Instructions in Inequality: Development, Human Rights, Capabilities, and Gender Violence in School

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INSTRUCTIONS IN INEQUALITY:
DEVELOPMENT, HUMAN RIGHTS,
CAPABILITIES, AND GENDER
VIOLENCE IN SCHOOLS

Erika George*

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I. INTRODUCTION: DEVELOPMENT, EDUCATION, AND GENDER EQUALITY

*Education is a human right with immense power to transform. On its foundation rest the cornerstones of freedom, democracy and sustainable human development.*

—Kofi A. Annan, Secretary-General of the United Nations

Education is a universal right enshrined in numerous international human rights treaties, most notably the popular and widely ratified United Nations Convention on the Rights of the Child. Nonetheless, millions of school-age children in the developing world have no access to basic education. The vast majority of children denied their fundamental right to education are female. Appropriately, the international development community has identified girls’ education as an especially critical priority, committing to end “gender disparities” in primary and secondary education.

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3. U.N. Children’s Fund, *supra* note 1, at 7 (estimating that over 130 million children of school age in the developing world are growing up without access to basic education).
4. See id. (estimating that of the nearly two-thirds of children in the developing world who do not receive a primary education, approximately 73 million are girls).
secondary education by 2005 and aspiring to achieve "gender equality" in education by 2015.5

While education has been celebrated by world leaders and development economists as a key solution to the social ills plaguing many nations and a means to gender equality,6 violent school environments continue to present a major obstacle to these goals. Human rights monitors maintain that those girls who have managed to surmount the numerous barriers blocking access to school are met with discriminatory treatment in the form of sexual violence once at school in violation of their equal right to education.7 For example, in a 2001 investigation, Human Rights Watch found that South African schoolgirls of every race and socioeconomic group encountered high levels of sexual violence and harassment in schools impeding their access to equal education.8 Generally, development initiatives aimed at closing the


gender gap have tended to concentrate primarily on removing barriers to school access for girls and have measured their success in terms of increasing girls' school enrollment, remaining largely blind to the barrier to learning created by sexual violence and sexual harassment in schools.

In 2005, the international community faced the first assessments of the United Nations Education for All (EFA) Goals agreed on at the 2000 World Education Forum. In these 2005 country assessments, policymakers asked critical questions about the nature of education and the barriers that are preventing children, particularly girls, from attending school: What is meant by gender equality in education? What is meant by a right to education? How should we understand the content of the right to education? How do we recognize when the right to education is violated? How do we judge educational systems in which girls are subjected to a sexually hostile environment?

This Article argues that the international community's gender equality targets will not be realized by 2015 because the problems associated with sexual violence against girls in schools are situated at an intersection of contested conceptual divides between human rights (civil and political liberties) and development aims (social and economic needs). Cracks in the conceptual foundations of both the liberal and utilitarian theories of justice and equality, which support traditional human rights advocacy and economic development plans, respectively render each approach inadequate to fully identify and address the grave danger sexual violence and harassment in schools pose to educational equality. In the end, this Article posits that development policy debates and human rights advocacy addressing the issue of gender equality in education could be advanced more constructively by the application of a "capabilities approach."

Originally conceived as a challenge to classical development economics by Nobel Laureate in Economics Amartya Sen, "capabilities theory" at its core emphasizes human development as the main foundation of economic development. Principally, the "capabilities approach" attempts to combine ethics and economics to explicitly acknowledge the value judgments that are inherent in development policy and societal structures. As advanced most recently by Sen and enhanced by legal philosopher Martha Nussbaum, the capabilities approach is a normative framework to inform social policy, maintaining that economic, political, legal, and other social arrangements should be evaluated according

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to how they expand people's capabilities—"what people are actually able to do and to be—that is, their actual freedom."[11]

Specifically, this Article explores the capabilities approach as applied to the experience of gender equity and school safety against the backdrop of current international development goals. Violence against girls in South African schools is discussed as a case in point.[12] Part I of the Article describes how South African girls' educations are impeded by various forms of sexual harassment and violence at school. Part II outlines present international development initiatives and priorities concerning women's education and reviews South Africa's progress toward gender equality. It also discusses limits of the utilitarian conceptual framework of development economics and shortcomings of the indicators used to measure policy progress and evaluate success. Part III explains how, in addition to compromising development objectives, gender discrimination in South African schools, as manifested by inadequate state responses to sexual violence, serves to deny girls' access to education on equal terms with boys and violates international human rights law. It also discusses some of the limits of the liberal conceptual foundations of human rights law in addressing violations of social and economic rights and in defining the substantive content of a right to education. Part IV presents capabilities theory and then explores its potential contribution to conversations on gender equality in education by using the capabilities approach to understand the effects of sexual violence against South African girls in their schools. Finally, Part V explores the relationship between capabilities theory and the competing conceptual frameworks animating human rights law and development policy to show that a capabilities approach could advance both development objectives and social justice by providing an enriched understanding of the role of education in eradicating gender-based violence, achieving gender equality, and giving positive content to social and economic rights.

Schools occupy a unique and important social space for fostering both rights and development. Provided that schools are safe for girls, education can present opportunities for realizing gender equality. Left unchecked, gender-based violence in schools will serve as a covert curriculum instructing children in gender inequality.

Beyond the 2005 EFA country assessments, policymakers must address critical questions about the nature of education and the barriers that are preventing children, particularly girls, from attending school—

12. SCARED AT SCHOOL, supra note 7.
questions that could arguably be better informed by a capabilities approach to the problem.

II. ORIGINS AND EXAMPLES OF GENDER VIOLENCE IN SOUTH AFRICAN SCHOOLS

Sometimes it feels scary.13

—JL, age sixteen

South African girls encounter disturbing levels of gender violence in their schools.14 The problem of sexual violence as experienced by girls in South African schools has been selected as an illustrative case for this exploration because of South Africa’s reportedly high incidence of violence against women generally,15 not because sexual violence is unique to South African schools.16 Indeed, gender-based violence in educational

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institutions is a global problem in need of greater attention. Moreover, South Africa participated in the World Education For All Forum and has pledged to ensure all South African children receive equal access to education by 2015.

A. Origins of Violence in South African Schools

In order to understand the nature of the discriminatory violence South African girls face at school, it is important to appreciate the context in which it occurs. Today, school violence takes place against the backdrop of a South African society plagued with high levels of violent crime. The apartheid regime used state-sponsored violence constantly to maintain order, and the political, social, and economic conditions of South Africa have been shaped and devastated by this violent legacy. The current government thus inherited a legacy of social and economic inequality that has lead to extremely high levels of violence throughout

17. See generally U.S. Agency for International Development, Unsafe Schools: A Literature Review of School-Related Gender Based Violence in Developing Countries (2004) (containing an annotated bibliography and discussion document on school-related gender-based violence). For a discussion of sexual harassment in United States schools, see Verna Williams & Deborah Brake, When a Kiss Isn't Just a Kiss: Title IX and Student to Student Harassment, 30 Creighton L. Rev. 423, 451-52 (1997) (urging courts to apply Title VII-type standards to peer sexual harassment under Title IX so that students will have as much protection from sex harassment in schools as women do in the workplace).


all sectors of South African society to which women and girls are not immune. Indeed, women and girls are often most vulnerable, particularly to various forms of gender-based violence—violence that is either directed against women and girls because they are female or that affects women and girls disproportionately.

Schools in particular have long been violent spaces for South African children. Prior to South Africa's transition to democracy in 1994, schools were often sites of struggle and political resistance to Apartheid. The state frequently repressed anti-apartheid activism in schools by violent means. Years of violent enforcement of Apartheid-era poli-

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23. In this Article, gender violence and sexual violence are used interchangeably and refer to any physical violence directed against women and girls because they are female or violence that affects females disproportionately, such as rape, sexual assault, sexual abuse, and indecent assault. Rape is defined under current South African law as unlawful sexual intercourse with a female without her consent. SOUTH AFRICAN LAW COMMISSION, Paper 102 (Project 107): Sexual Offences (Feb. 28, 2002), at http://www.law.wits.ac.za/salc; see also Stephen Craven, Medical, Legal and Financial Aspects of Rape in South Africa, 23 MED. & L. 889, 889 (2004). Sexual assault and abuse are used to describe violence or unwanted physical contact of a sexual nature which does not comport with the South African legal definition of rape, including but not limited to oral and anal penetration, sexual penetration with objects, and attempted rape. Sexual harassment is used to refer to unwanted sexual advances whether or not accompanied by physical contact and unsolicited sexualized and degrading language. Sexual violence or gender violence will be used generally to describe all of the above.


26. For a discussion of how the South African education system, despite meaningful reform measures, faces severe problems in overcoming the legacy of the past in the face of limited fiscal resources in the present day, see generally NEVILLE ALEXANDER, EDUCATION AND THE STRUGGLE FOR NATIONAL LIBERATION IN SOUTH AFRICA (1992); APARTHEID AND EDUCATION: THE EDUCATION OF BLACK SOUTH AFRICANS (Peter Kallaway ed., 1984); PAM CHRISTIE, THE RIGHT TO LEARN: THE STRUGGLE FOR EDUCATION IN SOUTH AFRICA (1985); EDUCATION, RACE AND SOCIAL CHANGE IN SOUTH AFRICA (John Marcum ed., 1982); SIMPHIWE
cies have resulted in vast social inequalities in South Africa and have fueled a culture of violence. This historical legacy presents a major challenge for schools still ill-equipped to curb the violence that remains in many areas. Violence is often sexualized, with devastating consequences for women and girls who disproportionately bear the brunt of sexual violence, not only in society at large but quite possibly in schools as well.

The especially burdensome legacy of South Africa's violent apartheid system makes it even more critical (and challenging) for school authorities to stop violence in schools. Youth attitudes regarding violence against girls and women continue to perpetuate violence. To date, the education system has been ineffective in changing attitudes or teaching students to control aggression; rather, schools are spaces where violence remains prevalent because it is not effectively challenged by school authorities.

B. Sexual Violence in South African Schools

South African girls report that they have been raped, sexually abused, sexually harassed, and assaulted at school by male classmates and teachers. For many South African girls, violence and abuse are an accepted part of the school environment. Because it often remains unchallenged, much of the behavior that is violent, harassing, degrading, and sexual in nature has become so normalized that it must be seen as a systemic problem for education and not merely a series of individual incidents. Although girls in South Africa have better access to school

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27. See generally Poverty and Inequality in South Africa (Julian May ed., 2000).


29. Id.; see generally Institute for Security Studies, supra note 22.


31. See, e.g., Scared at School, supra note 7.

32. Id.

33. Id.
than many of their counterparts in other sub-Saharan African nations, they are confronted with levels of sexual violence and sexual harassment in schools that impede their access to education on equal terms with male students in violation of international human rights law and South Africa's proclaimed commitments.

The incidence of sexual violence and harassment in schools had remained largely undocumented in South Africa until 1997, when a Gender Equity Task Team ("GETT"), commissioned by the South African Department of Education, analyzed the education system from a gender perspective and raised concerns about the perceived levels of violence against South African schoolgirls. More recently, in a 2001 report, Scared at School: Sexual Violence in South African Schools, Human Rights Watch documented cases of rape, assault, and sexual harassment against girls committed by both teachers and male students.

While quantitative data on school violence are not available, the existing qualitative case study evidence strongly suggests that violence—both physical and sexual—is prevalent in many South African schools, undermining their developmental and educational objectives. Rights investigations suggest that South African girls face the threat of multiple forms of violence at school; in addition to rape, sexual abuse, and sexualized touching and emotional abuse in the form of threats of violence, girls also encounter constant highly sexualized verbal degradation. The perpetrators of these forms of gender violence are largely other students, but in some instances teachers commit such acts as well.

1. Teacher Involvement in Sexual Abuse, Harassment, and Coercion

   I didn't go back to school for one month after I came forward. Everything reminds me, wearing my school uniform reminds me of what happened. I have dreams. He [the teacher] is in my dreams. He is in the classroom laughing at me. I can hear him

34. Gender disparities exist in other sub-Saharan African countries. For instance, the ratio of females to males in primary school enrollment is around three-quarters or less in a number of countries, including Chad, Burkina Faso, Mali, Ethiopia, Guinea, Guinea-Bissau, Benin, The Central African Republic, and Liberia. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, 2002 EDUCATION FOR ALL: IS THE WORLD ON TRACK? 68-71 (2002).

35. WOPLE, supra note 28, at 94.

36. See SCARED AT SCHOOL, supra note 7, at 36-60 (reporting that girls who encountered sexual violence at school were reportedly raped in school toilets, empty classrooms, hallways, hostels, and dormitories. Girls reported being fondled, subjected to aggressive sexual advances, and verbally degraded at school).

37. Id.

38. Id. at 43-48.
laughing at me in my dreams. I sometimes have to pass down the hall where his classroom was. I thought I could see him, still there. I was scared he'll still be there.\textsuperscript{39}

—PC, age fifteen

As the testimony gathered by Human Rights Watch and offered below demonstrates, teachers have raped, sexually assaulted, and otherwise sexually abused their female students. Sometimes reinforcing sexual demands with threats of physical violence or corporal punishment, teachers have sexually propositioned girls and verbally degraded them using highly sexualized language. At times, sexual relations between teachers and students do not involve an overt use of force or threats of force; rather, teachers abuse their authority by offering better grades or money to pressure girls for sexual favors or "dating relationships."

