Too Much Protection and, at the Same Time, Not Enough: Inconsistent Treatment of Adolescents by the Supreme Court

Suzanne Milne Alexander

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Suzanne M. Alexander, Too Much Protection and, at the Same Time, Not Enough: Inconsistent Treatment of Adolescents by the Supreme Court, 53 DePaul L. Rev. 1739 (2004)
Available at: https://via.library.depaul.edu/law-review/vol53/iss4/15
TOO MUCH PROTECTION AND, AT THE SAME TIME, NOT ENOUGH: INCONSISTENT TREATMENT OF ADOLESCENTS BY THE SUPREME COURT

INTRODUCTION

Adolescence is a difficult time, not only for the teens themselves, but also for parents, schools, and society. It is a period in life when an individual walks the line between childhood and maturity. Even the United States Supreme Court has been unable to set clear guidelines regarding teens and their place in society. The Supreme Court has decided several cases that impact adolescents but those decisions also send conflicting messages to all involved. Teens, especially those in high school, are viewed as children who need protection, even if that means taking away or minimizing their constitutional rights. However, at the same time, teens are often expected to act like adults and, like adults, are held responsible for their actions. This is especially true if a teen’s actions offend a normative standard, for example, when a teen commits a crime. Are adolescents children who need protection or young adults who need to take responsibility?

This Comment will analyze several recent Supreme Court decisions in the context of earlier decisions and will suggest that the Court is inconsistent in its treatment of adolescents. The current Court appears to suggest that teens must take responsibility for their actions as though they are already adults. However, this Court also suggests that teens are forced to accept that they are not entitled to all the constitutional protections to which adults are entitled. Teens are subjected to a lower standard of constitutional protection because adults want—and are determined—to protect them. At the same time, however, teens have not been protected. Adolescents can be sentenced to the death penalty but, at the same time, do not receive the standard constitutional level of protection from illegal search and seizure when they are at school. The Court is sending a mixed message to our adolescents. Teens are taught that they are not as important to society


as adults because their constitutional rights are not protected to the same extent adults' rights are protected. This message to teens can only serve to increase the problems that adolescents face today.

Part II of this Comment will offer a background for the development of the rights of children and teens. First, subpart A will focus on major cases that marked the earliest decisions in which the Court addressed the issue of children's rights during the 1920s. Next, subpart B will address the major cases that began to confer rights upon children and teens during the 1960s and early 1970s. This Comment discusses these rights within the criminal context, within the school context, and finally, the context of abortion. Third, Part II will demonstrate the decline in the rights of children and teens that took place largely during the 1980s, in the context of criminal, school, and abortion cases. Finally, more recent cases affecting teens will be discussed. Part III will expand on these cases, focusing on the negative and conflicting messages the current Court sends to teens. These inconsistencies are shown through an analysis of decisions concerning sexual harassment and drug testing in schools as well as those upholding capital punishment for adolescent offenders. Part IV will outline the negative impact these decisions will continue to have on our nation's adolescents.

II. BACKGROUND: THE DEVELOPMENT AND DECLINE OF ADOLESCENTS' RIGHTS

The Supreme Court began to decide cases involving the rights of children and teens in the 1920s. It was not until the 1960s that the Court first recognized that children and teens were entitled to some of the constitutional rights enjoyed by adults. Historically, the Court has struggled to define adequately those rights. In the 1970s and 1980s, the conservative-minded Court formulated decisions that proved to narrow and limit those rights.

3. See infra notes 13-22 and accompanying text.
4. See infra notes 23-61 and accompanying text.
5. See infra notes 23-35 and accompanying text.
6. See infra notes 36-46 and accompanying text.
7. See infra notes 47-61 and accompanying text.
8. See infra notes 62-100 and accompanying text.
9. See infra notes 101-124 and accompanying text.
10. See infra notes 125-244 and accompanying text.
11. See infra notes 125-244 and accompanying text.
12. See infra notes 245-270 and accompanying text.
A. Early Decisions Concerning Children and Teens: 1920s

Historically, children were not given constitutional rights or protections; parents were given the constitutional right to guide their children's development. Two cases were instrumental in developing this right of parents to control their children. The first, *Meyer v. Nebraska*, held that a state statute that prohibited the teaching of foreign languages to students before the ninth grade was unconstitutional. The State of Nebraska had created this statute 'to foster a homogeneous people with American ideals.' The Court held that the Nebraska Legislature had "attempted materially to interfere with . . . the power of parents to control the education of their own [children]."

In *Pierce v. Society of Sisters*, the Court held that a state statute was unconstitutional because it required parents to send their children to public rather than to private schools. The State of Oregon had created the Compulsory Education Act, which required parents to send their children to public schools when the children were between the ages of eight and sixteen. The Court held that the Act "un-

15. *Id.* at 399-400. Justice James McReynolds wrote for the majority, while Justice Oliver Wendell Homes wrote a dissenting opinion joined by Justice George Sutherland.
16. *Id.* at 402. See also *Bartels v. Iowa* 262 U.S. 404, 412 (Holmes, J., dissenting). Justice Holmes found it "desirable that all the citizens of the United States should speak a common tongue," and therefore did not find it unreasonable to allow states to forbid the teaching of foreign languages. *Id.*
18. 268 U.S. 510 (1925).
19. *Id.* at 534-35. Justice McReynolds again wrote for the majority.
20. 1922 Or. Laws 5259, cited in *Pierce*, 268 U.S. at 530-31. At the time the case was decided, the Compulsory Education Act read:

> Sec. 5259. Children Between the Ages of Eight and Sixteen Years. – Any parent, guardian or other person in the state of Oregon, having control or charge or custody of a child under the age of sixteen years and of the age of eight years or over at the commencement of a term of public school of the district in which said child resides, who shall fail or neglect or refuse to send such child to a public school for the period of time a public school shall be held during the current year in said district, shall be guilty of a misdemeanor and each day's failure to send such child to a public school shall constitute a separate offense; provided, that in the following cases, children shall not be required to attend public schools . . . .

*Id.* The statute lists several exceptions to the public school requirement: If the child is physically unable to attend school, if the child has completed the eighth grade, if the child lives too far from any public school, or if the child is being schooled at home by a parent or private teacher, then the child is not required to attend public school. The statute also lists fine and imprisonment as punishment for conviction of this crime. 1922 Or. Laws 5259.

21. *Pierce*, 268 U.S. at 530. Interestingly, under the statute, parents were permitted to teach their children at home themselves or with a private teacher, provided they received permission from the superintendent, but it seems parents were not permitted to allow a private teacher to
reasonably interfere[d] with the liberty of parents and guardians to
direct the upbringing and education of children under their control.”

These cases began the trend toward parental sovereignty, apart from
the state, to have complete control over how children were raised and
educated.

B. Development of Children's Rights: 1960s and Early 1970s

During the 1960s, the Court began to develop the rights of adoles-
cents separate and distinct from their parents' rights to control them.
This section will discuss the cases involving these rights in the contexts
of criminal law, schools, and abortion.

1. Criminal Cases Involving the Rights of Minors

In a 1967 Arizona case, In re Gault, the Court established the
principle that children are entitled to some constitutional protec-
tions. In Gault, a minor was arrested for making obscene phone
calls. The police detained and questioned the minor without giving
notice to his parents. At the trial, there was no sworn testimony,
and no transcript was taken. The minor was convicted and sen-
tenced to state industrial school for six years. The United States Su-
preme Court set aside the conviction and held that, although a
juvenile hearing need not "conform with all of the requirements of a
criminal trial or even of the usual administrative hearing, . . . [i]t must

teach their children within a group of other children, which might be like a private school. 1922
Or. Laws 5259.

22. Pierce, 268 U.S. at 534.
24. Id. Justice Abe Fortas wrote for the majority, and was joined by Chief Justice Earl Warren
and Justices William J. Brennan, William Douglas, and Tom Clark. Justices Hugo Black and
Byron White wrote concurring opinions and Justice John Harlan concurred in part and dissented
in part. Justice Potter Stewart dissented.
25. Id. at 4. At the time of his arrest, the minor, Gerald Gault, was currently on probation for
six months for being with another boy who had stolen a wallet. Id. Gerald was arrested on June
8, 1964 with his friend because a neighbor complained that the boys were making obscene phone
calls to her. Id. Justice Fortas, writing for the majority, stated: "It will suffice for purposes of
this opinion to say that the remarks . . . put to her were of the irritatingly offensive, adolescent,
sex variety." Id.
26. Gault, 387 U.S. at 5. Gerald was taken into custody while both of his parents were at
work. Id. at 4. His mother came home to find him gone and, after asking neighbors, was told he
had been arrested. Id.
27. Id. The complaining witness—the neighbor—was not at the hearing to testify. Id.
28. Id. at 7-8. If an adult had committed this crime, the sentence might have been a fine of
five to fifty dollars or not more than two months of incarceration. Gault, 387 U.S. at 8-9. Addition-
ally, the State of Arizona did not permit appeals in juvenile cases. Id. at 5.
measure up to the essentials of due process and fair treatment.”

Thus, the Court established that children, not just adults, are entitled to constitutional due process.

