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Jessica Lenahan (Gonzalez) v. United States & Collective Entity Responsibility for Gender-Based Violence

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JESSICA LENAHAN (GONZALES) V. UNITED STATES & COLLECTIVE ENTITY RESPONSIBILITY FOR GENDER-BASED VIOLENCE

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"State inaction towards cases of violence against women fosters an environment of impunity and promotes the repetition of violence 'since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.'" [1]

INTRODUCTION

With its recent decision in *Jessica Lenahan (Gonzales) v. United States*,

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1. Lenahan v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 168 (2011) (quoting Maria da Penha v. Brazil, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L.V.II.111 doc. 20 rev. ¶ 56 (2001), *available at* http://www.cidh.oas.org/women/Brazil12.051.htm).

the Inter-American Commission on Human Rights further developed a theory of "collective entity responsibility" for violence against women and gender-based violence.[2] In *Lenahan*, a domestic violence survivor, Jessica Lenahan (then Jessica Gonzales), held a civil protection order that directed police to arrest her husband if he violated its terms. When Mr. Gonzales kidnapped his three daughters one night, the police refused to enforce the civil protection order, despite Ms. Lenahan's frequent and increasingly urgent pleas for their help. Mr. Gonzales eventually opened fire on the

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2. A note about language: this article uses "violence against women" and "gender-based violence" interchangeably.

> The term 'gender-based violence' refers to violence that targets individuals or groups on the basis of their gender. The United Nations' Office of the High Commissioner for Human Rights' Committee on the Elimination of Discrimination against Women (CEDAW) defines it as 'violence that is directed against a woman because she is a woman or that affects women disproportionately,' in its General Recommendation 19. . . . This does not mean that all acts against a woman are gender-based violence, or that all victims of gender-based violence are female. The surrounding circumstances where men are victims of sexual violence could include men being harassed, beaten or killed because they do not conform to views of masculinity, which are accepted by the society.

Gender-Based Violence, INTEGRATED REGIONAL INFO. NETWORKS, http://www.irinnews.org/InDepthMain.aspx?InDepthId=20&ReportId=62847 (last visited March 5, 2012).

In addition, other than when I am discussing studies or other sources that use terms such as "sexual assault" or "rape," I use "sexual violence" instead of those terms because, in my view, "sexual violence" is a broader, more descriptive term that is not a term of art—one which I regard as including a wider range of actions that may not fit certain general or legal definitions of "sexual assault" or "rape." The term therefore includes "sexual assault" or "rape," as well as other actions involving physical contact of a sexual nature (while I acknowledge that non-physical actions can constitute violence, including those forms of violence is beyond the scope of this article). When I am discussing studies or other sources that use terms such as "sexual assault" or "rape," I retain use of those terms as the original researchers and authors used them.

Similarly, my definition of "report" and "reporting" is not a technical one. I regard a report as any time a victim discloses the violence to any professional with any role or authority to help victims. These professionals include, but are not limited to, medical professionals, counselors, security or conduct-related officials, residential life or other student affairs personnel, as well as faculty, campus, or community advocates.

In addition, I use "victim" and "survivor" interchangeably to refer to people who say that they have been victims of sexual violence. Therefore, "victim" is again not a term of art used to indicate a finding of responsibility for sexual violence. I use "perpetrator" or "assailant" when someone accused of sexual violence has been found responsible or in discussions where it can be assumed the person perpetrated the sexual violence, such as statistical analyses. I use "accused" or "alleged" to indicate when I am referring to those who have been charged but not found responsible for committing sexual violence and "accuser" when discussing the role of the victim/survivor in a disciplinary proceeding. Because studies confirm that the majority of victims are women and the majority of perpetrators and accused perpetrators are men, I use female pronouns to refer to victims and male pronouns to refer to perpetrators and accused perpetrators.

Finally, I use "school" and "institution" to identify either K-12 schools or higher education institutions, although I also use "college," "university," "campus," or "higher education" to refer to the latter category of schools.

police station and was shot and killed by police when they returned his fire. Ms. Lenahan's three daughters were later found shot to death in his truck and a variety of police actions and inactions surrounding the daughters' death cast suspicion on whether the daughters were shot by Mr. Gonzales or by police during the gunfight at the police station. Ms. Lenahan sued the police department for violations of her due process rights under the U.S. Constitution. Although the U.S. Supreme Court denied her claim, saying that she had no due process right to enforcement of a civil protection order, Ms. Lenahan prevailed in her complaint against the U.S. in front of the Inter-American Commission on Human Rights (Commission), which found the U.S. in violation of its international obligations under the American Declaration of the Rights and Duties of Man and the Charter of the Organization of American States.[3] In deciding the case, the Commission used the theory of "State responsibility" for domestic violence, which had its origins in the Inter-American human rights system's requirement that States prevent, investigate, sanction, and provide remedies for violence against women.[4]

Because, as the opening quote suggests, the State represents society, the State is a collective entity. Collective entities are entities that are treated like a single entity or actor by the law and are generally viewed as a unitary entity by actual individuals.[5] Nevertheless, collective entities are not individual persons themselves—they are made up of and/or represent a group of individuals, although "representation" in this context does not have a specific definition.

In addition, the opening quote also articulates that the State's actions and inactions are linked to the actions or inactions of individual actors. Because the State represents society, its actions and inactions are often assumed to express a society's normative views about a particular issue. The State's actions and inactions therefore send a message back to society as a whole about the "rightness" or "wrongness" of the actions or inactions of individual members of society. This message then encourages or discourages the individual actions or inactions that are addressed by that particular exercise of the State's expressive function. Because of this link between the State's normative powers and the actions or inactions of individuals, the theory goes, the State has a responsibility to act or not act in such a way that will encourage or discourage certain individual actions or inactions, including those affecting other individuals.

Moreover, as the opening quote further indicates, with regard to violence against women, States tend to be inactive. They either do not seek, or

3. *Lenahan*, Case 12.626, Report No. 80/11, ¶¶ 2, 4, 5, 90.

4. *See id.* ¶¶ 43, 116, 120, 122.

5. *See* United States v. White, 322 U.S. 694, 701 (1944).

inadequately seek, to prevent, investigate, sanction, and provide remedies for gender-based violence committed by non-State actors against other individuals.[6] This State inaction undercuts the message that gender-based violence is wrong, even when a State expresses such a normative principle through its laws, because the State has failed to back up that expression with enforcement of those laws. Thus, the State creates an "environment of impunity," where non-State actors continue to commit gender-based violence because they have not been sanctioned for previous acts of violence and thus have experienced neither normative nor practical deterrence of later violent acts.

At first glance, this theory of State responsibility for gender-based violence seems diametrically opposed to the attitude of U.S. law to gender-based violence. In fact, nothing demonstrates that difference more than comparing the Commission's decision in *Lenahan* with the U.S. Supreme Court's decision on the same facts, *Town of Castle Rock v. Gonzales*.[7] Besides this particular case, efforts to get U.S. local, state, and federal governments to combat violence against women adequately have generally met with barrier after barrier. U.S. jurisprudence—particularly constitutional jurisprudence on State action, due process, equal protection, even the commerce clause—appears opposed to the Inter-American system's theory of State responsibility for violence against women.

While the differences are prominent when one compares the theory in *Lenahan* only with U.S. jurisprudence involving the State, focusing upon the State responsibility theory as a theory of collective entity responsibility demonstrates that U.S. law does have an analogue to State responsibility for gender-based violence: "hostile environment" sexual harassment theory. Hostile environment sexual harassment theory holds employers and schools responsible for sex discrimination when they fail to respond adequately to gender-based violence (considered a severe form of sexual harassment) directed at their employees or students.[8] Fundamental to the hostile environment sexual harassment liability scheme is the idea that, although the employer or school is not directly harassing the victim, the employer or school is liable if it has failed to protect the victim from such harassment by employees, students, or other third parties who are peers to the victim in the workplace or school hierarchy.[9] Since employers and

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6. *Cf.* Brief for New York Legal Assistance Grp. et. al. as Amici Curiae Supporting Petitioner at 6, 8-9, *Lenahan*, Case 12.626, Report No. 80/11.

7. *Compare* Town of Castle Rock v. Gonzales (*Gonzales IV*), 545 U.S. 748, 768 (2005), *with Lenahan*, Case 12.626, Report No. 80/11, ¶¶ 90, 91, 196-97, 199.

8. *See* Heather Shana Bancheck, *Overcoming a Hostile Work Environment: Recognizing School District Liability for Student-on-Teacher Sexual Harassment Under Title VII and Title IX*, 55 CLEV. ST. L. REV. 577, 586-88 (2007).

9. *See id.* at 596-97.

schools are collective entities both in law and in fact, hostile environment sexual harassment theory is also a theory of collective responsibility for gender-based violence.[10]

Furthermore, both the State responsibility and hostile environment sexual harassment theories are based in legal prohibitions against sex discrimination. A State's failure to prevent, investigate, sanction, and provide remedies for violence against women is not a general failure with regard to all forms of violence. Rather, when the State's failure is not generalized but only happens with violence that disparately impacts women, the State's inaction is discriminatory on the basis of sex. Similarly, hostile environment sexual harassment theory is based in Title VII of the Civil Rights Act of 1964 (Title VII) and Title IX of the Educational Amendments of 1972 (Title IX), both of which prohibit sex discrimination: Title VII by employers, and Title IX by schools that receive federal funding.[11]

These collective entity responsibility theories also share similar conceptions of the causes, consequences, and complicating factors involved in gender-based violence—conceptions that are linked to the general similarities, including the concern with inaction on the part of collective entities, and the basis of the State and school responsibility theories in equal protection law. Moreover, these conceptions are confirmed both by sociological research on gender-based violence and by more detailed doctrinal similarities between the two theories.

One emerging set of relevant sociological theories suggests that the legal approaches encouraged by the collective entity responsibility theories of State responsibility and hostile environment sexual harassment are more likely to address and ultimately prevent gender-based violence. This scholarship shows that gender-based violence is enabled by a cycle of violence and non-reporting of the violence, as well as what one sociologist calls a "culture of silence and a culture of protection."[12] That is, a relatively small number of individual violent perpetrators are protected by the many "silent bystanders" who are aware of the violence, but do not report, intervene, or otherwise seek to stop it. Because victims often do not want to (or are not in a position to) report those who perpetrated violence against them, and because the bystanders remain silent, the violent

10. Note that employers of a very small size—such as individuals who are sole owners of a business—may not be considered collective entities. 42 U.S.C. § 2000e(b) (2006) (defining an employer as having fifteen or more employees). However, schools are always collective entities according to the conception of collective entities outlined above. 20 U.S.C. § 1681(c) (2006).

11. *See* 42 U.S.C. § 2000e-2; 20 U.S.C. § 1681(a).

12. MICHAEL KIMMEL, GUYLAND: THE PERILOUS WORLD WHERE BOYS BECOME MEN 59 (2008).

behavior of the small number of repeat perpetrators is implicitly supported. Those perpetrators are not deterred from perpetrating in the future, and thus the cycle of violence continues. *Castle Rock v. Gonzales* demonstrates the dynamics of bystander inaction surrounding gender-based violence, and the connections between this bystander culture and collective entity inaction. In contrast, the *Lenahan* and U.S. hostile environment sexual harassment cases are designed to prompt bystander intervention through holding the chief bystander—the State or the school—responsible for inaction.[13] The combined impact of these theories thus has the potential to reform legal regimes, such as U.S. tort and criminal justice systems, in a direction more likely to stop this cycle of violence.

Therefore, this Article explores the implications of *Lenahan* in the context of a broader project considering how theories of collective entity responsibility for gender-based violence might be integrated into other parts of the U.S. legal system in ways that can improve our response to and prevent such violence. The project will first consider U.S. common law tort regimes, then move on to the U.S. criminal justice system. It will employ the collective entity responsibility theories used in *Lenahan* and its predecessor international law cases, as well as in U.S. hostile environment sexual harassment jurisprudence, to discuss and suggest potential improvements to these other domestic law regimes. As the first in a series of articles developing various parts of this broader project, this Article will compare the commonalities between the State responsibility and hostile environment sexual harassment theories as examples of theories of collective entity responsibility for gender-based violence.

Accordingly, Part I of this Article reviews the development and import of the State responsibility theory that *Lenahan* applies to the U.S. Part II discusses hostile environment sexual harassment jurisprudence dealing with peer harassment in schools under Title IX. While acknowledging that hostile environment sexual harassment theory was developed in the context of Title VII and workplace sexual harassment, this part focuses on a comparison between State responsibility and "school responsibility" for several reasons, including because schools function more like the State in the lives of their students than employers do in the lives of their employees, and because Title IX jurisprudence includes a large number of cases involving gender-based violence (as opposed to sexual harassment not involving physical violence). Part III compares these two lines of collective entity responsibility jurisprudence. In doing so, Part III pays

13. *Compare Gonzales IV*, 545 U.S. 748, 773-74, 778 (2005) (holding that law enforcement's inaction in refusing to enforce Lenahan's civil protection order was not a legal violation), *with* Lenahan v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 5 (2011) (concluding that the United States' inaction was a legal violation).

particular attention to the goal of preventing gender-based violence that underlies these theories' focus on encouraging collective entity action, as well as how both this focus on prevention and these theories' basis in conceptions of equal protection result in similar doctrinal approaches. This Part also reviews the sociological evidence regarding the perpetuation of gender-based violence and demonstrates how the collective school responsibility and State responsibility theories respond to this evidence of how the violence actually occurs.

In sum, this Article demonstrates that, because *Lenahan* has collective entity responsibility analogues in U.S. domestic law, *Lenahan*'s State responsibility theory should not be rejected as being irrelevant or antithetical to U.S. law. This comparison, moreover, shows that whether the *Lenahan* decision is binding on the U.S. and the U.S. can be compelled to enforce it is not ultimately the most important insight of the case. Rather, because theories of collective responsibility are more likely to prevent gender-based violence, the State responsibility theory represented by *Lenahan* can and should be utilized, as a policy matter and along with its domestic law analogues, to end the epidemic of gender-based violence in the U.S. and around the globe.

I. STATE RESPONSIBILITY

The structure of international law has always complicated efforts to hold States responsible for violating women's human rights. Because international law deals with nation-states and their behaviors, relationships, rights, and obligations vis-à-vis each other, individual human beings were traditionally excluded from international law's ambit. Although international human rights law changed this structure so that individuals can now complain to international tribunals about State violations of their rights, protecting women's human rights presented additional difficulties even under international human rights law. For one thing, there was a relative absence of provisions in international human rights treaties that reflect how women experience rights violations. For another, because international law is the law of States, for a State to have violated an individual's human rights, the State itself must be responsible in some way for the violation. While violations of men's human rights are more likely to occur in the public sphere and more clearly at the hands of the State or State actors, women's rights are most often violated by non-State actors in the "private" sphere, making those rights hard—if not impossible—to redress under the traditional theories and approaches of international law.[14]

14. *See* Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 625-27 (1991).

The best example of this problematic relationship between international law and women's rights is gender-based violence. Violence against women is not explicitly named as a violation of women's human rights in any of the older and most widely adopted international treaties, including the Convention to Eliminate All Forms of Discrimination Against Women. While gender-based violence has been incorporated as a human rights violation through interpretations,[15] declarations,[16] and new treaties,[17] these efforts cannot compensate entirely for the silence regarding it in the older, more established treaties such as the International Covenant on Civil and Political Rights, which enjoy more signatories and wider acceptance by the international community. Under these older treaties, forms of gender-based violence (such as domestic violence) presented a stark State responsibility problem: because a domestic violence survivor's human rights are most often violated by a member of the survivor's family—an individual who is not being violent at the urging of the State or to fulfill any State purpose—it is difficult under traditional international law to hold a State responsible for domestic violence.

However, the Inter-American Court of Human Rights' decision in *Velásquez-Rodríguez v. Honduras* provided an international law rationale for requiring States to address violence committed by individual actors.[18] This case held Honduras responsible for violating the American Convention on Human Rights due to disappearances of citizens suspected to have been carried out by the Honduras military.[19] With only circumstantial evidence of the military's involvement, the Inter-American Court held that Honduras was responsible for violating international law even if it did not directly carry out the disappearances.[20] Because the State was not taking any action to prevent, investigate, or punish whoever was

15. *E.g.*, Rep. of the Comm. on the Elimination of Discrimination Against Women, 11th sess., U.N. Doc. A/47/38; GAOR, 47th Sess., Supp. No. 38 (1993) [hereinafter Gen. Rec. 19], *available at* http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19.

16. *E.g.*, The Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, art. 4, U.N. Doc. A/RES/48/103 (Feb. 23, 1994) [hereinafter DEVAW].

17. *E.g.*, Organization of American States (OAS), Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women: Convention of Belém do Pará, 24th Sess., June 6-10, 1994, at 20-21, OAS AG/RES. 1257 (XXIV-O/94) (June 9, 1994) [hereinafter Convention of Belém do Pará], *available at* http://scm.oas.org/pdfs/agres/ag03808E01.pdf; Council of Europe, Convention on Preventing and Combating Violence Against Women and Domestic Violence, May 11, 2011, *available at* http://conventions.coe.int/Treaty/EN/Treaties/Html/210.htm.

18. *See* Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 172-74 (July 29, 1988), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf (proclaiming that a State must exercise due diligence to prevent human rights violations committed by private citizens).

19. *Id.* ¶¶ 185-86.

20. *See id.* ¶¶ 183, 187.

carrying out the disappearances, the Inter-American Court said, Honduras was condoning and encouraging such violence and was indirectly responsible for it.[21]

Women's human rights activists took the State obligation to prevent, investigate, and punish created by *Velásquez* and combined it with sex discrimination theory to reach violence by non-State actors such as domestic violence. Dorothy Thomas and Michele Beasley were two of the earliest activists to articulate this new approach. In an article entitled "Domestic Violence as a Human Rights Issue," they used *Velásquez* to advance a theory under which a State can be held responsible for human rights violations committed by non-State actors.[22] Because domestic violence is overwhelmingly directed at women, they said, States commit sex discrimination in violation of human rights treaties when they fail to prevent, investigate, and punish domestic violence. By not preventing, investigating, and punishing crimes committed by individuals, the State is condoning and encouraging the harm caused by those crimes. Thus, when the State does not tolerate general lawlessness within its borders, but condones and encourages particular criminal activity that overwhelmingly harms one sex, the State's failure to act is discriminatory on the basis of sex. As a result, Thomas and Beasley argued, domestic violence is a violation of women's human rights for which States are responsible under every treaty that prohibits sex discrimination.[23]

The State responsibility theory explained by Thomas and Beasley remained a mere theory until courts and international tribunals applied it to States. Unsurprisingly, given their leadership in *Velásquez*, the Inter-American Commission and Court decided many of the earliest cases incorporating this theory. *Lenahan*, in fact, reflects the development of over 15 years of Inter-American Commission and Court jurisprudence dealing with violence against women. This jurisprudence began with cases involving gender-based violence committed under circumstances more similar to *Velásquez* than to *Lenahan*. For instance, in 1996 the Commission decided *Raquel Martí de Mejía v. Perú*, in which a group of men in military uniforms—likely members of the Peruvian military—invaded the home of the Mejía couple, who resided in an area subject to "emergency legislation" due to suspected "Shining Path" activity, and abducted the husband.[24] One member of the group returned to the home

21. *See id.* ¶¶ 172, 176, 179-80.

22. *See* Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, 58 ALB. L. REV. 1119, 1125-34 (1995) (asserting that a State can be held responsible for private persons engaged in gender motivated violence as a violation of equal protection and discrimination against women).

23. *See id.* at 1130-34.