It started he would keep me after class and we would talk about whatever was bothering me. We agreed that we needed more time to talk than just for moments after class. So he sent a note home to my parents saying I needed extra help with Afrikaans. My parents and I [later] gave this note to the police [as evidence].\textsuperscript{40}

A 1998 Medical Research Council survey found that among those rape victims who specified their relationship to the perpetrator, 37.7 percent said their schoolteacher or principal had raped them.\textsuperscript{41} In 2000 alone, the South African Council of Educators (SACE) was reportedly investigating about 150 cases of misconduct involving teachers and about 10 cases of alleged sexual harassment, molestation, and rape.\textsuperscript{42}

South African girls complained of routine sexual harassment in schools as well as psychological coercion by teachers to engage in

\begin{itemize}
\item 39. Interview by Human Rights Watch with PC, age 15, in Johannesburg, South Africa (Mar. 18, 2000).
\item 40. Id.
\item 41. MEDICAL RESEARCH COUNCIL, S. AFR. DEPT' OF HEALTH, THE SOUTH AFRICAN DEMOGRAPHIC AND HEALTH SURVEY OF 1998, reviewed in ROS HIRSCHOWITZ ET AL., STATISTICS S. AFR., QUANTITATIVE RESEARCH FINDINGS ON RAPE IN SOUTH AFRICA 16–19 (2000) (noting, as well, that 19.8% said that the perpetrator was a stranger or recent acquaintance; 29.6% said the perpetrator was a relative or someone close). The study, conducted by the Medical Research Council and the Department of Health in 1998, questioned women between 15 and 49 years of age. The study identified 12,327 eligible women and ultimately interviewed 11,735 women. The survey covered many issues, including information on fertility, childhood mortality rates, maternal and child health, and violence against women.
\item 42. Pule Waga Mabe, Raped at School, DAILY MAIL & GUARDIAN (Johannesburg), Nov. 14, 2000.
\end{itemize}
“dating relationships.” In some cases, girls said they acquiesced because of fears they would be physically punished if they refused. In other cases, teachers reportedly abused their positions of authority by promising better grades or money in exchange for sex with students. In the worst cases, teachers operated within a climate of entitlement to sexual favors from students. In a number of instances, the schools’ responses to student allegations were weak, nonexistent, or actually served to facilitate continued abuse.

a. Taking Advantage of Economic and Emotional Vulnerability

Children in poverty were often most vulnerable to a teacher’s advances and least likely to gain redress for abuse. In poorer areas of South Africa, abusive teachers have taken advantage of children’s poverty to gain sexual access to them. In one case documented by rights investigators, a young girl was raped by her teacher and later paid for her silence. A social worker in KwaZulu-Natal treating the child described the case as follows:

I have a case of a twelve-year-old girl who was having sex with her teacher in exchange for money. He raped her in an empty classroom during school. She’d left her class to go to the toilets. He gave her money for her silence. And after that she would meet him and he’d pay her. There was medical evidence of penetration. The teacher was suspended but later allowed to come back to school. He paid the girl one rand when he raped her. Another girl has said he did the same thing to her.

Poverty combined with fear forms a powerful incentive for girls not to resist or complain when they are sexually propositioned by adults in authority, thereby increasing girls’ vulnerability to assault. In another instance documented by rights researchers, a teacher responsible for transporting a female student to school made suggestive comments to her when she was alone with him in the car. The student shared her problem with a social worker, who reported:

In January, a sixteen-year-old girl came to me and told me that she had a problem. A teacher in the school, who gave her lifts to

43. Scared at School, supra note 7, at 42.
44. Interview by Human Rights Watch with Duni Nala, social worker for Childline, Durban, South Africa (Mar. 31, 2000). One South African rand was worth less than one U.S. dollar in March–April 2000, when the rate of exchange was approximately six rand to one dollar. Current and historic rates of exchange are available at http://www.economist.com/markets/currency/graphs.cfm.
and from school, was bothering her. She lived very far away from the school, she would have to rise at [5:00 a.m.] if she took public transport, and her parents had made an arrangement with the teacher, who lived near her to drive her to school in his car. There were two other kids that he drove to school with her. She started receiving lifts this year. She told me that the teacher would always drop her off last, and that he would make remarks, like "I'm tired. I need a bath. I need to be rubbed."

"My wife hasn't been home. I need to be rubbed." She told him that she didn't like that kind of talk and would he stop. I advised her to tell her parents but she doesn't want to. She's afraid of him and she's dependent on him for a ride. Her parents are unemployed and the public transport fare would be too much, her sister is the only one working in the family. She was afraid that her parents would approach him and take action against him, and that he would harm her. He's a big and intimidating man. You don't argue with him. He carries a cane around the school and uses it liberally with the kids.45

b. Blackmail and Bartering

Promises of improved grades or other privileges in return for sex, or in the alternative, threats of failing grades in retaliation for refusing to perform sexual favors figure prominently in abusive relationships between teachers and students. Girls report that the aggressive sexual advances from teachers make their school environment oppressive. One 17-year old student told a newspaper reporter,

Five teachers have proposed love to me. I told my parents, and I was eventually moved to classes where none of them teach, because I felt very uncomfortable. But there are many other relationships going on between teachers and pupils. It's like you have to pretend to fall in love with them to get A's.46

A social worker assisting children in townships outside Durban told rights investigators that she also had encountered the problem of teachers demanding sex from girls in exchange for passing marks. She said,

45. Scared at School, supra note 7, at 45-46 (quoting an interview with a youth development trainer).
“Teachers propose love to girls, and if they don’t say yes they say they will fail you.”

2. Student Perpetration of Sexual Assault, Harassment, and Intimidation

All the touching at school in class, in the corridors, all day everyday bothers me. Boys touch your bum, your breasts. Some teachers will tell the boys to stop and they may get a warning or detention, but it doesn’t work. Other teachers just ignore it. You won’t finish your work because they are pestering you the whole time.

—AC, age fourteen

Among the greatest threats to a South African girl’s safety at school are the boys seated next to her in class. South African girls are far more likely to be sexually assaulted by one or more—usually more—of her male classmates than by a teacher. Sometimes the violence accompanies adolescent dating relationships. At times, girls whom boys perceive to be arrogant or assertive—such as prefects, student leaders, or girls who perform well at school—are targeted for assault or threatened with sexual violence.

South African girls reported that aggressive sexual advances made by male students significantly interfered with their ability to study and perform academically at school. Girls are attacked in school toilet facilities, in empty classrooms and hallways, in hostel rooms and dormitories, and in other “no go” areas on school grounds. Male students often attempted sexual assaults during class breaks and recess activity times. Some girls even reported to rights investigators that certain forms of sexual assault and harassment occurred in classrooms during class in full view of their teachers. For instance, girls complained that their male classmates would try to kiss them, fondle their breasts, raise their skirts, and try to touch them under their skirts. Girls reported that such behavior was unwanted, unwelcome, and highly distracting to the learning environment. Boys who committed acts of sexual violence or harassment against girls rarely acted alone.

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47. Interview by Human Rights Watch with Hlengiwe Magwaza, social worker for Childline, Durban, South Africa, (Mar. 28, 2000).
48. SCARED AT SCHOOL, supra, note 7, at 56.
49. Id. at 48.
a. Role Reinforcement through Assault, Harassment, and Intimidation

Many of the investigated gender-based attacks appeared to be motivated by the desire of male students to control their female classmates or to put down assertive girls. For example, one student told researchers about an incident in which two of her male classmates attempted to rape her:

One of my friends who is a prefect was working at the media center and I was on my way to see her during break when [they] asked me where I was going and I said to the media center. They asked me if I was going by myself and I told them yes. I started walking there and they followed me. The media center is only about a two minute walk from the main school building but a teacher would not be able to see what goes on there, boys will go there to smoke because they cannot be seen. They started following me and came up behind me and pulled me behind the media center building. I felt like crying. They were trying to take my skirt off and they ripped my top. I had a button missing. There was a stick on the ground. I picked up the stick and started fighting them and they ran away.

The day before a group of us had been talking about rape. I said I could take care of myself, I wouldn’t be a rape victim. One boy said I couldn’t. He said ‘give me a chance and I’ll prove it.’ I told him I wasn’t afraid of them and they couldn’t hurt me. He wanted me to know I should be afraid. I am afraid. I think of what if there was no stick on the ground. I think if there was no stick—they would have raped me. I think if the three of us were here in this room as we are now, if they were in this room they could rape me.

Boys frequently use threats of sexual violence to scare girls into submission. Violence or the threat of it effectively operates as a mode of control over girls, their bodies, their dress, their lives, their conduct, and their movement in schools.

50. Male youth participating in research focus groups told researchers that boys rape to "break a woman’s pride," or "just to break a girl’s dignity" or simply to "teach her a lesson." One youth is quoted as saying, "Girls think that they own the world so the only way to break them is by raping them." CIETAfrica, supra note 30.

51. Interview by Human Rights Watch with MB, age 17, Durban, South Africa (Apr. 5, 2000).
South African girls recognize that there are a range of ways in which their lives are limited by their fears of violence. For example, girls repeatedly described "no go" areas at their schools to researchers, spaces known to be dangerous or potentially dangerous: "you cannot go to out of bounds areas by yourself." Similarly, girls learned that they could not behave "out of bounds" by being assertive or confrontational. To do so is to invite violence from male classmates. A 14 year-old female student beaten by a male classmate for talking back to him explained:

A boy beat me up in class while the teacher was out of the room. I was talking with my friend and he came up and asked me what we were talking about. I told him it was none of his business. He pulled and punched my arm and slapped me on my face. My face and arm were bruised and swollen.  

Intolerance of girls in leadership roles at school is made manifest through the use of threats of sexual violence in efforts to undermine girls' authority. One girl reported being threatened with sexual violence when she tried to assert her authority as a school prefect. She described one incident of sexual harassment as follows:

Last year, when I was on [hall monitor] duty, I came across a group of boys gambling with dice on school grounds during a break in violation of school rules. I came up to them and told them to stop gambling. They didn't stop. I told them I was going to take their cards. They told me to go away and stop bothering them. I told them I wasn't going anywhere. Then they threatened me and said they'd have someone rape me and they pulled down their pants. But I stood my ground until the end of break when they stopped gambling and everyone went back to class.

South African newspapers carried the story of one 16-year-old girl who reported being forced to resign her position as head of a student council out of fear for her safety after three boys rejected the outcome of the election and petitioned other students to turn against her.

Girls also reported that they were perhaps most bothered by what they called "flirting" but described as persistent unwanted fondling or "touch-
Unwanted and unwelcome sexual behaviors are constant and consistent features of girls’ school experiences such that unwanted sexual touching “happens to most girls, most days” at school while most “teachers just ignore it.” Many girls reported that they sometimes felt overwhelmed by sexual harassment at school. Explaining how the sexual harassment in her school made her feel powerless and frightened, one girl shared, “[Y]ou tell them [male students] to stop, but the next day, they’ll just be doing it again the next day—sometimes it feels scary.”

C. School Administration Responses to Sexual Violence

I don’t think they [the school administrators] really know how it affects us. Maybe to them it is just a big joke—but to me—it is not to me. I was not laughing or playing. It’s not a joke or game—it really bothers me.

—MZ, age seventeen

They all think that girls are supposed to be their doormat. I think boys must be taught to look at girls as people.

—AD, age fifteen

Responses to the types of violence girls reported to rights researchers have been largely inadequate. The abuse girls experience at school is often magnified by the reactions they receive when they report the abuse to school officials. Girls who did report abuse felt that school officials responded with indifference, willed disbelief, and hostility. Girls described a persistent response pattern whereby schools discounted their reports of sexual violence and harassment or failed to respond with any degree of seriousness. Girls were discouraged from reporting abuse to school officials for a variety of reasons, not the least of which was the hostile and indifferent responses they received from their school communities.

56. SCARED AT SCHOOL, supra note 7; see also Valerie Lee, The Culture of Sexual Harassment in Secondary Schools, 33 AM. EDUC. RES. J. 383 (1996) (arguing that peer sexual harassment is best explained by the school culture surrounding harassment).
57. Interview with AC, supra note 53.
58. Id.
59. Interview with JI, supra note 13.
60. Interview by Human Rights Watch with MZ, age 17, in Durban, South Africa (Apr. 4, 2000).
61. Interview with AD, supra note 52.
62. SCARED AT SCHOOL, supra note 7.
Sometimes school officials appear to have failed to respond adequately because they simply did not know what to do. Other times they ignored the problem. Still other times they appear to have been afraid to assist. In many instances, schools actively discouraged victims of school-based gender violence from alerting anyone outside the school or accessing the justice system. In the worst cases, school officials concealed the existence of violence at their schools and failed to fully cooperate with authorities outside the school system.

Girls repeatedly said that when school officials confront boys with allegations of sexual assault, the students claim they are just "joking" or "playing" and then expect the explanation to suffice. Often it does. One student explained what came of her complaint to school officials as follows: "I told a teacher about what happened. . . . They told the teacher they were just playing. But they weren't just playing because they were serious. They weren't playing when they were hitting me and ripping my clothes." Her attackers were not suspended or expelled from school.

The sad consequence of such responses is that gender inequality is taught and learned. Many girls have come to accept that sexual violence and harassment are simply things that must be endured if they are attending school. The failure of school authorities to respond allows perpetrators of gender violence to act with impunity and reinforces sex discrimination in schools. By contrast, when schools responded to girls who reported abuse by supporting them, investigating their claims, and confronting their attackers, girls reported feeling safe and empowered. The silence surrounding sexual violence grows for many girls into a resigned acceptance of unwanted and unwelcome sexual behavior in educational settings. Girls who escape this environment often do so at the cost of their education. Girls who stay in school, remaining silenced by the violence or its threat, are taught that their human rights are of little consequence.

III. Development Objectives: International Aims and National Achievements

Not only are girls a majority of out-of-school children, but women comprise a sizable majority of illiterate adults. Widespread female illiter-

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63. Interview with MB, supra note 51.
64. United Nations Educational, Scientific and Cultural Organization, Gender and Education for All: The Leap to Equality 6 (2003); U.N. Children's Fund, supra note 1.
acy severely compromises a given country’s ability to attain economic development goals. The consequences of female illiteracy are far-reaching and have a direct impact on women’s ability to sustain and protect themselves and their families. The recognized long-term social benefits of girls’ education include: increased family incomes; later marriages and reduced fertility rates; reduced infant and maternal mortality rates; better nourished and healthier children and families; greater opportunities and life choices for women; better chances of avoiding disease; and greater political participation and economic opportunities. Overall, the development community has established that positive effects of education for girls accrue to the whole of society and justify equal school access for girls.

