. art. VII, § 1; Ohio Const. art. VI, § 3; Okla. Const. art. XIII, § 1; Or. Const. art. VIII, § 3; Pa. Const. art. III, § 14, R.I. Const. art. XII, § 1; S.C. Const. art. XI, § 3; S.D. Const. art. VIII, § 1; Tenn. Const. art. XI, § 12; Tex. Const. art. VII, § 1; Utah Const. art. X, § 1; Vt. Const. ch. 2, § 68; Va. Const. art. VIII, § 1; Wash. Const. art. IX, § 1; W.Va. Const. art. XII, § 1; Wis. Const. art. X, § 3; Wyo. Const. art. VII, § 1.

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has an obligation to ensure that every student has an opportunity to receive a quality education. If sexual harassment transforms the school into a place of fear and insecurity, then quality education is undermined. The only way to ensure that all students receive a quality education is to make certain that order is maintained in the classroom.

### B. Federal Statutes

Title IX of the Education Amendments of 1972<sup>72</sup> prohibits gender discrimination by schools—both public and private—that receive federal funds.<sup>73</sup> Although the statute does not explicitly mention sexual harassment, the U.S. Supreme Court has interpreted it to prohibit sexual harassment of students by both teachers<sup>74</sup> and other students.<sup>75</sup> In order to recover damages under Title IX for sexual harassment by a teacher or another student, the student victim must demonstrate that (1) an “appropriate person” (2) actually knew of the conduct; (3) the response of the school was deliberately indifferent; and (4) the offending behavior is so severe, pervasive, and

72. 20 U.S.C. § 1681.

73. Title IX is modeled on Title VI, 42 U.S.C. § 2000d, and the two statutes “operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.” *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286, 118 S.Ct. 1989, 141 L.Ed.2d 277 [125 Ed.Law Rep. [1055]] (1998). Indeed, Title VI and Title IX are to be interpreted in the same manner. *Cannon v. University of Chicago*, 441 U.S. 677, 694-96, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). Since Title VI is co-extensive with the Equal Protection Clause, *Grutter v. Bollinger*, 539 U.S. 306, 342, 123 S.Ct. 2325, 156 L.Ed.2d 304 [177 Ed.Law Rep. [801]] (2003); *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23, 123 S.Ct. 2411, 156 L.Ed.2d 257 [177 Ed.Law Rep. [851]] (2003), Title IX must also be co-extensive with the Equal Protection Clause. Thus, any Title IX claim is also a constitutional claim for violation of the Equal Protection Clause. Indeed, Title IX is “the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions—and that is true whether suit is brought against the educational institution itself or the flesh-and-blood decision-makers who conceived and carried out the institution’s response.” *Fitzgerald v. Barnstable School Comm.*, 504 F.3d 165, 179-80 [226 Ed.Law Rep. [579]] (1st Cir. 2007), *cert. granted*, 128 S.Ct. 2903 (2008). But see *Communities for*

*Equity v. Michigan High School Athletic Ass’n*, 459 F.3d 676, 690-91 [212 Ed.Law Rep. [56]] (6th Cir. 2006), *cert. denied*, 127 S.Ct. 1912 (2007). *Cf. id.* at 702-04 (Kennedy, J., concurring & dissenting) (suggesting that equal protection claims are precluded by Title IX). Moreover, it is impossible to bring a Title IX action against an individual. See *Kinman v. Omaha Public Sch. Dist.*, 171 F.3d 607 [133 Ed.Law Rep. [418]] (8th Cir. 1999); *Smith v. Metro. Sch. Dist.*, 128 F.3d 1014 [122 Ed.Law Rep. [48]] (7th Cir. 1997). Title IX operates to condition “an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.” *Kinman*, 171 F.3d at 610-11. Many Circuits have held that “because they are not grant recipients, school officials may not be sued in their individual capacity under Title IX.” *Id.* at 610; see also *Floyd v. Waiters*, 133 F.3d 786, 789 [123 Ed.Law Rep. [51]] (11th Cir.), vacated and remanded, 525 U.S. 802, 119 S.Ct. 33, 142 L.Ed.2d 25 (1998); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 901 [51 Ed.Law Rep. [35]] (1st Cir. 1988); *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 730 [107 Ed.Law Rep. [49]] (6th Cir. 1996) (Nelson, J., concurring).