Another landmark case, In re Winship, established that the standard of proof for a juvenile case should be the same as the standard for adults: proof beyond a reasonable doubt. The juvenile in this case, a twelve-year-old boy, was arrested for stealing $112 out of a locker and was sentenced to a training school for eighteen months, which could be extended to his eighteenth birthday. The New York court found the boy guilty by a preponderance of the evidence.

The Court did not hold that juveniles are entitled to all of the constitutional protections afforded adults in criminal proceedings. This holding applied only to juvenile proceedings in which the child could be sentenced to some kind of state institution. Additionally, the Court held only that certain rights and privileges were guaranteed to juveniles, namely, the right to notice of charges, Gault, 387 U.S. at 33; the right to counsel, id. at 41; the right to confrontation unless the juvenile confessed, id. at 57; and the privilege against self-incrimination, id. at 55. The Court did not rule on the right to a transcript or the right to appeal. Id. at 57-58. Justice Harlan, in his opinion, concurring in part and dissenting in part, articulated three criteria for courts to use to determine whether procedural due process was violated:

[F]irst, no more restrictions should be imposed than are imperative to assure the proceedings' fundamental fairness; second, the restrictions which are imposed should be those which preserve, so far as possible, the essential elements of the State's purpose; and finally, restrictions should be chosen which will later permit the orderly selection of any additional protections which may ultimately prove necessary.

Id. at 72 (Harlan, J., concurring in part and dissenting in part). Justice Harlan also seemed to be concerned with maintaining the separate juvenile justice system. See Gault, 387 U.S. at 72. Justice Stewart, in his dissent, pointed out that juvenile proceedings are not criminal, adversary proceedings, and therefore the protections offered by the Constitution were not necessary. Id. at 78 (Stewart, J., dissenting). Justice Stewart felt that juvenile proceedings were meant to help a child correct behavior rather than to punish. Id. at 79. As he stated in his opinion:

Juvenile proceedings are not criminal trials. They are not civil trials. They are simply not adversary proceedings. Whether treating with a delinquent child, a neglected child, a defective child, or a dependent child, a juvenile proceedings's whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court. The object of one is correction of a condition. The object of the other is conviction and punishment for a criminal act.

Id. at 78-79.


Id. at 368.

Id. at 360.

Id. Preponderance of the evidence is clearly a lesser standard than proof beyond a reasonable doubt.
Supreme Court reversed, holding that when "a 12-year-old child is charged with an act of stealing which renders him liable to confinement for as long as six years, then, as a matter of due process . . . the case against him must be proved beyond a reasonable doubt." Thus, the Court sought to expand children's constitutional rights.

2. School Cases Involving the Rights of Minors

In 1969, the Court established First Amendment protection for high school students in *Tinker v. Des Moines Independent School Community School District*. In *Tinker*, students wanted to protest the Vietnam War by wearing black armbands to school. School officials suspended the students who wore the armbands until they would come back to school without them. The trial court dismissed the students' complaint and allowed the school's action because it was needed to "prevent the disturbance of school discipline."

The Supreme Court reversed, holding that the students' protest was "pure speech," with no reason to believe it would invoke any sort of disturbance, and was therefore protected by the First Amendment. Students and teachers do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” The Court went on to discuss students’ rights in public schools.

Justice Abe Fortas, writing for the majority, stated that “[s]chool officials do not

35. Id. at 368 (citing W. v. Family Court, 247 N.E.2d 253, 260 (N.Y. 1969) (Fuld, C.J., dissenting)). Justice Brennan, writing for the majority, also stated that “[t]he same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child.” *Winship*, 397 U.S. at 365. As in *Gault*, the Court rejected the notion that to hold states to the standard of due process by requiring proof beyond a reasonable doubt would in some way lessen the benefits of the separate juvenile system. *Id.* at 367. Justice Harlan, in his concurring opinion, again (as in *Gault*) emphasized that holding courts to a standard of proof beyond a reasonable doubt would not impair the special juvenile system and judges from the ability to rehabilitate youth. *Id.* at 375 (Harlan, J., concurring). He stated that this decision should not affect juvenile court judges adversely; rather, it “simply requires a juvenile court judge to be more confident in his belief that the youth did the act with which he has been charged.” *Id.*


37. *Id.* at 504. The petitioners, John Tinker, fifteen years old, Christopher Eckhardt, sixteen years old, and Mary Beth Tinker (John's sister), thirteen years old, had agreed to wear black armbands to school during the holidays and also to fast on December 16 and New Year's Eve. *Id.* The teens and their parents had previously been involved in similar peaceful protests. *Id.*

38. *Id.*

39. *Id.* at 504-05.

40. *Tinker*, 393 U.S. at 505-06.

41. *Id.* at 506.

42. *Id.* at 506-14.
possess an absolute authority over their students." Students in school are “persons” under the Constitution who possess fundamental rights. Justice Fortas went on to hold: “In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.” This holding would eventually be limited in 1988 by the Rehnquist Court.

3. Abortion Cases Involving the Rights of Minor Girls

The Court first addressed the issue of pregnant teens obtaining abortions in Planned Parenthood of Central Missouri v. Danforth. In Danforth, the Court considered a state statute requiring parental consent before an unmarried girl under eighteen years of age could obtain an abortion. Justice Harry A. Blackmun, writing for the Court, stated that “[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.” Furthermore, Justice Blackmun affirmed that minors, not just adults, enjoy constitutional rights. The Court held the statute unconstitutional because a “blanket veto” by a third party, even if that party is a parent, is constitutionally unacceptable. The Court noted, “Any independent interest the parent may have in the termination of the minor daughter’s pregnancy is no more weighty than the right of privacy

43. Id. at 511. Justice Fortas’s opinion was joined by Chief Justice Warren and Justices Douglas, Brennan, and Marshall. Justices Stewart and White wrote separate concurring opinions, while Justices Black and Harlan dissented.
44. Id. However, Justice Stewart, in his one paragraph concurrence, wrote to express his opinion that, although he agreed with the Court’s decision, he did not feel that “the First Amendment rights of children are co-extensive with those of adults.” Id. at 514-15 (Stewart, J., concurring).
45. Tinker, 393 U.S. at 511. Justice Harlan, however, disagreed with the Court. In his dissent, he stated that “school officials should be accorded the widest authority in maintaining discipline and good order in their institutions.” Id. at 526 (Harlan, J., dissenting). He felt that as long as the school did not have illegitimate reasons for restricting speech, such as to curtail the unpopular point of view, it should be permitted to regulate student speech. Id.
46. See infra notes 96-100 and accompanying text. See also H.L. v. Matheson, 450 U.S. 398, 413 (1981).
47. 428 U.S. 52 (1976). Justice Blackmun delivered the opinion of the Court, in which every Justice concurred in some or all parts. Justice White filed an opinion concurring in part and dissenting in part, in which Justices Burger and Rehnquist joined. Justice Stevens also filed an opinion concurring in part and dissenting in part.
48. Id. at 74.
49. Id.
50. Id.
51. Id. Justice Stewart, joined by Justice Powell, in his concurring opinion, stressed the importance of parental involvement in this difficult decision. Id. at 91 (Stewart, J., concurring). He felt that a state would be acting responsibly toward these pregnant girls by encouraging them to talk to their parents. Danforth, 428 U.S. at 91. However, he did believe that a judicial bypass provision would be necessary. Id.
of the competent minor." Thus, the Court affirmed a teen girl's right to abortion, separate and apart from her parents' right to control her upbringing.

The Court again considered parental consent for abortion in Bellotti v. Baird. In Bellotti, the Court considered a Massachusetts statute that required a pregnant teen to obtain consent from a parent if she wanted an abortion. Justice Lewis F. Powell, writing for the Court, rejected the statute as an unconstitutional infringement on a pregnant girl's right to an abortion. However, the Court did allow the state to require parental consent, but only if the state provided an alternative procedure, such as a judicial proceeding, whereby the minor could obtain authorization for an abortion without parental consent by proving to a judge that she is mature enough to make the decision herself or that the abortion is in her best interest, even if she cannot obtain her parents' consent. The Court in Bellotti did not base its decision on the reasoning that teen girls are entitled to constitutional rights, as set forth in Danforth, but instead reasoned that the state does have a need to control minors and is therefore entitled to limit a minor's constitutional rights. An abortion, however, is unique because of the time limitation on the availability of an abortion and because of the severe detriment imposed on teen girls by unwanted pregnancy and motherhood. Therefore, the Court, while limiting a teen girl's access

52. Id. at 75. Justice White, however, disagreed. In his opinion, in which he concurred in part and dissented in part, Justice White held that the state had every right to protect minor children from this irreversible decision by requiring parental consent. Id. at 95 (White, J., dissenting in part and concurring in part). Justice White felt that parents needed to help their minor daughters in making such an important and difficult decision. Id. He stated that parental consent is "the traditional way by which States have sought to protect children from their own immature and improvident decisions; and there is absolutely no reason expressed by the majority why the State may not utilize that method here." Id. Justice Stevens, in his separate concurring opinion, also felt that the "State's interest in the welfare of its young citizens justifies a variety of protective measures." Danforth, 428 U.S. at 102 (Stevens, J., concurring in part and dissenting in part). Justice Stevens pointed out several things that minors are not allowed to do without parental consent, including attending adult movies, working, traveling, and marrying. Id. However, with respect to Justice Stevens, these activities certainly do not concern a citizen's need for and right to privacy to the extent that an abortion does.