24. Mejía v. Peru, Case 10.970, Inter-Am. Comm'n H.R., Report No. 5/96, at 1-2

and raped the wife twice,[25] and the husband's body was later found in the river with evidence of torture.[26] Peru argued that the wife's complaint regarding the violation of her rights by the sexual violence was a "repetition" because the Commission had already decided a complaint brought by the wife regarding the abduction and death of the husband. The Commission rejected Peru's argument and noted evidence that women like Mejía, who are "living in areas subject to emergency legislation[,] report being victims of sexual abuse by soldiers, who generally act with absolute impunity."[27]

Although *Mejía* was closer in facts to *Velásquez* than to *Lenahan*, within four years of the *Mejía* case, the Commission would reach the domestic violence committed by individual, non-State perpetrators that was discussed by Thomas and Beasley. In *Maria da Penha Maia Fernandes v. Brazil,* the Commission found Brazil in violation of the American Declaration of Human Rights, American Convention on Human Rights, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará)[28] for failing to act with due diligence to investigate, prosecute, and punish the attempted murder of Fernandes by her then-husband some 17 years prior to the Commission's decision in the case.[29] In so deciding, the Commission stated:

> The failure to prosecute and convict the perpetrator under these circumstances is an indication that the State condones the violence suffered by Maria da Penha . . . . Furthermore . . . tolerance by the State organs is not limited to this case; rather, it is a pattern. The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women . . . [and] creates a climate that is conducive to domestic violence . . . .[30]

Thus, in addition to the application of *Velásquez* to violence committed by non-State actors, *Maria da Penha* also shows the development of the State responsibility theory. Although the *Mejía* opinion discussed how the State's inaction allowed individual perpetrators to commit gender-based

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(1996), *available at* http://cidh.org/annualrep/95eng/Peru10970.htm.

25. *Id.* at 2.

26. *Id.* at 3.

27. *See id.* at 8-11, 13.

28. *See* Maria da Penha v. Brazil, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L.V.II.111 doc. 20 rev. ¶ 3 (2001), *available at* http://www.cidh.oas.org/women/Brazil12.051.htm (holding that Brazil law "encourages an environment of impunity that . . . sends a message that violence against women is tolerated and accepted as part of daily life").

29. *Id.* ¶¶ 8, 44.

30. *Id.* ¶¶ 55-56.

violence with "impunity," *Maria da Penha* developed that idea into an articulation of how the State's inaction actually encourages the violence, rather than just allowing it to occur.

In the next case involving violence against women, *González v. Mexico* (*In re Cotton Field*),[31] the Inter-American Court linked the "impunity" for perpetrators and the perpetuation of gender-based violence even more explicitly. The *Cotton Field* case involved the disappearances of a 15-year-old girl, a 17-year-old girl, and a 20-year-old woman in Cuidad Juarez—all of whom were found murdered in a similar fashion in the same cotton field.[32] They were three out of hundreds or thousands (depending on who conducted the estimates) of women similarly "disappeared" and/or murdered in Cuidad Juarez from 1993 until the Inter-American Court's decision in 2009.[33] At several points in the lengthy Cotton Field decision, the Inter-American Court makes reference to the way in which State authorities' inadequate response to the murders "propelled the repetition of the [violence],"[34] and "perpetuat[ed] the violence against women in Ciudad Juárez."[35] The decision ultimately concludes its analysis of Mexico's failure to act with due diligence by affirming that the State's "ineffectiveness when dealing with individual cases of violence against women encourages an environment of impunity that facilitates and promotes the repetition of acts of violence in general and sends a message that violence against women is tolerated and accepted as part of daily life."[36]

While lacking as much explanation of the reasons behind its adoption, other international tribunals have widely adopted and applied the State responsibility theory, including the Committee on the Elimination of Discrimination Against Women (CEDAW) in five cases to date under its Optional Protocol:[37] *A.T. v. Hungary*,[38] *Şahide Goekce v. Austria*,[39] *Fatma*

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31. González v. Mexico (*In re* Cotton Field), Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Amer. Ct. H.R. (ser. C) No. 205, ¶ 388 (Nov. 16, 2009).

32. *Id.* ¶ 277.

33. *Id.* ¶¶ 118-19.

34. *Id.* ¶ 155.

35. *Id.* ¶ 164.

36. *Id.* ¶ 388.

37. *See generally* Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 54/4, Annex, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/4, at 3 (Oct. 15, 1999) [hereinafter Optional Protocol], *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/774/73/PDF/N9977473.pdf?OpenElement (agreeing the State has responsibilities to ensure women can fully enjoy their human rights).

38. *See* Commc'n No. 2/2003, Ms. A.T. v. Hungary, Comm. on the Elimination of Discrimination Against Women, 32nd Sess. ¶ 9.6, U.N. Doc. A/60/38(Part I) Annex III (Jan. 26, 2005) [hereinafter A.T.], *available at* http://www.un.org/womenwatch/daw/

Yildirim v. Austria,[40] *V.K. v. Bulgaria*,[41] and *Vertido v. Philippines*.[42] The CEDAW Optional Protocol cases develop several specific doctrines, including that States should provide "interim measures" to protect victims, such as putting a civil protection order option in place and being sensitive to the possibility of retaliatory violence. In addition, a State should not delay responding when it "knew or should have known" of serious dangers to the victim, and may not allow other rights, including those of the criminal defendant, to "supersede" a victim's rights.[43]

In *A.T. v. Hungary*, the author of the complaint had, for four years, suffered domestic violence at the hands of her common law husband, was unable to go to a shelter because of her brain-damaged son, and could not seek a protection order because Hungarian law did not provide for such an option.[44] Under Article 5 of the Optional Protocol, at A.T.'s request, CEDAW contacted Hungary to ask it to provide "interim measures"[45] to protect her from irreparable harm.[46] The State did not respond to this request. In judging the complaint admissible, CEDAW decided that the State had engaged in an "unreasonably prolonged delay" of "over three

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cedaw/protocol/decisions-views/CEDAW%20Decision%20on%20AT%20vs%20Hungary%20English.pdf (holding Hungary responsible for violating the rights of Ms. A.T.).

39. *See* Commc'n No. 5/2005, Goekce v. Austria, Comm. on the Elimination of Discrimination Against Women, 39th Sess., July 30-Aug. 10, 2007, ¶¶ 12.1.5-12.1.6, U.N.Doc. CEDAW/C/39/D/5/2005 (August 6, 2007) [hereinafter Goekce], *available at* http://www.bayefsky.com/pdf/austria_cedaw_t5_5_2005.pdf (holding Austria violated its obligations to uphold Ms. Goekce's rights to life and wellness).

40. *See* Commc'n No. 6/2005, Yildirim v. Austria, Comm. on the Elimination of Discrimination Against Women, 39th Sess., July 30-Aug. 10, 2007, ¶¶ 12.1.5-12.1.6 (October 1, 2007), U.N. Doc. CEDAW/C/39/D/6/2005 (October 1, 2007) [hereinafter Yildirim], *available at* http://www.bayefsky.com/pdf/austria_cedaw_t5_6_2005.pdf (holding Austria violated its obligations to uphold Ms. Yildirim's rights to life and wellness).

41. *See* Commc'n No. 20/2008, Ms. V.K. v. Bulgaria, Comm. on the Elimination of Discrimination Against Women, 49th Sess., July 11-29, 2011, ¶ 9.13, U.N. Doc. CEDAW/C/49/D/20/2008 (Sept. 27, 2011) [hereinafter V.K.], *available at* http://www2.ohchr.org/english/law/docs/CEDAW-C-49-D-20-2008_ru.pdf (holding Bulgaria violated its obligations by not making shelter available to Ms. V.K. and her children).

42. *See* Commc'n No. 18/2008, Vertido v. The Philippines, Comm. on the Elimination of Discrimination Against Women, 46th Sess., July 12-30, 2010, ¶¶ 8.5-8.7, U.N. Doc. CEDAW/C/46D/18/2008 (Sept. 1, 2010) [hereinafter Vertido], *available at* http://www.iwraw-ap.org/protocol/doc/Karen_Tayag_Vertido_v_Philippines.pdf (holding that there should not be an assumption in a State law or practice that a woman consents to rape by not physically resisting after being threatened).

43. *See* A.T., *supra* note 38, ¶¶ 8.4, 9.3, 9.5; Goekce, *supra* note 39, ¶¶ 12.1.4, 12.1.5; Yildirim, *supra* note 40, ¶¶ 12.1.4, 12.1.5; V.K., *supra* note 41, ¶ 9.4.

44. A.T., *supra* note 38, ¶ 2.1.

45. *Id.* ¶¶ 4.1-4.2.

46. Optional Protocol, *supra* note 37, at 4.

years from the dates of the incidents in question."[47] It also noted that Hungary had provided no temporary protection to A.T. after criminal proceedings were instituted, even though her abuser had not been detained,[48] implying that the State made A.T. vulnerable to retaliatory violence from her spouse. Finally, it stated that "[w]omen's human rights to life and to physical and mental integrity cannot be superseded by other rights,"[49] found the State in violation of its treaty obligations,[50] and made several recommendations, including that the State make reparations to the victim.[51]

In *Yildirim v. Austria* and in *Goekce v. Austria*, the victims were murdered by their abusive husbands after approximately three months in the *Yildirim* case,[52] and after three years of escalating death threats and abuse in the *Goekce* case.[53] In both cases, CEDAW found Austria in violation of the treaty because the State "knew or should have known" of the danger to the victims,[54] and cited *A.T.* for the premise that "the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity."[55]

Finally, in the two most recent CEDAW cases involving gender-based violence and the State's responsibility to act with due diligence, *Vertido v. Philippines* and *V.K. v. Bulgaria*, the two government-defendants already had laws on the books that should have allowed the States to respond effectively to gender-based violence.[56] However, in both cases, the enforcement of those laws was lacking due to affirmative refusals to use those laws by State courts, based on gender stereotypes. In *Vertido*, the victim had alleged that she had been raped by a professional colleague,[57] the case had remained at the trial court level for seven years,[58] and then the court acquitted the defendant based on gender stereotypes about rape

47. A.T., *supra* note 38, ¶ 8.4.

48. *Id.*

49. *Id.* ¶ 9.3.

50. *Id.* ¶ 9.6.

51. *See id.* ¶ 9.6 (stating reparation must be proportionate to the gravity of the violations infringing the victim's rights).

52. Yildirim, *supra* note 40, ¶¶ 2.2-2.13.

53. Goekce, *supra* note 39, ¶¶ 2.1-2.11.

54. *Id.* ¶ 12.1.4; Yildirim, *supra* note 40, ¶ 12.1.4.

55. Goekce, *supra* note 39, ¶ 12.1.5; Yildirim, *supra* note 40, ¶ 12.1.5.

56. *See* Vertido, *supra* note 42, ¶ 8.5; V.K., *supra* note 41, ¶ 9.12 (evaluating judicial precedents and interpretations of laws that are enacted to protect victims).

57. Vertido, *supra* note 42, ¶ 2.2.

58. *Id.* ¶¶ 8.3-8.4.

victims.[59] In *V.K.*, a victim of domestic violence had been denied a protection order against her abusive husband, a denial that CEDAW also judged to be based on gender stereotypes, demonstrated by such actions as the State court reprimanding the victim for using "insolent language" with her husband.[60] In both cases, CEDAW was careful to specify that it was not substituting its judgment regarding the facts for those of the State courts involved, but that it would review the State's policies and procedures for discrimination.[61] In both cases it also recommended that the State compensate the victims. [62] In *Vertido*, it went on to note the delay in the Philippines' handling of the case[63] and recommended that the State avoid such delay in future rape cases.[64] In *V.K.*, CEDAW once again asked the State to provide the victim, V.K., with "interim measures" of protection. It also found the "beyond a reasonable doubt" standard of proof used by Bulgarian courts when deciding domestic violence protection order cases "excessively high and not in line with the Convention, nor with current anti-discrimination standards which ease the burden of proof of the victim in civil proceedings relating to domestic violence complaints."[65] As a result, CEDAW recommended that the State change the standard of proof.[66]

Similarly, the European Court of Human Rights (ECHR) has recognized in multiple gender-based violence cases that the State has a responsibility to protect individuals against the acts of non-State actors, although it has not always discussed the theory using the "due diligence" terminology. Such ECHR cases include *Kalucza v. Hungary*,[67] *Hajduová v Slovakia*,[68] *A. v. Croatia*,[69] *Opuz v. Turkey*,[70] *E.S. & Others v. Slovakia*,[71] *Tomašić &*

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59. *See id.* ¶ 8.5 (noting the assessment of the credibility of the victim was influenced by stereotypes of how the court thought a rape victim should act, including by accepting the "myth that . . . a woman gives her consent because she has not physically resisted the unwanted sexual conduct").

60. V.K., *supra* note 41, ¶ 9.12.

61. *Id.* ¶ 9.6; Vertido, *supra* note 42, ¶ 8.2.

62. *See* V.K., *supra* note 41, ¶ 9.16; Vertido, *supra* note 42, ¶ 8.9.

63. Vertido, *supra* note 42, ¶ 8.3.

64. *Id.* ¶ 8.9.

65. V.K., *supra* note 41, ¶¶ 9.9-9.10.

66. *Id.* ¶ 9.16.

67. Kalucza v. Hungary, App. No. 57693/10, Eur. Ct. H.R. (2012), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110452.

68. Hajduová v. Slovakia, App. No. 2660/03, Eur. Ct. H.R. (2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101945.

69. A. v. Croatia, App. No. 55164/08, Eur. Ct. H.R. (2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101152.

70. Opuz v. Turkey, App. No. 33401/02, Eur. Ct. H.R (2009), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92945.

Others v. Croatia,[72] *Bevacqua v. Bulgaria*,[73] *Kontrova v. Slovakia*,[74] and *M.C. v. Bulgaria*.[75] Most of these cases proceed from the premise that States must "protect the individual against arbitrary action by public authorities," but they also have "positive obligations [that] may involve the adoption of measures in the sphere of the relations of individuals between themselves."[76] The standard that the ECHR uses to determine when these positive obligations kick in is when the State "knew or ought to have known at the time of the existence of a real and immediate risk" to the victim.[77] Inactions by the States that violate these obligations include delays in taking action,[78] the failure to order any interim or protective measures for the victim,[79] and the failure to enforce orders to detain or treat the offenders.[80] Many of these cases reference a 2002 Recommendation issued by the Council of Ministers for the European Union,[81] which encourages States to take, quickly and without delay,[82] a wide range of specific actions with regard to gender-based violence, including: interim

71. E.S. v. Slovakia, App. No. 8227/04, Eur. Ct. H.R. (2009), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-93955.

72. Tomašić v. Croatia, App. No. 46598/06, Eur. Ct. H.R. (2009), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-1695.

73. Bevacqua v. Bulgaria, App. No. 71127/01, Eur. Ct. H.R. (2008), *available at* http://www1.umn.edu/humanrts/research/bulgaria/BEVACQUA.pdf.

74. Kontrova v. Slovakia, App. No. 7510/04, Eur. Ct. H.R. (2007), *available at* http://www.coe.int/t/dg2/equality/domesticviolencecampaign/resources/Kontrova%20v.%20Slovakia_en.asp.

75. M.C. v. Bulgaria, App. No. 39272/98, Eur. Ct. H.R. (2003), *available at* http://www.unhcr.org/refworld/docid/47b19f492.html.

76. *See* Kalucza v. Hungary, App. No. 57693/10, Eur. Ct. H.R. ¶ 58-59 (2012), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110452; Hajduová v. Slovakia, App. No. 2660/03, Eur. Ct. H.R. ¶ 45 (2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101945; A. v. Croatia, App. No. 55164/08, Eur. Ct. H.R. ¶ 57 (2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101152 (including such positive measures as protecting the victim from arbitrary action by public authorities or from violent behaviors of an abuser).

77. *Hajduová*, App. No. 2660/03, ¶ 50; Opuz v. Turkey, App. No. 33401/02, Eur. Ct. H.R. ¶ 129 (2009), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92945; *Tomašić*, App. No. 46598/06, ¶ 51; *Kontrova*, App. No. 7510/04, ¶ 50.

78. *Kalucza*, App. No. 57693/10, ¶¶ 64, 68; *Opuz*, App. No. 33401/02, ¶¶ 195-96; E.S. v. Slovakia, App. No. 8227/04, Eur. Ct. H.R. ¶ 43 (2009), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-93955; *Bevacqua*, App. No. 71127/01, ¶ 76; *M.C.*, App. No. 39272/98, ¶ 184.

79. *Kalucza*, App. No. 57693/10, ¶¶ 65-67; *Opuz*, App. No. 33401/02, ¶¶ 148, 171; *E.S.*, App. No. 8227/04, ¶ 43.

80. *Hajduová*, App. No. 2660/03, ¶ 50; *A.*, App. No. 55164/08, ¶ 78; *Tomašić*, App. No. 46598/06, ¶¶ 55-56.

81. EUR. CONSULT. ASS., Recommendation Rec (2002)5 of the Committee of Ministers to Member States on the Protection of Women Against Violence, 794th Sess. (2002) [hereinafter Rec (2002)5].

82. *Id.* ¶¶ 23, 29, 35.

protective measures,[83] protection of victims from "threats and possible acts of revenge,"[84] and appropriate compensation.[85] The Recommendation also notes that States should "penalise all forms of physical, sexual and psychological violence perpetrated or condoned in situations in which the responsibility of the state or of a third party may be invoked, for example in boarding schools."[86] Moreover, in each of these cases, the ECHR ordered the State to pay compensation to the victims.[87]

Nearly all of these cases involved domestic violence, usually spousal abuse. While the majority do not explicitly reference the State obligation to act with due diligence, two of these cases have used that specific term—*Opuz v. Turkey*[88] and *Bevacqua v. Bulgaria*[89]—and have cited to other international tribunals, including the Inter-American Court and Commission in *Velasquez*[90] and *Maria da Penha*,[91] as well as CEDAW's decisions in *Yildirim v. Austria*[92] and *A.T. v. Hungary*.[93] They also both reference the 1993 Declaration on the Elimination of Violence Against Women (DEVAW)[94] and the Special Rapporteur on Violence Against Women, Its Causes and Consequences (Special Rapporteur).[95] *Opuz v. Turkey* involved years of repeated and escalating domestic violence by an abusive husband against his wife and her mother, and culminated in his

83. *Id.* ¶ 58.

84. *Id.* ¶ 44.

85. *Id.* ¶ 36.

86. *Id.* ¶ 78.

87. Kalucza v. Hungary, App. No. 57693/10, Eur. Ct. H.R. ¶ 79 (2012), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110452; Hajduová v. Slovakia, App. No. 2660/03, Eur. Ct. H.R. ¶ 64 (2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101945; A. v. Croatia, App. No. 55164/08, Eur. Ct. H.R. ¶ 112 (2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101152; E.S. v. Slovakia, App. No. 8227/04, Eur. Ct. H.R. ¶ 57 (2009), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-93955; Tomašić v. Croatia, App. No. 46598/06, Eur. Ct. H.R. ¶ 82 (2009), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-1695; Opuz v. Turkey, App. No. 33401/02, Eur. Ct. H.R. ¶ 214 (2009), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92945; Bevacqua v. Bulgaria, App. No. 71127/01, Eur. Ct. H.R. ¶ 101 (2008), *available at* http://www1.umn.edu/humanrts/research/bulgaria/BEVACQUA.pdf; Kontrova v. Slovakia, App. No. 7510/04, Eur. Ct. H.R. ¶ 76 (2007); M.C. v. Bulgaria, App. No. 39272/98, Eur. Ct. H.R. ¶ 201 (2003), *available at* http://www.unhcr.org/refworld/docid/47b19f492.html.

88. *Opuz*, App. No. 33401/02, ¶ 149.

89. *Bevacqua*, App. No. 71127/01, ¶ 73.

90. *Id.* ¶ 53; *Opuz*, App. No. 33401/02, ¶ 83.

91. *Bevacqua*, App. No. 71127/01, ¶ 53; *Opuz*, App. No. 33401/02, ¶ 86.

92. *Opuz*, App. No. 33401/02, ¶ 77.

93. *Bevacqua*, App. No. 71127/01, ¶ 53.

94. *Id.* ¶ 52; *Opuz*, App. No. 33401/02, ¶ 78.

95. *Bevacqua*, App. No. 71127/01, ¶ 53; *Opuz*, App. No. 33401/02, ¶ 79.

murdering the mother.[96] Based on evidence of widespread problems enforcing the protection order law,[97] poor treatment of victims by police,[98] and "the general and discriminatory judicial passivity in Turkey [that] created a climate that was conducive to domestic violence,"[99] the ECHR additionally found the State responsible for violating guarantees of equal protection.[100] In addition, the ECHR noted concerns with Turkey's criminal law, including its lack of "an adequate deterrent effect capable of ensuring . . . effective prevention,"[101] and that State officials made the decision not to prosecute, "without conducting any meaningful investigation," even in the face of serious attacks and severe injuries.[102] Altogether, it expressed concern that the abuser's "impunity"[103] meant that "the violence suffered by the applicant had not come to an end and that the authorities had continued to display inaction,"[104] and admonished the State that "in domestic violence cases perpetrators' rights cannot supersede victims' human rights to life and to physical and mental integrity."[105]

Some of these themes were echoed in an earlier case, *M.C. v. Bulgaria*, involving an acquaintance gang-rape of a 14-year-old girl.[106] In that case, while the ECHR made clear, as it has done elsewhere, that "it cannot replace the domestic authorities in the assessment of the facts of the case[,] nor can it decide on the alleged perpetrators' criminal responsibility,"[107] it stated that it could review whether the State had fulfilled its "positive obligation to conduct an official investigation,"[108] which "may extend to questions relating to the effectiveness of a criminal investigation."[109] In finding violations of those positive obligations, particular faults identified by the ECHR included that the investigating officials made no credibility assessments of the defendants and their witnesses despite "the presence of

96. *Opuz*, App. No. 33401/02, ¶¶ 7-54.