United Nations agencies have identified girls in South Asia, West Asia, sub-Saharan Africa, and the Arab states as requiring particular attention if the goal of ensuring education for all children is to be reached. Presently, the gender gap is greatest in South Asia, sub-Saharan Africa,

66. See, e.g., Sen, Development as Freedom, supra note 9 (finding female literacy to have “an unambiguous and statistically significant reducing impact on under-five mortality, even after controlling for male literacy”); see also Critical Perspectives on Schooling and Fertility in the Developing World (Caroline H. Bledsoe et al. eds., 1999).


68. U.N. Children's Fund, supra note 1, at 52; see also, Paula K. Lorgelly, Are There Gender-Separate Human Capital Effects on Growth? A Review of Recent Empirical Literature (Centre for Research in Economic Development and International Trade, University of Nottingham, 2000), available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=627222 (surveying studies that use microeconomic data to highlight the "social effects of female and male education on health and the different contributions that female and male human capital make to economic growth and/or productivity levels").


70. United Nations Educational, Scientific and Cultural Organization, Education for All Global Monitoring Report: Education for All: Is the World on Track?, supra note 34, at 25 ("Progress towards the goals is insufficient; the world is not on track to achieve EFA by 2015.")
and the Arab states.71 Girls from South Asia and sub-Saharan Africa comprise the majority of children with no access to basic education.72

Gender discrimination denies many girls in developing countries access to education. In many countries, traditional customs and practices relegate girls to subordinate status.73 Child labor or time-consuming chores, early marriage, early pregnancy, and poverty are also factors impeding girls’ access to school.74 Cultural preferences for males or family economic constraints may direct parental choices to favor education for their sons and not for their daughters.75 For these reasons, the international community has urged countries to commit to advancing education for women and girls as a weapon to combat such attitudes and practices that perpetuate discrimination and inequality.

A. Education for All: International Ambitions and Assessments

In 2000, United Nations Secretary-General Kofi Annan launched a 10-year initiative on girls’ education at the opening of the World Education Forum in Dakar, Senegal.76 Emphasizing the importance of girls’ education as a “social development policy that works,” the Secretary-General compared educating girls to “a long-term investment that yields an exceptionally high return” and noted the benefits that accrue to the whole of society.77

Organized and convened jointly by the United Nations Development Fund (UNDP), the United Nations Education, Scientific, and Cultural Organization (UNESCO), the United Nations Populations Fund (UNFPA), the United Nations Children’s Fund (UNICEF), and the World Bank, the World Education Forum resulted in country commitments to

71. Id. at 17 (explaining that gender disaggregated data on secondary education is less readily available and, while participation rates for girls are increasing according to UNESCO, “it remains true that where there are major gender disparities in primary education, this is amplified at the secondary level.” Central and West Africa have some of the lowest secondary school enrollment for girls.).
72. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, GENDER AND EDUCATION FOR ALL: THE LEAP TO EQUALITY, supra note 64, at 50 (explaining that the number of “out-of-school” girls is highest in sub-Saharan Africa (23 million), followed by South and West Asia (21 million)).
73. Id. at 131.
74. Id. at 121–25.
75. Id. at 119.
76. See United Nations Secretary-General Kofi Annan, Building a Partnership for Girls’ Education, supra note 6.
77. Id.
ensure access to education for all children, with special attention to be directed to access for girls.\(^7^8\)

A decade prior to the adoption of the Dakar Framework, delegates from 155 governments, together with policymakers and education specialists representing intergovernmental bodies and numerous nongovernmental organizations, met in 1990 at the World Conference on Education for All in Jomtien, Thailand and reached a worldwide consensus on an expanded vision of basic education.\(^7^9\) At Jomtien, governments agreed to universalize primary education and to reduce illiteracy before the end of the decade.\(^8^0\) Jomtien’s goals remain unrealized.\(^8^1\)

Six years after the Jomtien Conference, a Mid-Decade Meeting of the International Consultative Forum on Education for All convened in Amman, Jordan to assess the advances made since 1990.\(^8^2\) The meeting produced the Amman Affirmation, which recommended that an emphasis on educational quality accompany the quantitative gains sought by EFA. It states: “Given the trend toward more open societies and global economies, we must emphasize the forms of learning and critical thinking that enable individuals to understand changing environments, create

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78. Forum participants adopted the Dakar Framework for Action and pledged to ensure that all children, especially girls, have access to and complete a quality basic education by 2015. South Africa, along with 164 other countries, committed itself to: (1) expand and improve comprehensive early childhood care and education, especially for the most vulnerable and disadvantaged children; (2) ensure that by 2015 all children, particularly girls, children in difficult circumstances, and those belonging to ethnic minorities, will have access to and complete free and compulsory primary education of good quality; (3) ensure that the learning needs of all young people and adults are met through equitable access to appropriate learning and life skills programs; (4) achieve a 50% improvement in levels of adult literacy by 2015, especially for women, and equitable access to basic and continuing education for adults; (5) eliminate gender disparities in primary and secondary education by 2005 and achieve gender equality in education by 2015, with a focus on ensuring girls’ full and equal access to and achievement in basic education of a good quality; and (6) improve all aspects of the quality of education and ensure excellence of all aspects so that recognized and measurable learning outcomes, especially in numeracy, literacy, and life skills, may be achieved by all. See The Dakar Framework for Action, supra note 5.


80. Id.

81. See World Bank, Education for All: From Jomtien to Dakar and Beyond (2000). Six years after the Jomtien Conference, the Mid-Decade Meeting of the International Consultative Forum on Education for All convened in Amman, Jordan to assess the advances made since 1990 and produced the Amman Affirmation. The Affirmation recommended that an emphasis on quality accompany the quantitative gains sought and noted the urgent need to close the gender gap. See The Amman Affirmation, Education for All: Achieving the Goal, Mid-Decade Meeting of the International Consultative Forum on Education for All (June 16–19, 1996), at http://www.unesco.org/education/efa/ed_for_all/background/amman_affirmation.shtml.

82. Id.
new knowledge and shape their own destinies. Significantly, the Affirmation also confirmed "the urgent need to close the gender gap in education" and identified the education of women and girls as a continuing challenge. Despite real gains in primary school enrollments, Amman Forum delegates warned against complacency, urging governments to mobilize new resources and to use existing resources more effectively in advancing education and calling on international agencies and donor countries to assume greater partnership roles to improve coordination of resources.

The Dakar World Education Forum intended to review advances in basic education achieved during the 1990s and reinvigorate commitment to education for all. The resulting Framework document reaffirmed the goals set forth by the Jomtien delegates. Specifically, Dakar Forum participants pledged to ensure that by 2015 all children, particularly girls, have access to education. Participants also promised to eliminate gender disparities in primary and secondary education by 2005. The Dakar Framework aspires to achieve gender equality in education by 2015 by ensuring girls' full and "equal access" to and achievement of basic education of a good quality.

The gender equity ambitions of EFA complement other recently announced global development goals, principally those contained in the United Nations Millennium Declaration. World conferences organized by the United Nations during the 1990s gave rise to eight global development priorities, the United Nations Millennium Development Goals (MDG), to reduce poverty and achieve sustainable development. The MDG is an ambitious agenda for reducing world poverty agreed on by world leaders at the Millennium Summit in 2000. For each goal, one or

83. Id.
84. Id.
85. Id.
86. Id.
87. EFA 2000 The Dakar World Education Forum was host to more than 1,100 participants ranging from teachers to prime ministers, academics to policymakers, and nongovernmental organizations representing, in all, 164 countries. See The Dakar Framework for Action, supra note 5.
89. Id.
91. Id.
92. United Nations Development Program Administrator Mark Malloch Brown, as chair of the U.N. Development Group, was appointed the coordinator of the MDG for the UN
more targets have been set using 1990 as a benchmark. Like the EFA goals, the MDG also calls for the elimination of gender disparities in primary and secondary education by 2005 and enrollment of all children in primary school by 2015.

B. Assessing Success in Achieving Education for All

Eliminating gender disparities in primary and secondary education by 2005 now stands as the first test of credibility in the world’s commitment to both EFA and MDG goals. According to the 2002 EFA Global Monitoring Report, out of 153 countries for which disaggregated data are available, 86 have achieved the goal of gender parity, and of the remaining 67, only 18 have a decent chance of attaining the goal by 2015 (but not by 2005). Of the remaining 49 countries that will not attain the goal, nearly 50 percent are in sub-Saharan Africa.

The international development community has identified four indicators to monitor progress toward achieving universal primary education: the net primary enrollment ratio; the proportion of students reaching grade five; the primary school completion rate; and the youth literacy rate among ages 15-24. Net primary enrollment is the ratio of the number of children of official “school age” (as defined by the national education system) who are enrolled in primary school to the total population of children of official school age. A primary education is defined

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93. The goals to be achieved between 1990 and 2015 include: (1) halving extreme poverty and hunger; (2) achieving universal primary education; (3) promoting gender equality; (4) reducing under-five mortality by two-thirds; (5) reducing maternal mortality by three-quarters; (6) reversing the spread of HIV/AIDS, malaria, and tuberculosis; (7) ensuring environmental sustainability; and (8) developing a global partnership for development, with targets for aid, trade, and debt relief. For a complete list of the set targets and indicators used to assess achievement, see Millennium Development Goals Targets and Indicators, at http://ddp-ext.worldbank.org/ext/MDG/home.do [hereinafter MDG Targets & Indicators].

94. See id. (Millennium Development Goals (2) and (3)).

95. These timelines seek to build accountability into the EFA and MDG frameworks. See id. For a critique of the measurements used to evaluate progress towards the goals, see Amir Attaran, An Immeasurable Crisis? A Criticism of the Millennium Development Goals and Why They Cannot Be Measured, 2 PLOS MED. 1 (2005) (identifying gaps in data and arguing that shortcomings in measurements will impede progress toward development goals if corrective steps are not taken).


97. Id.

98. MDG Targets & Indicators, supra note 93.
as one which provides children with basic reading, writing, and math skills along with an elementary understanding of subjects such as history, geography, natural science, social science, art, and music. The net enrollment ratio indicator is used to monitor achievement of both MDG and EFA initiatives with data recorded by the country’s ministry of education or compiled from surveys and censuses. 99 Although it attempts to capture the education system’s coverage and efficiency, it has limitations. For instance, the World Bank Group has observed that school enrollments may be over-reported, as survey data may not reflect actual rates of attendance or dropout during the school year and school administrators may report exaggerated enrollments, especially if there is a financial incentive to do so. In addition, the Bank has noted that there may be insufficient data by gender. 100

The second indicator of success in achieving universal primary education, commonly known as “survival rate to grade five,” is the percentage of a cohort of students enrolled in grade one of the primary level of education in a given school year who are expected to reach grade five. This indicator is typically estimated from data on enrollment and repetition by grade for two consecutive years in a procedure called the reconstructed cohort method. 101 The grade five survival rate standard is intended to measure an education system’s success in retaining students from one grade to the next as well as its “internal efficiency.” The World Bank asserts that various factors account for poor performance on this indicator, including low quality of schooling, poor student performance, and the direct and indirect costs of school. 102 The frequency and drop-out patterns vary between girls and boys, as do their reasons for leaving school. 103 Noted as especially important for girls are the security and

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99. Id. Net enrollment rates below 100% provide a measure of the proportion of children of school age who are not enrolled in primary school. For international comparisons and estimates of regional and global aggregates, UNESCO’s Institute for Statistics regularly produces data series on school enrollment based on data reported by national education ministries or statistical offices and UN population estimates. See id.

100. MDG TARGETS & INDICATORS, supra note 93.

101. The reconstructed cohort method makes three assumptions: dropouts never return to school; promotion, repetition, and dropout rates remain constant over the entire period in which the cohort is enrolled in school; and the same rates apply to all pupils enrolled in a given grade. The calculation is made by dividing the total number of pupils in a school cohort who reach each successive grade of a specified level of education by the total number of pupils in the school cohort and multiplying the result by 100. A description of the method is available at http://www.uis.unesco.org.


103. Id.
proximity of school facilities and the availability of adequate sanitation.\textsuperscript{104}

Primary completion rate is the ratio of the total number of students successfully completing the last year of primary school in a given year to the total number of children of official primary graduation age in the population.\textsuperscript{105} The indicator is intended to monitor the education system’s coverage and student progress in order to measure human capital formation and the school system’s quality and efficiency.\textsuperscript{106} Systems for collecting and standardizing the data from 155 developing countries are not yet in place. As a result, the current database has many gaps, particularly for smaller countries and in gender breakdowns. In addition, primary completion rates based on primary enrollment have an upward bias, since they do not capture drop-outs during the final grade.

The literacy rate of 15–24-year olds indicator is intended to measure the effectiveness of the primary school system and, by proxy, social progress and economic achievement.\textsuperscript{107} The indicator is the percentage of the population aged 15 to 24 years who can both read and write, with understanding, simple statements concerning daily life activities.\textsuperscript{108} It should be noted that this indicator is not a measure of the quality and adequacy of the literacy level needed for individuals to function in a society. In addition, literacy data may be derived from population censuses, household surveys, and literacy surveys and most of the available data on literacy are based on reported literacy rather than on tested literacy.\textsuperscript{109} Higher illiteracy rates for women are the result of lower school enrollment and early drop-out for girls. Women generally have less access to information and training and literacy programs. The Bank has cautioned that estimates based on enrollments may actually overestimate literacy for girls.\textsuperscript{110}

\textsuperscript{104} Id.
\textsuperscript{105} MDG TARGETS \& INDICATORS, supra note 93.
\textsuperscript{106} Id. The primary completion rate indicator is compiled by staff in the Education Group of the World Bank’s Human Development Network based on two main data sources used to compute gross and net enrollment ratios: enrollment data from national ministries of education and population data from UNESCO’s Institute for Statistics.
\textsuperscript{107} MDG TARGETS \& INDICATORS, supra note 93.
\textsuperscript{108} Id. The definition of literacy sometimes extends to basic arithmetic and other life skills.
\textsuperscript{109} A common practice is to consider those with no schooling as illiterate and those who have attended grade five of primary school as literate.
\textsuperscript{110} Methods of measuring literacy can vary from simply asking whether an individual is literate to testing for literacy skills. The shortcomings of definitions of literacy, measurement problems, and the infrequency of censuses and literacy surveys weaken this indicator as a means of monitoring education outcomes.
The promotion of gender equality is evaluated using four indicators: the ratio of girls to boys in primary and secondary education; the ratio of young literate females to males; the share of women employed in nonagricultural sectors; and the proportion of seats held by women in national parliaments.