54. Id.
55. Id. at 643.
56. Id.
57. Id. at 637.
58. See id. at 642. Justice Powell stressed the adult responsibility associated with having a child. See Bellotti, 443 U.S. at 642. Things would change, however, if the girl were to have the child. She would likely be considered an adult in some ways, as she would be a parent. As a parent, she would be legally entitled to make decisions concerning the care and control of her own child, making her constitutional rights no longer limited as a minor, but fully developed as a parent. See Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925). Were she to stay in school, however,
to abortion, allowed for an alternative to the required parental consent. The Court did not deny that a teen girl does have the right to choose abortion for herself, regardless of her parents' wishes.\textsuperscript{59} Paradoxically, the Court allowed the state to make an abortion more difficult for a girl to obtain, but did not allow the state to completely deny her this right.\textsuperscript{60} This decision signals a decline in the rights of adolescents, but not a total abandonment, because the Court acknowledged that teen girls should not be denied a right that is guaranteed by the Constitution.\textsuperscript{61}

\begin{center}
\textit{C. Decline in the Rights of Minors: 1980s}
\end{center}

During the 1980s, the Rehnquist Court limited severely the rights that had previously been established for teens. Within the criminal context, the Court eventually ruled that the death penalty may be applicable to minors who are sixteen or seventeen years old.\textsuperscript{62} Within the school context, the Court limited the protections offered to high school students by the First and Fourth Amendments.\textsuperscript{63} Finally, the Court allowed states to require parental notification for a pregnant teen to obtain an abortion, even without a judicial bypass provision.\textsuperscript{64}

\begin{enumerate}
\item \textbf{1. Criminal Cases: Limit the Protection of Minors and Increase Their Responsibility}

The first of three criminal cases discussed in this section that deal with teen offenders is \textit{Eddings v. Oklahoma}.\textsuperscript{65} In \textit{Eddings}, the Supreme Court considered the application of the death penalty to a defendant who was sixteen years old at the time of his offense.\textsuperscript{66} The Court vacated Edding's death sentence because it was imposed with-

\begin{footnotes}
\begin{enumerate}
\item \textsuperscript{59} See \textit{Bellotti}, 443 U.S. at 622.
\item \textsuperscript{60} Id.
\item \textsuperscript{61} See id. Perhaps the Court reached this result because there were other people involved, not just one teen, but the father and the parents of both teens. Perhaps the Court was also concerned about the impact that rampant teen pregnancy has on society, contributing to other social problems, such as dependence on welfare, poverty, and the social and medical problems that the children or the teens may have developed.
\item \textsuperscript{62} See infra notes 65-80 and accompanying text.
\item \textsuperscript{63} See infra notes 81-95 and accompanying text.
\item \textsuperscript{64} See infra notes 96-100 and accompanying text.
\item \textsuperscript{65} 455 U.S. 104 (1982).
\item \textsuperscript{66} Id. at 105.
\end{enumerate}
\end{footnotes}
out consideration of all mitigating factors. The trial court had refused to consider evidence of the defendant’s family history of abuse and emotional problems. The Supreme Court reasoned that evidence of such treatment is an important consideration, especially when the defendant is so young. Justice Powell, writing for the Court, stated that “when the defendant was 16-years-old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.”

Next, in Thompson v. Oklahoma, the Court concluded that the Eighth Amendment prohibited the execution of a person who was under sixteen years old when he or she committed the offense. Justice John Paul Stevens wrote that the death penalty for young teens offended our standards of decency. He also wrote that one of the reasons it offended “contemporary standards of decency” was that "such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty." This decision, however, did not explicitly state that sixteen and seventeen-year-old adolescents may be sentenced to death without violating the Eighth Amendment.

That decision came a year later in Stanford v. Kentucky. Justice Antonin Scalia delivered the plurality opinion of the Court, concluding that a death sentence for a defendant who had committed a crime at sixteen or seventeen years of age does not violate the Eighth Amendment. Such a sentence, the plurality concluded, was not cruel or unusual; only a minority of states chose to prohibit capital punishment for sixteen or seventeen-year-old offenders. Justice Scalia stated that the Court must look to American standards of decency when deciding what is cruel and unusual punishment. Justice Scalia focused on the fact that

67. Id. at 113-14.
68. Id. at 108.
69. Id. at 115. One wonders what happened to this reasoning in Stanford v. Kentucky, 492 U.S. 361 (1989). The majority in Stanford did not even consider these mitigating factors when holding that a state may allow a sixteen-year-old to be sentenced to death without offending our standards of decency. See id.
70. Eddings, 455 U.S. at 115. Theoretically, such factors are always considered when determining whether a defendant might receive a penalty of death.
72. Id.
73. See id. at 823.
74. See id.
76. Id.
77. Id. at 373.
78. Id. at 369.
of the 37 States whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it on 17-year-old offenders. This does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual. They do not establish a national consensus as this Court has previously thought sufficient to label a particular punishment cruel and unusual.

Because a small majority of states that allows the death penalty allows it for sixteen and seventeen-year-olds, the Court found that such capital punishment could not offend American standards of decency.

2. School Cases: Limiting the Protection Offered by the First and Fourth Amendments

The Court changed the rule it had promulgated in Tinker when it decided Bethel School District No. 403 v. Fraser. In Fraser, a high school student made a "lewd" speech at a school function and was disciplined for his use of profanity and vulgar language. The student challenged the school district's actions, claiming his speech was protected by the First Amendment. The Court held that the student's speech was not protected, reasoning that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." One scholar has opined that the Court concluded that speech of high school students may be limited by the school, regardless of whether the content is vulgar or not, stating: "[T]he majority did not rely on the disruptive nature of the speech for its conclusion."

---

79. Id. at 370–71. However, as pointed out in a newspaper article in 2001, "[a] slim majority of the states—27—either ban the death penalty outright or prohibit it for juvenile murderers. The most recent was Montana in 1999." Pamela Brogan, Moves To Ban Death Penalty for Juveniles Gain Momentum, Gannett News Service, Sep. 11, 2001, at GGN2. Brogan also pointed out that "of [the] 23 states that permit the death penalty for juveniles, the 10 considering legislation to ban executions are Alabama, Arizona, Arkansas, Florida, Indiana, Kentucky, Mississippi, Nevada, South Carolina, and Texas." Id. Perhaps Justice Scalia's argument about the "national consensus" is or will be losing weight soon. And because the standards of decency are evolving, perhaps the Court will have to update its moral compass, as the states seem to be doing.

80. Stanford, 492 U.S. at 371. Interestingly, the dissent pointed out that the plurality does not include in its numbers the states that do not permit the death penalty at all, giving the discussion a "distorted view." Id. at 384 (Brennan, J., dissenting).

82. Id. at 678.
83. Id. at 679.
84. Id. at 682.
Another case that limited students’ speech in schools, *Hazelwood School District v. Kuhlmeier*, 86 allowed school districts to censor student publications. In *Hazelwood*, the school principal objected to a story written by students for the school newspaper about pregnancy and another story about divorce. 87 The principal decided that the pages containing these stories were to be withheld from the publication. 88 The Court held that the actions of the principal did not violate the students’ First Amendment rights, reasoning again that the rights of students are not always the same as the rights of adults, and that school officials may limit the speech as they deem appropriate. 89

In *New Jersey v. T.L.O.*, 90 the Court also found a lesser standard for the search and seizure of a student’s belongings under the Fourth Amendment than for the search and seizure of an adult’s belongings. 91 In *T.L.O.*, a school official searched a student’s purse. 92 The Court considered whether the Fourth Amendment was applicable to this action and found that school officials require less cause to search a student than the police require to search an adult. 93 A school official’s search of a student need only be reasonable under the circumstances; the official does not need probable cause, as a police officer does when conducting a search outside of the school setting. 94 One scholar

---

87. Id. at 263.
88. Id. at 264.
89. Id. at 266-67.
91. Id.
92. Id.
93. Id. at 340-41. The Fourth Amendment to the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.
94. *T.L.O.*, 469 U.S. at 341. As Justice Brennan pointed out in his dissent, for adults, warrantless searches are per se unreasonable, with a few exceptions. Id. at 354 (Brennan, J., concurring in part and dissenting in part) (citing *Katz v. United States*, 389 U.S. 347 (1967); *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *United States v. Place*, 462 U.S. 696 (1983); *Steagald v. United States*, 451 U.S. 204 (1981); *Mincey v. Arizona*, 437 U.S. 385 (1978); *Terry v. Ohio* 392 U.S. 1 (1968); and *Johnson v. United States*, 333 U.S. 10 (1948) as exceptions to the warrant requirement). Justice Brennan also stated that police must have probable cause to conduct a search, whether they have a warrant or whether they have an exception. Id. at 354-55. The police must show that they had probable cause to believe that a crime had been committed and that “evidence of the crime will be found in the place to be searched.” Id. at 355 (citing *Beck v. Ohio*, 379 U.S. 89 (1964); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Brinegar v. United States*, 338 U.S. 160 (1949)). Justice Brennan further argued that “intrusions that are substantially less intrusive than full-scale searches or seizures may be justifiable in accordance with a balancing test even absent a warrant or probable cause, provided that the balancing test used gives sufficient weight to the privacy interests that will be infringed.” Id. Justice Brennan’s problem with the
has theorized that the Court made its decision based on its view of high school life today and its significant drug and violence problem.95