97. *Id.* ¶¶ 195-96.

98. *Id.* ¶ 192.

99. *Id.* ¶ 198.

100. *Id.* ¶ 191.

101. *Id.* ¶ 153.

102. *Id.* ¶ 169.

103. *Id.*

104. *Id.* ¶ 173.

105. *Id.* ¶ 147.

106. M.C. v. Bulgaria, App. No. 39272/98, Eur. Ct. H.R. ¶ 10 (2003), *available at* http://www.unhcr.org/refworld/docid/47b19f492.html.

107. *Id.* ¶ 168; *see also* Hajduová v. Slovakia, App. No. 2660/03, Eur. Ct. H.R. ¶ 47 (2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101945 (declining to substitute the Court's judgment for that of domestic authorities in matters pertaining to protecting an individual's personal integrity).

108. *M.C.*, App. No. 39272/98, ¶ 151.

109. *Id.* ¶ 152.

two irreconcilable versions of the facts,"[110] delayed the investigation,[111] and "attach[ed] little weight to the particular vulnerability of young persons."[112] The ECHR drew the existence of the positive obligations from a much earlier 1985 case, *X & Y v. Netherlands*,[113] involving the rape of a 16-year-old girl with mental disabilities by an adult male without mental disabilities at the privately-owned facility where the girl lived.[114] Thus, although the ECHR has not, until recently, described its recognition of the State's responsibility to protect individual actors from violence by other individual actors as "due diligence," this doctrine parallels the due diligence approach both in substance and in its origins in a case involving violence against women. In fact, given that case's age and the repeated invocation of it in this line of cases, the ECHR's recognition of the due diligence concept could be seen as pre-dating its recognition in the Inter-American and U.N. systems.

Finally, the State's responsibility to act with due diligence has been recognized in many non-tribunal settings, enough so that, combined with its use by tribunals, the Special Rapporteur could justifiably characterize it as a rule of customary international law.[115] These international bodies include the United Nations General Assembly, whose members voted to issue DEVAW,[116] and CEDAW, which issued General Recommendation 19 regarding violence against women.[117] The Organization of American States' Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará) entered into force in 1995,[118] and in 2011 the Council of Europe's Convention on Preventing and Combating Violence Against Women and Domestic Violence opened for signature.[119] Moreover, as noted by the Special Rapporteur herself, the due diligence concept was explicitly

110. *Id.* ¶ 177.

111. *Id.* ¶ 184.

112. *Id.* ¶ 183.

113. X & Y v. Netherlands, App. No. 8978/80, Eur. Ct. H.R. (1985), *available at* http://www.juridischeuitspraken.nl/19850326EHRMXenYtegenNederland.pdf.

114. *Id.* ¶¶ 7-8.

115. Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on the Due Diligence Standard as a Tool for the Elimination of Violence against Women, Comm'n on Human Rights, 62nd Sess., U.N. Doc. E/CN.4/2006/ 1 (Jan. 20, 2006) [hereinafter Special Rapporteur Rep.], *available at* http://www.unhcr.org/refworld/docid/45377afb0.html.

116. DEVAW, *supra* note 16, at Art. 4, Sec. (c).

117. Gen. Rec. 19, *supra* note 15, ¶ 9.

118. Convention of Belém do Pará, *supra* note 17, at 92.

119. Council of Europe, Convention on Preventing and Combating Violence Against Women and Domestic Violence, May 11, 2011, *available at* http://conventions.coe.int/Treaty/EN/Treaties/Html/210.htm.

referenced in the Commission on Human Rights resolution creating the Special Rapporteur in 1994,[120] and is regularly referenced in United Nations' reports regarding gender-based violence.[121] This last category includes a 2006 study conducted by the Secretary-General, which devotes a significant portion of its report to States' "duty to prevent acts of violence against women; to investigate such acts when they occur and prosecute and punish perpetrators; and to provide redress and relief to the victims."[122]

Like the Inter-American jurisprudence on violence against women, many of these sources also connect gender-based violence and gender discrimination as a cause and consequence of each other. For instance, the Secretary-General's report states that "violence against women is not the result of random, individual acts of misconduct, but rather is deeply rooted in structural relationships of inequality between women and men."[123] Therefore, eliminating gender-based violence requires "addressing discrimination, promoting women's equality and empowerment, and ensuring that women's human rights are fulfilled."[124] Moreover, "[w]ithin the broad context of women's subordination," State inaction is a "specific causal factor[] for violence."[125] Indeed,

> "[w]hen the State fails to hold the perpetrators of violence accountable, this not only encourages further abuses, it also gives the message that male violence against women is acceptable or normal. The result of such impunity is not only denial of justice to the individual victims/survivors, but also reinforcement of prevailing inequalities that affect other women and girls as well."[126]

Thus, *Lenahan* functions as one of the most recent applications of a collective entity responsibility theory that has been developing in multiple venues around the world for over two decades—a theory widespread enough to be characterized as a rule of customary international law. This theory attributes responsibility for gender-based violence to the collective entity of the State based on how the State's actions or inactions "condone," "encourage," "facilitate," "promote," "perpetuate," and "sustain" gender-based violence by non-State actors or those who cannot be confirmed to be State actors.[127] This encouragement, moreover, is accomplished when the

120. Rec (2002)5, *supra* note 81, at 8.

121. Special Rapporteur Rep., *supra* note 115, at 8.

122. U.N. SEC'Y-GEN., ENDING VIOLENCE AGAINST WOMEN, FROM WORDS TO ACTION (2006) [hereinafter SEC'Y-GEN. STUDY], *available at* http://www.un.org/womenwatch/daw/public/VAW_Study/VAWstudyE.pdf.

123. *Id.* at ii.

124. *Id.* at i.

125. *Id.* at ii.

126. *Id.* at iv-v.

127. Lenahan v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No.

State fails to act with due diligence to prevent violence; investigate violence when it occurs; prosecute and sanction those who perpetrate it; or compensate those who are victims of it. Failing to do these things when the State knows of general problems or specific instances of violence against women creates an "environment" or "climate" of "impunity." It is also inextricably linked to patriarchy and discrimination, which the theory includes as both cause and consequence of gender-based violence. As a result, the failure of a State to fulfill its due diligence responsibility represents a serious barrier to the goal of ending gender-based violence and discrimination.

II. SCHOOL RESPONSIBILITY

The focus on environment and climate in the State responsibility theory echoes the focus of that theory's U.S. domestic law analogue: hostile environment sexual harassment theory. As noted above, U.S. hostile environment sexual harassment theory developed first in the employment context, under Title VII's prohibition of discrimination on the basis of sex. However, the focus of this Part is on the more recent development of hostile environment sexual harassment jurisprudence under Title IX, which prohibits sex discrimination in educational settings.[128] This focus is due to the fact that schools play a more "State-like" role in their students' lives than do most employers in their employees' lives. Most particularly, schools and school officials have disciplinary authority over student behavior that more closely approximates a State's than an employer's authority, at least in the popular imagination.[129] In some cases, such as boarding schools or colleges and universities, schools can also function as their students' place of residence, further increasing the school's pervasiveness in, and impact on, a student's life.

U.S. schools are also the site of a distressingly large amount of gender-based violence, including sexual violence and dating or relationship violence (similar to domestic violence except occurring within a non-cohabiting dating or romantic relationship). Sexual violence in schools

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80/11, ¶ 126 (2011).

128. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 632 (1999) (discussing the standard by which school boards and districts can be held liable for Title IX violations).

129. In reality, States and schools are quite different, because schools have a lot less power than States do, particularly in terms of responding to misconduct. In fact, the worst punishment schools can levy is expulsion from the school, as opposed to the State's powers to imprison and even execute nationals. Schools even lack such State powers as the subpoena. For more information regarding this comparison, see generally Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613, 627-80 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1457343.

occurs most often between students, although teacher-perpetrated sexual harassment and violence directed at students is not an insignificant phenomenon. To give a brief sense of the scope of the violence, comprehensive studies on campus-based, peer sexual violence that have been completed over the last several decades consistently find that 20-25% of college women are victims of attempted or completed nonconsensual sex during their time in college.[130] In addition, "[w]omen ages 16 to 24 experience rape at rates four times higher than the assault rate of all women, making the college (and high school) years the most vulnerable for women. [Furthermore,] college women are more at risk for rape and other forms of sexual assault than women the same age but not in college."[131]

The vast majority of this violence is committed by someone known to the victim.[132] In one study, 12.8% of completed rapes, 35% of attempted

130. Brenda J. Benson et al., *College Women and Sexual Assault: The Role of Sex-Related Alcohol Expectancies*, 22 J. FAM. VIOL. 341, 348 (2007); CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT STUDY: FINAL REPORT 5-3 (2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf (finding that 19% of students in the sample had experienced attempted or completed sexual assault since entering college, but noting that over 50% of the sample had completed less than 2 years of college and therefore discussing the incidence reported by college seniors, where 26% had experienced attempted or completed sexual assault since entering college, to predict a woman's risk during her overall college career); *see also* BONNIE S. FISHER ET AL., THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 10 (2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/182369.pdf; CAROL BOHMER & ANDREA PARROT, SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION 6 (1993). Note: although some of the studies that are cited here are somewhat old, they are included because the findings of the older studies are quite consistent with the most recent ones, even when the studies have been conducted in different decades. This indicates that the findings of older studies are still valid in terms of what we see today.

131. *See* RANA SAMPSON, ACQUAINTANCE RAPE OF COLLEGE STUDENTS 2 (2003), *available at* http://www.cops.usdoj.gov/pdf/e03021472.pdf. *But see* KATRINA BAUM & PATSY KLAUS, BUREAU OF JUST. STAT., VIOLENT VICTIMIZATION OF COLLEGE STUDENTS, 1995-2002, at 3 (2005), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/vvcs02.pdf (finding that college students were less likely to be the victim of sexual assault than non-students). The discrepancy in these two findings is due to the wording of questions asked during data collection. The conclusions of Baum and Klaus are based on the National Crime Victimization Survey, which gathers information on sexual assault by asking category-centered questions, such as "[h]as anyone attacked or threatened you in [this way]: rape, attempted rape or other type of sexual attack." *Id.* The conclusions that Sampson cites are based on studies such as the National College Women Sexual Victimization study, which use behavior-oriented questions, such as "[h]as anyone made you have sexual intercourse by using force or threatening to harm you or someone close to you?" *See* FISHER ET AL., *supra* note 130, at 6, 13 (explicitly comparing the difference between the National Crime Victimization Survey methodology and results and the National College Women Sexual Victimization study methodology and results). Other than the wording of the questions, the basic methodology of the two studies was identical, yet behavior-oriented questions have been found to produce eleven times the number of reported rapes. *Id.* at 13.

132. *See* SAMPSON, *supra* note 131, at 3 (stating that ninety percent of college women who are victims of rape know their assailant); *see also* KREBS ET AL., *supra* note 130, at 5-18; FISHER ET AL., *supra* note 130, at 17.

rapes, and 22.9% of threatened rapes took place on a date.[133] Typical perpetrators include classmates and friends of the survivor and boyfriends or ex-boyfriends.[134] Studies of college men indicate that 6-14.9% of them "report acts that meet legal definitions for rape or attempted rape,"[135] and that a small number of repeat perpetrators commit most of the sexual violence and likely contribute to other violence problems as well.[136]

While most studies on high school students have not focused on the occurrence of sexual violence among these students, dating and relationship violence among high school students has been examined a fair amount, and these studies have shown that dating/relationship violence is a similarly widespread phenomenon. Specifically, studies have found that about one in three high school students have experienced dating violence.[137] 25% of teenagers ages fourteen to seventeen say they know a student who has been a victim of dating violence,[138] including 40% of girls.[139] "20% of surveyed male students report witnessing someone with whom they go to high school physically hit a person they were dating."[140] Same-sex dating partners appear to experience similar rates of violence as heterosexual couples.[141] "One-third or more of teens in relationships have been with a partner who frequently asked where they were and whom they were with,"[142] and "30% . . . say they are text messaged 10, 20, or 30 times an hour by a partner inquiring where they are, what they're doing, or who they're with."[143] "One in four teens in serious relationships have been prevented from spending time with friends and family or pressured to only

133. *See* FISHER ET AL., *supra* note 130, at 17.

134. *See id.* at 19 (providing statistics that show that over ninety percent of completed and eighty percent of attempted rapes are committed by offenders who are either a classmate, friend, or boyfriend of the victim); *see also* KREBS ET AL., *supra* note 130, at 5-15.

135. David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 73 (2002).

136. *See id.* at 78-80 (noting that 68.4% of repeat rapists admit to other forms of violence, compared to 40.9% of single-act rapists); *see also* WALTER S. DEKESEREDY & MARTIN D. SCHWARTZ, SEXUAL ASSAULT ON THE COLLEGE CAMPUS: THE ROLE OF MALE PEER SUPPORT 12 (1997).

137. *Dating Violence*, ALA. COALITION AGAINST DOMESTIC VIOLENCE, http://www.acadv.org/dating.html#statistics (last visited Nov. 20, 2012).

138. THE CLOTHESLINE PROJECT, TEEN DATING VIOLENCE FACTS 2 (2006) [hereinafter CLOTHESLINE PROJECT], *available at* http://www.clotheslineproject.org/teendatingviolencefacts.pdf.

139. *Dating Violence*, *supra* note 137.

140. CLOTHESLINE PROJECT, *supra* note 138, at 2.

141. *Id.* at 1.

142. *10 Teen Dating Abuse Facts*, VIOLENCE AGAINST WOMEN ONLINE RESOURCES, http://www.vaw.umn.edu/documents/teendatingabusefacts/teendatingabusefacts.html (last visited Oct. 2, 2012).

143. *Id.*

spend time with their partner,"[144] and "39% of female high school students report that students talk in school about whether someone is attempting to control the person they are dating."[145]

In light of these distressing statistics and the even more disturbing individual stories that come out through the cases, Title IX's hostile environment sexual harassment theory has been increasingly used to combat this problem. Title IX prohibits sexual harassment as a form of sex discrimination on the part of a school when that school is allowing a hostile environment to be created and/or continued by violence.[146] Peer sexual violence is generally considered a case of hostile environment sexual harassment that is "so severe, pervasive and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[147] Because of the severity of sexual violence, generally, even a single instance of violence will be considered hostile environment sexual harassment.[148]

Because Title IX regards the school as the one that is responsible—and therefore liable—for protecting its students from sexual harassment, the legal theory of sexual harassment puts the primary legal responsibility for preventing and responding to harassment on institutions. Title IX is enforced in two ways when peer sexual violence is at issue: first, through a survivor's private right of action against her school,[149] and second, through administrative enforcement by the Office of Civil Rights (OCR) of the Department of Education.[150] Both enforcement jurisdictions derive from the fact that schools agree to comply with Title IX in order to receive

144. *Id.*

145. CLOTHESLINE PROJECT, *supra* note 138, at 2; *see also* Lisa Vollendorf Martin, *What's Love Got to Do With It: Securing Access to Justice for Teens*, 61 CATH. U. L. REV. 457 (2012) (reviewing the teen dating violence problem and suggesting changes to state civil protection order statutes to better protect teen dating violence victims).

146. U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENT BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 2 (2001) [hereinafter REVISED GUIDANCE], *available at* http://www.ed.gov/offices/OCR/archives/pdf/shguide.pdf.

147. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 632 (1999).

148. *See* REVISED GUIDANCE, *supra* note 146, at 6 ("The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical. For instance, if the conduct is more severe, e.g., attempts to grab a female student's breasts or attempts to grab any student's genital area or buttocks, it need not be as persistent to create a hostile environment. Indeed, a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment.").

149. *See* Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 70 (1992); Cannon v. Univ. of Chi., 441 U.S. 677, 709 (1979).

150. *See* EDUCATOR'S GUIDE TO CONTROLLING SEXUAL HARASSMENT ¶ 321 (Travis Hicks ed., 2008) [hereinafter EDUCATOR'S GUIDE].

federal funds.[151]

The private right of action requires a plaintiff/survivor to reach the standard set out by two Supreme Court cases, *Gebser v. Lago Vista Independent School District*[152] and *Davis v. Monroe County Board of Education*.[153] Under this standard, a plaintiff must show that a school acted with "deliberate indifference" in the face of "actual knowledge" of an incident of sexual violence.[154] If a plaintiff can meet that standard, the damages that the school could be required to pay are quite significant, thus providing schools with a significant incentive to comply with Title IX.

Because settlements and jury awards can be quite large in these cases, with several settlements coming in at the seven- and six-figure marks,[155] these cases show that schools can face significant liability if they respond to a report of sexual violence in a way that is not protective of student survivors. Moreover, the focus of this case law is forward-looking, scrutinizing whether the school's institutional responses would avoid or lead to further risk for, or actual occurrence of, harassment or violence against a survivor.

Courts have defined an institutional response as deliberately indifferent "'when the defendant's response to known discrimination is clearly unreasonable in light of the known circumstances, and when remedial action only follows after a lengthy and unjustified delay.' The deliberate indifference 'must, at a minimum, cause students to undergo harassment or

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151. *See* REVISED GUIDANCE, *supra* note 146, at 2-3 ("Title IX applies to all public and private educational institutions that receive Federal funds, i.e., recipients, including, but not limited to, elementary and secondary schools, school districts, proprietary schools, colleges and universities.").

152. 524 U.S. 274 (1998).

153. 526 U.S. 629 (1999).

154. S.S. v. Alexander, 177 P.3d 724, 726 (Wash. Ct. App. 2008); *see also* Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 258-59 (6th Cir. 2000); Soper v. Hoben, 195 F.3d 845, 854 (6th Cir. 1999).

155. According to publicly available information, the largest settlement in a Title IX case to date was in *Simpson v. University of Colorado Boulder*, 500 F.3d 1170 (10th Cir. 2007), when two college women were gang-raped as a part of an unsupervised football recruiting program that the university had evidence was leading to sexual violence. The university ultimately paid $2.85 million to the plaintiffs, hired a special Title IX analyst, and fired some thirteen university officials, including the President and football coach. *See* Diane L. Rosenfeld, *Changing Social Norms? Title IX and Legal Activism: Concluding Remarks*, 31 HARV. J.L. & GENDER 407, 418 (2008). Other large settlements include an $850,000 settlement by Arizona State University in a case where a student was raped by a football player who had been expelled for misconduct, including sexual harassment, but was readmitted after intervention by the coach. Tessa Muggeridge, *ASU Settlement Ends in $850,000 Payoff*, STATE PRESS (Feb. 3, 2009), http://www.statepress.com/archive/node/4020. In addition, the University of Georgia paid a six-figure settlement to a plaintiff who was raped by several athletes, including one who the university knew had a criminal record before he was admitted to the university. *See also* Rosenfeld, *supra*, at 420.

make them liable or vulnerable to it.'"[156] In the case of peer sexual violence, schools are rarely held responsible for the sexual violence itself.[157] Instead, the focus is on the institutional response post-violence.

As such, doing nothing at all is clearly unacceptable.[158] Schools must at least investigate claims of peer harassment,[159] and that investigation cannot involve merely accepting an accused student's denial at face value and not engaging in any credibility determinations.[160] School officials also may not exhibit bias in their treatment of the survivor or characterization of her case.[161] For instance, courts have disapproved of school officials making

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156. Doe v. Hamden Bd. of Educ., No. 3:06-cv-1680, 2008 U.S. Dist. LEXIS 40269, at *20-21 (D. Conn. May 19, 2008) (quoting *Davis*, 526 U.S. at 645).