The ratio of girls to boys in primary, secondary, and tertiary education indicator is a comparison of the number of female students enrolled at these levels in public and private schools with the number of male students. The “indicator of equality of educational opportunity,” measured in terms of school enrollment, is intended to be a measure of both fairness and efficiency. Data on school enrollments are usually recorded by the ministry of education and derived from surveys and censuses. If administrative data are not available, household survey data may be used. Again, this indicator has limitations. It is an imperfect measure of the accessibility of schooling for girls because it does not reveal whether improvements in the ratio reflect increases in girls’ school attendance or decreases in boys’ school attendance. It also does not show whether those enrolled in school complete the relevant education cycles.

The Literacy Gender Parity Index indicator is the ratio of the female literacy rate to the male literacy rate for people aged 15–24 and is derived by dividing the literacy rate of women by the literacy rate of men in the relevant age group. This indicator measures progress toward gender equity in literacy and learning opportunities for women in relation to those for men. It also measures a presumed outcome of attending school and is a key indicator of empowerment of women in society.

Significantly, none of these MDG indicators will capture the problem of sexual violence in schools or adequately assess the quality of

111. The wage employment indicator measures the share of female workers in the non-agricultural sector expressed as a percentage of total employment, including industry and services, to measure the degree to which labor markets are open to women. There are large gender differences between employment in developing countries, where women are more likely to be engaged in informal sector activities and subsistence or unpaid work in the household, and wage employment, which in most of Africa and much of Asia is limited to the urban middle class. See MDG TARGETS & INDICATORS, supra note 93.

112. This indicator calculates the proportion of seats held by women in national parliaments as the number of seats held by women divided by all occupied seats.

113. MDG TARGETS & INDICATORS, supra note 93.

114. Id. Household surveys usually measure self-reported attendance rather than enrollment as reported by schools.

115. See, e.g., C. Colclough et al., Gender Inequalities in Primary Schooling: The Roles of Poverty and Adverse Cultural Practice, 20 INT’L J. EDUC. DEVT. 5–27 (2000) (observing that the gap between girls’ and boys’ primary school enrollment in sub-Saharan Africa was a result of boys’ enrollment falling farther than girls’ enrollment over the same period from 1980–1994).

116. MDG TARGETS & INDICATORS, supra note 93.
education. For example, a net primary enrollment indicator only provides information about the numbers of children in school but does not, without more, offer insight into why girls may not be enrolled. Many parents, for instance, fear for the safety of their female children in route to and from school. Similarly, knowledge of the youth literacy rate and the primary school completion rate, while important, may not render information about gender equality in the school environment. In addition to learning to read, a girl could also learn that she is not equal if sexual harassment and violence are prevalent in her school. While knowledge of the primary school completion rate could provide information as to who does and does not remain in school, without more, it may remain unclear as to why school survival differs for different children. Indeed, enrollment numbers alone may not offer much insight into the problem and prevalence of gender-based violence in schools as many girls remain in school despite abuse. Accordingly, policy makers would do well to look beyond these indicators in their efforts to advance girls education.

C. The State of Education for All in South Africa

While South Africa has committed itself to the goals of Education for All as agreed on in Jomtien and later Dakar, the country does not have a separate EFA plan.\textsuperscript{117} As a result of international isolation, South Africa did not participate in the 1990 Jomtien Conference and was not invited to join the EFA process until the formal end of Apartheid. In 1994, when a democratically elected government replaced the Apartheid regime, South Africa started to develop a democratic and equitable education system.\textsuperscript{118} Despite the country's late entry into the EFA process, South Africa claims to have embraced the EFA goals and maintains that the education policy and programs developed since the start of the country's democratic transformation are fully in alignment with those of the international community.\textsuperscript{119}

Accordingly, the South African government has taken the position that EFA is not a new initiative to be implemented but merely an opportunity to strengthen existing education development and reforms already

\textsuperscript{117} Deputy Minister of Education Enver Surty, \textit{supra} note 18.


\textsuperscript{119} Other African continental initiatives aimed at promoting education development include the work of the Association for the Development of Education in Africa, the Organization of African Unity's (OAU) Decade of Education in Africa, the work of the Southern African Development Community (SADC), the World Bank's Group of 8 Education Task Force, and the New Partnership for Africa's Development (NEPAD) human resource development initiative. \textit{Id.} at 3.
in place.\textsuperscript{120} As a result, South Africa has no formal EFA plan. Nevertheless, it did prepare a status report mapping the progress made toward achieving the Dakar agreed goals.\textsuperscript{121} Today, the report boasts, South Africa has "no gender disparities in the participation of learners at primary and secondary levels . . . ."\textsuperscript{122}

According to the South African Department of Education, as many females participate in literacy programs as males in proportion to their numbers in the population, so gender parity has been achieved. The Department reports that as many girls as boys participate in schooling overall but notes that recent data suggest some gender disparities at the primary level (with more boys than girls enrolled) that are reversed in the secondary level of education (with more girls than boys enrolled).\textsuperscript{123}

South Africa's written submission prepared in advance of the Dakar Forum offered a bleak assessment of the state of education in the country. The submission identified the possession of weapons by students, sexual abuse, the use of alcohol and drugs on school premises, and burglaries as having a debilitating effect on the morale of school managers, educators, and governing bodies detrimental to learning.\textsuperscript{124} However, to date there are no national sources of data on school violence. Neither the national nor provincial departments of education monitor incidents of violence in schools. Similarly, there are no data systems to facilitate the evaluation of crime statistics on the basis of where the crime was committed.

The government's self assessment described the general performance of South African primary school learners as "poor,"\textsuperscript{125} with girls dropping out of school earlier than boys and children in rural areas tending to drop out earlier than those children in urban areas.\textsuperscript{126} South Africa's gross enrollment ratio in primary schools is 96.5 percent. There are substantial differentials in gross enrollment by gender, however; in 2000, the enrollment ratio was higher among males at 98.3% than among females at 86.3%.\textsuperscript{127} Although most of the students who took the

\begin{itemize}
\item \textsuperscript{120} EFA SOUTH AFRICA 2002, \textit{supra} note 118, at x.
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} Deputy Minister of Education Enver Surty, \textit{supra} note 18, at 49–50.
\item \textsuperscript{123} EFA SOUTH AFRICA 2002, \textit{supra} note 118, at xiv.
\item \textsuperscript{125} The average score obtained by grade four students targeted in the 1999 South Africa Monitoring Learning Achievement (MLA) Survey was below 50% in all the literacy, numeracy, and life skills tasks. \textit{Id.} at 14.
\item \textsuperscript{126} See \textit{id.} at 43.
\item \textsuperscript{127} Gross enrollment gender disparities are more pronounced in some provinces, such as Northern Province and Mpumalanga. \textit{Id.} at 59.
\end{itemize}
1999 matriculation examination were female, most of those who passed were male; moreover, in each individual province, the pass rate was higher for males than females.\textsuperscript{128}

More recently, the South African government has maintained that girls are performing well and are doing better than boys on key competency tests, noting that at higher education institutions, female enrollment has increased from 44.1 percent in 1993 to 54 percent in 2001.\textsuperscript{129} Yet, the government acknowledges that post-primary, secondary enrollment remains a problem, particularly for girls.\textsuperscript{130}

The country's EFA status report is silent on the issue of gender-based violence in schools despite increased scrutiny after rights advocates' condemnation of its failure to protect girls against such violence.\textsuperscript{131}

IV. HUMAN RIGHTS OBLIGATIONS:
NON-DISCRIMINATION IN EDUCATION

The purpose of education, as enshrined in the United Nations Convention on the Rights of the Child, is to foster development of the child's personality, talent, and mental and physical abilities to their fullest potential to prepare him or her for a responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of the sexes, and

\textsuperscript{128} In 1999, females made up 55.7\% of the 511,474 candidates in all nine provinces. The number of females who passed was only 46.1\%, compared to 52.3\% for males. \textit{Gender Gap in Matric Pass Rate}, \textit{NEWS24.COM}, Jan. 1, 2000 (on file with the Michigan Journal of International Law). In 1996, more girls than boys wrote matric in each province, but proportionally fewer girls than boys passed. \textit{Schoolboys in a Class of Their Own}, \textit{SUNDAY TIMES}, Jan. 5, 1997 (on file with the Michigan Journal of International Law).

\textsuperscript{129} Deputy Minister of Education Enver Surty, supra note 18.

\textsuperscript{130} Id.

friendship among all peoples. Unchallenged gender-based violence in schools impedes the ability of girls to attain the educational objectives set forth in the Convention.

Pursuant to the international human rights treaties it has ratified and its own national legislation, the South African government is obligated to provide an education system that does not discriminate on the basis of sex. Failure to prevent and redress gender-based violence in all its forms—from rape to sexual harassment—operates as a de facto discriminatory deprivation of the right to education for girl children in violation of international and national legal obligations.

A. International Human Rights Law

International human rights law requires states to show due diligence in preventing and responding to human rights violations. With respect to violations of bodily integrity in particular, governments have a duty to prevent, investigate, and punish such abuse, whether perpetrated by an agent of the state or by a private citizen. The International Covenant on Civil and Political Rights (ICCPR), which South Africa has signed, re-

134. ICCPR art. 2 requires governments to provide an effective remedy for abuses and to ensure the rights to life and security of the person of all individuals in their jurisdiction, without distinction of any kind, including sex. Article 3 of the ICCPR provides: “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.” Article 6 of the ICCPR provides, in pertinent part, “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” Article 9 provides, in pertinent part, “Everyone has the right to liberty and security of person.” International Covenant on Civil and Political Rights, Mar. 23, 1967, 999 U.N.T.S. 171, (1967) [hereinafter ICCPR]. For discussions of state responsibility for violations of certain rights by private persons, see generally Donna Sullivan, The Public/Private Distinction in International Human Rights Law, in WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 126 (Julie Peters & Andrea Wolper eds., 1995).
quires the government to ensure the rights to life and security of the person of all individuals in its jurisdiction. Similarly, the South African Constitution enshrines the right to bodily and psychological integrity and the right to life and recognizes the inherent dignity of all human beings and the right to have that dignity respected and protected. To be in compliance with its international and national legal obligations, South Africa must prevent state agents (teachers) and private actors (students) from committing acts of violence against girls in South African schools.

When states do not prohibit such abuse or routinely fail to respond to evidence of rape or sexual assault of women and girls, they send the message that such attacks can be committed with impunity. In so doing, states fail to take the minimum steps necessary to protect the right of women and girls to physical integrity or even life. When a state tolerates violations of the bodily integrity of female students in educational settings, it allows gender violence to erect a discriminatory barrier to the ability of female students to enjoy their right to education.

1. Sexual Violence as Discrimination

International human rights law requires South Africa to ensure that women enjoy basic human rights and fundamental freedoms on an equal basis with men. The United Nations Committee on the Elimination of Discrimination Against Women (CEDAW Committee), established under the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), has noted that “[g]ender-based violence is a

136. For a more detailed discussion of South Africa’s obligations under international law, see HUMAN RIGHTS WATCH, VIOLENCE AGAINST WOMEN IN SOUTH AFRICA: STATE RESPONSE TO DOMESTIC VIOLENCE AND RAPE, supra note 22, at 39–43.
form of discrimination which seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.\textsuperscript{139} The CEDAW Committee also stated that the general prohibition of gender discrimination includes gender-based violence. Gender-based violence includes acts which inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion, or other deprivations of liberty.\textsuperscript{140}

Through its ratification of CEDAW, the South African government assumed the obligation to pursue by all appropriate means and without delay a policy of eliminating discrimination against women. It will meet this obligation by refraining from engaging in any act of discrimination against women and ensuring that public authorities and institutions act in conformity with this obligation by adopting legislation and other measures, including sanctions where appropriate, to prohibit all discrimination against women, and by ensuring through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.\textsuperscript{141}

As illustrated through their own testimonies, South African girls have suffered great harm in schools at the hands of their male teachers and classmates because of their gender, often without remedy. Sexual violence is a form of gender discrimination and South Africa is obligated to take all appropriate measures to eliminate violence against girls

\textsuperscript{139} Id. \textsuperscript{140} The Declaration defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or private life." The definition includes, but is not limited to:

a. Physical, sexual, and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

b. Physical, sexual, and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment, and intimidation at work, in education institutions and elsewhere, trafficking in women and forced prostitution;

c. Physical, sexual, and psychological violence perpetrated or condoned by the state, wherever it occurs.


\textsuperscript{141} The Declaration on the Elimination of Violence Against Women, adopted by the UN General Assembly in 1994, calls on states to "pursue by all appropriate means and without delay a policy of eliminating violence against women" and, among other tasks, to "exercise due diligence to prevent, investigate and in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons." Id.
whether committed by an individual or condoned by an organization or enterprise.

Teachers are government agents entrusted with a special duty to care for the physical and psychological well-being of South African school children. Accordingly, the government has a clear obligation to prevent teachers from committing acts of violence against students, to investigate teachers who are violent, and to cooperate with other state agencies in the prosecution of teachers who harm school children.