3. Abortion Case: The Court Makes Abortion More Difficult for Teen Girls to Obtain

In H.L. v. Matheson,96 the Court moved away from the judicial bypass rule laid out in Bellotti and Danforth. In this case, the Court upheld a state statute requiring parental notification of a minor's decision to obtain an abortion without a judicial bypass provision.97 The Court reasoned that the parental notification provision did not require parental consent and therefore did not give parents a veto power over a minor's decision to have an abortion.98 The Court found that "the statute plainly serves the important consideration of family integrity and protecting adolescents . . . ."99 One scholar concluded that the Court's "approval of a parental notification statute with no judicial alternatives effectively amounted to a reinforcement of the traditional right of parents to control the upbringing of their children."100

D. Recent Cases: 1990s to Present

In the last decade, the Court has decided several cases that affect teens. In 1998, the Court decided two cases concerning liability for sexual harassment; both in school and in work settings.101 In 1995, and again in 2002, the Court addressed the issue of random drug testing of students in public high schools.102 The decisions in both contexts limit the rights of teens and do not offer protection appropriate for the situation. These cases will be the focus of Part III.

---

95. See Dale, supra note 85, at 212.
97. Id.
98. Id. at 411.
99. Id.
100. Michele D. Sullivan, From Warren to Rehnquist: The Growing Conservative Trend in the Supreme Court's Treatment of Children, 65 ST. JOHN'S L. REV. 1139, 1149 (1991). The Court made several references in the opinion to family integrity and the need for parents to be involved in these kinds of decisions.
101. See infra notes 103–114 and accompanying text.
102. See infra notes 115–124 and accompanying text.
1. Liability for Sexual Harassment in Schools

In June 1998, the Court addressed the issue of liability for sexual harassment in schools and in the workplace. In *Gebser v. Lago Vista Independent School District*, the Court developed a two-pronged standard to hold a school district liable in a private sexual harassment suit under Title IX. First, a school official must have actual notice of the teacher's harassment; second, the school official must be deliberately indifferent to it. In *Gebser*, a high school student had sexual intercourse with one of her teachers but did not report this to school officials. The Court refused to apply a standard akin to that of *respondeat superior* and constructive notice. Generally, to hold an employer liable for the actions of its employee, one must prove only that the employer should have known about the injurious conduct. Instead, the Court concluded that Congress did not intend Title IX to allow for such a recovery, and that actual notice must be given to an "appropriate person" who has the "authority to take corrective action to end the discrimination."

2. Liability for Sexual Harassment in the Workplace

In contrast to *Gebser*, four days later, the Court decided another sexual harassment case, *Faragher v. City of Boca Raton*. In *Faragher*, a woman brought suit against her former employer, the City of Boca Raton, alleging that her supervisors had created a sexually hostile environment by touching her and making offensive remarks. The district court found the employer liable under traditional agency principles and vicarious liability. The Supreme Court concluded that an employer is vicariously liable for sexual harassment in the workplace, but that the employer may offer the defense that its con-

104. *Id.*
105. *Id.* at 278.
106. *Id.* at 288. In general, employers are liable for the actions of their employees under the theory of *respondeat superior*. Restatement (Third) of Agency § 2.04 (Tentative Draft No. 2, 2001). Under this theory, the employer is liable for what it knew or should have known (constructive notice) about the behavior of its employee. *Id.*
107. Employers, or principals, are responsible for the actions of their employees or agents while in furtherance of their employment. Restatement (Second) of Agency § 219 (2002). If a person is injured by an employee of a business, he or she must prove that the employer knew or should have known of the employee's conduct that caused the injury. *Id.*
110. *Id.*
111. *Id.* at 783.
duct was reasonable. Therefore, an employee may bring a sexual harassment suit and need only prove that the employer had constructive knowledge, as required by principles of vicarious liability, and that the employer's conduct was unreasonable. This is in sharp contrast to the standard applied to girls in school under Gebser.

3. Drug Testing in Schools

The Court has recently decided two cases regarding random drug testing in schools. The first, Vernonia School District v. Acton, decided in 1995, holds that a school district is constitutionally permitted to require student athletes to submit to random drug testing. The Court concluded that the privacy interests of the students do not outweigh the interest of the school in preventing drug use by the athletes. In 2002, the Court took Acton one step further by allowing schools to randomly drug test any student participating in a competitive extracurricular activity in Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls. In Earls, the Court applied similar reasoning to that demonstrated in Acton. Both Courts reasoned that schools have a custodial function over students, and have an important interest in preventing drug use, outweighing any privacy interest the students may have.

Justice Sandra Day O'Connor, dissenting in both Acton and Earls, disagreed. She argued that drug testing, which constitutes a search under the Fourth Amendment, should be based on individual suspicion, which is the general requirement in Fourth Amendment cases. Here, the Court ignored students' privacy concerns and held the school's general, or blanket, search constitutional. Such a blanket search, Justice O'Connor argued, interfered too greatly with students' privacy to allow these types of searches. Justice O'Connor noted, "For most of our constitutional history, mass, suspicionless searches

112. Id. at 780.
113. See id. at 792.
114. See supra notes 103–108 and accompanying text.
116. Id.
117. See id. at 661.
118. 536 U.S. 822 (2002).
119. See id.
120. Acton, 515 U.S. at 666 (O'Connor, J., dissenting); Earls, 536 U.S. at 842 (O'Connor, J., dissenting).
121. Acton, 515 U.S. at 667 (O'Connor, J., dissenting).
122. Id.
123. Id.
have been generally considered *per se* unreasonable within the meaning of the Fourth Amendment."\(^{124}\)

III. **Analysis: Too Much Protection and, at the Same Time, Not Enough**

Unfortunately, when one examines the cases, it is clear that the United States Supreme Court, on one hand, is not protecting adolescents and, on the other hand, is taking away their rights in the name of protection. This section will analyze this conclusion in three contexts: sexual harassment, school searches, and capital punishment. First, the context of sexual harassment will be addressed. This section will argue that, similar to abortion rights for young girls, which are quickly being narrowed, girls in public school are given less protection from sexual harassment by teachers than women in the workplace get from sexual harassment by supervisors.\(^ {125}\) The standard of liability for sexual harassment is significantly higher for a school district than it is for any other type of employer. This section will then analyze this conclusion in light of the recent decisions concerning school-based searches in the form of random drug testing.\(^ {126}\) The Court allows such searches and a lower form of constitutional protection for adolescents in school because schools need to protect students from drug use.\(^ {127}\) When viewed as a whole, the Court does not, in fact, protect adolescents. Minors do not receive the same protection as women in the workplace, and furthermore, they are subject to the death penalty in certain situations.\(^ {128}\) In either case, the adolescent loses rights and protections; the adolescent is protected too much and, at the same time, not enough.

A. **Girls at School are Given Less Protection than Women in the Workplace Against Sexual Harassment**

Title IX of the Education Amendments of 1972 (Title IX)\(^ {129}\) states that no student shall be discriminated against on the basis of sex.\(^ {130}\)

\(^{124}\) *Id.*

\(^{125}\) *See infra* notes 129–196 and accompanying text. This Comment uses "girls" to address the issue of sexual harassment of students by teachers in the school setting. This is purely for the convenience of the reader and author, in the interest of simplicity. While boys certainly can be, and often are, sexually abused and harassed, the majority of such abuse and harassment, unfortunately, happens to girls and women in this country—and around the world.

\(^{126}\) *See infra* notes 197–219 and accompanying text.

\(^{127}\) *See infra* notes 197–219 and accompanying text.

\(^{128}\) *See infra* notes 220–244 and accompanying text.


\(^{130}\) *See id.*
The Court has held sexual harassment and abuse to be a form of sex discrimination.\textsuperscript{131} When teachers sexually abuse students, the school district may be held liable for a claim of sexual harassment under Title IX.\textsuperscript{132} This section will analyze two cases concerning employer liability for sexual harassment, one in which a girl was harassed by a teacher in her school, and another in which a woman was sexually harassed at work. The inconsistencies between these two cases will also be discussed.