157. *See* Doe v. Derby Bd. of Educ., 451 F. Supp. 2d 438, 445-46 (D. Conn. 2006) (finding that since the Board could not be liable for the assault, it could only be liable for the situation in the school after the assault); *S.S.*, 177 P.3d at 738 (finding that while a school may not be liable for an act of sexual harassment, the school's response may give rise to liability); Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165, 1170 (D. Cal. 2000) (holding the school liable when specific acts known to the school culminated in assault after the school did nothing).

158. *See, e.g.*, Estate of Brown v. Ogletree, No. 11-cv-1491, 2012 U.S. Dist. LEXIS 21968, at *54 (S.D. Tex. Feb. 21, 2012); Estate of Carmichael v. Galbraith, No. 3:11-CV-0622-D, 2012 U.S. Dist. LEXIS 857, at *12 n. 6 (N.D. Tex. Jan. 4, 2012); Pratt v. Indian River Cent. Sch. Dist., 803 F. Supp. 2d 135, 151 (N.D.N.Y 2011) (for a more complete fact statement, see http://www.lambdalegal.org/in-court/cases/pratt-v-indian-river-central-school-district); Walsh v. Tehachapi Unified Sch. Dist., No. 1:11-cv-01489, 2011 U.S. Dist. LEXIS 125175, at *15 (E.D. Cal. Oct 28, 2011); Rinsky v. Trs. Bos. Univ., No. 1:11-cv-01489, 2010 U.S. Dist. LEXIS 136876, at *38 (D. Mass. Dec. 23, 2010); T.Z. v. N.Y.C., 634 F. Supp. 2d 263, 268-69 (E.D.N.Y. 2009); McGrath v. Dominican Coll., 672 F. Supp. 2d 477, 486-87 (S.D.N.Y. 2009); Doe ex rel Doe v. Coventry Bd. of Educ., 630 F. Supp. 2d 226, 234 (D. Conn. 2009); C.T. v. Liberal Sch. Dist., 562 F. Supp. 2d 1324, 1334 (D. Kan. 2008); Dawn L. v. Greater Johnstown Sch. Dist., 586 F. Supp. 2d 332, 365 (W.D. Pa. 2008); S.G. v. Rockford Bd. of Educ., No. 08 C 50038, 2008 U.S. Dist. LEXIS 95522, at *15-16 (N.D. Ill. Nov. 24, 2008); James v. Indep. Sch. Dist. No. 1-007, No. CIV-07-434-M, 2008 U.S. Dist. LEXIS 82199, at *6 (W.D. Okla. Oct. 16, 2008); Bruning v. Carroll Cmty. Sch. Dist., 486 F. Supp. 2d 892, 915-16 (N.D. Iowa 2007); Bashus v. Plattsmouth Cmty. Sch. Dist., No. 8:06CV300, 2006 U.S. Dist. LEXIS 56565, at *10 (D. Neb. Aug. 3, 2006); Doe v. Se. Greene Sch. Dist., No. 03-717, 2006 U.S. Dist. LEXIS 12790, at *14 n. 3 (W.D. Pa. Mar. 24, 2006); Derby Bd. of Educ., 451 F. Supp. 2d at 447-48; Doe v. E. Haven Bd. of Educ., 430 F. Supp. 2d 54, 63-65 (D. Conn. 2006), *aff'd*, 200 F. App'x 46, 49 (2d Cir. 2006); Martin v. Swartz Creek Cmty. Sch., 419 F. Supp. 2d 967, 974 (E.D. Mich. 2006); Jones v. Ind. Area Sch. Dist., 397 F. Supp. 2d 628, 645-46 (W.D. Pa. 2005); Theno v. Tonganoxie Unified Sch. Dist. No. 464, 394 F. Supp. 2d 1299, 1301 (D. Kan. 2005); Doe v. Perry Cmty. Sch. Dist., 316 F. Supp. 2d 809, 832 (S.D. Iowa 2004); Schroeder v. Maumee Bd. of Educ., 296 F. Supp. 2d 869, 874, 879 (N.D. Ohio 2003); Henkle v. Gregory, 150 F. Supp. 2d 1067, 1078 (D. Nev. 2001); O.H. v. Oakland Unified Sch. Dist., No. C-99-5123 (JCS), 2000 U.S. Dist. LEXIS 21725, at *50-51 (N.D. Cal. Apr. 14, 2000); *Ray*, 107 F. Supp. 2d at 1170.

159. *See Vance*, 231 F.3d at 259; Murrell v. Sch. Dist. No. 1, 186 F.3d 1238, 1248 (10th Cir. 1999); Babler v. Ariz. Bd. of Regents, Case 2:10-cv-01459-RRB (D. Ariz. Feb. 15, 2010); Ross v. Corp. of Mercer Univ., 506 F. Supp. 2d 1325, 1357 (M.D. Ga. 2007); *Bruning*, 486 F. Supp. 2d at 915-16; Doe v. Oyster River Coop. Sch. Dist., 992 F. Supp. 467, 481 (D.N.H. 1997); *S.S.*, 177 P.3d at 738.

160. *See, e.g.*, *S.S.*, 177 P.3d at 740.

161. *See, e.g.*, Patterson v. Hudson Area Sch., No. 08-1008, 2009 U.S. App. LEXIS

statements indicating that they agreed with the assailants,[162] laughing in the face of the harassment,[163] publicly characterizing a sexual assault as "not legal rape,"[164] adopting an inappropriately lenient response to a rape by a perpetrator whose father was on the school board,[165] and changing their previously sympathetic behavior after the victim revealed her assailant's name, telling her that her assailant was "very bright, very intelligent, and 'going places,'" and refusing to enforce a judicial stay-away order.[166] Moreover, schools certainly may not tell sexual violence victims not to tell others,[167] and unjustified delay in responding can result in a school being viewed as deliberately indifferent.[168]

25, at *4 (6th Cir. Jan. 6, 2009); Doe v. Galster, No. 09-C-1089, 2011 U.S. Dist. LEXIS 77706, at *19 (E.D. Wis. Jul 14, 2011); Terrell v. Del. State Univ., No. 09-464 (GMS), 2010 U.S. Dist. LEXIS 74841, at *6 (D. Del. July 23, 2010); Albiez v. Kaminski, No. 09-CV-1127, 2010 U.S. Dist. LEXIS 59373, at *17-18 (E.D. Wis. June 14, 2010); Marcum *ex rel.* C.V. v. Bd. of Educ. of Bloom-Carroll Local Sch. Dist., 727 F. Supp. 2d 657, 668 (S. D. Ohio 2010); *McGrath*, 672 F. Supp. 2d at 477; *Dawn L.*, 586 F. Supp. 2d at 370; Doe v. Brimfield Grade Sch., 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008); Siewert v. Spencer-Owen Cmty. Sch. Corp., 497 F. Supp. 2d 942, 954 (S.D. Ind. 2007); Doe v. Erskine Coll., No. 8:04-23001-RBH, 2006 U.S. Dist. LEXIS 35780, at *33-34 (D.S.C. May 25, 2006); *Theno*, 394 F. Supp. 2d at 1310-11; Kelly v. Yale Univ., No. 3:01-CV-1591, 2003 U.S. Dist. LEXIS 4543, at *3 (D. Conn. Mar. 26, 2003); Snelling v. Fall Mountain Reg'l Sch. Dist., No. 99-448-JD, 2001 U.S. Dist. LEXIS 3591, at *18 (D.N.H. 2001); *S.S.*, 177 P.3d at 740.

162. *See Patterson*, 2009 U.S. App. LEXIS 25, at *4; *Brimfield*, 552 F. Supp. 2d at 823; *Siewert*, 497 F. Supp. 2d at 954; *Theno*, 394 F. Supp. 2d at 1310-11.

163. *See Patterson*, 2009 U.S. App. LEXIS 25, at *4; *Brimfield*, 552 F. Supp. 2d at 823; *Theno*, 394 F. Supp. 2d at 1310.

164. *Kelly*, 2003 U.S. Dist. LEXIS 4543, at *3.

165. Doe v. Derby Bd. of Educ., 451 F. Supp. 2d 438, 447.

166. *Erskine Coll.*, 2006 U.S. Dist. LEXIS 35780, at *33-34.

167. *See, e.g.*, Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 64 (1992) (noting with disapproval the failure of the school to report peer sexual violence to law enforcement or to inform the survivor of her right to do so); Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 262 (6th Cir. 2000) (noting with disapproval the failure of the school to report peer sexual violence to law enforcement or to inform the survivor of her right to do so); Murrell v. Sch. Dist. No. 1, 186 F.3d 1238, 1248 (10th Cir. 1999) (finding that after a male student repeatedly raped a student with spastic cerebral palsy, the school did not inform and told the victim not to inform her mother); Doe v. Oyster River Coop. Sch. Dist., 992 F. Supp. 467, 479 (D.N.H. 1997) (finding that two girls were harassed repeatedly by a boy who exposed himself to them and touched them on their legs and breasts on the school bus and in school; when they reported the behavior, the school's guidance counselor told them not to tell their parents because it could subject the school to lawsuits).

168. *See, e.g.*, Williams v. Bd. of Regents, 477 F.3d 1282, 1297 (11th Cir. 2007) (finding the school took eight months to respond to reports of a gang rape); Evans v. Bd. of Educ. Sw. Sch. Dist., No. 2:08-CV-794, 2010 U.S. Dist. LEXIS 72926 (S.D. Ohio July 20, 2010) (denying school's motion for summary judgment on Title IX claims when school did not respond to two 12-year-old girls' reports of sexual harassment by male students on school bus, including escalating incidents of verbal harassment, pulling down the girls' pants, exposing their breasts and forcing one to perform oral sex,] and eventually suspended both the victim and the perpetrator of the forced oral sex incident, even when the perpetrator pled guilty to attempted assault in a separate criminal proceeding); Doe *ex rel.* Doe v. Coventry Bd. of Educ., 630 F. Supp.

If their investigations indicate that harassment did occur, school officials are required to take some kind of action, and the cases indicate that courts are concerned with how that action increases or decreases the likelihood of future violence. In the discipline category, the case law shows that, although it is acknowledged that victims have no right to demand any particular disciplinary or remedial action on the part of a school,[169] some kind of disciplinary action is likely required, and it should not discipline both the alleged victim and assailant equally.[170] However, the cases also put a premium on "interim measures" short of disciplinary action, most particularly separating the victim from the perpetrator and protecting her from having to interact with her assailant.[171] Therefore, these cases as a

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2d 226, 234 (D. Conn. 2009) (denying summary judgment to school when a male student sexually assaulted a female student off school grounds and the school took no disciplinary action against the assailant (permitting him "to continue attending school with [plaintiff] for three years after the assault, leaving constant potential for interactions between the two"), engaged in unreasonable delay by allowing the two students to share a lunch period and class for over six months after the school was notified of the assault, and allowed the assailant's "friends [to] verbally harass [and threaten] her in school"); Doe v. E. Haven Bd. of Educ., 430 F. Supp. 2d 54, 64 (D. Conn. 2006), *aff'd* 200 F. App'x 46, 49.

169. *See* Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 175 (1st Cir. 2007); Doe v. Hamden Bd. of Educ., No. 3:06-cv-1680, 2008 U.S. Dist. LEXIS 40269, at *22 (D. Conn. May 19, 2008); *Kelly*, 2003 U.S. Dist. LEXIS 4543, at *4; Clark v. Bibb Cnty. Bd. of Educ., 174 F. Supp. 2d 1369, 1374 (M.D. Ga. 2001).

170. *See, e.g.*, *Vance*, 231 F.3d at 262 (6th Cir. 2000); Estate of Brown v. Ogletree, No. 11-cv-1491, 2012 U.S. Dist. LEXIS 21968, at * 54 (S.D. Tex. Feb. 21, 2012); Doe v. Galster, No. 09-C-1089, 2011 U.S. Dist. LEXIS 77706, at *19 (E.D. Wis. July 14, 2011); Pratt v. Indian River Cent. Sch. Dist., 803 F. Supp. 2d 135, 152; *Evans*, 2010 U.S. Dist. LEXIS 72926, at *24; Terrell v. Del. State Univ., No. 09-464 (GMS), 2010 U.S. Dist. LEXIS 74841, at *7 (D. Del. July 23, 2010); Marcum *ex rel.* C.V. v. Bd. of Educ. of Bloom-Carroll Local Sch. Dist., 727 F. Supp. 2d 657 (S.D. Ohio 2010); *Coventry Bd. of Educ.*, 630 F. Supp. 2d at 226; T.Z. v. N.Y.C., 634 F. Supp. 2d 263 (E.D.N.Y. 2009); C.T. v. Liberal Sch. Dist., 562 F. Supp. 2d 1324, 1335 (D. Kan. 2008); Jones v. Kern High Sch. Dist., No. CV-F-07-1628, 2008 U.S. Dist. LEXIS 74040 (E.D. Cal. Aug. 14, 2008); *Hamden Bd. of Educ.*, 2008 U.S. Dist. LEXIS 40269, at *6-7; M. v. Stamford Bd. of Educ., No. 3:05-cv-0177, 2008 U.S. Dist. LEXIS 51933, at *28 (D. Conn. July 7, 2008); Siewert v. Spencer-Owen Cmty. Sch. Corp., 497 F. Supp. 2d 942, 954 (S.D. Ind. 2007); Annamaria M. v. Napa Valley Unified Sch. Dist., No. C 03-0101 VRW, 2006 U.S. Dist. LEXIS 38641, at *11-12 (N.D. Cal. May 30, 2006); Doe v. Se. Greene Sch. Dist., No. 03-717, 2006 U.S. Dist. LEXIS 12790, at *4-5 (W.D. Pa. Mar. 24, 2006); *Erskine Coll.*, 2006 U.S. Dist. LEXIS 35780, at *35; *Derby Bd. of Educ.*, 451 F. Supp. 2d at 447; Theno v. Tonganoxie Unified Sch. Dist. No. 464, 394 F. Supp. 2d 1299, 1310-1 (D. Kan. 2005); Doe v. Perry Cmty. Sch. Dist., 316 F. Supp. 2d 809, 835 (S.D. Iowa 2004); Schroeder v. Maumee Bd. of Educ., 296 F. Supp. 2d 869 (D. Iowa 2004); Henkle v. Gregory, 150 F. Supp. 2d 1067 (D. Nev. 2001); Snelling v. Fall Mountain Reg'l Sch. Dist., No. 99-448-JD, 2001 U.S. Dist. LEXIS 3591, at *15 (D.N.H. Mar. 21, 2001); O.H. v. Oakland Unified Sch. Dist., No. C-99-5123 (JCS), 2000 U.S. Dist. LEXIS 21725, at *51 (N.D. Cal. Apr. 14, 2000); *Oyster River Coop. Sch. Dist.*, 992 F. Supp. at 481; S.S. v. Alexander, 177 P.3d 724, 739 (Wash. Ct. App. 2008).

171. *See Hamden Bd. of Educ.*, 2008 U.S. Dist. LEXIS 40269, at *17 ("Further encounters, of any sort, between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities provided to her at school.").

whole indicate that courts are primarily concerned with schools taking actions that will protect victims, and they do not require "punishment" of perpetrators just for punishment's sake; rather they do so because sanctioning assists in preventing future violence.

This concern with victim protection is present, on the one hand, in cases where the school responses were found as a matter of law to be *adequate* under Title IX, and the cases were therefore dismissed prior to a trial by a jury. Two clear trends emerge from these cases. First, once a school has knowledge of an incident of sexual violence, the case law suggests that separating the students involved can help a school avoid a "deliberate indifference" finding.[172] Moreover, in the majority of these cases, the separation of the students was achieved by moving the alleged perpetrator,[173] suspending the alleged perpetrator,[174] or both. Second, a smaller group of schools have avoided being found deliberately indifferent because they expelled the perpetrators after determining them to be

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172. *See, e.g.*, Watkins v. La Marque Indep. Sch. Dist., 308 Fed. App'x. 781 (5th Cir. 2009); Porto v. Town of Tewksbury, 488 F.3d 67, 74 (1st Cir. 2007); Gabrielle M. v. Park Forest-Chicago Heights, 315 F.3d 817, 825 (7th Cir. 2003); P.K. v. Caesar Rodney High Sch., No. 10-CV-783 (GMS), 2012 U.S. Dist. LEXIS 9572, at *23-24 (D. Del. Jan. 27, 2012); Brooks v. City of Phila., 747 F. Supp. 2d 477, 487 (E.D. Pa. 2010); Marshall v. Batesville Sch. Dist., No. 1:05-CV-05 (CDL), 2008 U.S. Dist. LEXIS 99663, at *12, 13 (E.D. Ark. Dec. 9, 2008); Addison v. Clarke Cnty. Bd. of Educ., No. 3:06-CV-05 (CDL), 2007 U.S. Dist. LEXIS 56166, at *15 (M.D. Ga. July 30, 2007); Lewis v. Booneville Sch. Dist., No. 1:06-CV-091, 2007 U.S. Dist. LEXIS 24976, at *4-5 (N.D. Miss. Apr. 2, 2007); Theriault v. Univ. of S. Me., 353 F. Supp. 2d 1, 15 (D. Me. 2004); Doe v. Lennox Sch. Dist. No. 41-4, 329 F. Supp. 2d 1063, 1068 (D.S.D. 2003); Ings-Ray v. Sch. Dist. of Phila., No. 02-CV-3615, 2003 U.S. Dist. LEXIS 7683, at *11 (E.D. Pa. Apr. 30, 2003); C.R.K. v. U.S.D. 260, 2002 U.S. Dist. LEXIS 6326 (D. Kan. Jan. 30, 2002); *Clark*, 174 F. Supp. 2d at 1369; KF's Father v. Marriott, No. CA 00-0215-C, 2001 WL 228353, at *16-17 (S.D. Ala. 2001); Wilson v. Beaumont Indep. Sch. Dist., 144 F. Supp. 2d 690, 693 (E.D. Tex. 2001); Manfredi v. Mount Vernon Bd. of Educ., 94 F. Supp. 2d 447, 455 (S.D.N.Y. 2000); Vaird v. Sch. Dist. of Phila., No. CIV. A. 99-2727, 2000 WL 57644, at *3 (E.D. Pa. 2000). Only three cases differ in some respects from the clear weight of this authority regarding separating students involved in sexual violence. *See* Doe v. Univ. of the Pac., 457 Fed. App'x. 685, 688 (9th Cir. 2012); Pemberton v. W. Feliciana Parish Sch. Bd., No. 09-30, 2012 WL 443860, at *4 (M.D. La. 2012); *O'Hara*, 2002 U.S. Dist. LEXIS 12153 (dismissing plaintiff's claims when she was sexually assaulted repeatedly through sexual touching of breasts and genitalia by a male classmate, only reporting the assaults when the assailant became violent, after which the school suspended the assailant for seventy days, and then allowed him to return to school, when he "could occasionally be found in the same vicinity as the plaintiff and . . . would stare at her").

173. *See Watkins*, 308 Fed. App'x. at 781; *Porto*, 488 F.3d at 74; *Gabrielle M.*, 315 F.3d at 825; *Addison*, 2007 U.S. Dist. LEXIS 56166, at *15; *Lewis*, 2007 U.S. Dist. LEXIS 24976, at *4-5; *Theriault*, 353 F. Supp. 2d at 15; *Lennox Sch. Dist.*, 329 F. Supp. 2d at 1068; *Ings-Ray*, 2003 U.S. Dist. LEXIS 7683, at *11; *C.R.K.*, 2002 U.S. Dist. LEXIS 6326; *Clark*, 174 F. Supp. 2d at 1369; *Wilson*, 144 F. Supp. 2d at 693; *Manfredi*, 94 F. Supp. 2d at 455; *Vaird*, 2000 U.S. Dist. LEXIS 6492, at *3.

174. *See Caesar Rodney High Sch.*, 2012 U.S. Dist. LEXIS 9572, at *23-24; *Marshall*, 2008 U.S. Dist. LEXIS 99663, at *12-13; *Theriault*, 353 F. Supp. 2d at 15; *Lennox Sch. Dist.*, 329 F. Supp. 2d at 1068; *Clark*, 174 F. Supp. 2d at 1369; *Vaird*, 2000 U.S. Dist. LEXIS 6492, at *3.

responsible for peer sexual violence.[175]

On the other hand are the cases where courts have not dismissed the case and allowed it to proceed to a jury due to evidence that schools have not protected the victim from retaliation from the alleged perpetrator or other students as a result of her report.[176] Some of these cases indicate that schools will be liable for failing to take steps to protect the victim from having to constantly confront her assailant while continuing with her education.[177] Such cases include *Doe v. Derby Board of Education,* where

175. *See* Doe *ex rel.* Doe v. N. Allegheny Sch. Dist., No. 2:08cv1383, 2011 WL 3667279, at *9 (W.D. Pa. 2011); Snethen v. Bd. of Pub. Educ. for Savannah, No. 406CV259, 2008 WL 766569, at *5 (S.D. Ga. 2008); Fortune *ex rel.* Fortune v. Detroit Pub. Schs., 2004 WL 2291333, at *33 (Mich. Ct. App. 2004).