Despite the status of students as private citizens, the government still must hold them accountable in some manner when they violate the human rights of others. International law places a duty on the government to appropriately sanction teachers and students who commit violent acts against girls and hold schools accountable for concealing criminal acts against girls. The obligations enumerated by the CEDAW Committee extend beyond a country’s justice system and encompass preventive and protective measures, including counseling and support services.

2. The Right to Non-Discriminatory Education

Education is recognized internationally as a fundamental right for all children. A state that provides an education system for children cannot

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142. Article 34 of the Convention on the Rights of the Child requires state parties “to undertake to protect the child from all forms of sexual exploitation and sexual abuse.” See supra note 2.

143. In 1992, the CEDAW Committee adopted a general recommendation and comments on states’ obligations under CEDAW that set forth the following elements of potentially effective remedies to address the problem of violence against women:

(a) Effective legal measures, including penal sanctions, civil remedies, and compensatory provisions to protect women against all kinds of violence, including inter alia violence and abuse in the family, sexual assault, and sexual harassment in the workplace;

(b) Preventive measures, including public information and education programs to change attitudes concerning the roles and status of men and women;

(c) Protective measures, including refuges, counseling, rehabilitation, and support services for women who are the victims of violence or who are at risk of violence.


provide schooling in a discriminatory manner. A number of international treaties, to which South Africa and numerous other EFA countries have acceded, recognize education as a fundamental right.\textsuperscript{145} Each treaty includes nondiscrimination language such that the right to education must be ensured for all children. According to international legal standards, no child should be denied an education on the basis of race, color, sex, language, religion, national or social origin, property, or birth.\textsuperscript{146}

Article 26 of the Universal Declaration of Human Rights (UDHR) provides that "[e]very one has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory."\textsuperscript{147} Similarly, the International Covenant on Economic, Social and Cultural Rights (ICESCR) requires free and compulsory primary education and contains a broad nondiscrimination clause.\textsuperscript{148} Article 13(1) of the ICESCR states, "The States Parties to the present Covenant recognize the right of everyone to education . . . ." Article 13(2)(a) adds, "Primary education shall be compulsory and available free to all."

The Convention on the Rights of the Child (CRC), article 28, guarantees "the right of the child to education" as a fundamental human right and calls upon states to endeavor, "with a view to achieving [the right to education] progressively and on the basis of equal opportunity," to provide free and compulsory primary education available to all, to make forms of secondary education available and accessible to every child, and to take measures to encourage regular attendance at schools and reduce dropout rates.\textsuperscript{149}

International human rights law requires that a state providing education to its citizens must assure equal access to education for all its citizens. Women and girls must be able to enjoy education on equal terms with men and boys. In addition to requiring the provision of elementary education, ICESCR has a broad prohibition of discrimination,
borrowing its language from the UDHR. Article 2(2) states, “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status.” Article 3 focuses on women in particular. It states, “The States Parties to the present Covenant undertake to ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”

CEDAW acknowledges the existence of a right to education and calls for states to dismantle barriers that block access to education for women. Article 10 of the Convention obliges state Parties to pledge to:

Take all appropriate measures to eliminate discrimination against women in order to ensure them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;

150. Although the ICCPR does not list primary education as a core right, art. 24 has been interpreted to include the right to education. In pertinent part, art. 24 states, “Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor on the part of his family society and the State.” Although education is not explicitly mentioned, leading commentators on the ICCPR have concluded that “measures of protection” include social and welfare measures set forth in the 1959 Declaration on the Rights of the Child (the Declaration). Incorporating Principal 7 of the Declaration into art. 24, a state party has a duty to provide free and compulsory primary education as a measure of protection without discriminating on the grounds enumerated in art. 24. The measures of protection to be adopted are not specified in the Covenant, and it is for each state to determine them in the light of the protection needs of children in its territory and its jurisdiction. The Committee notes in this regard that such measures, although intended primarily to ensure that children fully enjoy the other rights enunciated in the Covenant, may also be economic, social, and cultural. In the cultural field, every possible measure should be taken to foster the development of children’s personality and to provide them with a level of education that will enable them to enjoy the rights recognized in the Covenant. Pursuant to art. 24, children have a right to education as a measure of protection by the state. Art. 26 states that so long as a state offers a right it cannot do so in a discriminatory manner. Therefore, all children must have equal access to education. ICCPR, supra note 134.

151. See ICESCR, supra note 144.
b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality

c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and adaptation of teaching methods.

Gender-based violence is a form of sex discrimination. Where gender-based violence occurring in educational settings is not prevented or punished, it impairs girls' enjoyment of the fundamental human right to education on a basis of equality with others. Gender violence acts as a de facto discriminatory barrier to education for girls. In South Africa, state failure to protect girl children from rape, sexual abuse, and sexual harassment at school has a discriminatory impact on the fulfillment of their right to education.

B. The Limitations of Liberalism in Giving Content to Education Rights

International support for a core group of human rights, mainly civil and political, has been a feature of international law for more than half a century since the UDHR was crafted in the aftermath of the Holocaust and World War II. 152 Although not a ratified document, the UDHR has proved a respected statement of principle encompassing the moral claim that human rights belong equally to everyone by virtue of being human. The subsequent ICCPR and ICESCR gave greater substance to the principles contained in the UDHR. During the Cold War, support for the two Covenants split along ideological lines, with capitalist societies privileging civil and political rights and Communist bloc societies focusing on social and economic rights.

In terms of publicity and promotion, the rights set out in the ICCPR have enjoyed greater prominence, bolstered by international human rights monitors and advocates, such as Amnesty International and Human Rights Watch, which have successfully shamed many nations into compliance with their obligations. Until quite recently, advocates used


the ICESCR less widely to promote the rights of housing, food, health care, and education, among others; economic and social campaigns were mostly the realm of philanthropists and humanitarians.

More recently, international human rights organizations have increasingly given attention to economic and social rights, as demonstrated by Human Rights Watch’s investigation into sexual violence in schools as evidence of discrimination in education. However, there are both philosophical and pragmatic barriers to overcome before rights advocates can persuade governments to take all the rights commitments in international law seriously by giving the right to an education, a house, or a meal equal weight as freedom from torture or the right to vote, for example.

While economic and social rights may appear to have the same legal status on paper as civil and political rights—both sets of rights were deemed worthy of their own Covenant—the philosophical grounding of economic and social rights is often questioned. Generally, designating something as a universal human right means that under no jurisdiction and under no circumstances may that right be justly denied to anybody. For example, one could argue that freedom from torture falls into this category of nonderogable rights but goods such as food and housing cannot and do not.

Certain human rights of the civil and political persuasion have attained the status of moral absolutes, the violation of which could lead to sanction by the international community. It has been argued that giving similar status to economic and social rights would produce the curious outcome of some nations receiving condemnation because of their poverty.

155. The Politics of Human Rights, Special Report: Righting Wrongs, Economist, Aug. 18, 2001, at 18–20 (cautioning Western human rights campaigners against forays into economic and social rights advocacy, suggesting that “too many rights may well make a wrong,” and arguing that the moral imperative to stop poverty or disease is not as convincing as the moral imperative to stop torture).
157. For example, a jus cogens norm is a peremptory rule of international law that prevails over any conflicting international rule or agreement and permits no derogation. Commentators have suggested that prohibitions against genocide, slavery, racial discrimination, and torture have acquired jus cogens status under international law. See generally Ian Brownlie, Principles of Public International Law 513 (1979).
Critics of an expanded set of rights also point to, among other things, the distinction drawn between "negative" and "positive" rights. Negative rights impose a duty of noninterference—a state's duty not to interfere with an individual's physical security or liberty. Positive rights, in contrast, impose active obligations on the state to provide food, education, and health care. Many understand positive rights as requiring the state to commit resources. Within the human rights movement, a philosophical dispute has emerged, pitting liberties against basic material entitlements, over whether the concept of human rights should embrace positive as well as negative aspects.

Caught in this divided conceptual framework, economic and social rights have been difficult for international human rights campaigners to advance as successfully as civil and political rights, which is not to say that they should not try. However, it is far from clear that the historic


159. But see Diane Elson, Gender Justice, Human Rights and Neo-Liberal Economic Policies, in Gender Justice, Development and Rights 97 (Maxine Molyneux & Shahrar Razavi eds., 2002) (arguing that enjoyment of "so-called" negative freedoms depends on well-resourced systems of law and order financed by taxation just as much as enjoyment of "so-called" positive freedoms, such as the right to education, depend on well-resourced school systems financed by taxation).


strategy and methodology of international human rights groups will work effectively in the realm of social and economic rights. These groups have been trying to figure out what their voice can add to the conversation on poverty and economic development. If people lack medical care, should it be said that their right to health has been violated? If people lack shelter, should it be said that their right to housing has been violated? If people are hungry, should it be said that their right to food has been violated?

For example, international human rights organizations view the core strength of their methodology to be their ability to investigate, expose, and shame, thereby holding official conduct up to scrutiny to generate outrage. To maximize and mobilize the power of shaming, the methodology has emphasized three issues: violation, violator, and remedy. In reporting, human rights groups have focused their attention on identifying who is responsible for a violation, whether the government in question has violated the right or is taking steps to progressively realize the relevant right, and the remedy for any violation found. Rights investigators attempt to show that a particular state of affairs amounts to a violation of human rights standards, that a particular violator is principally or significantly responsible, and that a widely accepted remedy exists. Because these elements more easily coincide with liberal conceptions of civil and political rights and operate differently in the context of economic and social rights, reports on economic and social rights violations are less frequent.

Given the continued dominance of conceptualizing rights in the negative, short of an absolute and outright denial of education, liberalism alone is inadequate to answer the question, "What does it mean for a state to violate the right to education?"


163. See Kenneth Roth, supra note 162, at 38 (arguing that the issues that can be most effectively taken up by international human rights organizations are those that rely on shaming and public pressure and urging caution on the expenditure of an organization's moral capital, as it will dissipate rapidly if not grounded on methodological strength).

164. Id. at 38.

V. CAPABILITIES’ CONTRIBUTION TO THE CASE FOR EQUALITY

Before addressing how the capabilities approach can offer a better understanding of what it would mean to realize gender equality in education than either the utilitarian approach to development policy evaluation or the classic liberal approach to human rights advocacy, this Part first presents the central tenets of the capabilities theory. Next, it examines the contributions of the capabilities approach to understanding gender inequality in education, revealing how looking to development or human rights alone provides an incomplete understanding of inequality and the means to achieve equality.

A. The Capabilities Approach

Originally conceived as an approach to quality of life assessments in the context of international development, the capabilities approach has become a particular type of universal normative system intended to offer guidance to international agencies and governments. The capabilities approach, set forth principally by Amartya Sen, was motivated by a desire among some observers and commentators for an alternative and more accurate measure for evaluating public action aimed at reducing inequality or poverty and realizing social justice.166

Sen’s early writings were critical of the existing economic literature on inequality measurements because of the discipline’s inordinate focus on utilities, resources, and income.167 Sen rejected the then-dominant paradigm of welfare economics which equated development with the growth of gross national product (GNP), rises in personal income, increases in industrialism, technological advances, or social modernization.168 Instead, he posited that in order to truly assess inequality, development economists should focus on the real freedoms that people have for leading a valuable

166. See generally Amartya Sen, Choice, Welfare and Measurement (1982); Sen, Inequality Reexamined, supra note 11; The Quality of Life (Martha C. Nussbaum & Amartya Sen eds., 1993); Women, Culture and Development (Martha C. Nussbaum & Jonathan Glover eds., 1995); Sen, Development as Freedom, supra note 9; Martha C. Nussbaum, Women and Human Development: The Capabilities Approach (2000).


168. While Sen acknowledges that GNP growth may be important as a means to expanding freedom, his capabilities approach appreciates that more than GNP growth is required. Sen, Development as Freedom, supra note 9, at 3.
life, such as the capability to undertake activities like being healthy or literate.

For Sen, "development requires the removal of 'unfreedom.'" Treating freedom as the central end of development requires that close attention be paid to the expansion of the capability of an individual to lead the kind of life he or she may have reason to value. This line of Sen's work has evolved into what has commonly become known as the capabilities approach.

The capabilities approach postulates that when making normative evaluations about individual well-being, the focus should be on what people are able to be and to do and not on what they can consume or their incomes. Capabilities theory posits a direct relationship between individual freedom and the achievement of development, such that what people can positively achieve is influenced by their economic opportunities, political liberties, and social powers as well as the enabling conditions of good health, basic education, and the encouragement and cultivation of individual initiative supported by institutional arrangements. Accordingly, development must be understood as "an integrated process of expansion of substantive freedoms that connect with one another."

Consistent with Sen's thesis on development, the capabilities approach involves "concentration on freedoms to achieve in general and the capabilities to function in particular." Thus, the basic elements of the capabilities approach are capabilities and functionings.

1. What are Capabilities?

A capability is a feature of a person in relation to a given commodity, good, or service. Capabilities are people's potential functionings.

169. *Id.* at 4 (explaining the condition of 'unfreedom' as closely correlated with lack of public facilities and social services like epidemiological programs, organized arrangements for health care and educational facilities, or effective institutions for maintaining local peace and order).


171. *Sen, Development as Freedom, supra* note 9, at 5.

172. *Id.* at 8; see also Des Gasper & Irene van Staveren, *Development as Freedom-And As What Else?*, 9 FEMINIST ECON. 137 (2003) (explaining the evolution of Sen's capabilities approach from a position in welfare economics to a development philosophy including concerns for positive freedom such that the "term 'freedom' now typically replaces 'capability' in [Sen's] work").


For example, consider a good like milk. The development economist will be concerned with the fact that milk gives a person the ability to meet some of their nutritional needs. However, knowing that a person possesses milk does not tell us what the person will be able to do with the milk. It could be the case that the person with the milk also has a parasitic disease that makes it difficult for her to absorb nutrients, or perhaps the person is lactose intolerant or otherwise allergic and cannot digest milk. The person could possibly suffer from undernourishment even though she drinks an amount of milk that would be more than adequate for someone else. Indeed, if the person is lactose intolerant, she might be better off without any milk at all.