\textbf{I. Gebser v. Lago Vista Independent School District}\textsuperscript{133}

In 1991, Alida Star Gebser was in the eighth grade in Lago Vista Independent School District (Lago Vista).\textsuperscript{134} She met a teacher in a high school book discussion group and was assigned to this teacher’s class the next year when she entered high school.\textsuperscript{135} The teacher made inappropriate sexual comments during class and to Gebser while they were alone together.\textsuperscript{136} In the spring of Gebser’s first year of high school, her teacher began to have sexual intercourse with her.\textsuperscript{137} This abuse continued through the summer and into the next school year.\textsuperscript{138} Gebser never reported this abuse to anyone, but in 1993, the police discovered that the teacher was having sex with Gebser, and they arrested him.\textsuperscript{139} Lago Vista fired the teacher and his teaching license was revoked.\textsuperscript{140}

But when Gebser and her parents sued the school district in November 1993, they were rebuffed.\textsuperscript{141} They sued Lago Vista for compensatory and punitive damages under Title IX, and the district court granted summary judgment to Lago Vista, rejecting the claim.\textsuperscript{142} The district court held that in order for the school district to be held liable, it must have actual notice of the harassment and then fail to respond.\textsuperscript{143} Because Gebser did not report the abuse, the court held

\begin{itemize}
\item \textsuperscript{131} Franklin v. Gwinnett County, 503 U.S. 60, 75 (1992).
\item \textsuperscript{132} \textit{See id.} at 76 (holding that a student who was sexually harassed by her teacher could sue the school district under Title IX).
\item \textsuperscript{133} 524 U.S. 274 (1998).
\item \textsuperscript{134} \textit{Id.} at 277.
\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} \textit{Id.} at 278.
\item \textsuperscript{137} \textit{Id.}
\item \textsuperscript{138} \textit{Id.}
\item \textsuperscript{139} \textit{Gebser,} 524 U.S. at 278.
\item \textsuperscript{140} \textit{Id.}
\item \textsuperscript{141} \textit{Id.} at 278-79.
\item \textsuperscript{142} \textit{Id.} at 279.
\item \textsuperscript{143} \textit{Id.}
\end{itemize}
that the school district did not have actual knowledge. The United States Court of Appeals for the Fifth Circuit affirmed, and refused to use the common law standard of agency and principles of respondeat superior to hold the employer liable for actions of the employee.

The Supreme Court agreed with the lower courts. Gebser argued that the school district should be held liable under principles of respondeat superior liability because the teacher’s authority facilitated the harassment. She also argued that the school district should “at a minimum be liable for damages based on a theory of constructive notice, i.e., where the district knew or ‘should have known’ about harassment but failed to uncover or eliminate it.” The five-four majority rejected these arguments. Justice O’Connor, writing for the majority, reasoned that the breach of Title IX must be intentional, and therefore required actual knowledge. The Court’s final holding was that, in order to be held liable for damages under Title IX, a school district must have actual notice of the harassment and must have acted deliberately indifferent to it.

2. Faragher v. City of Boca Raton

In contrast, that same month, the Court decided a case brought under Title VII of the Civil Rights Act of 1964 (Title VII) that concerned sexual harassment in the workplace. Beth Ann Faragher was a lifeguard in the city of Boca Raton, Florida. After Faragher resigned from her job, she sued the City under Title VII for creating a

144. Id.
146. Gebser, 524 U.S. at 282.
147. Id. (citing Brief for Petitioner at 28; Brief of Amicus Curiae for the United States at 15-16). The petitioner argued for these two broader standards of liability for the school district. See Gebser, 524 U.S. 274. Both standards would allow for a broader range of situations in which a student who was sexually abused by her teacher could recover damages from the school district. Id. Interestingly, the Government realized the need for a broader standard and argued for the broader reading. Id. The Act does not explicitly confer a private right of action; the Court has inferred that. Id. Therefore, the Act also does not state how liability should be determined. Id. In the absence of any evidence of congressional intent within the Act, perhaps the Court might have weighed the position of the United States a bit more heavily.
149. Id. at 292.
151. 42 U.S.C. § 2000e (2000). Title VII is part of the Civil Rights Act of 1964, which was enacted to provide relief against discrimination in public accommodations and to end discrimination in employment and education. Id. Title VII is used to bring workplace sexual harassment suits. Title IX, on the other hand, is part of the Education Amendments of 1972, and was enacted to provide for gender equality in education. 20 U.S.C. § 1681 (2000).
152. Faragher, 524 U.S. at 775.
"sexually hostile atmosphere." She claimed that her male supervisors were sexually offensive in their words and actions. Faragher also claimed that the men touched her sexually without her permission. Faragher never made a formal complaint about this behavior to her employer, the City.

The district court found this to be an "abusive working environment" and held the City liable for damages. The court found that the City had constructive knowledge of this sexual harassment and that the supervisors were acting as agents of the City. However, the district court awarded Faragher only one dollar. The appellate court reversed the decision because the supervisors were not acting within the scope of their employment when harassing Ms. Faragher.

The Supreme Court, however, reversed the court of appeals and remanded the case to enter judgment in favor of Faragher. The Court held that an employer must be held vicariously liable for such harassment. In order for an employer to be vicariously liable, common law principles of agency require that the employee be acting within the scope of his or her employment. Sexual harassment is obviously not within the scope of anyone's employment; however, the Court deemed that the appropriate inquiry is whether the "harassing behavior ought to be held within the scope of a supervisor's employment . . . ." The Court, looking to the Restatement (Second) of Agency, suggested that such behavior is a risk that businesses should bear, as it is a fairly common risk. The Court ruled that, in today's climate, sexual harassment happens so often that an employer must anticipate this risk and be forced to bear it. Another reason the Court considered such harassing behavior within the scope of employ-

153. Id. at 780.
154. Id.
155. Id.
156. Id. at 782.
157. Id. at 783.
158. Faragher, 524 U.S. at 783.
159. Id.
160. Id. at 784.
161. Id. at 786.
162. Id. at 802.
163. Id. at 793 (citing Restatement (Second) of Agency § 219(1) (1957)).
164. Faragher, 524 U.S. at 797.
165. See id. (citing Restatement (Second) of Agency § 229). It also seems that as a matter of policy, the employer should be forced to bear this risk, rather than innocent employees who have been harassed. It seems unfortunate that such behavior is now considered a risk to be borne by employers. It is unfortunate that this flows from the fact that such behavior has become so commonplace in society today.
166. See id. at 798.
ment is that supervisors are supposed to create a safe working environment.167 Clearly, when a supervisor is consistently making unwanted sexual advances—touching and making remarks—the employee cannot feel safe.168

Because the Court was able to define why sexual harassment should be considered within the scope of employment, it was able to find the City liable in this case.169 The Court did, however, create two elements of an affirmative defense to the charge of sexual harassment.170 To assert properly the defense, the defendant employer must show: (1) that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior"; and (2) that the victim unreasonably failed to take advantage of these opportunities offered by the employer.171

3. Inconsistencies Between the Two Cases

The conflict between these two cases is that the precedent set appears to protect women in the workplace from sexual harassment more than it protects teenage girls in school. Logic dictates that girls need more protection than adults in general; this argument gains strength in the context of sexual harassment and abuse by a teacher or authority figure. The two cases differ between the standard of liability imposed on the defendant school district versus the defendant employer. The inconsistencies lie in the areas of knowledge and the defendant's response to that knowledge.

a. The Issue of Knowledge

The first inconsistency between these cases is the issue of notice or knowledge of the harrassment. Under Faragher, the victim need only prove that the employer should have known about the harassment, which can be demonstrated easily when the offender is in a supervisory position over the harasser.172 Presumably, supervisors should know about their employees' conduct, because their job involves over-

167. Id. at 797.
168. Interestingly, teachers are also supposed to create a safe environment for their students at school. Arguably, teachers have even more responsibility for safety than supervisors. During school hours, teachers are charged with taking care of the minor students. This statement may seem obvious, but the Court did not seem to consider this contention when deciding Gebser.
169. Id. at 797–98.
170. Id. at 807. The Court could not hold an employer automatically liable for sexual harassment by a supervisor because of the principle of stare decisis. The Court had previously held, in Meritor Savings Bank, FAB v. Vinson, 477 U.S. 57 (1986), that an employer is not "automatically" liable for harassment by an employee in a supervisory position. Faragher, 524 U.S. at 804.
171. Id. at 807.
172. See supra notes 150–171 and accompanying text.
seeing, keeping track of, and supervising the worker. A victim of sexual harassment is likely to show that her supervisor should have known about the conduct, especially if it happened at the workplace.

Conversely, under Gebser, a student must prove that the school district had actual knowledge of the harassment.\(^\text{173}\) This essentially means that the student must report the fact that her teacher is sexually abusing\(^\text{174}\) her to a school official.\(^\text{175}\) As one scholar has noted, this is an unreasonable expectation.\(^\text{176}\) An adolescent girl will not likely report the abuse for several reasons, including the following: that she is afraid or embarrassed,\(^\text{177}\) that she does not want to get into trouble, that she does not want to get the teacher into trouble, or that she may not even believe that the conduct is wrong. The facts in Gebser affirm such behavior—the abuse was never reported by the student who was being abused.\(^\text{178}\) Alida Gebser, the plaintiff, never reported the abuse to a school official.\(^\text{179}\) Instead, the police discovered that the teacher was having sexual intercourse with Gebser, and he was arrested.\(^\text{180}\)