176. *See, e.g.*, Patterson v. Hudson Area Sch., No. 08-1008, 2009 U.S. App. LEXIS 25, at *67 (6th Cir. Jan. 6, 2009); Doe v. E. Haven Bd. of Educ., 430 F. Supp. 2d 54, 59-60 (2d Cir. 2006); Doe v. Galster, No. 09-C-1089, 2011 U.S. Dist. LEXIS 77706, at *22 (E.D. Wis. July 14, 2011); Terrell v. Del. State Univ., No. 09-464 (GMS), 2010 U.S. Dist. LEXIS 74841, at *6 (D. Del. July 23, 2010); Doe *ex rel.* Doe v. Coventry Bd. of Educ., 630 F. Supp. 2d 226, 237 (D. Conn. 2009); C.T. v. Liberal Sch. Dist., 562 F. Supp. 2d 1324, 1336-37 (D. Kan. 2008); *Hamden Bd. of Educ.*, 2008 U.S. Dist. LEXIS 40269, at *5-6; M. v. Stamford Bd. of Educ., No. 3:05-cv-0177, 2008 U.S. Dist. LEXIS 51933, at *28 (D. Conn. July 7, 2008); James v. Indep. Sch. Dist. No. 1-007, No. CIV-07-434-M, 2008 U.S. Dist. LEXIS 82199, at *6 (W.D. Okla. Oct. 16, 2008); S.G. v. Rockford Bd. Of Educ., No. 08 C 50038, 2008 U.S. Dist. LEXIS 95522, at *10, *15-16 (N.D. Ill. Nov. 24, 2008); Bashus v. Plattsmouth Cmty. Sch. Dist., No. 8:06CV300, 2006 U.S. Dist. LEXIS 56565, at *10-11 (D. Neb. Aug. 3, 2006); Doe v. Derby Bd. of Educ., 451 F. Supp. 2d 438, 444-45 (D. Conn. 2006); Doe v. Erskine Coll., No. 8:04-23001-RBH, 2006 U.S. Dist. LEXIS 35780, at *39 (D.S.C. May 25, 2006); Martin v. Swartz Creek Cmty. Sch., 419 F. Supp. 2d 967, 974 (E.D. Mich. 2006); Jones v. Ind. Area Sch. Dist., 397 F. Supp. 2d 628, 645-46 (W.D. Pa. 2005); Theno v. Tonganoxie Unified Sch. Dist. No. 464, 394 F. Supp. 2d 1299, 1310-11 (D. Kan. 2005). In addition to these cases, in two cases where the school was granted summary judgment on the plaintiff's deliberate indifference claim, the courts allowed the plaintiff's claim alleging that the school itself retaliated to proceed to a jury: *Pemberton*, 2012 WL 443860, at *8 (finding that the school did not act with deliberate indifference but denying the school's motion for summary judgment on plaintiff's retaliation claim when the school initiated an investigation into her residency and dropped her from the school when she complained after three male students attacked and groped her after school); Marcum *ex rel.* C.V. v. Bd. of Educ. of Bloom-Carroll Local Sch. Dist., 727 F. Supp. 2d 657, 676 (S.D. Ohio 2010) (denying the deliberate indifference claim but granting the retaliation claim of 12-year-old girl who was sexually assaulted on the school bus by a 17-year-old boy, suspended along with the boy for 10 days, complained about students harassing her by calling her a "slut" and "whore" for four days after her return to school, and was then suspended and expelled for the alleged theft of a wallet and iPod). Only one case is a full outlier on this issue: *Univ. of the Pac.*, 457 Fed. App'x. 685, 688 (concluding in an unpublished opinion that the district court "did not err" in its decision rejecting plaintiff's claims that the school had not adequately investigated suspicions that one of the men who raped plaintiff was involved in the gang-rape of another woman the month prior to plaintiff's rape, had acted with deliberate indifference to plaintiff's rape "by requiring her to be in contact with her assailants when it refused to expel two of the men," and had retaliated against plaintiff for her Title IX complaint).

177. *See Hamden Bd. of Educ.*, 2008 U.S. Dist. LEXIS 40269, at *17; *S.G.*, 2008 U.S. Dist. LEXIS 95522, at *10; *Derby Bd. of Educ.*, 451 F. Supp. 2d at 444; *Erskine Coll.*, 2006 U.S. Dist. LEXIS 35780, at *33-34; Kelly v. Yale Univ., No. 3:01-CV-1591 (JCH), 2003 U.S. Dist. LEXIS 4543, at *11-12 (D. Conn. Mar. 26, 2003); S.S. v. Alexander, 177 P.3d at 742, 745 (Wash. Ct. App. 2008).

the victim and assailant went to school in the same building, and the school suspended the perpetrator for ten days but then allowed him to return to school.[178] In finding that these actions could be judged by a jury to be deliberately indifferent to the harassment, the court stated that even if the assailant in the case had not harassed the victim following the rape, the school's actions could be judged to be deliberately indifferent because they allowed for the possibility of contacts between the victim and assailant.[179] Similarly, in *Doe v. Hamden Board of Education*, the victim was raped by another student during the summer and off the grounds of her high school. The court stated that exposing a victim to "[f]urther encounters, of any sort" with her assailant could create a hostile environment.[180]

Although the courts in the cases cited above seem to indicate that no subsequent harassment occurred, victims actually often face a good deal of harassment and retaliation after reporting violence, whether the harassment is from the accused perpetrator or his friends. In the two cases just mentioned, one student was harassed by her assailant's friends, who would drive by her and shout "slut" from their vehicle,[181] and the other was subjected to five weeks of constant harassment by classmates, including being called "a slut, a liar, a bitch, [and] a whore," harassment that eventually resulted in a trip to the hospital when the plaintiff threatened

178. *Derby Bd. Of Educ.*, 451 F. Supp. 2d at 441.

179. *See id.* at 444 (explaining a school district's lack of action in response to a rape outside of school grounds can be found to be deliberate).

180. *Hamden Bd. of Educ.*, 2008 U.S. Dist. LEXIS 40269, at *16-17; *see also Rockford Bd. of Educ.*, 2008 U.S. Dist. LEXIS 95522, at *2-3, *10-11 (first-grader who "sexually batter[ed], harass[ed] and abuse[d]" plaintiff first-grader, continued to stalk the victim at the school, directing sexual innuendos and comments that she was "hot" to her when he was not disciplined in any way). Note that in all three cases, the courts noted that the victims ended up having to change schools themselves in order to avoid their assailants. *See Hamden Bd. of Educ.*, 2008 U.S. Dist. LEXIS 40269, at *17; *Rockford Bd. of Educ.*, 2008 U.S. Dist. LEXIS 95522, at *12; *Derby Bd. of Educ.*, 451 F. Supp. 2d at 445 (showing that a female student transferred schools after being raped and harassed by her assailant's friends). Indeed, many of the plaintiffs in these cases end up leaving their schools. *See also Patterson,* 2009 U.S. App. LEXIS 25 at *12 (showing how student was psychologically unable to set foot in the school due to continued harassment that occurred); Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 256-57 (6th Cir. 2000) (illustrating how the school board did not meet with the victim until her mother withdrew her from the school); *James*, 2008 U.S. Dist. LEXIS 82199 *6 (explaining a student transferring after a school district took no action against harassment); *Brimfield Grade Sch.,* 552 F. Supp. 2d at 820 (noting parents decided for their son to transfer after repeated attempts to have the school act); *Bruning,* 486 F. Supp. 2d at 910-11 (detailing Bruning's transfer to an alternative school to escape the harassment); Siewert v. Spencer-Owen Cmty. Sch. Corp., 497 F. Supp. 2d 942, 953 (S.D. Ind. 2007) (showing that victim transferred after two years of harassment that was not addressed properly by the school system); *Theno,* 394 F. Supp. 2d at 1309 (detailing how a student was unable to "laugh off" harassment and transferred schools).

181. *See Derby Bd. of Educ.*, 451 F. Supp. 2d at 444-45 (explaining how fellow students would yell slurs at the victim from a blue truck).

suicide.[182] In *Doe v. Erskine College*, the student was repeatedly harassed by both the accused student and his friends to such an extent that she stated that she was "referred to on campus as the 'rape girl.'"[183] The ongoing trauma eventually led her to attempt suicide also, after which she was diagnosed with Post Traumatic Stress Disorder and nearly involuntarily institutionalized.[184] In *Doe ex rel. Doe v. Coventry Board of Education*, a male student sexually assaulted a female student off school grounds and the school took no disciplinary action against the assailant.[185] As a result, the school allowed him "to continue attending school with [plaintiff] for three years after the assault, leaving constant potential for interactions between the two," allowed the two students to share a lunch period and class for over six months after the school was notified of the assault, and allowed the assailant's "friends [to] verbally harass [and threaten] her in school, calling her 'slut,' 'cow,' 'whore,' 'liar,' and 'bitch,'" and [sending] her a text message stating, "'[Y]ou better watch your back if my boy goes to jail.'").[186]

Furthermore, statements in these cases indicate court concerns that a school's failure to respond properly to initial or repeated instances of harassment can actually encourage harassers. To protect against this, several courts have decided that, when schools are aware that a response

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182. *E. Haven Bd. of Educ.*, 430 F. Supp. 2d at 59 (showing the victim was subject to more harassment after she submitted her complaint to the school).

183. *See* Doe v. Erskine Coll., No. 8:04-23001-RBH, 2006 U.S. Dist. LEXIS 35780, at *22 (D.S.C. May 25, 2006).

184. *See id.* (noting victim suffered from being questioned continuously and wanted to die from harassment).

185. *See* 630 F. Supp. 2d 226, 232 (D. Conn. 2009) (describing how the school system allowed the assailant to attend school with the victim through graduation with no disciplinary action).

186. *Id.* at 233; *see also* Terrell v. Del. State Univ., No. 09-464 (GMS), 2010 U.S. Dist. LEXIS 74841, at *3 (D. Del. July 23, 2010) (denying the school's motion to dismiss because, when the plaintiff reported that another student assaulted and beat her, the school permitted him to continue attending classes without restriction, "informed [her] that she would be required to adjust her schedule and transfer out of [a shared] class," and "punished [her] equally with her male assailant" by initiating disciplinary proceedings against her, thus causing the plaintiff to miss a semester from school, "because of her fear of the alleged male assailant's presence on campus, along with the defendants' lack of action concerning her assault"); C.T. v. Liberal Sch. Dist., 562 F. Supp. 2d 1324, 1336 (D. Kan. 2008) (denying summary judgment to a school where the school did nothing to address harassment of a male student by peers who physically assaulted him, threatened to kill him, "called him names such as 'fag boy' and said things to him like 'I hear you are Johnny's little bitch' and 'I hear you got butt raped by Johnny'" because the victim had filed charges of molestation against a male school volunteer who ran a weight-training program for students in his house); Jones v. Ind. Area Sch. Dist., 397 F. Supp. 2d 628, 628 (W.D. Pa. 2005) (denying school's motion to dismiss Title IX claims, without discussion, when a female student was raped by a teacher, eventually reported the rape, and was subsequently subjected to student-on-student harassment, including being called a "slut" and "whore," mocked for reporting the rape, spit upon, pushed, and having the books knocked out of her hands, as well as having teachers tell students that the victim was lying about the rape).

method is not achieving the goal of stopping the harassment, those schools may not continue using only that method.[187] Other cases have noted that school inaction in one instance of violence is often followed by additional violence, including violence that escalates in severity. In *Derby*, for instance, in questioning why the school did not consider expelling the assailant, the court notes that the assailant was later expelled after he sexually assaulted a second student.[188] In *Ray v. Antioch Unified School District*, the court accepted plaintiff's claim that, as a consequence of the school's deliberate indifference to students' harassment of plaintiff for plaintiff's perceived sexual orientation and his transgendered mother, "Defendant Carr became emboldened, and assaulted and severely injured Plaintiff while on his way home from school."[189] In *Siewert v. Spencer-Owen Community School Corp.*, after the school's failure to respond to a similar instance of escalating harassment, the Court went as far as to state that "the students at OVMS who were bullying S.S. could have actually construed the School Corporation's inaction as tacit approval of their behavior, prompting them to engage in even greater acts of bullying."[190]

The concern that school responses to peer sexual violence may actually encourage further violence is echoed by another line of Title IX cases in which the facts indicate that a school's actions actually facilitated or made women vulnerable to sexual violence. For instance, in *Simpson v. University of Colorado Boulder*, the plaintiffs alleged that the University of Colorado (CU) "sanctioned, supported, [and] even funded"[191] a football recruiting program where the risk of peer sexual violence was so obviously great that the school's failure to address it constituted deliberate indifference.[192] In denying the University's motion for summary judgment, the Tenth Circuit found that the football coach "maintained an unsupervised player-host program to show high-school recruits 'a good

187. *See* Patterson v. Hudson Area Sch., No. 08-1008, 2009 U.S. App. LEXIS 25, at *32 (6th Cir. Jan. 6, 2009) (making a school system still responsible for indifference even if some action was taken); Martin v. Swartz Creek Cmty. Sch., 419 F. Supp. 2d 967, 974 (E.D. Mich. 2006) (making school system's responsible for incidents witnessed by faculty even if formal complaints were not submitted); *Jones*, 397 F. Supp. 2d at 645 (showing the school system's non-reaction after the victim was harassed); Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 261 (6th Cir. 2000) (describing how when a school system realizes their system is inadequate, they are responsible for remedying the procedure); S.S. v. Alexander, 177 P.3d 724, 739 (Wash. Ct. App. 2008) (explaining that the school continuing to use ineffective methods to respond to the violence constitutes deliberate indifference).

188. *See* Doe v. Derby Bd. of Educ., 451 F. Supp. 2d 438, 447-48 (D. Conn. 2006).

189. Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165, 1168 (D. Cal. 2000).

190. Siewert v. Spencer-Owen Cmty. Sch. Corp., 497 F. Supp. 2d 942, 954 (S.D. Ind. 2007).

191. Simpson v. University of Colorado Boulder, 500 F.3d 1170, 1177 (10th Cir. 2007).

192. *Id.* at 1185.

time'" despite knowing generally "of the serious risk of sexual harassment and assault during college-football recruiting efforts; . . . that such assaults had indeed occurred during CU recruiting visits; . . . [and] that there had been no change in atmosphere since" the last assault.[193]

Along the same lines, in *Williams v. Board of Regents*, the plaintiff was gang-raped by three fellow students, the leader of whom was recruited by the University of Georgia (UGA) basketball team and admitted to the school even though UGA's coach, athletics director, and president had knowledge that the student had criminal and disciplinary problems—including a history of sexually violent behavior—which resulted in his dismissal from another school and plea of no contest to misdemeanor criminal charges.[194] The Eleventh Circuit denied the school's motion to dismiss because UGA's admission to having had this knowledge about the student prior to admitting him, combined with taking eight months to respond to Williams's report and the school's failure "to inform student-athletes about the applicable sexual harassment policy," could show that the school was deliberately indifferent to the harassment.[195] Finally, in *J.K. v. Arizona Board of Regents*, the court denied the university's summary judgment motion when a student athlete in a "Summer Bridge Program" designed to help high school students transition to college, was expelled for sexual harassment and other misconduct.[196] The court found evidence indicating deliberate indifference in the university's re-admission of the athlete to Arizona State University as a freshman, which put him in a position to sexually assault the plaintiff.[197]

If this case law was not enough to encourage schools to take responsibility for addressing gender-based violence between students, there is an additional administrative enforcement regime for Title IX provided by OCR.[198] Both enforcement jurisdictions derive from the fact that schools agree to comply with Title IX in order to receive federal funds,[199] but the OCR process is injunctive, so student victims complaining to OCR will not get monetary damages. OCR enforcement generally takes place as a result

193. *See id.* at 1184.

194. Williams v. Bd. of Regents, 477 F.3d 1282, 1297 (11th Cir. 2007) (showing that because the University of Georgia did little to prevent future attacks, the inaction perpetuated deliberate indifference).

195. *See id.* (explaining how the University of Georgia exerted no control over the situation where individuals were victims of harassment).

196. *See* J.K. v. Ariz. Bd. of Regents, No. CV 06-916-PHX-MHM, 2008 U.S. Dist. Lexis 83855 (D. Ariz. Sept. 29, 2008).

197. *See id.* at *6.

198. *See* REVISED GUIDANCE, *supra* note 146, at i (regulating compliance standards for sexual harassment).

199. *See id.* at 2-3 (explaining that compliance is mandatory to receive federal funds from all categories of schools).

of a complaint being filed regarding a school's response to a sexual harassment case, which causes OCR to undertake a fairly comprehensive investigation of that school's response system.[200] OCR cases are generally resolved through a "letter of finding" (LOF) addressed to the school and written by OCR, which is sometimes accompanied by a "commitment to resolve" signed by the school.[201]

Due to its injunctive nature, OCR can, and often will, require schools to change their entire peer sexual violence and harassment response system, including but not limited to policies, procedures, and resource allocations. For the same reason, OCR's process uses a "knew or reasonably should have known" standard when it conducts an investigation of a school's compliance[202] because "OCR always provides the school with actual notice and the opportunity to take appropriate corrective action before issuing a finding of violation."[203] Thus, OCR has found Title IX violations when a school's policies and procedures did not follow OCR's requirements. Examples of this include when schools create fact-finding procedures and hearings with significantly more procedural rights for the accused than the survivor;[204] adopt a standard of proof more exacting than "preponderance of the evidence,"[205] and do not provide clear time frames for prompt

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200. *See id.* at 14 (illustrating the investigative process when an incident is reported).

201. *See* EDUCATOR'S GUIDE, *supra* note 150, ¶ 322 (explaining the interview process and how the university must show that it did all it could to remedy the situation).

202. *See* REVISED GUIDANCE, *supra* note 146, at 13.

203. *Id.* at iv.

204. *See, e.g.*, Letter from Debbie Osgood, Dir., Office for Civil Rights, U.S. Dep't of Educ., to Rev. John I. Jenkins, President, Univ. of Notre Dame, *available at* http://www2.ed.gov/about/offices/list/ocr/docs/investigations/05072011-a.pdf (Jun. 30, 2011) [hereinafter Univ. Notre Dame Letter]; Letter from Catherine D. Criswell, Dir., Office for Civil Rights, U.S. Dep't of Educ., to Gloria Hage, General Counsel, E. Mich. Univ., *available at* http://www2.ed.gov/about/offices/list/ocr/docs/investigations/15096002-a.pdf (Nov. 22, 2010) [hereinafter E. Mich. Univ. Letter]; Letter from Catherine D. Criswell, Dir., Office for Civil Rights, U.S. Dep't of Educ., to Dave L. Armstrong, Vice President for Enrollment and Legal Counsel, Notre Dame Coll., *available at* http://www2.ed.gov/about/offices/list/ocr/docs/investigations/15096001-a.pdf (Sept. 24, 2010) [hereinafter Notre Dame Coll. Letter]; Letter from Myra Coleman, Team Leader, Office for Civil Rights, U.S. Dep't of Educ., to Valerie I. Harrison, Esq., University Counsel, Temple Univ., *available at* http://ncherm.org/documents/66-TempleUniversity-03062060.pdf (June 4, 2007) [hereinafter Temple Univ. Letter]; Letter from Gary D. Jackson, Reg'l Civil Rights Dir., Office for Civil Rights, U.S. Dep't of Educ., to Jane Jervis, President, The Evergreen State Coll., *available at* http://www.ncherm.org/documents/193-EvergreenStateCollege10922064.pdf (Apr. 4, 1995) [hereinafter Evergreen State Coll. Letter].