74. *Gebser*, 524 U.S. at 288-92, 118 S.Ct. 1989.

75. *Davis v. Monroe Co. Bd. of Educ.*, 526 U.S. 629, 650-52, 119 S.Ct. 1661, 143 L.Ed.2d 839 [134 Ed.Law Rep. [477]] (1999).

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objectively offensive that it denies its victims *the equal access to education*.<sup>76</sup> In other words, the school must be aware of the alleged behavior and must choose to ignore the allegations.<sup>77</sup> Each of these four elements has been further clarified by the courts. First, an “appropriate person” is a school official “who at a minimum has authority to address the alleged discrimination and to institute corrective measures” on the school’s behalf.<sup>78</sup> Thus, the inquiry is whether the individual, acting alone, had the authority to terminate or otherwise discipline the alleged harasser.<sup>79</sup> Moreover, the mere fact that a person has duty to report incidents of sexual harassment does not mean that the person is considered an “appropriate person.”<sup>80</sup> Second, it is actual notice, not constructive notice, which triggers the school’s obligations.<sup>81</sup> Third, once it is established that “appropriate person” acquired actual knowledge of the conduct, then the Court must determine whether the school’s response was deliberately indifferent. The term “deliberate indifference” means that the school knows of the conduct and, as a matter of official policy, does nothing.<sup>82</sup> Deliberate indifference occurs when the school makes an official decision not to remedy the illegal conduct. Consequently, the school effectively causes a continuing violation. Conversely, acting to remedy the offending conduct, by itself, is sufficient to avoid a finding of deliberate indifference.<sup>83</sup> Indeed, the Supreme Court explicitly has stated that it is not necessary to terminate every faculty member or expel every student who engages in sexual harassment.<sup>84</sup> Fourth, in determining whether the conduct is so severe and objectively offensive to deny educational opportunities, the judiciary has avoided an expansive definition. For example, “simple acts of teasing and name calling” are not considered severe and objectively offensive.<sup>85</sup> The Court also stressed that it did not contemplate or hold that a mere decline in grades is sufficient.<sup>86</sup> The Court attempted to provide some general guidance as to when gender-oriented conduct rises to the level of actionable sexual harassment by stating that it “depends on a constellation of surrounding circumstances, expectations, and relationships, including, but not limited

76. See *Davis*, 526 U.S. at 650-52, 119 S.Ct. 1661. See also *Gebser*, 524 U.S. at 288-92, 118 S.Ct. 1989.

77. See *Kinman v. Omaha Public Sch. Dist.*, 171 F.3d 607, 610 [133 Ed.Law Rep. [431]] (8th Cir. 1999).

78. *Gebser*, 524 U.S. at 290, 118 S.Ct. 1989.

79. See *Floyd v. Waiters*, 171 F.3d 1264, 1266 [133 Ed.Law Rep. [717]] (11th Cir. 1999); *Rosa H. v. San Elizario Ind. Sch. Dist.*, 106 F.3d 648, 660 [116 Ed.Law Rep. [64]] (5th Cir. 1997) (both holding that there was no school district liability unless someone with the power to stop the abuse knew of the action).

80. See *Liu v. Striuli*, 36 F.Supp.2d 452, 466 [133 Ed.Law Rep. [431]] (D. R.I. 1999).

81. See *Gebser*, 524 U.S. at 289, 118 S.Ct. 1989. See also *id.* at 291, 118 S.Ct. 1989 (holding that school district did not have

actual notice of sexual relationship between student and teacher despite the fact that principal had been received complaints regarding the teacher’s inappropriate class comments).

82. *Gebser*, 524 U.S. at 290-91, 118 S.Ct. 1989 (citations omitted).

83. See *Gebser*, 524 U.S. at 291, 118 S.Ct. 1989 (“The administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation”).

84. *Davis*, 526 U.S. at 648, 119 S.Ct. 1661.