---

173. See supra notes 133–149 and accompanying text.
174. The term abuse, rather than harassment, is used because in the context of sexual harassment of a student by a teacher, the conduct is abusive. Having sex with a minor is a crime, as is sexual touching. See 720 ILL. COMP. STAT. § 5/12-14.1(a)(1) (2002).
175. See Gebser, 524 U.S. 274.
176. Amy K. Graham, Note, Gebser v. Lago Vista Independent School District: The Supreme Court's Determination That Children Deserve Less Protection Than Adults from Sexual Harassment, 30 LOY. U. CHI. L.J. 551, 587 (1999). Graham noted that “[u]nder the actual knowledge standard, the victimized student essentially has an affirmative duty to report the harassment to a responsible school official.” Id. Requiring the student to report will result in less liability for school districts, less protection for teen girls, and “injustice, rendering Title IX ineffective.” Id. at 586.
177. Id. at 586.
179. Id. at 278. “Gebser did not report the relationship to school officials, testifying that while she realized [her teacher's] conduct was improper, she was uncertain how to react and wanted to continue having him as a teacher.” Id. While not given any other facts, one might also hypothesize that Gebser had romantic feelings for this teacher and wanted the relationship to continue. Young girls often have “crushes” on teachers, but that does not make a sexual relationship between that young girl and the teacher appropriate. It is still abuse, no matter how the young girl, a child, feels about it.
180. Id. In addition to having sexual intercourse with his underage student, the teacher, Frank Waldrop, made sexually suggestive comments to the students during a book discussion group while Gebser was still in the eighth grade. Id. at 277. Waldrop began addressing his comments more directly to Gebser during the next school year when, after she entered high school, she was assigned to his class. Id. at 278. Waldrop did not initiate sexual contact until that spring, when he visited Gebser at her home, “ostensibly to give her a book, he kissed and fondled her.” Gebser, 524 U.S. at 278. He then began having sexual intercourse with Gebser on a regular basis for the rest of that school year, through the summer, and into the following school year. Id. The Court noted that “they often had intercourse during class time, although never on school property.” Id. Thus, it seems that, for Gebser, this abuse began before she got to high school and continued well into her second year.
Not only is the effect detrimental to teens because it becomes more difficult to hold a school district liable in cases of sexual harassment, it is detrimental because so many cases of abuse will go unreported. For all of the reasons stated above, a teen girl is extremely unlikely to report sexual harassment by a teacher. This increases the probability that the school district will not be held liable for the abuse, and consequently that the abuse will continue. Additionally, this standard creates a significant burden on teen girls to report abuse. Courts and school districts should be doing everything in their power to protect young students from sexual abuse, and yet this holding will have the opposite effect. This knowledge requirement protects school districts from liability and creates an environment in which the student is never encouraged to report abuse, thus serving only to perpetuate it on an institutional and an individual level. Students in general will suffer more abuse, and students individually—like Alida Gebser—will suffer the abuse for longer periods of time.

This actual knowledge standard also creates an incentive for school districts to stay ignorant about sexual harassment in school. They are “rewarded for remaining ignorant of any harassment taking place in their schools.” If a school official does not actually know of the abuse, the district cannot be liable.

b. The Issue of the Defendant’s Response

The second inconsistency between these two cases is the issue of the defendant’s response to the knowledge that the plaintiff is being sexually harassed. A school district must deliberately (or intentionally) disregard the knowledge in order to be held liable. Under Faragher, the employer’s conduct was analyzed under a reasonableness standard. It is much easier for a victim to show that the defendant acted unreasonably than to show that the defendant intentionally did nothing to help. All of this points to the obvious conclusion that a non-school district employer will be held liable for sexual harassment much more often than a school district will. Therefore, adult employees at work are afforded more protection and recourse than students at school.

181. Graham, supra note 176, at 588.
183. See generally Gebser, 524 U.S. 274.
184. Id.
To add more support to this argument, one scholar notes that school is mandatory for girls, while work is not.\textsuperscript{186} School is a student's work, so why not treat it in the same manner? If students cannot expect the same constitutional rights as adults because schools must protect students, and therefore take away some constitutional rights, then this result makes no logical sense. A supervisor in the workplace has a duty to create a safe environment and, therefore, the employer can be held liable for the supervisor's sexual harassment.\textsuperscript{187} A teacher at school has an even greater duty than a supervisor has, a fact that the Court neglected to observe. Schools are entrusted to take care of children, to act as their parents for the duration of the school day. Sexual abuse by a parent is a crime condemned by society as one of the worst possible crimes, so why not hold school teachers and administrators to that same standard? It seems that a school district, charged with protecting and educating minors, should be held to the highest standard of liability.

Justice Ruth Bader Ginsburg, in her dissenting opinion in \textit{Gebser}, concluded that the standard of liability for sexual harassment in public schools should be similar to that used in \textit{Faragher}.\textsuperscript{188} She would require a plaintiff who brings a sexual harassment claim under Title IX, as Gebser did, to show only that the school district knew or should have known about the abuse, a standard akin to common law principles of agency and constructive knowledge.\textsuperscript{189} Justice Ginsburg would also allow the district an affirmative defense.\textsuperscript{190} She would allow the school district defendant to show that it has "an effective policy for

\begin{itemize}
  \item \textsuperscript{186} See Graham, supra note 176, at 594.
  \item \textsuperscript{187} See \textit{Faragher}, 524 U.S. 775.
  \item \textsuperscript{188} See \textit{Gebser}, 524 U.S. at 307 (Ginsburg, J., dissenting).
  \item \textsuperscript{189} See \textit{id.} Justice Stevens also wrote a dissenting opinion, which Justice Ginsburg joined. In his dissent, Justice Stevens purported that the resolution to this case should be a simple one. See \textit{id.} at 294 (Stevens, J., dissenting). Under a previous case decided unanimously by the Court, \textit{Franklin v. Gwinnet County Public Schools}, 503 U.S. 60 (1992), a student who had been sexually harassed by a teacher could recover damages from the school district under Title IX. See \textit{Gebser}, 524 U.S. at 294-95. In that case, Justice Stevens stated, the Court had considered the legislative intent of Title IX and had concluded that Congress had intended Title IX to include "all appropriate remedies, unless it expressly indicat[ed] otherwise." \textit{Id.} at 295. Justice Stevens also noted that previous decisions by the Court had held that Title IX should be read and interpreted broadly. \textit{Id.} at 296. Therefore, according to Justice Stevens, the majority rejected stare decisis. \textit{Id.} at 297 (Stevens, J., dissenting). As he stated, the answer is found in a previous case: \textit{Franklin} therefore stands for the proposition that sexual harassment of a student by her teacher violates the duty—assumed by the school district in exchange for federal funds—not to discriminate on the basis on sex, and that a student may recover damages from a school district for such a violation.
  \item \textsuperscript{190} \textit{Gebser}, 524 U.S. at 307.
\end{itemize}
reporting and redressing such misconduct." Additionally, the victim must have failed to take advantage of the policy in order to receive damages. This defense is strikingly similar to that allowed in *Faragher*, and seems to be offered as a compromise position.

The most appalling aspect of these inconsistent cases is the disparity between the two behaviors at issue. The harassing behavior at issue in *Gebser* was a teacher having sex with his student. The harassing behavior at issue in *Faragher* consisted of sexual comments that made work uncomfortable for Faragher. In *Gebser*, the behavior was not sexual harassment, it was sexual abuse, and yet the victim cannot recover from the offender's employer. Gebser and her parents should be allowed to hold this teacher's employer, the school district, responsible for the pain and abuse he caused. It is obvious that he was able to use his position of power and authority over Gebser in order to abuse her. The fact that parents and students who have been abused are not able to receive compensation for their losses is saddening. This family, and especially this teen girl, will likely need to seek extensive professional therapy in order to heal. However, women who are injured by sexual harassment in the workplace are much more likely to recover compensation, and to feel a sense of empowerment when they are able to seek and receive an appropriate remedy in a court of law.

One might counter that the cure for such a disparity in the standard should be a legislative concern, and that the legislature should amend the laws to include the cause of action and the standard of liability. This argument fails because if the Court had held that it was a legislative concern, it should not have decided on any standard of liability. The Court decided to rule on the subject, and ruled on each case with-

---

191. *Id.*
192. *Id.*
193. See generally Graham, *supra* note 176 (positing that Ginsburg's position would help students be free from sexual harassment while at the same time mitigating damages suffered by school districts).
194. It is not mentioned in the case, but one hopes that this teacher was held criminally liable and punished appropriately.
195. This statement is not in any way meant to minimize the seriousness of sexual harassment in the workplace and the pain that it can cause to its victims. It is merely meant to show the disparity between the two behaviors and to show the inconsistency with which the Court treated these two cases, decided four days apart.
196. Congress amended Title IX to eliminate the States' Eleventh Amendment immunity. 42 U.S.C. § 2000d-7(a)(1) (2000). This is another clear example of the legislative intent to keep Title IX liability on a broader scale. Clearly, if a state agency is receiving federal funds, it should be required to comply with federal antidiscrimination laws.
out regard to the other, leaving the results inconsistent with each other and with justice.

B. The Cost of Protection and Inconsistent Results

While students are not being adequately protected from sexual harassment, students' Fourth Amendment rights are being violated in the name of "protection." This same Court is also allowing adolescents to be sentenced to death. The two most recent examples of this contradiction are the Court's decisions in Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls and Stanford v. Kentucky. This section will first analyze Earls and how the Court purports to protect students. Next, capital punishment for teens will be analyzed under Stanford.