205. *See, e.g.*, Univ. Notre Dame Letter, *supra* note 204, at 6 (noting that, although the University stated that it used a preponderance of the evidence standard, it did not notify students of this standard); Letter from Sheralyn Goldbecker, Team Leader, Office for Civil Rights, U.S. Dep't of Educ., to John J. DeGioia, President, Georgetown Univ., *available at* http://www.ncherm.org/documents/199-GeorgetownUniversity—11032017.pdf (May 5, 2004) (requiring a preponderance of evidence standard upon

resolutions of complaints.[206] Such violations constitute additions to the list of institutional responses that have gotten schools in trouble in private lawsuits, although the responses that qualify as deliberately indifferent in private lawsuits also qualify as violations of Title IX under OCR enforcement.[207]

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investigation); Evergreen State Coll. Letter, *supra* note 204, at 8 (stating that the evidentiary standard applied to Title IX actions is that of a "preponderance of the evidence"); Letter from John E. Palomino, Reg'l Civil Rights Dir., Office for Civil Rights, U.S. Dep't of Educ., to Ruben Armiñana, President, Sonoma State Univ. (Apr. 29, 1994) (on file with author) [hereinafter Sonoma State Univ. Letter] (noting that a "much different and lower standard [of proof] is required for proving a case of sexual harassment, including assault, under Title IX" than for "a criminal charge alleging sexual assault").

206. *See, e.g.*, Univ. Notre Dame Letter, *supra* note 204, at 3; E. Mich. Univ. Letter, *supra* note 204, at 3; Temple Univ. Letter, *supra* note 204, at 6-7; Letter from Howard Kallem, Chief Attorney, Office for Civil Rights, U.S. Dep't of Educ., to Stephen W. Vescovo, Thomason, Hendrix, Harvey, Johnson & Mitchell, *available at* http://ncherm.org/documents/80-ChristianBrothersUniversity-04032043.pdf (March 26, 2004); Letter from John E. Palomino to Karl Pister (June 15, 1994), in Univ. of Cal., Santa Cruz, OCR Case No. 09-93-2141 (on file with author) [hereinafter Univ. of Cal., Santa Cruz Letter]; Sonoma State Univ. Letter, *supra* note 205, at 5.

207. For examples where the victim reported rape or harassment to a school official or some other authority figure, but the school did nothing or failed to prevent the offender or his friends from continually coming in contact with the victim, see, e.g., Letter from Debbie Osgood, Dir., Office for Civil Rights, U.S. Dep't of Educ., to Dennis Carlson, Superintendent, Anoka-Hennepin Sch. Dist., *available at* http://www2.ed.gov/about/offices/list/ocr/docs/investigations/05115901-a.pdf (Mar. 15, 2012); *see also* Univ. Notre Dame Letter, *supra* note 204, at 5-6; Letter from Zachary Pelchat, Supervisory Attorney, Office for Civil Rights, U.S. Dep't of Educ., and Anurima Bhargava, Chief, Civil Rights Division, U.S. Dep't of Just., to Richard L. Swanson, Superintendent, Tehachapi Unified Sch. Dist., *available at* http://www2.ed.gov/about/offices/list/ocr/docs/investigations/09111031-a.pdf (June 29, 2011); Letter from Charlene F. Furr, Operations Officer, Office for Civil Rights, U.S. Dep't of Educ., to Jimmy D. Hattabaugh, Superintendent, Mansfield Sch. Dist. (Apr. 16, 2007) (on file with author); Letter from Cathy H. Lewis, Acting Dir., Policy & Enforcement Serv., Office for Civil Rights, U.S. Dep't of Educ., to Thomas Crawford, Superintendent, Acad. Sch. Dist. (Apr. 16, 1993) (on file with author).

For examples where the school delayed responding, see, e.g., Letter from Frankie Furr, Team Leader, Office for Civil Rights, U.S. Dep't of Educ., to James E. Nelson, Superintendent, Richardson Indep. Sch. Dist. (Aug. 5, 2005) (on file with author) [hereinafter Richardson Indep. Sch. Dist. Letter]; Letter from Thomas J. Hibino, Reg'l Civil Rights Dir., Office for Civil Rights, U.S. Dep't of Educ., to Daniel Kehoe, Superintendent, Millis Pub. Sch. (May 19, 1994) (on file with author) [hereinafter Millis Pub. Sch. Letter]; Letter from Charles R. Love, Program Manager, Office for Civil Rights, U.S. Dep't of Educ., to Glenn Roquemore, President, Irvine Valley Coll. (Jan. 28, 2003) (on file with author).

For more details on cases in which the school conducted a biased investigation, *see* Richardson Indep. Sch. Dist. Letter, *supra*; Sonoma State Univ. Letter, *supra* note 205; Univ. of Cal., Santa Cruz Letter, *supra* note 206.

Finally, for examples of cases where school officials investigated and determined that the sexual violence did occur, but did not discipline or minimally disciplined the assailant and did not protect the survivor from any retaliation, see Millis Pub. Sch. Letter, *supra*; Sonoma State Univ. Letter, *supra* note 205; Letter from Patricia Shelton, Branch Chief, and C. Mack Hall, Div. Dir., Office for Civil Rights, U.S. Dep't of Educ., to James C. Enochs, Superintendent, Modesto City Schs. (Dec. 10, 1993) (on file with author); Letter from John E. Palomino, Reg'l Civil Rights Dir., Office for

Thus, Title IX jurisprudence in peer sexual violence cases puts an emphasis on the role of the institution—the collective entity—in addressing, or failing to address, the violence. In doing so, it focuses on how the school's action or inaction when faced with reports of sexual violence is linked to the actions of individual students, understanding that the school's actions or inactions send a message to individual students. These Title IX cases, moreover, are particularly concerned with how the school's message translates into later student behavior. Title IX case law particularly disapproves of school inaction—the most common of school reactions to known instances of peer sexual violence—and makes it clear that schools must at least investigate reports of such violence and seek to prevent the reoccurrence of the violence and any harassment or retaliation related to the violence. Courts generally do not engage in prescriptive analyses that discuss specific methods by which schools should seek to prevent future violence. Nevertheless, the cases cumulatively suggest that failing to discipline—properly or at all—known perpetrators, displaying anti-victim bias, minimizing the significance of the violence, etc., are all frowned upon because of the role they play in not only failing to prevent later violence, but in potentially encouraging that violence by giving "tacit approval" to it that can lead perpetrators to become "emboldened" and to continue—even potentially escalate—the violence.

III. SIMILARITIES BETWEEN THE "STATE RESPONSIBILITY" AND "SCHOOL RESPONSIBILITY" THEORIES

As this review of both the theory of State responsibility in international law and the theory of school responsibility under Title IX shows, there are many similarities between these two theories, which can be broken down into two general categories. In the first category are similarities related to States' and schools' status as collective entities, most prominently the concern with inaction by the collective entity and the consequences of that inaction. In the second category are similarities related to both theories' derivation from equal protection and anti-sex discrimination theories.

A. Inaction

The first set of similarities show the ways in which the State responsibility and school responsibility theories both see States' and schools' status as collective entities as empowering them not only to coerce certain types of behavior from individual members of the collective, but also to express what the collective community thinks is wrong or right

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Civil Rights, U.S. Dep't of Educ., to Robin Wilson, President, Cal. State Univ., Chico (Oct. 23, 1991) (on file with author).

about that behavior. As such, these theories treat inaction on the part of the State or school as having particular power because of its force as a normative statement. That is, even when a collective entity articulates rules of behavior, if that entity takes no action to enforce such rules, it undermines the message of those rules by implying that they are not important enough for enforcement.

The concern with inaction and its effect on the normative message that gender-based violence is a crime can be seen first in the similar use by both theories of the concept of "environment." Indeed, what this Article terms the "school responsibility theory" is more commonly known as a form of hostile *environment* sexual harassment.[208] As such, the concept of environment is a central part of the theory, and captures the experience of how this form of sexual harassment operates: as a form of harassment that permeates the space in which the victim operates, whether it be school or workplace. In fact, in the Title IX context, the legal standard used for determining whether hostile environment sexual harassment exists is whether the alleged harassing behavior is "so severe, pervasive and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[209] As this standard has been applied, moreover, pervasiveness is often the most critical part of the determination, with severity substituting entirely for pervasiveness only in cases like sexual violence,[210] in which the severity of the trauma resulting from the violence essentially makes the harassment a pervasive part of the victim's life even if the violence itself has not been repeated.

This recognition of the environmental effects of trauma, widely acknowledged as a common experience for most sexual violence victims,[211] can be seen in court statements in Title IX cases finding that a school's failure to separate victims and perpetrators qualifies as deliberate indifference. The court in *Doe v. Hamden Board of Education* articulated this premise most directly. In that case, when the school allowed both the

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208. *See* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 675 (1999) (describing hostile environment harassment at academic institutions).

209. *See id.* at 632.

210. *See* REVISED GUIDANCE, *supra* note 146, at 6 ("The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical. For instance, if the conduct is more severe, e.g., attempts to grab a female student's breasts or attempts to grab any student's genital area or buttocks, it need not be as persistent to create a hostile environment. Indeed, a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment.").

211. *See* Nicole P. Yuan et al., *The Psychological Consequences of Sexual Trauma*, NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN (Mar. 2006), http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=349 (reporting rates of PTSD among rape survivors vary from approximately 30% to 65% depending on how and when the PTSD symptoms are assessed).

victim and attacker to attend the same school the semester following the rape, the court stated that "[a] reasonable jury could conclude that Garcia's presence at school throughout the school year was harassing to Mary Doe because it exposed her to multiple encounters with him. Further encounters, of any sort, between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities provided to her at school."[212] Similarly, in *Derby,* where the assailant was allowed to return to school after a brief 10-day suspension, the court stated that "Sally Doe's affidavit states that she saw Porto, Jr. many times during the school year and that the experience of seeing him 'was very upsetting' and made the 'school year very hard.' Thus, even absent active post-assault harassment by Porto, Jr., the fact that he and the plaintiff attended school together could be found to constitute pervasive, severe, and objectively offensive harassment."[213]

The articulations of the State responsibility theory echo this concern about environment. Each of the Inter-American opinions relating to gender-based violence committed by non-State actors—*Maria da Penha, Cotton Field,* and *Lenahan*—make references to an "environment of impunity,"[214] or "a climate that is conducive to domestic violence."[215] The U.N. Secretary-General discusses how "[s]ocial norms . . . [can] create an environment that either condones or discourages violence"[216] and advises States that, among the actions they need to take in meeting their international obligations to combat violence against women, they must prosecute perpetrators to "eliminat[e] any climate of impunity surrounding such offences."[217] He further indicates that "[v]igorous arrest and prosecution policies make a statement to society as a whole that violence against women is a serious crime that is not condoned by the authorities."[218] However, because "the majority of reported cases of violence against women are not prosecuted and of those that are, many do not result in a conviction,"[219] a message of tolerance for gender-based violence is sent to society instead, subverting the significance of any

212. Doe v. Hamden Bd. of Educ., No. 3:06-cv-1680, 2008 U.S. Dist. LEXIS 40269, at *16-17 (D. Conn. May 19, 2008).

213. Doe v. Derby Bd. of Educ., 451 F. Supp. 2d 438, 444 (D. Conn. 2006).

214. Lenahan v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 168 (2011); González v. Mexico (*In re* Cotton Field), Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Amer. Ct. H.R. (ser. C) No. 205, ¶ 388 (Nov. 16, 2009).

215. Maria da Penha v. Brazil, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L.V.II.111 doc. 20 rev. ¶ 55-56 (2001).

216. SEC'Y-GEN. STUDY, *supra* note 122, at 35.

217. *Id.* at 99.

218. *Id.* at 108.

219. *Id.*

normative anti-gender-based violence messages that might exist in that society.

Moreover, both the State and school responsibility theories are concerned not only with the normative message itself, but also with the consequences of that message. Their concern with these environments of impunity derives from these theories' view that such climates perpetuate continued, future violence. As the opening quote from the *Lenahan* opinion indicates, the Inter-American Commission's main concern regarding State inaction is that the environment of impunity that it creates "promotes the repetition of violence."[220] It sees inaction as serving "to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women,"[221] to "propel[] the repetition of the [violence],"[222] to "promote[] the repetition of acts of violence in general and [to] send[] a message that violence against women is tolerated and accepted as part of daily life."[223] The ECHR agreed when it held that Turkey violated women's right to equal protection, stating that "the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence."[224] The Secretary-General also concurs, stating, "Impunity for violence against women compounds the effects of such violence[;] . . . [w]hen the State fails to hold the perpetrators of violence accountable and society explicitly or tacitly condones such violence, impunity . . . encourages further abuses."[225]

Moreover, the facts of the cases from which the above statements come seem to confirm the accuracy of this concern, as the abuse directed at the victims in several of these cases not only continued, but escalated over time, often culminating in murder or attempted murder. In *Maria da Penha*, Brazil "condoned, for years during their marital cohabitation, domestic violence perpetrated . . . by Marco Antônio Heredia Viveiros against his wife at the time, . . . culminating in attempted murder and further aggression in May and June 1983."[226] In *Opuz v. Turkey*, from 1995 to 2001, authorities received five reports of assault and two reports of

220. *See* Lenahan v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 168 (2011).

221. Maria da Penha v. Brazil, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L.V.II.111 doc. 20 rev. ¶ 55-56 (2001).

222. González v. Mexico (*In re* Cotton Field), Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Amer. Ct. H.R. (ser. C) No. 205, ¶ 155 (Nov. 16, 2009).

223. *Id.* ¶ 388.

224. Opuz v. Turkey, App. No. 33401/02, Eur. Ct. H.R. ¶ 198 (2009), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92945.

225. SEC'Y-GEN. STUDY, *supra* note 122, at 132.

226. *Maria da Penha*, Case 12.051, Report No. 54/01, ¶ 2.

death threats before the applicant's abusive husband finally murdered her mother.[227] In *Goekce v. Austria*, the victim was murdered by her husband after three years of escalating death threats and abuse.[228] Finally, in *Cotton Field*, the sheer number of murdered women—in the hundreds and possibly thousands over a 12 year period—with bodies often showing evidence of "extreme levels of violence, including sexual violence,"[229] demonstrated the consequences of Mexico's inaction.

Likewise, the facts and opinions in many Title IX school responsibility cases reflect the insight that inaction leads to further—and often escalated—violence. The cases where courts show the most concern—and which have resulted in schools paying some of the largest settlements—are ones in which the school's inaction leads to additional violence, escalation of violence, retaliation, or further harassment against the same or other victims. For instance, in *Derby*, the assailant was later expelled after he sexually assaulted a second student.[230] In *Ray*, in light of the school's inaction, the plaintiff's harasser "became emboldened, and assaulted and severely injured Plaintiff while on his way home from school."[231] In *Siewert*, after the school's failure to respond to a similar state of escalating harassment, the court saw the school's "inaction as tacit approval of [the harassers'] behavior, prompting them to engage in even greater acts of bullying."[232] In *Williams*[233] and *J.K.*,[234] where, according to publicly available information, schools paid the second largest settlements in Title IX's history, the schools knew of previous sexual violence committed by the perpetrators who later assaulted the plaintiffs. In *Simpson*, the largest Title IX settlement to date ($2.8 million), the Tenth Circuit found that the

227. *See Opuz*, App. No. 33401/02, ¶¶ 9-54 (outlining the events of harassment leading to the death of the mother); *see also* Tomašić v. Croatia, App. No. 46598/06, Eur. Ct. H.R. ¶ 10 (2009), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-1695 (illustrating failed attempts by authorities to prevent the harassment and killing of M.T. and her daughter); Kontrova v. Slovakia, App. No. 7510/04, Eur. Ct. H.R. ¶ 14 (2007) (showing the murder of two children after the applicant issued a complaint against her husband); Yildirim, *supra* note 40, ¶ 2.13 (showing how the victim was stabbed after many failed attempts by authorities to stop the harasser).

228. *See* Goekce, *supra* note 39, ¶¶ 2.1-2.11 (showing how the victim was shot by the father of their children when authorities did not respond to a call for help).

229. González v. Mexico (*In re* Cotton Field), Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Amer. Ct. H.R. (ser. C) No. 205, ¶ 164 (Nov. 16, 2009).

230. *See* Doe v. Derby Bd. of Educ., 451 F. Supp. 2d 438, 447-48 (D. Conn. 2006).

231. Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165, 1168 (D. Cal. 2000).

232. Siewert v. Spencer-Owen Comty. Sch. Corp., 497 F. Supp. 2d 942, 954 (S.D. Ind. 2007).

233. *See* Williams v. Bd. of Regents, 477 F.3d 1282, 1297 (11th Cir. 2007).

234. *See* J.K. v. Ariz. Bd. of Regents, No. CV 06-916-PHX-MHM, 2008 U.S. Dist. LEXIS 83855, at *13 (D. Ariz. Sept. 29, 2008).

university's actions actually facilitated the violence because it had maintained a football player recruitment program where the university knew sexual violence had occurred in the past and "there had been no change in atmosphere since" the last assault.[235]

In the campus context, moreover, it is not only the court cases that corroborate the State and school responsibility theories' concern with the link between collective entity inaction and future violence. The theory is also borne out by empirical studies that have been conducted regarding sexual violence between peers on college campuses. These studies have often been treated by the researchers themselves as relevant beyond the college population.[236]

In the first set of such studies, criminologists have used the Routine Activities Theory to posit that sexual violence occurs so much on college campuses because there are a surfeit of "motivated offender[s] [and] suitable target[s] and an absence of capable guardians all converg[ing] in one time and space."[237] These studies suggest that all three elements must be present for there to be a significant crime problem and that the failure of schools to act as "capable guardians"[238] causes "motivated offenders" (i.e.,

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235. Simpson v. Univ. of Colorado Boulder, 500 F.3d 1170, 1184 (10th Cir. 2007).

236. For instance, one of the earliest studies on acquaintance sexual assault, discussed in Robin Warshaw's *I Never Called It Rape*, was conducted on college women and men subjects, but draws conclusions regarding men and women generally. *See, e.g.*, ROBIN WARSHAW, I NEVER CALLED IT RAPE 48 (1988) (using survey from Ms. Magazine Campus Project on Sexual Assault, which questioned 3,187 female college students from randomly selected classes at campuses that reflected a cross section of regions and cultures to support the statement that sexual assault is a common experience for women); *see id.* at 84 (using survey from Ms. Magazine Campus Project on Sexual Assault, which questioned 2971 college men, to support that "men who committed rape were more likely to believe rape-supportive myths"). More recently, Lisak and Miller's *Repeat Rape and Multiple Offending Among Undetected Rapists* used a study conducted on 1,882 students at a mid-sized, urban commuter university to support the proposition that the majority of undetected rapists are repeat rapists, without differentiating between college student undetected rapists and undetected rapists in general. Lisak & Miller, *supra* note 135, at 72, 76, 80-81.

237. Amy I. Cass, *Routine Activities and Sexual Assault: An Analysis of Individual- and School-Level Factors*, 22.3 VIOLENCE AND VICTIMS 350, 351 (2007).

238. *See* Martin D. Schwartz et al., *Male Peer Support and a Feminist Routine Activities Theory: Understanding Sexual Assault on the College Campus*, 18 JUST. Q. 623, 630 (2001) (describing how capable guardians can help deter harassment situations); *see also* Elizabeth Ehrhardt Mustaine & Richard Tewksbury, *Sexual Assault of College Women: A Feminist Interpretation of a Routine Activities Analysis*, 27 CRIM. JUST. REV. 89, 101 (2002) (providing an explanation for the history and use of the Routine Activities Theory in explanations of criminal violence generally and sexual violence on college campuses specifically. The original theory focused almost entirely on the victims as "suitable targets," and has been criticized for seeking to "deflect[] attention away from offenders' motivation."); Schwartz et al., *supra*, at 625 (focusing on the "motivated offender" part of the equation, including proposing a feminist version of Routine Activities Theory); *see id.* at 628 (noting that the "absence of capable guardians" aspect of the theory's equation is the least studied and highlighting the effect that a rape-supportive culture has on all three parts of the equation, in that it "gives men some of the social support they need . . . to victimize

college men) to be more influenced by peers who support assaults against "suitable targets" (i.e., college women).[239]

In light of this theory, other studies can be viewed as elucidating different parts of the "suitable target," "motivated offender," and "incapable guardian" triangle. For instance, studies have focused on the "suitable targets" when studying the high rate of victim non-reporting and on "the motivated offenders" when studying the widespread presence of sexual harassment- and rape-supportive attitudes among college students. Such studies estimate that 90% or more of survivors of sexual assault on college campuses do not report the assault,[240] due to fear of hostile treatment or disbelief by legal and medical authorities,[241] not thinking a crime had been committed or that the incidents were serious enough to involve law enforcement,[242] not wanting family or others to know,[243] and lack of proof.[244] In addition, studies have confirmed wide subscription to sexual violence-supportive attitudes among college men. For instance, a 2001 study found significant peer support for sexual violence among college men.[245] A study in 1993 found that 5-8% of college men commit rape knowing it is wrong; 10-15% of college men commit rape without knowing that it is wrong; and 35% of college men indicated some likelihood that they would rape if they could be assured of getting away with it.[246] A 1986 study whose subjects were overwhelmingly

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women [while women's] internalization of [the same culture] can contribute both to the availability of 'suitable targets' and to the lack of deterrence structures to act as effective guardianship"); *id.* at 630.