85. *Id.* at 652, 119 S.Ct. 1661 (quotation marks original).

86. *Id.*

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to, the ages of the harasser and the victim and the number of individuals involved.”<sup>87</sup>

### III. REVIEW AND RECOMMENDATIONS

#### A. South Africa

The tragedy of sexual abuse and harassment in South Africa requires a comprehensive executive and legislative response as well as vigorous enforcement by the judiciary.

First, the National Department of Education must provide leadership and mobilize commitment for combating sexual violence in schools at every level in the education system. At present, there is no national policy or guidelines dealing with the handling or prevention of sexual harassment and sexual violence within the school system.<sup>88</sup> Responding to various reports about the level of sexual harassment and sexual violence,<sup>89</sup> the Department of Education acknowledged “compelling evidence to indicate that both the nature and levels of abuse require immediate and urgent action.”<sup>90</sup> The Department of Education acknowledged that ineffective management systems and the lack of basic rules and regulations makes it impossible to apply sanctions. Furthermore, there is confusion as to what is, unacceptable and criminal both in relation to abuse and to sexual harassment.<sup>91</sup> In order to remedy these problems and ensure a more effective response to sexual violence in schools, the national Department of Education should: (1) adopt

**87.** *Id.*

**88.** The Department of Education has so far instituted a range of strategies to assist schools. These include (1) including a Life Skills Learning Area as part of the Revised National Curriculum (2005); (2) amending the Employment of Educator’s Act (2000) to deal with abuse of students by teachers. The amendment makes it clear that if a teacher is found guilty of having a sexual relationship with a student at his/her school, whether with or without the consent of such student, the teacher will be dismissed; and (3) developing general publications to address sexual abuse in schools.

**89.** In 2001, a report documented how girls are raped, sexually abused, sexually harassed, and assaulted by their male classmates and even by their teachers. According to the report, girls have been attacked in school toilet facilities, in empty classrooms and corridors, hostel rooms and dormitories. It also reported about teachers misusing their authority to abuse girls sexually, sometimes reinforcing sexual demands with treats of corporal punishment or promises of better grades, or even money. Human Rights Watch 2001, *supra* note 5.

Similarly, CIEAfrica conducted a UNICEF funded study titled A STUDY OF SCHOOL RE-

SPONSE TO VIOLENCE AND HARASSMENT OF GIRLS in 2002. 283,000 students from all nine provinces in South Africa participated in this research. The CIET research report emphasizes the misconception about sexual violence amongst black students. Examples of the findings include: 30% of the respondents said girls may not refuse sex; 10% said girls who are raped asked for it; 26% did not think that girls hate it to be raped; 17% said girls prefer violent sex; 60% is of the opinion that having sex with someone you know cannot be seen as sexual abuse and 51% said unwanted touching is not a form of sexual abuse.

**90.** South African Government 2002, SEXUAL ABUSE IN SCHOOLS: SUBMISSION BY THE DEPARTMENT OF EDUCATION TO TASK GROUP ON SEXUAL ABUSE IN SCHOOLS 11 March 2002 (South African Government Information) (available at <http://www.info.gov.za/other-docs/2002/sexual.htm>).

**91.** *Id.* The Department stated that schools fail to protect students because students fear that they will not be believed, students fear that they will be blamed for the abuse, and that abusive teachers intimidate the students into silence.

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a national plan of action on sexual violence and sexual harassment in schools; and (2) develop guidelines to schools detailing the appropriate response to allegations by students of rape, sexual assault or harassment, whether by fellow students or teachers.

Second, the legislature—at both the national and provincial level—must enact laws defining sexual harassment in the schools and mandating that schools respond to allegations of sexual abuse.<sup>92</sup> While the Children’s Act 38 of 2005 is an excellent start, it does not go far enough.<sup>93</sup> The failure to report all forms of child abuse to relevant authorities should be a criminal offence and all school employees should participate in mandatory education about their obligations to report sexual abuse to the relevant authorities.<sup>94</sup>

Finally, as no jurisprudence on sexual violence in education is available in South Africa, the judiciary needs to be more innovative in both its interpretation of existing provisions and the remedies for non-compliance.<sup>95</sup> Specifically, the judiciary should adopt a more rigorous version of the American *Gebser-Davis* standard.