1. Too Much Protection at the Expense of Fourth Amendment Rights: Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls

In Earls, the Court took T.L.O. and Acton a step further. Prior to Earls, students in public schools were already subject to searches that adults would not be subject to, hence minimizing their Fourth Amendment right to be free from unreasonable searches. The Court in T.L.O. created a lower standard for searches at school; probable cause is not needed to search a student. Acton held that student athletes were subject to random drug testing because the school needed to protect students from the serious drug problems teens face today, and the school was especially concerned about drug use among athletes. In Earls, the challenged school policy allowed random drug testing for any student participating in extracurricular activities. The Court held that the policy did not violate students' Fourth Amendment rights because it "is a reasonably effective means

197. U.S. CONST. amend IV.
200. See infra notes 202-219 and accompanying text.
201. See infra notes 220-244 and accompanying text.
202. 536 U.S. 822.
205. See supra notes 81-95 and accompanying text.
206. See supra notes 91-95 and accompanying text.
207. See supra notes 115-124 and accompanying text.
of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use.\textsuperscript{209}

The Juvenile Law Center, in an \textit{amicus curiae} brief in support of the student, argued that these searches were unconstitutional because they were blanket searches and not based on any individualized suspicion.\textsuperscript{210} Allowing these blanket searches lowers the constitutional protection for students even further than they already sit.\textsuperscript{211} The brief also argued that such searches limit students' abilities to learn by participating in these activities.\textsuperscript{212} After-school activities are a large part of a student's high school education, and a student who does not wish to submit to drug testing loses out on this important part of student life.\textsuperscript{213}

Justice Ginsburg, in her dissent, pointed out another flaw with the Court's reasoning.\textsuperscript{214} If the school wished to protect students from the dangers of drug use, such a policy would not be effective.\textsuperscript{215} She noted: "Nationwide, students who participate in extracurricular activities are significantly less likely to develop substance abuse problems..."
than are their less-involved peers." Justice Ginsburg argued that the school district was testing the wrong students. Furthermore, Justice Ginsburg argued, "Even if students might be deterred from drug use in order to preserve their extracurricular eligibility, it is at least as likely that other students might forgo their extracurricular involvement in order to avoid detection of their drug use." Thus, the students who really need protection from drug abuse are probably not getting the help they need. Meanwhile, all students are paying the price through the diminishment of their constitutional rights.

2. **Not Enough Protection at the Expense of Adolescent Lives: Stanford v. Kentucky**

The Court has held that a teen may be constitutionally subject to the death penalty. This certainly cannot be a way to protect adolescents, like the Court purports to do. The United States is one of six countries that permit a juvenile to be sentenced to death. Clearly, most of the world does not believe that executing juveniles is hu-

---

216. Id.
217. See id.
218. Id.
219. As one scholar noted, "Except to the extent legislators remember their childhoods and can analogize across decades to present-day juvenile life, there is no check of the sort experienced by a lawmaker setting rules under which he or she must live." Susannah Z. Ringel, Comment, *Fourth Amendment Protection of Public School Students: Legal and Psychological Inconsistencies*, 3 MD. J. CONTEMP. LEGAL ISSUES 289 (1992). Ringel also pointed out that "[t]he lessened standard of protection from unwarranted searches and seizures applied to students is inconsistent with established theory and practices of juvenile justice in . . . United States Supreme Court law." Id.
221. Sherri Jackson, Note, *Too Young To Die—Juveniles and the Death Penalty—A Better Alternative to Killing Our Children: Youth Empowerment*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 391 (1996) (citing Letter from Amnesty International to President Clinton, United States of America: Open Letter to the President on the Death Penalty 8 (Jan. 14, 1994)). In addition to the United States, six other countries allow juveniles to be executed. Amnesty International has documented these executions, and found, since January 1993, twenty-four executions of child offenders worldwide—one in the Democratic Republic of Congo, one in Nigeria, one in Yemen, two in Pakistan, three in Iran, and sixteen in the United States. Pakistan and Yemen have since legislated to abolish such use of the death penalty, as did the world's main executing country, China, in 1997. Press Release, Amnesty International, USA: Indecent and Internationally Illegal, the Death Penalty Against Child Offenders (Sept. 25, 2002), available at www.web.amnesty.org/library/Index/engamr511432002 (last visited Jan. 26, 2004). Justice Scalia, in his opinion in Stanford, questioned whether this statistic should be relevant to the discussion. Stanford, 492 U.S. at 369 n.1. Justice Scalia pointed out that the Court's job is to interpret the Constitution of the United States, which does not take its values from other countries. Id. He stated in his majority opinion, "We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici . . . that the sentencing practices of other countries are relevant." Id.
mane.\textsuperscript{222} Many scholars have argued against this practice. One argument pertains to deterrence, which is often cited as justification for the death penalty.\textsuperscript{223} As one scholar noted, "[I]t is important to consider a juvenile's perception of death and whether juveniles tend to act in a cold and calculated manner, or in the heat of passion."\textsuperscript{224} Social scientists have noted that adolescents do not possess the maturity of judgment to appreciate such future consequences and that "now" is most important to them.\textsuperscript{225} In this respect, perhaps the death penalty cannot really deter an adolescent, especially one who is angry enough to commit a heinous crime such as murder.

One might argue that setting any age limit on the death penalty is arbitrary. The age of eighteen is just as arbitrary as the age of sixteen and, therefore, there is no difference between sentencing a sixteen-year-old to death and sentencing an eighteen-year-old to death. This argument fails because society has historically chosen age limits for which to allow children certain privileges. Teens can drive when they are sixteen, they can vote when they are eighteen, they can drink alcohol when they are twenty-one.\textsuperscript{226} Some age limit must always be drawn, and society has deemed that teens become mature enough for certain activities at particular age levels. Any age is arbitrary, but what is the alternative? Determine case by case how mature the teen might be? There would be no end; a number must be drawn. As pointed out by Justice William J. Brennan in his dissent in \textit{Stanford}:

Insofar as age 18 is a necessarily arbitrary social choice as a point at which to acknowledge a person's maturity and responsibility, given the different developmental rates of individuals, it is in fact "a conservative estimate of the dividing line between adolescence and adulthood." Many of the psychological and emotional changes that

\textsuperscript{222} In fact, the United States has ratified an international treaty, the International Covenant on Civil and Political Rights, which prohibits the execution of juveniles. \textit{Press Release, Amnesty International, supra note 221.} However, the United States reserved the right to execute child offenders. \textit{Id.} "The relevant expert UN body has found the US 'reservation' to be invalid, but the US has ignored its finding." \textit{Id.} In addition, noted Amnesty International, "[s]ince 1990, 191 countries have ratified the Convention on the Rights of the Child, one of the treaties banning the use of the death penalty against children who were under 18 years old at the time of the crime. Only Somalia and the USA have failed to ratify." \textit{Id.}

\textsuperscript{223} See \textit{Jackson supra note 221, at 417} (citing \textit{Press Release, Amnesty International, supra} note 221, at 9).

\textsuperscript{224} \textit{Id. at 418.}

\textsuperscript{225} \textit{Thompson v. Oklahoma, 487 U.S. 815, 835 (1988).}

\textsuperscript{226} This seems almost ironic, that nineteen-year-old teens are deemed by the state to be mature enough to appreciate the consequences of their actions, enough so that they can receive the ultimate irreversible punishment, but they cannot buy beer.
an adolescent experiences in maturing do not actually occur until the early 20s.\textsuperscript{227}

Moreover, something does not seem right when one looks at the numbers already drawn. For example, the legal age to drink alcohol has been set at twenty-one. Society deems it necessary to protect teens from the dangers of alcohol use until they are twenty-one—three years older than eighteen. This implies that eighteen must not be considered very mature. In fact, most teens are still in high school when they turn eighteen. If an eighteen-year-old is not mature enough to appreciate the consequences of drinking alcohol, and needs to be protected, how is an even younger adolescent of sixteen supposed to be mature enough to appreciate the consequences of a crime and of the value of his life? Does that teen not need to be protected as well? As one scholar notes, "Juveniles lack the degree of responsibility for their crimes and, therefore, imposition of the death penalty is unconstitutional under all circumstances."\textsuperscript{228}

Some proponents of the death penalty might argue that if a person can commit a crime so heinous as intentional murder, that person deserves to die and should be forced to bear the consequences of his or her actions. Most people would say that a sixteen or seventeen-year-old certainly has the ability to act intentionally and therefore should pay the price for the crime committed. This argument fails because under the Eighth Amendment to the Constitution, which forbids cruel and unusual punishment,\textsuperscript{229} there must exist a proportionate relationship between the punishment and the defendant's level of blameworthiness and culpability.\textsuperscript{230} Adolescents under the age of eighteen are routinely forbidden rights and privileges freely given to adults, the underlying notion being that adolescents are not as responsible as adults and that adults need to protect teens. When society deems that adolescents are not responsible enough to vote, how can that same society expect that adolescents can be held responsible enough to receive a death sentence? Additionally, as Justice Brennan pointed out in his dissent in \textit{Stanford}:

\begin{quote}
[M]inors are treated differently from adults in our laws, which reflects the simple truth derived from communal experience that juveniles as a class have not the level of maturation and responsibil-
\end{quote}

\textsuperscript{227.} \textit{Stanford}, 492 U.S. at 396 (Brennan, J., dissenting) (citing Brief of Amici Curiae American Society for Adolescent Psychiatry at 4).