In short, measuring how much of a good someone has gives us only part of the picture, telling us that all things being equal, everybody who has the same amount of milk will be able to receive the same benefits from consuming that milk. However, the capabilities approach draws attention to the fact that “all things are not equal” and that the value of the milk to different people will depend on their “capabilities in consuming milk.” More generally, the relative value of a good or service depends on people’s abilities to use or consume it—their abilities to transform it into something else that they value.

Goods are often defined and measured by economists based on the good’s most salient or characteristic use. Sometimes this approach obscures the important fact that a good possesses a variety of characteristics and that people may value some of these varied characteristics of a good more than others. Accepting that commodities, goods, and services have characteristics which make them valuable to people, capabilities theory offers a way to conceptualize how different people may not be able to make the same use of the same commodity, good, or service. Capabilities theory is an attempt to identify, measure, and theorize about the specific characteristics of a good that people in specific contexts and with different capabilities value.

Consider a bicycle, a commodity with certain characteristics that make it valuable to people. Principally, a bike can be used for transportation, mobility, or moving from one place to another faster than walking.

175. Amartya Sen, Commodities and Capabilities: Professor Dr. P. Hennipman Lectures in Economics 9 (1985) (accepting the thesis of modern consumer theory, which views goods as bundles of ‘characteristics,’ but arguing that even if commodities should be seen in terms of their characteristics, this fact does not offer insight into what a person will actually be able to do with the commodities he or she may own).

176. Id. (offering a variant of this classic illustration using rice); see also Sen, Rights and Capabilities, supra note 167.

177. Sen, Rights and Capabilities, supra note 167 (citing Kelvin J. Lancaster, A New Approach to Consumer Theory, 74 J. Pol. Econ. 132 (1966)).
Capabilities theory emphasizes what a person is able to do with the commodities, goods, or services at their command and concerns the relation between the good and a person's potential for transforming it into a particular function. So, if a bike is given to a person who is disabled, or in poor physical condition, or has never learned to ride a bike, it will be of limited use in enabling the function of mobility. Basically, capabilities without goods are useless; goods without capabilities are useless.

2. What are Functionings?

The term "functionings" is used by capabilities theorists to refer to people's states of being and their activities. Put simply, people do things. People take action. People become things. People do things with the commodities, goods, and services at their disposal. What people do with the goods and services available to them influences their well-being and opportunities in life. For example, adults often ask children: "what do you want to be when you grow up?" "What do you want to do with your education?" Indeed, in conducting my field research among South African schoolgirls I would ask each child I interviewed what she wanted to be when she grew up and what she thought she might like to do. Virtually all of my conversations with children began or ended with such a question. When we ask questions such as these we are asking children about their functionings.

The capabilities theorist understands the capability to function as a reflection of what a person can do. This concept reflects what functions are feasible for a person to achieve. Put simply, we will either be able to do something or we will not. For example, suppose one of the girls I interviewed on a visit to an impoverished and crime-ridden South African township told me that she wanted to become a world famous athlete—a cyclist. How should she go about reaching her dream? She would need a bike, somewhere to ride her bike, perhaps some training, or even a cycling coach. If the government gives these materials to her and to Lance Armstrong, and both are treated equally and get access to the same kind of bike, she might not be able to wield these goods and services in the same manner as Lance Armstrong (i.e., she may not go on to win multiple Tour de France victories), but her bicycle could allow her to "function" as a cyclist in some sense of the word.

178. See generally Sen, Inequality Reexamined, supra note 11; Sen, Commodities and Capabilities, supra note 166; Sen, Rights and Capabilities, supra note 167. See also Ingrid Robeyns, The Capability Approach: A Theoretical Survey, 6 J. HUM. DEV. 93, 102 (2005) (offering illustrations of the differences between functionings and capabilities).

179. Sen, Rights and Capabilities, supra note 167.

180. Sen, Development as Freedom, supra note 9, at 75.
The capabilities theorist is concerned with what will influence the
girl's potential to move from having access to a good to achieving a de-
sired goal. The relation between the girl, the bike (a commodity), and
cycling (functioning) at a level where her ambition to be a world-famous
elite athlete is attained could be influenced by her internal personal at-
tributes or external societal or environmental circumstances. For
example, if her physical condition is severely compromised, then her
goal will be more difficult to reach. Similarly, public policy, social
norms, cultural practices, discrimination, power relations, and the envi-
ronment in which she lives could play a role in her ability to transform
the characteristics of her bike (a good) into riding with speed and stam-
ina (the individual functioning). For example, if there are no paved roads
for her racing bike, or if her society imposes a social or legal norm that
prohibits women from cycling without being accompanied by a male
relative, or if there is simply too much violent crime for her to risk going
out alone, then it becomes much more difficult or even impossible for
her to use the good to enable the functioning she desires.

The conversion or transformation of the characteristics of a given
commodity into a particular functioning will differ among people. Some
of these differences will be personal and particular to the individual
while other differences will be societal, related to gender, class, race, or
caste. Discrimination, for instance, can be a significant factor influenc-
ing conversion. Suppose a high caste man and a low caste man have
equal access to higher education and are awarded the same scholarship.
Both eventually receive the same degree and both want to use this degree
to enable certain functionings. They both want to achieve financial secu-
rity and to be able to support their dependents while doing stimulating
professional work. But because low caste men are discriminated against
in the labor market in their society, it will be more difficult for the low
caste man to use his degree to enable all the available functionings when
compared with his higher caste counterpart.

Or, imagine two children who have the same individual conversion
factors and posses the same commodities. Both girls have bicycles and
are able-bodied. However, Michelle lives in a small town with bike
paths, public parks, and low levels of violent crime, while Monica lives
in a large city with high rates of violent crime and no safe public parks.
Whereas Michelle can use her bike to ride anywhere she wants at any time
of day, Monica will be faced with a higher chance that she will be as-
saulted or have her bike stolen. The same commodity (a bike) leads to
different levels of functioning to transport each girl safely due to the char-
acteristics of the society in which each girl lives, its public infrastructure,
poverty, and crime levels. The environment can influence conversion.
Capabilities theory can also take into account the influences of societal structures and constraints on the choices people consider and the options they entertain. For example, suppose Jeremy and Jonathan both have the same intellectual capacities and human capital at age six. Both boys live in a country where education is free. Jeremy was born into a family that paid little attention to intellectual achievement, while both of Jonathan's parents are celebrated Nobel Laureates in physics. The social environments in which Jeremy and Jonathan find themselves could greatly influence and shape their preferences for studying. While both boys initially have the same capability set, the social structures and constraints which influence and shape their preferences will influence the choices they will make in selecting preferred functions.

Thus, on the theoretical level, by distinguishing functions from capabilities, the capabilities approach attempts to account for the influence of interpersonal relations, constraints, and institutions on individuals by recognizing the social and environmental factors that influence a person's ability to transform a commodity into functionings.

Now suppose I return to South Africa some years later and encounter the girl who dreamed of becoming a Tour de France champion. As it turns out, she has not yet become a professional cyclist. I could ask her: why not? What got in the way? And she might answer, "I didn't have the money," or "How do you expect me to become a famous cyclist if my day-to-day existence is one of hunger and abuse?" Or she might explain that she simply did not have what it took to achieve what she wanted. Why not? She might answer that she wasn't born with the lung capacity, or has asthma that limits her stamina, or she never got picked to ride for the cycling team but instead was assigned to operate the stopwatch because she is a girl. Should she be realistic about what she will be able to achieve? Why should she not have the freedom to choose what she wants to do and succeed like Lance Armstrong was able to? A capabilities approach examines why she is not functioning as she desired and what impeded her ability to attain results.

The difference between a functioning and a capability is similar to the difference between an achievement and the freedom to achieve or the difference between an outcome and an opportunity—"a functioning is an achievement, whereas a capability is the ability to achieve."

Achieved functionings are understood by capabilities theory to constitute a person's well-being, while the capability to achieve functions constitutes the person's freedom—"the real opportunities . . . to have well-being."

182. Sen, Inequality Reexamined, supra note 11, at 40.
To illustrate this point, Sen offers a hypothetical which compares two individuals who are starving. Imagine person A is a victim of famine in Sudan, while Person B has decided to go on a hunger strike in front of the White House to protest the conflict in Iraq and U.S. foreign policy. Although both persons lack the function of being nourished, the freedom each has to avoid starvation is crucially different. A capabilities inquiry which looks to positive freedom and real opportunity to create a particular lifestyle enables a distinction to be made with respect to the difference between the functionings that each individual could have achieved. While both individuals lack the achieved function of being nourished, the political protester has a capability to achieve such functioning that the Sudanese famine victim does not.

A capabilities theorist envisions a person as having a capability set that encompasses "the various combinations of functionings (beings and doings) that the person can achieve" and reflects the person's freedom to lead any of a variety of different lifestyles that he or she may choose. Therefore, capabilities, in contrast to functionings, are notions of freedom in the positive sense concerned with the real opportunities a person has to lead a given life or create a particular lifestyle; the freedom to lead different types of life is reflected in the person's capability set.

In conclusion, all capabilities together correspond to the overall freedom to lead a life that a person has reason to value:

Capability is primarily a reflection of the freedom to achieve valuable functionings. It concentrates directly on freedom as such rather than on the means to achieve freedom, and it identifies the real alternatives we have. In this sense [capabilities] can be read as a reflection of substantive freedom. In so far as functionings are constitutive of well-being, capability represents a person's freedom to achieve well-being.

Ideally, the capabilities approach should recognize the full extent of freedom, or lack thereof, to choose between different functionings.

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183. See Sen, Development as Freedom, supra note 9, at 75.
184. Sen, Inequality Reexamined, supra note 11, at 40 (explaining capability as "a set of vectors of functionings" such that "the 'capability set' in the functioning space reflects the person's freedom to choose possible livings").
186. Sen, Capabilities and Well-Being, in The Quality of Life, supra note 166, at 33.
187. Sen, Inequality Reexamined, supra note 11, at 49.
188. Id. at 53.
B. The Capabilities Approach Elaborated

Although welfare economics produced the capabilities approach, philosophy has provided its more recent developments. In contrast to Sen's articulation of the capabilities approach, which makes broad and unspecified claims, legal theorist Martha Nussbaum has argued for a comprehensive list of valuable capabilities in order to more effectively apply the approach to questions of social justice and gender inequality.

The capabilities approach, as articulated by Martha Nussbaum, departs from Sen's vision in that it sets forth a purportedly universal account of central human functions intended to provide a philosophical grounding for capabilities, which ultimately could offer an account of basic constitutional principles to be implemented by governments of all nations.

The product of cross-cultural discussions, Nussbaum's list of "Central Human Functional Capabilities" is an attempt to identify the basic content of a universal normative system supportive of human dignity. The central capabilities she identifies are:

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190. It must be noted that Sen's and Nussbaum's versions of the capabilities approach have different theoretical assertions and entail different views on whether there should be a list of capabilities. For Sen, a list of relevant capabilities is context-dependent, allowing application of the approach to be varied either by academic, activist, policy-oriented, abstract, philosophical, applied, theoretical, or empirical concerns, encompassing social, political, economic, legal, or other dimensions of advantage taken together or individually or in any combination. Currently, there is a significant debate on the relative merits of each approach. This Article does not take a position, but rather appreciates aspects of both conceptions as relevant to issues of gender equality, sexual violence against girls in schools, and education. See generally Des Gasper, Sen's Capability Approach and Nussbaum's Capabilities Ethic, 9 J. Int'l Dev. 281 (1997) (providing a comparative assessment of the versions of capabilities theory outlined by Sen and Nussbaum); David Crocker, Functioning and Capability: The Foundations of Sen's and Nussbaum's Development Ethic, in Women, Culture, and Development: A Study of Human Capabilities, supra note 173 (comparing different perspectives on the capabilities theory's foundational concepts of functioning and capability as applied to conceptions of social justice).


192. Nussbaum, supra note 10, at 70; see also Sabina Alkire, Valuing Freedoms: Sen's Capability Approach and Poverty Reduction (2002) (characterizing Nussbaum's capabilities approach as one entailing "a list of normative things-to-do" that is highly prescriptive and makes universalistic claims as to its scope).

193. This version of Nussbaum's list, in her own words, appears in Nussbaum, supra note 10, at 77–80; see also Women, Culture, and Development: A Study in Human
a. Life. Nussbaum describes this capability as being able to live to the end of a human life of normal length without dying prematurely and without having one’s life so degraded and devalued as to make life simply not worth living.

b. Health. This is defined by Nussbaum as the capability to maintain “good” bodily health, including reproductive health. The definition of this capability also encompasses the associated material conditions necessary to sustain good health such as adequate nourishment and shelter.

c. Bodily Integrity. This is described by Nussbaum as being able to move freely from one place to another—having one’s bodily boundaries treated as sovereign. This capability entails security against assault, sexual violence, child abuse, and domestic violence. Reproductive choice is also included in this capability.

d. Senses, Imagination, Thought. Nussbaum explains this capability as the ability to imagine, think, and reason in a truly human way, “informed and cultivated by an adequate education” including but not limited to literacy and numeracy. Nussbaum further qualifies this capability as being able to use imagination and thought in connection with self-expression—artistic, political, and personal. At its heart is the ability to search for the meaning of life and one’s own path, having pleasurable experiences, and being free of unnecessary pain and suffering in life.

e. Emotions. Nussbaum describes this capability as being able to have attachments to things and people outside of oneself without having one’s emotional development stunted by overwhelming fear, anxiety, or the trauma associated with abuse and neglect.

f. Practical Reason. Nussbaum describes this capability as being able to form a conception of the good and engage in critical reflection about planning one’s own life.

g. Affiliation. Put simply, this capability involves possessing the social basis of self-respect and non-humiliation. It centers on social interaction, compassion, and friendship. As explained by Nussbaum, it would also include protections against discrimination on the basis of race, sex, sexual orientation, religion, caste, or ethnicity.

h. Other species. This capability appears to encompass living with concern for and in relation to the natural world and environment humanity inhabits.

i. Play. This capability consists of being able to laugh, to play, and to enjoy recreational activities.

j. Control Over One’s Environment. Nussbaum explains this capability as the ability to exercise meaningful participation in choices

CAPABILITIES, supra note 173, at 72-86 (setting out an earlier conception of the human being and central human capabilities).
governing the political and material aspects of one’s life, such as the ability to hold property or to seek employment on an equal basis with others.