### B. United States

While the American approach to imposing liability for sexual harassment offers an excellent starting point for determining the scope of the duty, it is by no means conclusive or definitive. Fulfillment of the obligation to stop sexual harassment requires more than simple adherence to the *Gebser-Davis* standard.

Specifically, Congress should amend Title IX so that *Gebser-Davis* standard should be expanded in the following ways.<sup>96</sup> First, the imposition of

92. South Africa, like the United States, is a federal system. While the nine provinces do not have the sovereign authority of the American States, they do have the discretion to make some educational policies on their own. *See* S. AFR. CONST. §§ 103-150. *See also* Rautenbach & Malherbe, *supra* note 20, at 241-72 (discussing the constitutional provisions concerning the provinces).

93. Under that Act, “abuse”, in relation to a child, means any form of harm or ill treatment deliberately inflicted on a child, and includes (1) assaulting a child or inflicting any other form of deliberate injury to a child; (2) sexually abusing a child or allowing a child to be sexually abused; (3) bullying by another child; (4) a labor practice that exploits a child; or (5) exposing or subjecting a child to behavior that may harm the child psychologically or emotionally;

In terms of this Act, “sexual abuse,” in relation to a child, means: (1) sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted; (2) encouraging, inducing or forcing a child to be used for the sexual gratification of

another person; (3) using a child in or deliberately exposing a child to sexual activities or pornography; or (4) procuring or allowing a child to be procured for commercial sexual exploitation or in any way participating or assisting in the commercial sexual exploitation of a child.

94. The damage to the teaching profession and the education system as a whole caused by the reports on sexual abuse in schools points seriously to the role of the SACE in determining the standard of professional conduct of teachers.

95. However, in the South African context where the Bill of Rights clearly protects a student’s safety and security, their dignity, privacy and best interests every child, teacher, school administrator and education departmental official should be aware of their respective rights and responsibilities regarding sexual harassment and sexual violence.

96. If the United States government is to remain one of laws rather than popular will, it is imperative that judges confine their decisions to the actual words of the statute or the Constitution. The fact that a particu-

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the duty should not depend upon whether a person is an “appropriate person.” In America, a school district can escape liability if an instructor knew, but a principal or senior administrator did not. That position is unacceptable. If any member of the school staff knows, then the school should have a responsibility to take action. Second, the actual notice requirement is too burdensome. A school’s obligation to its student victims should not turn on whether a senior administrator has actual knowledge. The fact that a school staff member reasonably should know what American law calls constructive notice, should be sufficient. Third, while the deliberate indifference standard—knowing about the conduct and doing nothing—should remain, the scope of what constitutes effective denial of educational services should be expanded. If the conduct is a violation of school rules and is severe enough to warrant a suspension, then the school district has an obligation to act. Fourth, individual school officials, not just the school itself, should be held liable for monetary damages.

Of course, this proposal has enormous consequences. Schools and school officials will face numerous lawsuits and, in many instances, will end up paying money damages. Yet, if the courts do not vigorously enforce the law, then words of the law, no matter how noble, are meaningless. The right to a quality education includes a safe and secure classroom environment. That aspect of the right must be enforced.

## CONCLUSION

The scene is all too common and always tragic. A child goes off to school to learn, but instead encounters sexual harassment from her peers or even worse her teachers. Such a result violates the basic rights of children in both South Africa and the United States. The law in South Africa has been ineffective in preventing such abuses. The South African Cabinet and Parliament must enact new laws, but ultimately the South African judiciary must enforce the rights. While the law in the United States—at least since *Gebser* and *Davis*—has been somewhat effective in protecting children, there is still a need for Congress to strengthen the laws.

lar result may be politically popular, reflect the real intention of a majority of the legislature, and/or be sound public policy does not justify the disregard of the text or well-established rules of interpretation. If the

statute’s text does not support the desirable outcome, then the judiciary should follow the law and let the Executive and the Legislature correct any omissions in the statutes.