239. *See* Schwartz et al., *supra* note 238, at 646 (assessing the gender of individuals who are vulnerable to harassment).

240. *See* FISHER ET AL., *supra* note 130, at 24 (noting that victims of rape, sexual coercion, and sexual contact with force had especially high levels of non-reporting, between ninety-five and one hundred percent).

241. *See id.* at 23 (citing that some victims stated they did not report the abuse in part because they believed the police would not want "to be bothered" with investigating the incident); *see also* BOHMER & PARROT, *supra* note 130, at 13 (finding that women may not desire to go through uncomfortable medical procedures associated with reporting); WARSHAW, *supra* note 236, at 50 (noting that women may also try to turn their experience of rape into an ongoing relationship to make it acceptable).

242. *See* FISHER ET AL., *supra* note 130, at 23 (noting that victims stated they did not perceive the incidents of abuse to be important enough to notify the police).

243. *See id.* at 23-24 (noting that for incidents of completed rape, approximately 44% of victims stated they did not report the incident because they did not want their family to know about the abuse).

244. *See id.* (stating that approximately 31% of victims of a threat of rape stated they did not report the incident because they believed there was an absence of proof that the incident occurred).

245. *See* Schwartz et al., *supra* note 238, at 641 (finding that data also suggested that those who did not have friends who encouraged them to abuse women had very low levels of admission to committing rape).

246. *See* BOHMER & PARROT, *supra* note 130, at 6-7, 21 (noting the study indicated that 35% of males in fraternities forced another person to have sex).

undergraduate men indicated that 30% of men say they would commit rape and 50% would "force a woman into having sex" if they would not get caught.[247]

In the area of male peer support for sexual violence, Professors Martin D. Schwartz and Walter S. DeKeseredy have done a series of studies, together or in conjunction with others, where they have examined the role of such support in encouraging college men to perpetrate sexual violence. In the most recent of those studies, they concluded that, "men who report having [sexually aggressive friends] clearly report more sexually aggressive behavior,"[248] and that these "peers encourage [sexually abusive male undergraduates] to assault their girlfriends or dating partners."[249] Specifically, they found that male peer support for emotional, physical, or sexual violence approximately doubled the chances for the man to commit an act of sexual aggression.[250] When the peer support was combined with drinking alcohol two or more times a week, the likelihood that a man would "force sexual activity on a dating partner" increased nearly ten-fold over men who did not drink so frequently or did not have peers who influenced them to be emotionally, physically, or sexually violent.[251] In contrast, "men who claim to have no friends advocating abuse of women admit to relatively little abuse themselves."[252]

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247. *See* WARSHAW, *supra* note 236, at 97 (noting the increase in men who responded affirmatively when the wording of the survey was changed from rape to forcing a woman to have sex).

248. *See* Schwartz et al., *supra* note 238, at 642 (acknowledging that "[i]t is impossible to discover whether the man's friends actually act in this manner, or whether the man simply perceives that they do so"; but pointing out that this caveat does not affect the analysis because the perception acts as a form of peer support).

249. *See id.* at 641 (noting that this relationship is moderately strong and that similar findings have been made by other studies).

250. *See id.* at 644 (finding that peer support for sexual violence increases these odds by 2.4 times).

251. *See id.* (finding that the perpetrator's consumption of alcohol had more of a clear effect on the perpetration of sexual violence than the victim's consumption of alcohol); *see also id.* at 638-39 (finding a "mostly linear relationship" between "men who admit to engaging in sexually aggressive behavior" and men who "drink and use drugs more often, but stating that "[t]he relationship for women is more complex"); *see also* Michael A. Messner, *The Triad of Violence in Men's Sports*, in TRANSFORMING A RAPE CULTURE 23, 38 (Emilie Buchwald et al. eds., revised ed. 2005) (positing that the key role of heavy alcohol consumption in the male peer support group dynamic is again largely about men's status and relationships with each other. It is simultaneously a "part of the system of competitive status enhancement" and providing the "short term benefit[]" of "loosen[ing] constraints on verbal and emotional expression" and making "[t]he key desires underlying boys' and men's affiliations with each other—for acceptance, emotional connection, respect—seem more accessible."); *see also* KIMMEL, *supra* note 12, at 239 (noting speculation that "[d]rinking may be part of some men's premeditated strategy to coerce women into unwanted sex or to be violent . . . [and then] distance themselves from their violence").

252. *See* Schwartz et al., *supra* note 238, at 646-47 (noting that this study did not ask about a perpetrator's number of friends who discouraged violence but that this would

In addition, studies have shown that the vast majority of sexual violence—and often other interpersonal violence as well—is committed by a small number of repeat perpetrators. For example, a 2002 study surveyed 1882 male students at a university and found that 6.4% self-reported acts qualified as rape or attempted rape.[253] Of this group, 63.3% reported committing repeat rapes, averaging about six rapes per perpetrator.[254] In addition, these "undetected" (i.e., not arrested or prosecuted) rapists each committed an average of fourteen additional acts of interpersonal violence (which includes battery, physical and/or sexual abuse of children, and sexual assault short of rape or attempted rape). Thus, 4% of the students in the study accounted for 28% of the violence, nearly ten times that of non-rapists (1.41 acts of violence per person) and 3.5 times that of single-act rapists (3.98 acts of violence per person).[255] A more limited study in 1987 revealed that ninety-six college men accounted for 187 rapes.[256]

Thus, these studies cumulatively show a cycle whereby perpetrators' willingness to commit sexual violence appears to increase if they believe it is unlikely that they will get caught—a belief that is confirmed, according to studies on repeat perpetration, when perpetrators are actually not caught. Then, because survivors do not report the violence, perpetrators continue to avoid getting caught, apparently continue to believe they will not get caught, and continue to perpetrate. Furthermore, because research indicates that the main reasons campus sexual violence survivors do not report is that they do not think anyone will believe them and that various authorities, especially legal and medical authorities, will be hostile to them, the nature of schools' responses to victims' reports can influence the rate of victim reporting.[257] On the perpetrator's side, moreover, the school is obviously in the best position to increase what these studies indicate has a significant deterrent effect, i.e. getting caught, which contradicts perceptions, apparently held by the small number of perpetrators, that they can "get away with" committing violent acts. Unfortunately, the Routine Activities Theory studies seem to suggest that schools' "incapable guardian" behavior is having the exact opposite effect, and that schools' inaction plays a critical role in perpetuating the cycle of non-reporting and continued violence that fuels the peer gender-based violence problem.

The studies regarding the small number of repeat offenders, who other

"be a starting point for studying the nature of effective guardianship").

253. Lisak & Miller, *supra* note 135, at 78.

254. *Id.*

255. *Id.*

256. Schwartz et al., *supra* note 238, at 12.

257. *See* FISHER ET AL., *supra* note 130, at 23-24 (noting that twenty-five percent of victims in this survey stated they did not report an incident of rape to the police because they feared the police would respond by treating them in a hostile manner).

studies indicate are surrounded by peers who provide attitudinal support for offending, also corroborate observations and analyses of the "silent bystander" phenomenon as a factor in the perpetuation of sexual violence. These analyses have come largely from sociologists and other social scientists studying men and masculinity in the U.S., and they suggest that male violence against women is supported by what Professor Michael Kimmel has characterized as the "cultures of silence and protection." [258] Several of these analyses have used the infamous cases of the Glen Ridge gang-rape, the Richmond gang-rape, and the Mepham hazing incident to illustrate how these cultures operate. The Glen Ridge gang-rape was perpetrated by a group of thirteen high school football players and wrestlers who lured a "slightly retarded" 17-year-old girl into a basement, where four raped her, three stayed and watched, and six left the basement without intervening in the rape, reporting it, or agreeing to provide evidence in subsequent litigation.[259] The Richmond gang rape was perpetrated against a 15-year-old female student while about 20 male witnesses watched, some laughing and taking photos, although some witnesses came forward later and said they did not intervene because they feared retaliation for calling the police and being viewed as a "snitch." [260] The Mepham hazing case involved three players on the Mepham High School football team raping three younger players with broomsticks, pinecones, and golf balls coated with Mineral Ice, while other players watched.[261]

Various studies and analyses related to these cases and others like them indicate that the cultures of silence and protection are maintained by a wide

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258. *See* KIMMEL, *supra* note 12, at 227 (noting these cultures enable men to choose to commit rape).

259. Messner, *supra* note 251, at 26.

260. *See* Stephanie Chen, *Gang Rape Raises Questions About Bystanders' Role*, CNN (Oct. 28, 2009), http://articles.cnn.com/2009-10-28/justice/california.gang.rape.bystander_1_bystander-crime-prevention-kitty-genovese?_s=PM:CRIME (noting that witnesses may fail to come forward for fear of being seen as a snitch and for fear that the system will not protect them if they do); *Richmond Rape Witness Describes the Assault*, ABC7 NEWS, KGO-TV SAN FRANCISCO, CA (Nov. 12, 2009), http://abclocal.go.com/kgo/story?section=news/local/east_bay&id=7111732 (noting how witnesses laughed and took photos of the rape; one witness came forward later and said he feared retaliation for calling the police and being viewed as a "snitch."); Edecio Martinez, *While Dozens Gawked at Richmond Rape, One Brave Girl Called 911*, CBS NEWS (Nov. 5, 2009), http://www.cbsnews.com/8301-504083_162-5535036-504083.html?tag=contentMain%3bcontentBody (mentioning that the girl who called the police stated that in this community in particular, snitching was looked down upon).

261. *See* Robert Kolker, *Out of Bounds*, N.Y. MAGAZINE (Oct. 27, 2003), http://nymag.com/nymetro/news/features/n_9391/ (citing the tension in the community about whether this incident was one of hazing or sexual assault). Note that some cases involving male victims, at least in school peer sexual violence cases, qualify as gender-based violence, a subject that is explored at length in my current work-in-progress involving traditional masculinity, Title IX, and sexual harassment directed at boy victims.

range of actors, including not only teachers, coaches, and the rest of the school administration, but also students, alumni, parents, and the larger community. The six boys who left the scene at the Glen Ridge rape did nothing to stop the boys who stayed, and they did not report the assault—indeed, all six "refused, during the subsequent long and painful years of litigation, to turn on their male friends and provide incriminating evidence."[262] The Richmond gang-rape was not reported until a woman who was not present heard about the rape from her brother-in-law and called the police.[263]

In the Mepham case, when the victims reported, other team members refused to speak about what they had witnessed. The perpetrators were not suspended until two weeks after the victims reported the abuse, and students harassed the victims, calling them "fag" and "broomstick boy."[264] Students protested when the perpetrators were eventually suspended, and parents who spoke out on behalf of the victims at a school board meeting received "identical profanity-laced letters in the mail, warning that if they [kept] speaking out, they'[d] also get the broomstick treatment. 'Keep your mouth shut,' the letters read, 'and nothing will happen to you or your family.'"[265] In addition, a previous case of senior players hazing a junior player had been reported eight years before and, when the same coaches did nothing, it resulted in a lawsuit that was later settled.[266] That student also received threatening letters and pointed to retaliatory behavior by the coach, including benching the student for two years and physically attacking him when he came back to play in the third year.[267]

Professor Kimmel and other experts on masculinity have concluded that the cultures of silence and protection happen because of hierarchies among the men and boys involved.[268] As Professor Christopher N. Kendall

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262. Messner, *supra* note 251, at 27.

263. *See* Martinez, *supra* note 260 (noting that the woman who came forward stated that when her brother informed her of the incident, he said he did not know what to do and that he was scared).

264. *See* Kolker, *supra* note 261 (noting also that initially the superintendent tried to limit the inquiries about the abuse, told police that he would not provide information about the students without a subpoena, and did not suspend any of the alleged perpetrators from the school).

265. *See id.* (noting that even after the student protests, the school held its prep rally, which was seen by many as a sign of support for the head coach, as well as the suspended football players).

266. *See History of Violent Hazing at L.I. High School*, ABC NEWS (Sept. 24, 2003), http://abcnews.go.com/US/story?id=90243&page=1 (noting that, in that incident, the student was physically assaulted in the locker room when his teammates tried to push his head into a urine-filled toilet).

267. *See* Kolker, *supra* note 261 (noting that the same head coach physically lunged at the player and reached for his throat).

268. *See* KIMMEL, *supra* note 12, at 4-5 (explaining that while young men "remain fixated on the trappings of boyhood . . . the boys . . . struggle heroically to prove that

explains, "men . . . have two options: be violent and aggressive, hence masculine and in control, or be the person upon whom that power is exercised sexually."[269] In other words, most boys and men become silent bystanders not because they support the behavior, but because the denigration of girls and feminized boys *through* harassment and violence generally establishes or maintains the perpetrators' status at the top of the hierarchy. Challenging the perpetrators therefore threatens a loss of masculine status for the bystander. To make it even more risky, that loss of masculine status could itself open the bystander up to becoming a victim of harassment and violence himself. This risk not only leads to the widespread silent bystander phenomenon, but could also influence both perpetrators and bystanders to be more tolerant of gender-based violence—or even see it as an acceptable form of sexual expression. Under such a cultural norm, Professor Kendall continues, "if [men] want to retain the privilege that attaches to those who are male, they must reject any form of sexual expression that is nonhierarchical, non-abusive, non-alienating, read equal."[270]

Furthermore, Professors Schwartz and DeKeseredy note the interaction between these cultures and the institution's absence of "capable guardianship."[271] The 2001 study that they conducted regarding male peer support for sexual violence indicates that, in light of the lack of strong anti-violence messages from campus authority figures, male peer support for sexual violence likely encourages some men to perpetrate who might not otherwise do so.[272] In discussing the "incapable guardian" prong of the Routine Activities Theory formula, they come to a conclusion that is certainly borne out by the Title IX case law discussed above: "college campuses too often are 'effective-guardian-absent.' Many campus administrators do not seriously punish men who sexually abuse women, even if they engage in extremely brutal behavior such as gang rape. Even criminal justice personnel often disregard acquaintance and/or date rapes, essentially telling men that their sexually aggressive behavior is

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they are real men").

269. Christopher N. Kendall, *Gay Male Liberation Post* Oncale*: Since When Is Sexualized Violence Our Path to Liberation?*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 221 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

270. *Id.*

271. *See* Schwartz et al., *supra* note 238, at 625-27, 630 (noting that college campuses are places particularly deficient in effective guardianship since the administrators often do not seriously punish male perpetrators who assault women, thus essentially sending a message to these perpetrators that their sexual assaults are acceptable).

272. *See id.* at 630, 641 (finding that even when brutal rapes occur, a large number of campus administrators fail to effectively punish male perpetrators).

acceptable."[273] In this climate, the role of male peers may actually substitute for proper guardianship:

> [M]ale peer support can be regarded as a component of effective guardianship. When offenders receive either encouragement or no punishment from peers, administrators, faculty, and law enforcement officials, then effective guardianship is lacking. On the other hand, insofar as a man's friends give no support for abuse, this absence of support may well be the beginning of effective guardianship.[274]

In other words, the school itself becomes a silent bystander and its bystander behavior interacts with other, individual bystanders. In addition, its particular power as a bystander is acknowledged by the fact that the support (or lack thereof) of the individual bystanders becomes a significant factor only when the school is itself engaging in bystander behavior. Moreover, given the way in which masculinities scholars suggest the bystander phenomenon is created and perpetuated, it is worth noting that the school has no excuse for being a silent bystander since it is not a person susceptible to being victimized for breaking the code of silence.

In sum, the State responsibility cases before various international tribunals, the Title IX school responsibility case law, and the empirical research on incapable guardians and silent bystanders collectively support the similar insights of the State and school responsibility theories as to the link between inaction by collective entities and the perpetuation of violence. Together, these three sets of evidence show that these theories' common normative concern about "hostile environments" or "environments of impunity" are confirmed by the real, and too often devastating, consequences of such environments.

B. Equal Protection

The evidence of the practical consequences of collective entity inaction also confirms the widely held conclusion that gender-based violence is both a cause and a consequence of gender inequality. As the United Nations Secretary-General stated:

> Impunity for violence against women compounds the effects of such violence as a mechanism of male control over women. When the State fails to hold the perpetrators of violence accountable and society explicitly or tacitly condones such violence, impunity not only encourages further abuses, it also gives the message that male violence against women is acceptable or normal. The result of such impunity is not solely the denial of justice to the individual victims/survivors, but

273. *Id.* at 630 (citations omitted) (noting that these factors can reinforce an environment wherein female victims are trained to blame themselves for rape).

274. *Id.* at 646 (citations omitted).

> also the reinforcement of prevailing gender relations and replication of inequalities that affect other women and girls as well.[275]

Because "violence against women is not the result of random, individual acts of misconduct, but rather is deeply rooted in structural relationships of inequality between women and men,"[276] the report also states that "[i]t can only be eliminated . . . by addressing discrimination, promoting women's equality and empowerment, and ensuring that women's human rights are fulfilled."[277]

Given this conception of the overlap between gender-based violence and gender discrimination, it is not surprising that both the State and school responsibility theories derive from feminist legal theories regarding equal protection and gender discrimination. As noted above, women's rights activists and scholars combined *Velásquez*'s due diligence concept with prohibitions on sex discrimination and guarantees of equal protection in order to allow existing laws to reach gender-based violence.[278] Similarly, sexual harassment was a "centuries old"[279] "social practice"[280] that Catharine MacKinnon and others theorized—or "talk[ed] about" in "new ways"—that "enabled its re-characterization as unlawful conduct,"[281] specifically as unlawful sex discrimination. The fact that both of these theoretical projects derived in large part from the determination of feminist activists to use the law to advance a political agenda of equality adds to the power of these theories, because they are based in women's real world experiences of gender discrimination. Moreover, because both theories are concerned with entrenched, real world experiences of discrimination—with "centuries-old social practices"—their ultimate goal is prevention and compensation-oriented, with prevention seeking to end discrimination as a part of achieving equality in the long-term, and compensation seeking to lessen the inequalities resulting from the discrimination in the short term.

Thus, at the more detailed, doctrinal level, both of these theories have developed similar mechanisms for achieving these prevention and compensation goals. Specifically, the courts and tribunals deciding specific cases utilizing the State and school responsibility theories have often adopted standards and rules designed to encourage victims to come forward and report to those in an official capacity, including by (1) crafting broad-

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275. SEC'Y-GEN. STUDY, *supra* note 122, at 132.

276. *Id.* at ii.

277. *Id.* at i.

278. *See supra* notes 22-23 and accompanying text.

279. Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 269, at 3.

280. *Id.* at 1.

281. *Id.* at 8.

based standards regarding when a collective entity has sufficient knowledge of violence to respond to it, (2) providing mechanisms for compensation of victims, and (3) requiring that States and schools protect victims from retaliation for reporting, institute "interim measures" to address victims' immediate needs resulting from the violence, and avoid delay in responding to a report. The first on this list is oriented towards primary prevention because knowledge standards can create incentives for collective entities to take steps to stop the violence before it starts. The others fit into the category of secondary or tertiary prevention, because they take place after a certain amount of violence has already occurred but seek to prevent further violence. Providing mechanisms for victims to receive compensation can be considered secondary prevention but is also its own independent goal.

With regard to knowledge standards, various international tribunals have adopted a constructive knowledge standard in State responsibility cases. Under this standard, States can be held responsible for violence committed by non-State actors when the State "knew or should have known" prior to the violent incident that there was a risk of violence, and yet did not act on that knowledge.[282] Therefore, in *Lenahan*, the Commission noted that "the issuance of [a] restraining order and its terms reflect that the judicial authorities knew that Jessica Lenahan and her daughters were at risk of harm by Simon Gonzales . . . . [This order] is a key component in determining whether the State authorities should have known that the victims were in a situation of imminent risk of domestic violence upon breach of the terms of the order."[283] The Commission also discusses the similar constructive knowledge standards used by the European Court of Human Rights, the CEDAW committee, and by its own previous decisions.[284]

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282. *See* Lenahan v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 133 (2011).