For Nussbaum, each capability is a separate component such that all capabilities are of central importance yet distinct in quality. Satisfying one capability by simply providing more of another is not sufficient, nor do these capabilities lend themselves easily to trade-offs or a cost-benefit calculation. All the listed central human functional capabilities are of fundamental importance and are distinct in quality.

There are, in Nussbaum’s view, three different types of capabilities: (1) basic, (2) internal, and (3) combined. Basic capabilities cover the innate equipment of the individual at birth. The term internal capabilities refers to the developed states of the individual. So far as the individual is concerned, this means having sufficient personal conditions for exercise of the requisite functions, including a more mature condition of readiness than an individual would possess at birth. Combined capabilities come about when internal capabilities are united with the suitable external conditions for the actual exercise of the function.

Although Nussbaum’s version of capabilities disassociates capability from functioning generally, for children she argues both must be present. Developing an internal capability requires favorable external conditions and the practicing of the actual function, while persistent deprivation ultimately affects the internal readiness to function. Accordingly, a certain type of functioning is required in children, and the external environment must support development of their internal capabilities. Exercising a function in childhood is essential to the production of a mature adult capacity.

Therefore, under Nussbaum’s configuration of basic, internal, and combined capabilities and her understanding of how capabilities relate to functioning, it is clear that primary and secondary educational requirements for children are legitimate state ends. Similarly, it is legitimate to insist that the health, emotional well-being, bodily integrity, and dignity of children also be protected. Under the capabilities approach, the state’s interest in adult capabilities gives it a very strong interest in issues affecting children’s lives that will have a long-term impact on mature

195. Id. at 84–86.
196. Id.
197. Id.
198. Id.
199. Id. at 89–90.
functioning. Accordingly, both the rights and capabilities approaches insist on state obligations to children.

C. The Capabilities Approach Applied to Sexual Violence in Schools

In practical application, a focus on capabilities as conceived by either Sen or Nussbaum would require policymakers to ask what girls are actually able to do and whether the education they receive and the manner in which they receive it will promote positive freedom for them to enjoy well-being and live lives of dignity.

A review of the capabilities imperiled by sexual violence against girls in South African schools provides an illustration of just how “unfree” schools can be for girls, offers insight into the content of the positive right to education, and sharpens our understanding of the consequences when sexual violence in schools remains unchallenged, thereby bringing us closer to realizing the true content of the right to education. Through a capabilities approach, considering what girls will actually be able to be and to do in the context of a violent school environment can reveal what is required for them to enjoy equal education.

The unchallenged presence of sexual violence in schools is highly disruptive to girls' educational achievements. Left unchecked, it has a negative impact on the educational and emotional needs of girls and acts as a barrier to attaining education. Putting aside the associated health risks posed by sexual violence, including unwanted pregnancy and sexually transmitted diseases such as HIV/AIDS, South African girls also reported losing interest in school, changing schools, or leaving school entirely. In many instances, girls who have been victims of sexual violence at school leave school for some time, change schools, or even quit attending school entirely, fearing continued abuse from those who have raped, sexually assaulted, and harassed them.

Not surprisingly, South African girls reported that missing school had a negative impact on their school performance, and many victims who miss school while trying to cope with what has happened to them are unable to catch up with their coursework. Girls who are victims of rape and other forms of sexual violence often struggle with physical and

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200. See Scared at School, supra note 7, at 62.
201. Id.
202. Id.
203. Id.; see also Susan Fineran & Larry Bennett, Gender and Power Issues in Peer Sexual Harassment Among Teenagers, 14 J. INTERPERSONAL VIOLENCE 626, 627–28 (1999) (referencing research documenting educational harms of peer sexual harassment).
emotional trauma and are unable to do their school work or view school as a priority.\textsuperscript{204}

One student described her school performance after she was raped by her teacher as follows: "I did badly in school. First term [before the rape] I passed with flying colors, but second term I did badly . . . third and fourth term were also bad."\textsuperscript{205} After two male classmates sexually assaulted her, a 17-year old described her subsequent school experience:

I felt like leaving this school, I cried. I feel horrible because before all this happened they were my friends. I was thinking how am I going to face these guys. We attend classes together. How am I going to be myself like before? How am I going to be the same again? I asked advice from my mother she said I must try to calm myself down. I had to write my exams. So I just calmed myself down and tried to forgive them. I passed my exams, but it was hard. I still feel bad but I just take it out of my mind. I would leave this school if I could.\textsuperscript{206}

Most clearly, the sexual violence experienced by South African schoolgirls highlights how threats to the capability of “bodily integrity” can severely compromise the capability for “senses, imagination and thought.” The inability to secure against assault or move freely in schools while having bodily boundaries respected compromises girls’ abilities to attain an adequate education that would afford them the capability to imagine, think, reason, and enjoy forms of expression.

Compromising the capability for “senses, imagination and thought” lessens a girl’s capability for “practical reason” to the extent it requires engaging in critical reflection about planning a life and the ability to search for meaning and to have pleasurable experiences free of unnecessary pain and suffering. A girl’s affiliation capability is undermined when at an early age she learns from her educational setting that she apparently does not deserve or possess the social basis for self-respect or non-abasement. A girl cannot easily enjoy social interaction and friendship while she suffers from gender discrimination and students and teachers threaten her bodily integrity.

Girls who survived assaults at school also repeatedly expressed how they were overwhelmed by fear.\textsuperscript{207} Put simply, they were scared to be at school. A girl’s emotional capability is compromised when policymakers

\textsuperscript{204} Scared At School, supra note 7, at 63.
\textsuperscript{205} Id. at 63–64.
\textsuperscript{206} Interview by Human Rights Watch with MB, supra note 51.
\textsuperscript{207} See Scared At School, supra note 7, at 64.
and education authorities fail to recognize sexual violence and harassment as a serious problem and not just "joking" among students.

Finally, in the context of South Africa, given the high incidence of HIV/AIDS and the transmission risk associated with sexual violence, girls' capabilities of health and perhaps of life itself may be threatened. South Africa's education system must face the HIV/AIDS crisis. It cannot be ignored that, going forward, girls' education in Africa will likely be disproportionately and negatively affected by the AIDS epidemic. Whether or not they are infected with the virus, girls are most likely to care for a sick family member and manage the household. Sadly, with a total of 4.2 million infected people, South Africa has the largest number of people living with HIV/AIDS of any country in the world. The situation has not significantly improved.

The harm of sexual violence and harassment against girls demonstrates just how closely all the central human functional capabilities are linked to one another; the absence of one, while negative in itself, may also erode most other capabilities. Looking at the issue from a capabilities perspective, we now must consider the following issues: How will girls choose what they want to do and become and how does sexual violence get in the way of this practical reasoning aspect or restrict girls' freedom to choose what they value? How does sexual violence limit a girl's set of possible goals and actions as she attends school? How might such sexual violence limit a girl's future prospects as she grows up and becomes an adult and part of her society? What is the role of education in helping all students choose how they want to live their lives and in providing them with a set of capabilities necessary to follow through on their life plans?

Applied here, the capabilities approach captures for normative purposes girls' obstacles to developing capabilities now and functioning as women in the future, enjoying independence and dignity in a way that a utilitarian or liberal account alone simply cannot adequately appreciate.

VI. AN ENRICHED UNDERSTANDING OF EQUALITY

The capability to function is the thing that comes closest to the notion of positive freedom, and if freedom is valued then capability itself can serve as an object of value and moral importance.²¹¹

This Part explores the points of contrast between capabilities theory and the conceptual frameworks animating human rights and development approaches. It shows that the use of a capabilities approach to conceptualize and evaluate gender inequality in schools could advance both development objectives and social justice by providing an enriched understanding of the role of education in eradicating gender-based violence, achieving gender equality, and giving positive content to social and economic rights.

A. Capabilities' Challenge to Utilitarianism and Liberalism

Strictly speaking, capabilities theory only advocates that evaluative judgments about well-being and equality should measure capabilities. In the context of girls' education, an application of the capabilities approach means that policy planning and evaluation focuses on whether education actually results in more opportunities for girls to grow into the women they dream of becoming. Such an approach also requires policymakers to consider whether schooling provides girls with the ability to create a wider range of options for different life activities. It is in this respect that capabilities theory presents a challenge to utilitarianism and liberalism.

Utilitarianism, as applied in development economics (with its focus on the aggregate greatest good for the greatest number), considers whether girls are enrolled in school in the same numbers as boys. Liberalism, as it informs human rights monitoring and advocacy, considers whether girls are being treated the same as boys. In contrast, a capabilities approach brings a more qualitative texture to an assessment of girls' education by considering whether a girl's school experience expands her capabilities set, enables her to maximize the various combinations of possible achievements, and enhances her freedom to lead a variety of different lifestyles that she may choose. Capabilities theory challenges utilitarianism as a restrictive approach to measuring equality that ignores freedom and concentrates only on outputs.²¹²

²¹¹ Sen, Gender Inequality and Theories of Justice, supra note 172, at 262.
²¹² Id.
Traditionally, development economics found its roots in utilitarianism. In its classical form, as developed by Jeremy Bentham, utility is defined as individual pleasure, happiness, or satisfaction. In the aggregate, the framework of utilitarianism has no interest in or sensitivity to the actual distribution of goods since the focus is on the whole of a society. Utilitarianism in ethics involves the principle of valuing things or actions according to their contribution to the overall good, seen as the greatest good to the greatest number.

As applied in modern economics, utilitarianism replaces pleasure with representation of choice behavior. Utilitarianism sees the choice of girls to enroll in school as generally benefiting society. The question of the quality of the education experienced is neither asked nor answered. The utilitarian inquiry ends at the point of asking whether girls are in school due to its indifference to freedoms, rights, and liberties. Arguably, this utilitarian view mismeasures the equality of those South African girls subjected to violence at school.

The capabilities theorist argues that the utilitarian way of seeing equality is particularly limited in the presence of entrenched inequalities, while the focus on capabilities provides a more straightforward account of the lack of freedom to achieve functionings. Simply considered from the vantage point of utility, the output of school enrollment does not tell a policymaker anything about the set of possible activities from which girls might be able to choose.

In the case of South Africa, while some girls leave school after assaults, most stay entrenched in inequality, having learned submission and silence as school survival skills. A capabilities approach could create space to recognize girls' failures to report instances of sexual violence as adapted responses to their condition by looking not only to school attendance, but also to the capabilities being developed in school. The utilitarian position sees a girl's presence at school as an indication of free choice and would not look to context, conditions, or how girls are compromised by violent school environments.

Capabilities theory also rejects normative evaluations predominant in certain variants of liberalism that base evaluations of well-being ex-

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214. Id. ch. 4, section 5; see also Charles Blackorby, Utilitarianism and the Theory of Justice, in Handbook of Social Choice and Welfare 543-96 (Kenneth J. Arrow & Amartya Sen eds., 2002).
216. Scared at School, supra note 7, at 71-73.
clusively on goods or resource distribution. The capabilities theorist argues that the emphasis placed on resource distribution—central to certain forms of liberalism—is misplaced because it does not necessarily follow that equalizing ownership of resources or holdings of primary goods will result in equalizing the substantive freedoms enjoyed by different people. For the capabilities theorist, the concern should be with what matters intrinsically, specifically a person’s functions and potential to transform resources and goods into something the person values, to better assess equality in a meaningful manner. The resource-based equality theories in the liberal tradition do not acknowledge that people differ in their abilities to convert a given resource or good into capabilities due to personal, social, or environmental differences like physical and mental handicaps, levels of talent, tradition, social norms and customs, discrimination, legal rules, public infrastructure, and climate. By shifting the policymaker’s focus and priorities toward what a person is actually able to be and do, the capabilities approach appreciates conversion concerns and can acknowledge that more resources or reforms may be required to achieve the equality necessary for girls to convert schooling into a capability enhancing experience.

While capabilities theorists advance a different language to talk about basic entitlements than the conventional international development economist or human rights lawyer might, they would do well, despite their compelling critique of these competing conceptual frameworks, to recognize that any capabilities approach ultimately needs to be combined with a respect for human rights law and methodology. Capabilities can be deployed to strengthen the substance and content of positive rights, but the relationship between rights and capabilities has to date

217. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 60–65 (1971) (setting forth a theory of equality of “primary goods”); Ronald Dworkin, What is Equality? Part I: Equality of Welfare, 10 PHIL. & PUB. AFF. 185, 185–246 (1981) (setting forth a resources equality theory); Ronald Dworkin, What is Equality? Part II: Equality of Resources, 10 PHIL. AND PUB. AFF. 283, 283–345 (1981) (setting forth a resources equality theory); see also, SEN, INEQUALITY REEXAMINED, supra note 11, at 25 (explaining, “[l]iberties, rights, utilities, incomes, resources, primary goods, need-fulfillments, etc., provide different ways of seeing the respective lives of different people, and each of the perspectives leads to a corresponding view of equality” and noting that with this comes different ways of assessing equality).

218. See SEN, INEQUALITY REEXAMINED, supra note 11, at 33–34 (arguing that as liberalism has made the theoretical “move away from achievement to the means of achievement (in the form of Rawls’ focusing on primary goods or Dworkin’s concentration on resources) it may well have helped to shift the attention of the literature in the direction of seeing the importance of freedom, but the shift is not adequate to capture the extent of freedom. If our concern is with freedom as such, then there is no escape from looking for a characterization of freedom in the form of alternative sets of accomplishments that we have the power to achieve.”).