283. *Id.* ¶¶ 141, 143.

284. *See id.* ¶¶ 132-35 (noting that the CEDAW committee has held States responsible for not protecting victims, especially where the State had previously known of the risk and failed to provide any protection). For more on the CEDAW and ECHR cases, see Hajduová v. Slovakia, App. No. 2660/03, Eur. Ct. H.R. ¶ 50 (2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101945 (finding that a District Court assessment that the perpetrator had a history of criminal actions and was in need of psychiatric treatment constituted constructive knowledge); Opuz v. Turkey, 2009-III Eur. Ct. H.R. ¶¶ 129, 133-36, *available at* http://www.coe.int/t/dghl/standardsetting/minjust/mju29/CASE%20OF%20OPUZ%20v[1].%20TURKEY.pdf (finding constructive knowledge where State officials were aware that the applicant and her mother had repeatedly been severely assaulted by the applicant's husband, despite the fact that they had withdrawn their complaints); Tomašić v. Croatia, 2009-I Eur. Ct. H.R. ¶¶ 51-53, *available at* http://sljeme.usud.hr/usud/prakESen.nsf/Praksa/DE6EF404943E5FB2C125758200702071?OpenDocument (holding that previous imprisonment for threats against the victims was evidence that the authorities knew the threats were serious); Kontrova v.

In the school responsibility cases, the standard adopted by courts is an actual knowledge standard, which does not include the "should have known" part of the constructive knowledge test.[285] This more narrow knowledge standard has been consistently criticized since it was adopted, including by some U.S. Supreme Court Justices.[286]

Much of the criticism of the actual knowledge standard derives from the concern that it sets up the wrong incentives for schools—in that it encourages schools to avoid knowledge, both generally and with regard to specific cases, and therefore creates disincentives for schools to engage in prevention efforts.[287] That is, when schools may be held responsible for not preventing violence when they "should have known" of the risk of that violence, they have a reason to minimize the chances that violence will occur at all, which in turn creates incentives to engage in primary prevention. When they can be held liable only if they "knew" about the risk of violence, they have an incentive to lessen the likelihood that they might learn of something to which they would be legally obligated to respond. This creates disincentives to engage in any primary prevention methods likely to increase reporting.

Nevertheless, OCR does use a constructive knowledge standard and has done so consistently.[288] Therefore, although a constructive knowledge

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Slovakia, 2007-IV Eur. Ct. H.R. ¶¶ 50-54, *available at* http://www.coe.int/t/dg2/equality/domesticviolencecampaign/resources/Kontrova%20v.%20Slovakia_en.asp (repeating that the constructive knowledge standard should not be applied in every situation where a risk was present, yet finding that police had constructive knowledge in part because one officer helped amend a complaint against the perpetrator so that no further action on a criminal offense was necessary); Goekce, *supra* note 39, ¶ 12.1.4 (finding that the police should have responded to Goekce's call as an emergency, given evidence of Mustafa Goekce's history of violence as a criminal); Yildirim, *supra* note 40, ¶ 12.1.4 (finding that Austrian authorities should have arrested Irfan Yildirim given their constructive knowledge that he presented a great danger to Fatma Yildirim).

285. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998) (holding that a school may be found liable under Title IX when "an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct").

286. *See id.* at 293, 300 (Stevens, J., dissenting) (noting that the actual knowledge standard encourages schools to avoid knowledge rather than set up procedures by which survivors can easily report); *see also* Megan Ryan ed., Commentary, *Comments from the Spring 2007 Harvard Journal of Law & Gender Conference Held at Harvard Law School*, 31 HARV. J.L. & GENDER 378, 386-87 (2008) (citing Linda Wharton, who notes that the standard from *Gebser* did not comport with the standard applicable under Title VII, inflicted too great a burden on victims, and created a danger that this standard would be applied in ways that precluded liability except in extreme cases).

287. *See generally* Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 223, 232-40 (2011) (noting that if schools do not establish procedures that encourage survivors to report incidents, they can avoid knowledge, and outlining more details on the actual knowledge problem).

288. *See* REVISED GUIDANCE, *supra* note 146, at 13 (stating that a "school has notice if a responsible employee 'knew, or in the exercise of reasonable care should have

standard would create greater liability (and therefore be more powerful) if it was sufficient to prove violation of Title IX in private lawsuits, OCR's use of the constructive knowledge standard in the school responsibility context helps to somewhat ameliorate the disincentives engendered by the actual knowledge standard. It also indicates that there is some overlap, although not a total one, between the school and State responsibility approaches with regard to knowledge standards.

With regard to secondary prevention-oriented doctrines, there is greater overlap between the deliberate indifference standard used in school responsibility cases and standards developed by international tribunals. First, both theories provide a mechanism for victim compensation—the school responsibility cases by allowing private lawsuits for monetary damages in Title IX cases,[289] and the State responsibility decisions awarding damages or recommending compensation.[290]

Second, both theories require State and school collective entities to take various measures that cumulatively make it more likely that victims will report, that protect them if they do report, and that are more likely to hold perpetrators accountable for violent acts, all of which have an underlying purpose of preventing future violence by breaking the cycle of victim non-reporting and continued violence. These methods accept that holding perpetrators accountable requires encouraging victims to report, so they seek to address victims' reasons for not reporting (as documented by the sociological studies reviewed above)—particularly perceptions that various authorities will treat victims hostilely instead of protecting them. In addition, these methods show an awareness, also supported by empirical evidence, that deterring perpetrators from perpetrating requires changing their perception that they will not "get caught" or face meaningful consequences. Thus, the emphases of these collective entity responsibility theories on perpetrator accountability, and victim reporting and protection lead to very similar doctrinal mechanisms.

As an initial matter, both courts and tribunals reviewing collective entity actions under the State and school responsibility theories make clear that

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known,' about the harassment").

289. *See, e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677, 709 (1979); *see also* Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 73 (1992).

290. *See, e.g.*, V.K., *supra* note 41, ¶¶ 9.15-9.16 (noting that the State should provide sufficient compensation to correspond to the her rights violations); Lenahan v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 215 (2011) (holding that the State needed to provide full compensation to Jessica Lenahan and her relatives); Bevacqua v. Bulgaria, 2008-V Eur. Ct. H.R. ¶101, *available at* http://www1.umn.edu/humanrts/research/bulgaria/BEVACQUA.pdf (holding that the State had to provide the applicants with monetary redress within three months of the case's final judgment); *see also* Rec (2002)5, *supra* note 81, ¶ 36 (noting that member states should ensure that victims receive compensation, including for legal costs).

they are not substituting themselves for the fact-finders involved in the case.[291] Rather, they review the responses of the collective entity to the violence, as is acknowledged by the general Title IX rule that schools are not held responsible for the violence itself.[292] Nevertheless, they can and do look closely at those responses and their effectiveness, including looking at elements such as whether the collective entity initiated an investigation, how they conducted that investigation, whether they had available and used "interim measures" to protect the victim once she reported (including protection from retaliation), whether such steps were taken quickly and avoided delay, and whether some disciplinary action or sanctions were levied against the perpetrator.

Beginning with investigations, both international tribunals and U.S. courts have made clear that in gender-based violence cases implicating State and school responsibilities, collective entities have an obligation to at least investigate.[293] Moreover, those investigations must meet certain minimal requirements, like conducting credibility assessments when faced with competing factual accounts and not judging credibility based on stereotypes about women or gender-based violence victims.[294] While the

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291. *See, e.g.*, Kalucza v. Hungary, App. No. 57693/10, Eur. Ct. H.R. ¶ 63 (2012), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110452 (stressing that the Court's "task is not to take the place of the competent Hungarian authorities in determining the most appropriate methods of protecting individuals from attacks on their personal integrity, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation"); *see also* V.K., *supra* note 41, ¶ 9.6 (finding the Committee should not review the facts or evidence of a case unless they appear arbitrary or discriminatory).

292. *See, e.g.*, Doe v. Derby Bd. of Educ., 451 F. Supp. 2d 438, 445-46 (D. Conn. 2006) (finding that since the Board could not be liable for the assault, it could only be liable for the situation in the school after the assault); S.S. v. Alexander, 177 P.3d 724, 738 (Wash. Ct. App. 2008) (noting that when notice is provided regarding the harassment, the analysis of the adequacy of a school's response commences).

293. *See, e.g.*, Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 259 (6th Cir. 2000) (noting that the school's response of having the victim complete her studies at home rather than conducting an investigation was inadequate); Opuz v. Turkey, 2009-III Eur. Ct. H.R. ¶ 169, *available at* http://www.coe.int/t/dghl/standardsetting/minjust/mju29/CASE%20OF%20OPUZ%20v[1].%20TURKEY.pdf (finding that local authorities did not display the necessary diligence in investigating and preventing the assault of the applicant); M.C. v. Bulgaria, App. No. 39272/98, Eur. Ct. H.R. ¶ 151 (2003), *available at* http://www.unhcr.org/refworld/docid/47b19f492.html (finding that Article 3 of the Convention creates an obligation for an official investigation to be conducted); *Lenahan*, Case 12.626, Report No. 80/11, ¶¶ 181, 184 (noting that the United States has a duty to conduct an investigation of this case and that this investigation must be impartial and serious to ensure the truth of the facts); González v. Mexico (*In re* Cotton Field), Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Amer. Ct. H.R. (ser. C) No. 205, ¶ 289 (Nov. 16, 2009) (noting that the State's investigation must be diligent to avoid liability).

294. *See, e.g.*, *S.S.*, 177 P.3d at 740 (finding that the school's "allowing [S.S.'s] rapist's denial of wrongdoing to be accepted at face value" indicated deliberate indifference on the part of the school); *M.C.*, App. No. 39272/98, ¶ 177 (finding the disregard by the prosecutors in failing to test the credibility of two conflicting witnesses' testimonies was inadequate); Vertido, *supra* note 42, ¶ 8.5 (stating that the

investigation is going on, or once a report is made, the entity should both have available and actually use interim measures to protect the victim,[295] including protecting the victim from retaliation for reporting.[296]

Once the case proceeds to the point of adjudication, U.S. administrative enforcement of Title IX and international tribunals have also developed similar requirements for the procedural rights of victims and alleged perpetrators (i.e., that they should be more equal than they are in the U.S. criminal system), [297] including by adopting less onerous standards of proof than "beyond a reasonable doubt."[298] Finally, both forms of U.S. Title IX enforcement, as well as the international tribunals discussed here, frown

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State's court's "judgment [showed] that the assessment of the credibility of the [victim's] version of events was influenced by a number of stereotypes").

295. *See, e.g.*, Gabrielle M. v. Park Forest-Chicago Heights, 315 F.3d 817, 824 (7th Cir. 2003) (noting various measures taken by the school to separate the harasser and victim and to discipline the harassing student); A. v. Croatia, App. No. 55164/08, Eur. Ct. H.R. ¶ 47 (2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101152 (finding that these provisions may include implementing a protocol for social and medical services); *Opuz*, 2009-III Eur. Ct. H.R. ¶ 82 (finding that States should enact measures allowing the judiciary to implement measures that protect victims during the litigation); *Lenahan*, Case 12.626, Report No. 80/11, ¶ 177 (finding restraining orders to be adequate interim measures); Maria da Penha v. Brazil, Case 12.051, Inter. Am. Comm'n H.R. Report No. 54/01, OEA/Ser.L.V.II.111 doc. 20 rev. ¶¶ 3, 54 (2001) (noting these measures may include implementing legal redress preventing the perpetrator from intimidating the woman); V.K., *supra* note 41, ¶ 5.1 (requiring that interim measures be appropriate and concrete); A.T., *supra* note 38, ¶ 9.5 (noting the lack of adequate interim measures enacted by the State).

296. *See, e.g.*, Doe v. E. Haven Bd. of Educ., 430 F. Supp. 2d 54, 60 (D. Conn. 2006), aff'd, 200 F. App'x 46, 49 (2d Cir. 2006) (noting that the plaintiff "was subject to nearly constant peer harassment upon reporting that she had been sexually assaulted by two upperclassmen"); *Opuz*, 2009-III Eur. Ct. H.R. ¶ 173 (mentioning the authorities continued inaction despite the perpetrator's threats against the applicant after he was released from prison, which the applicant reported); A.T., *supra* note 38, ¶ 8.4 (finding a three year delay between the incidents and the proceedings was inappropriate, "particularly considering that the author has been at risk of irreparable harm and threats to her life during that period"); *see also* Rec (2002)5, *supra* note 81, ¶ 44 (directing States to take "measures . . . to protect victims effectively against threats and possible acts of revenge").

297. *See, e.g.*, Univ. Notre Dame Letter, *supra* note 204 (finding judicial proceedings that allow for the associate dean to dismiss the charges if he believes they lack merit are inadequate under Title IX's requirements); *see also Opuz*, 2009-III Eur. Ct. H.R. ¶ 147 (finding that in these cases perpetrators' rights should not overwhelm the victims' right to mental and physical integrity); A.T., *supra* note 38,_¶ 9.3 ("Women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy."); Rec (2002)5, *supra* note 81, ¶ 38 (advising states to "ensure that all victims of violence are able to institute judicial proceedings").

298. *See, e.g.*, Evergreen State Coll. Letter, *supra* note 204 (noting that the clear and convincing evidence standard of proof used by the school was higher than Title IX's requirement of a preponderance of the evidence); *see also Opuz*, 2009-III Eur. Ct. H.R. ¶ 147 (noting that the State's argument that there was no tangible evidence of apparent danger to the applicant's mother was an insufficient standard); V.K., *supra* note 41, ¶¶ 9.9, 9.16 (noting that, in this case, a beyond a reasonable doubt standard was applied, which did not correspond with anti-discrimination standards).

upon failures to hold perpetrators accountable,[299] and all stress the importance of avoiding delay in arrest, adjudication, or the issuing of protective orders.[300]

Thus, both the history and the current doctrinal approaches of the State and school responsibility theories contain similarities that derive from these theories' basis in feminist legal theories regarding equal protection and gender discrimination. Accordingly, these theories share an understanding of gender-based violence as a form of gender discrimination and as a cause and consequence of gender inequality. Therefore, they view the elimination of gender-based violence as part of the greater goal of achieving gender equality, and they agree on a very practical, doctrinal level on what kinds of specific legal rules and standards will help prevent such violence. Those prevention methods include creating doctrinal measures to give victims incentives to report and to eliminate barriers to victim reporting by protecting them from retaliation, avoiding delay, and providing access to resources most easily provided by collective entities, such as "interim measure" protection and compensation if and when a victim comes forward. These methods also include adopting knowledge standards that encourage collective entities to engage in primary prevention of gender-based violence.

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299. *See, e.g.*, Babler v. Ariz. Bd. of Regents, Case 2:10-cv-01459-RRB (D. Ariz. Feb. 15, 2010) (order denying school's motion to dismiss plaintiff's claims that the school had ignored a five-year pattern of misconduct by the fraternity, she was subsequently drugged and anally raped by fraternity member(s) and the school obstructed the collection of evidence following her rape and failed to investigate because she was "drunk" at the fraternity party); Hajduová v. Slovakia, App. No. 2660/03, Eur. Ct. H.R. ¶ 50 (2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101945 (finding that though police intervention was commendable, their later failure to detain the perpetrator for psychiatric treatment was inadequate); González v. Mexico (*In re* Cotton Field), Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Amer. Ct. H.R. (ser. C) No. 205, ¶ 388 (Nov. 16, 2009) (finding that prior judicial ineffectiveness in the case cultivated an environment that was sympathetic towards continued acts of violence); Yildirim, *supra* note 40, ¶ 12.1.2 (finding that a comprehensive system to address domestic violence including remedies is insufficient if not supported by actors who implement these requirements with due diligence).

300. *See, e.g.*, Williams v. Bd. of Regents, 477 F.3d 1282, 1297 (11th Cir. 2007) (finding the school took eight months to respond to reports of a gang rape); Kalucza v. Hungary, App. No. 57693/10, Eur. Ct. H.R. ¶ 64 (2012), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110452 (finding it "striking that the authorities needed more than one and a half years to decide on the applicant's first request for a restraining order"); *In re Cotton Field*, Inter-Amer. Ct. H.R. (ser. C) No. 205, ¶ 284 (finding that by failing to act with diligence right after the reports were filed, the State lost important time); *Maria da Penha*, Case 12.051, Report No. 54/01 ¶ 32 (finding that an unwarranted delay could have interfered with the statute of limitations); Vertido, *supra* note 42, ¶ 8.3 (noting that claims should be dealt with in an expeditious fashion); *see also* Rec (2002)5, *supra* note 81, ¶¶ 23, 29, 35 (noting that victims should receive immediate assistance including medical treatment, should have their complaints dealt with quickly by police, and should be assured of swift action by the State against their perpetrators).

CONCLUSION

As the first case to apply to the United States the decades-old international law theory that States have a responsibility to act with due diligence to prevent, investigate, punish, and provide compensation for gender-based violence committed by non-State actors, *Jessica Lenahan (Gonzales) v. United States* seems at first to conflict with U.S. law. Moreover, the United States rejects the idea that it is subject to the jurisdiction of the Inter-American Commission on Human Rights because the United States is a party only to the non-binding American Declaration on the Rights and Duties of Man,[301] which the United States views as not setting out "an affirmative duty on States to actually prevent the commission of individual crimes by private parties," [302] and generally protests as a source of any mandatory authority by the Inter-American Commission and Court over the United States.[303] These factors seem to indicate that the case has little relevance within the United States and "domesticating" it into U.S. law will be a difficult, if not impossible task.

However, conceiving of the State as a collective entity and comparing *Lenahan*'s "State responsibility" theory with another "collective entity responsibility" theory, hostile environment sexual harassment, particularly as it is used to regulate schools, demonstrates that *Lenahan* is *not* antithetical to U.S. domestic law or to U.S. legal commitments to human rights and equal protection. Its many similarities with the enforcement of Title IX in hostile environment sexual harassment cases demonstrates that the United States recognizes and uses tenets and doctrines in its regulation of schools as collective entities that are very similar to the State responsibility theory's regulation of State collective entities. This "school responsibility" theory shares with the State responsibility theory concerns about collective entity inaction and how that inaction fails to prevent and

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301. *See FAQ's on Human Rights: 6) How Do A Deceleration, A Convention And A Covenant Differ from One Another?*, UNITED NATIONS POPULATION FUND, http://www.unfpa.org/derechos/preguntas_eng.htm#faq6 (last visited September 24, 2012) (noting generally that though "a declaration is a series of norms and principles drafted by States by and which they pledge to abide by," there is "no forceful component to a declaration," and "those States who do not observe those norms and principles are subject to 'moral sanctions' before the international community (i.e., The American Declaration of the Rights and Duties of Man)").

302. Lenahan v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 106 (2011).

303. *See* Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights (Art. 64 American Convention on Human Rights), Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (Ser. A) No. 10, ¶12 (July 14, 1989) (stating that the United States Government views The American Declaration of the Rights and Duties of Man as "a declaration of basic moral principles and broad political commitments and as a basis to review the general human rights performance of member states, not as a binding set of obligations").

perpetuates gender-based violence. In addition, both theories derive their doctrinal approaches from equal protection law and a goal to end gender-based violence as a cause and consequence of gender inequality. As a result, these doctrines are similarly designed to prevent violence and compensate victims as opposed to punish perpetrators, except to the extent that punishment can help achieve the prevention and compensation goals. Finally, both the theories' general focus on collective entity inaction and their specific doctrinal approaches are borne out by empirical, sociological research regarding the dynamics of gender-based violence—particularly the role of silent bystanders and collective entities as the most powerful of those bystanders. These various similarities show not only that *Lenahan* does not oppose U.S. law, but also that *Lenahan* and U.S. law share common values, goals, and methods to reach those goals.

Moreover, the analogy between these two theories has the potential to help us recognize and create other forms of collective entity responsibility theory in other legal regimes. The larger project for which this article is a first step will turn to precisely this task by considering collective entity responsibility concepts in separate follow-on articles examining the U.S. tort and criminal justice systems. As we increase our understanding of the insights that these theories hold regarding the normative and practical consequences of discriminatory inaction by collective entities, they can help us design and utilize legal methods more likely to reach the ultimate goal: ending gender-based violence and eliminating it as a significant barrier to gender equality. Doing so has the potential not only to achieve gender equality, but to expand equal protection generally.