219. Id.
remained largely unexamined by most human rights advocates, development economists, and capabilities theorists.

A number of questions remain unanswered concerning the relationship between rights and capabilities—does the capabilities view supplement a theory of rights, or is it intended to be a particular way to determine what a theory of rights captures? Are rights and capabilities competing or complementary approaches? Does the capabilities view aid in answering any of the difficult issues that arise in the context of rights theory and analysis or are capabilities ultimately indistinguishable—merely a terminological shift? Is there any reason, beyond mere rhetoric, why the international community should use the language of rights in addition to or instead of the language of capabilities?\(^\text{220}\)

At base, the capabilities theorist would likely conclude that rights are not especially “informative” in much the way that a country’s GNP is not fully instructive when it comes to understanding the meaning of quality of life measures used in international economic development planning. Capabilities theorists maintain that there are significant problems with using rights rhetoric to address issues of development—problems that do not similarly afflict the capabilities approach. For example, Nussbaum in particular identifies a number of difficult theoretical questions about rights: Do human rights guarantee certain opportunities and capacities or certain resources with which to make life choices? Do human rights guarantee a certain type of treatment or a certain level of achieved well-being?\(^\text{221}\)

Nussbaum suggests that rights are best understood as a kind of combined capability.\(^\text{222}\) To protect rights is to put an individual in a position of combined capability to function in an area. Understanding rights in terms of combined capabilities, it becomes apparent that a child may not have a right to education simply because the right has been enshrined in an international treaty and acceded to by her country when external conditions necessary for her to actually exercise the relevant functions are not present.\(^\text{223}\) A combined capabilities conception fosters an appreciation


\(^{221}\) Id. at 275.

\(^{222}\) Id. (arguing that such rights can also be understood more like a basic capability, meaning people have a justified claim to such rights just by virtue of being human, whether the specific state in which they live has guaranteed that particular liberty); see also Nussbaum, *supra* note 10.

of the reality that a person only truly has a right where there is an effective measure to make the person capable of exercising and enjoying it.

In contrast to the classic liberal human rights approach, emphasizing noninterference and concerned with identifying victims, state violators, and judicial remedies, the capabilities approach redirects policymakers to establish conditions conducive to the material basis of securing human freedom by highlighting interconnections between issues that might otherwise be less clear.

The shortcomings inherent in the utilitarian and liberal conceptual frameworks discussed herein suggest that for policy planning and evaluative purposes, the appropriate normative space for measuring equality is neither utilitarianism as employed in standard development economics nor classical liberalism in rights theory as it has privileged negative liberty. Rather, positive substantive freedoms—the capabilities to choose a life one has reason to value—may prove a more accurate measure. The contribution of the capabilities approach to conversations about inequality rests in its ability to broaden the informational basis for making evaluative judgments about public policy, permitting simultaneous appreciation of difference and context in assessing a person's well-being. Accordingly, a focus on capabilities has the potential to make a profound theoretical difference in understanding and addressing inequality through a combination of human rights and development policy prescriptions.

B. Connecting Economic Development and Human Rights Through the Capabilities Approach

Despite their respective shortcomings, the conceptual frameworks of both human rights and economic development are nevertheless concerned with the instrumental objective of achieving well-being for humanity. In the capabilities approach, functionings are the constitutive elements of well-being, and capabilities reflect the freedom to pursue these constitutive elements. The relationship between these two elements of capabilities theory can serve to bridge the long-standing conceptual gulf between utilitarian frameworks focused on social and economic issues and liberal frameworks concerned with civil and political issues. The combination of these separate and distinct frameworks upon which theorists have constructed human rights and economic development

224. SEN, DEVELOPMENT AS FREEDOM, supra note 9, at 74.
offers support that neither could provide alone for the realization of the right to education for all children.

In development policy circles, an ascendant capabilities approach now provides the framework for the recent "human development" (as opposed to economic development) paradigm.\textsuperscript{226} The concept of human development has theoretical roots in the capabilities approach and asserts that human rights and human development share a common vision and purpose—to secure the freedom, well-being, and dignity of everyone everywhere.\textsuperscript{227}

Human development is the process of enlarging people's choices by expanding human functionings and capabilities.\textsuperscript{228} Thinkers in the human development school have identified three essential capabilities as requisites for well-being: (1) the capability to lead longer, healthier lives, (2) the capability to be knowledgeable, and (3) the capability to have access to the resources needed for a decent standard of living.\textsuperscript{229}

The human development school has devised evaluative indicators moving beyond GNP per capita.\textsuperscript{230} These new measurement indices include: the human development index (HDI), the gender-related development index (GDI), and the gender empowerment measure (GEM), among others. The HDI measures a country's average achievements in three basic dimensions of human development: a long and healthy life, knowledge, and a decent standard of living. As a composite index, the HDI contains three variables: life expectancy at birth, educational attainment (using adult literacy and combined gross primary, secondary, and tertiary enrollment ratios) and GDP per capita. The GDI measures the achievements in the same dimensions and using the same variables as...
the HDI but takes into account inequality in achievement between men and women. The greater the gender disparity in basic human development, the lower the country’s GDI compared with its HDI. While the GDI is simply the HDI “discounted” or adjusted downward for gender inequality, the GEM indicates whether women are able to actively participate in economic and political life. It measures gender inequality in key areas of economic life, economic and political participation, and decision making. It differs from the GDI in that it focuses on areas of economic and political participation beyond basic capabilities.

The UN Development Program commissioned the first Human Development Report (HDR), making use of these new indices and based on the human development concept, in 1990 with the single goal of putting people back at the center of the development process in terms of economic debate, policy, and advocacy. Although the human development school, as seen in the HDR, identifies only a few central capabilities, incorporates just a few functionings, and does so in a simplistic fashion, it is a serious and successful effort to empirically apply capabilities theory in a way that offers potential for bridging the traditional gulf between human rights advocacy and development thinking and policy. For example, the 2000 HDR report, titled Human Rights and Human Development for Freedom and Solidarity, highlights the similarities between development and rights approaches to contemporary social problems.

In contrast, while most capabilities are in some way encompassed in the spirit of principles already announced in the Universal Declaration of Human Rights, capabilities theory has made fewer inroads with human rights advocates. This is regrettable given that the capabilities approach could serve as a valuable supplement to a theory of human rights, operating as a kind of “translator” between the rhetoric of economic and social rights and their realization by strengthening them with greater positive content and substance.

The example of gender violence in schools illustrates why rights and capabilities theories are best viewed as complements to one another. Where capabilities offer an enriched appreciation of interconnections between and among the potential human functions offering substance to a right, a claim of rights commands respect for whatever entitlement is at

231. See ul Haq, The Human Development Paradigm, supra note 227. The HDR is an independent report commissioned by the United Nations Development Program and produced by a selected team of leading scholars, practitioners, and members of the Office of UNDP. Each HDR focuses on topical themes in the current development debate and provides analysis and policy recommendations.

issue and associated with the function. Moreover, rights compel state action to protect and promote an entitlement and demand a state obligation to prevent abuses that prohibit the exercise of a given entitlement. Where rights protection would compel state action to redress violations, capabilities, in comparison, seem to be mere aspirations. Accordingly, both are required.

Capabilities, to the extent that they are intended to form the basis for constitutional principles, would not look terribly different from the existing social and economic rights already enshrined in the Universal Declaration of Human Rights, which several states have already bound themselves to respect through subsequent international treaties. The existing human rights framework benefits from an institutional system that, if respected, could create binding and enforced norms.

However, in analyzing the conceptual difficulties associated with positive economic and social rights in the human rights framework, there is a strong case to be made for evaluating the content of the rights protected and the realization of those rights in terms of capabilities that a person possesses—his or her ability to enjoy the opportunity to lead the kind of life he or she may later come to value. Taken together, a rights framework and a capabilities approach provide justification for demanding an adequate state response to school violence.

The exercise and enjoyment of rights have material economic and security preconditions. While there are already recognized material rights enshrined in widely ratified international human rights instruments such as the ICESCR and others, these rights have simply not enjoyed the same attention from human rights activists as rights of a civil or political nature. This shortsightedness is due equally to political considerations and the lack of a strong conceptual framework for justifying social and economic needs.

A rights theorist could agree with a capabilities theorist that the realization of human rights requires material and institutional resources. Capabilities theory could, together with existing human rights law, provide a more solid foundation on which to build toward an increased understanding of and respect for indivisible economic and social rights.
C. Advancing Education and Gender Equality Through the Capabilities Approach

The issue of gender inequality is ultimately one of disparate freedoms.\footnote{See Sen, Inequality Reexamined, supra note 11, at 124.}

—Madoka Saito

Education can only present opportunities for realizing gender equality so long as schools are free of sexual violence and harassment directed against girls. In the example of sexual violence against South African schoolgirls, we have seen that a traditional development approach emphasizing gross educational enrollment numbers with a view toward increasing a country's GNP remains largely blind to the difficulty presented by gender violence and discrimination for girls in schools. The development economist's solution to the gender gap in education seeks to close the gap by increasing the number of girls in school, rather than by engaging in a close examination of the issues girls encounter in schools. The development approach therefore still leaves much to be desired. Using school enrollment alone to evaluate gender equality in education would make South Africa an unqualified educational success despite the rampant and unchecked sexual violence and harassment prevalent in the school system.

While a traditional human rights advocacy approach would not be blind to gender discrimination and would demand some form of state accountability through the judicial system for trespasses against bodily integrity, it would offer little information on the positive content of the right to education through its lenses of discrimination. Neither the development economist's approach to gender equality through numerical parity nor the human rights lawyer's demand for justice alone can offer a full account of the substantive content of the right to education and the consequences of sexual violence against girls in educational settings.

The development community proclaims a strong commitment to closing the gender gap in education, as evidenced by EFA and MDG, but a variety of forms of discrimination against girls based on their gender perpetuate the educational gap between boys and girls at school in violation of anti-discrimination standards in international human rights law. The capabilities approach can aid the international community in better comprehending why its EFA and MDG policies must place emphasis not only on getting girls into school, but also on keeping them there and keeping them safe. More is required than merely ensuring children's
equal access or gender parity in school enrollment. The international community must move beyond school access to achieve its pledged targets. When conducted in safe schools, education could expand children's capabilities. Indeed, there appears to be a strong and mutually enhancing relationship between capabilities and education.\textsuperscript{234}

Why make normative assessments about education in the space of capabilities instead of or in addition to utility or liberalism? Why would this capabilities framework be attractive for an analysis of gender inequality? The principal advantage of capabilities theory is that it explicitly acknowledges the existence of human diversity, including gender diversity, in a departure from other inequality approaches based on utility or liberalism, which assume that all people have the same utility functions or are influenced in the same way and to the same extent by the same personal, social, and environmental characteristics. By conceptualizing gender inequality using functionings and capabilities, there is more space to account for diversity, including gender differences.\textsuperscript{235}

Because the central question considered by the capabilities approach in evaluating law and social policy is what a given individual is "able to do and to be,"\textsuperscript{236} there must be an appreciation of substantive freedom in education. South African girls are made undeniably "unfree" by the unaddressed sexual violence prevalent in their schools. Rather than resist, many girls have resigned themselves to being the object of violence. Most girls interviewed by rights investigators did not formally complain to their school administrations about the bulk of abuse they endured because they received little support.\textsuperscript{237}

A 17-year old girl who did report abuse to her school's officials after an attempted rape but later elected not to pursue formal charges against two classmates explained, "They apologized and I told them I forgive them. I must forgive them. There is no choice. I didn't want to forgive them. Because I am a girl, I can't fight them."\textsuperscript{238} Girls are learning their place of submission, inferiority, and inequality and ultimately understanding that they are far from free. As Sen expressed, "The most blatant forms of inequalities and exploitations survive in the world through making allies out of the deprived and the exploited. The underdog learns to

\textsuperscript{234} See Madoka Saito, Amartya Sen's Capability Approach to Education: A Critical Exploration, 37 J. OF PHIL. OF EDUC. 17 (2003) (examining the relationship between the capabilities approach and education as it illuminates the concept that education encompasses both intrinsic and instrumental values).

\textsuperscript{235} See Robeyns, supra note 170.

\textsuperscript{236} Nussbaum, supra note 10, at 71.

\textsuperscript{237} SCARED AT SCHOOL, supra note 7, at 71–86.

\textsuperscript{238} Interview by Human Rights Watch with MB, supra note 51.
bear the burden so well that he or she overlooks the burden itself. Discontent is replaced by acceptance, hopeless rebellion or by conformist quiet.\textsuperscript{239}

Attending school does not necessarily enhance capabilities and substantive freedom. On the contrary, it can be disabling in certain contexts with far reaching consequences for women's equality in society.\textsuperscript{240} Capabilities theory, as it offers content to social and economic rights recognized by the international human rights regime, will better enable conscientious policymakers—truly committed to realizing the right to education—to see gender differences for the difference they make.

\section*{VII. Conclusion}

If governments seriously intend to fulfill their pledges to achieve educational equality by 2015, they must recognize sexual violence and harassment in schools as problems in urgent need of attention. Educational systems are uniquely situated to play an important part in combating gender inequality and creating the conditions for capability development. It is not only curriculum that teaches a child respect for human rights; the context in which learning takes place also informs the lesson. A school environment where sexual violence and harassment is tolerated is one that compromises the right of girl children to enjoy education on equal terms with boys—a lesson that is damaging to all children. Left unchecked, sexual violence serves to offer clear instruction that legitimates violence and reinforces gender inequality. This covert curriculum impedes capabilities, undermines economic and human development, and persists in sharp variance with a state's international legal obligations under human rights law.

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\item Sen, \textit{Rights and Capabilities}, supra note 167.
\item Elaine Unterhalter, \textit{The Capabilities Approach and Gendered Education: An Examination of South African Complexities}, \textit{I Theory and Res. in Educ.} 7 (2003) (arguing that education has been "under-theorized" in Sen's writings on capabilities and challenging Sen's assumption that "education linked with substantive freedom can unproblematically be equated with schooling").
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