\textsuperscript{228.} \textit{See} Jackson, \textit{supra} note 221, at 411-12.

\textsuperscript{229.} U.S. \textsc{Const.} amend. VIII.

\textsuperscript{230.} \textit{Stanford}, 492 U.S. at 393 (Brennan, J., dissenting).
ity that we presume in adults and consider desirable for full participation in the rights and duties of modern life.\textsuperscript{231}

Additionally, minors on death row "appear typically to have a battery of psychological, emotional, and other problems going to their likely capacity for judgment and level of blameworthiness."\textsuperscript{232} Justice Brennan cited psychological studies that showed that most juvenile inmates on death row had a psychiatric diagnosis, including psychosis, severe mood disorders, paranoia, and head injuries.\textsuperscript{233} Only two inmates studied had an Intelligence Quotient in the normal range, and all but two had been abused—physically and sexually.\textsuperscript{234} This evidence demonstrates that these adolescents are the most vulnerable in our society and the most in need of adult protection. They are also the least likely to be able to appreciate the consequences of what they have done.\textsuperscript{235} Similarly, some people who are mentally retarded cannot fully appreciate the consequences of their actions. Therefore, in 2002, the Court, in \textit{Atkins v. Virginia}, held that the death penalty for mentally retarded defendants violated the Eighth Amendment.\textsuperscript{236} It is unclear why the Court chooses to protect the mentally disabled from the ultimate punishment but not teens, who, due to their mental

\textsuperscript{231} Id. at 395 (Brennan, J., dissenting). One might say that the plurality in this opinion wants to deny teens most of the rights given to adults but at the same time wants to hold them to the same responsibility.

\textsuperscript{232} Id. at 398 (Brennan, J., dissenting).

\textsuperscript{233} Id.

\textsuperscript{234} Id.

\textsuperscript{235} One scholar has commented on adolescent brain development, suggesting that the adolescent brain is not as fully developed as the adult brain. See Jane Rutherford, \textit{Juvenile Justice Caught Between The Exorcist and A Clockwork Orange}, 51 \textit{DEPAUL L. REV.} 715 (2002). "Neuroscience data, however, suggests that there are developmental differences in the brain's biochemistry and anatomy that may limit adolescents' ability to perceive risks, control impulses, understand consequences, and control emotions." \textit{Id.} at 716 (citing Francis J. Lexcon & Dickon Repuci, \textit{Effects of Psychopathology on Adolescent Medical Decision-Making}, 5 U. CHI. L. SCH. ROUNDTABLE 63, 77-78 (1998)). Therefore, Rutherford stated, "adolescents may be more prone to emotional outbursts and even violence." \textit{Id.} Adolescent differences "are exacerbated by psychosocial conditions that render youth more susceptible to peer influences and less likely to be deterred by consequences." \textit{Id.} at 716 (citing Elizabeth S. Scott & Thomas Grisso, \textit{The Evolution of Adolescence: A Developmental Perspective of Juvenile Justice Reform}, 88 J. CRIM. L. & CRIMINOLOGY 137, 171 (1997)).

\textsuperscript{236} 536 U.S. 304 (2002). Justice Stevens, in the first paragraph of the \textit{Atkins} decision, stated: "Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." \textit{Id.} at 306. The defendant, Daryl Renard Atkins, and another man, William Jones, abducted a man using a handgun, took his money, drove him to an automated teller machine and forced him to withdraw additional cash, then shot him eight times, killing the victim. \textit{Id.} at 307. The defendants were recorded by cameras at the automated teller machine. \textit{Id.} Both defendants testified as to the same story, but both stated that the other had shot and killed the victim. \textit{Id.} The jury believed defendant Jones and found that Atkins had been the shooter. \textit{Id.}
immaturity, could easily be protected using the same reasoning.\textsuperscript{237} For example, one scholar has noted that "the prefrontal lobe of the brain that mediates emotional impulses generated by the amygdala does not fully develop until sometime between the ages of twenty-five and thirty."\textsuperscript{238} Similarly, in \textit{Atkins}, Justice Stevens discussed the fact that mentally retarded persons have "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."\textsuperscript{239}

If our goal as a society is to protect teens, who are still children, then we should not turn our back at the age of sixteen.\textsuperscript{240} In summary, these decisions by the Supreme Court cannot be reconciled. Are we protecting adolescents or are we really disenfranchising them?

\textsuperscript{237} Clearly, certain Members of the Court do not agree that the two groups are the same, or are deserving of the same protections. For example, Atkins appealed his sentence to the Virginia Supreme Court, which upheld the death penalty for Atkins. \textit{Atkins v. Commonwealth}, 534 S.E.2d 312, 318 (Va. 2000). The Virginia court was "not willing to commute Atkins' sentence of death to life imprisonment merely because of his IQ score." \textit{Id.} at 321. The dissent, however, felt that the defendant's mental age was between nine and twelve years of age, and that the death penalty was excessive. \textit{Id.} at 325 (Koontz, J., dissenting).

\textsuperscript{238} \textit{See} Rutherford, \textit{supra} note 234, at 726. Rutherford noted that brain development is gradual, and therefore advocates not always holding teens morally culpable for that which they cannot fully control, certainly not to the extent that they may be sentenced to die. \textit{See id.}

\textsuperscript{239} \textit{Atkins}, 536 U.S. at 318. These characteristics are strikingly similar to those noted by Professor Rutherford. \textit{See} Rutherford, \textit{supra} note 235. Interestingly, Chief Justice Rehnquist, in his dissent in \textit{Atkins}, did not consider this evidence of mental and moral culpability. \textit{Atkins}, 536 U.S. at 321-37 (Rehnquist, J., dissenting). The Chief Justice considered only statistics relating to jury decisions and decisions of state legislatures as indicative of whether executing the mentally disabled is within our evolving standard of decency. \textit{Id.} As far as Justice Rehnquist was concerned, "[t]here are strong reasons for limiting our inquiry into what constitutes an evolving standard of decency under the Eighth Amendment to the laws passed by legislatures and the practices of sentencing juries in America." \textit{Id.} at 328. These, he stated, are "well-established objective indicators of contemporary values." \textit{Id.} The Chief Justice made only minimal reference to the defendants' mental state, as they "indisputably are competent to stand trial, aware of the punishment they are about to suffer and why, and [their] mental retardation has been found an insufficiently compelling reason to lessen their individual responsibility for the crime." \textit{Id.} at 321. The Chief Justice seemed to miss the point made by the majority, not that the mentally retarded defendant should not be held responsible, or that he does not know what is happening, but that he should not be \textit{killed} by the state because of his insufficient mental capabilities. Similarly, Justice Scalia, in his dissent, argued that the majority's decision "rested so obviously upon nothing but the personal views of its members." \textit{Id.} at 338 (Scalia, J., dissenting). Justice Scalia argued that the jury had heard evidence about the defendant's mental retardation and had sentenced him to death anyway, because of the brutality of the crime, and the defendant's criminal history. \textit{Atkins}, 536 U.S. at 338-39. "[P]etitioner's mental retardation was a central issue at sentencing. The jury concluded, however, that his alleged retardation was not a compelling reason to exempt him from the death penalty in light of the brutality of his crime and his long demonstrated propensity for violence." \textit{Id.} at 339.

\textsuperscript{240} As the Court stated in \textit{Atkins}, "A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail." \textit{Id.} at 311.
The answer, unfortunately, is that adolescents are being taught how unimportant they are to society, and we are reinforcing the modern stereotypes of "those terrible teens." The Court—and society—is in a difficult position. Teens need some protection; they are not yet adults and lack the experience and maturity to deal with difficult situations. Teens also need to be given constitutional protections, which would be akin to treating them more like adults. How do we give teens the right amount of protection and responsibility? This question has been plaguing parents for years. However, the Court has made some inconsistent decisions that are affecting the everyday lives of teens in and out of school. Teens are not being protected at school in some ways (i.e., recovery for sexual harassment) and are not given constitutional rights in other ways (i.e., searches). The most vulnerable teens, the ones who are committing terrible crimes, are expected to take on the same responsibility as adults, but are not given the same basic constitutional protections in their schools. For example, under Earls and Stanford, an adolescent boy may be subjected to a bodily search at school, without a warrant, probable cause, or even any suspicion—a search to which an adult would never be legally subjected; but if that boy is extremely troubled and commits a heinous crime, such as murder, he will be tried as an adult, and can be sentenced to death, without any attempt to rehabilitate him.

Along with this inconsistent treatment of adolescents by adults comes another problem. Society acts as a guide for teens and teaches them how to act; during the teen years, children grow up and learn appropriate standards of conduct. These differing standards are so difficult for teens because they are trying to learn how to act as adults, but are then taught two different standards. They are treated differently, and yet are expected to learn to conform to the adult standard. They are given no significant guidance in what constitutes appropriate behavior; in some situations, they are expected to act like children, not deserving of adult rights and in other situations, they are expected to act like adults, and pay the consequences if they cannot.

241. See supra notes 129–195 and accompanying text.
242. See supra notes 197–219 and accompanying text.
243. See supra notes 220–244 and accompanying text.
244. Professor Rutherford provided a useful example of the variance among teens. She noted that, "[b]ecause the prefrontal lobe is not fully mature, teens are almost inevitably overly emotional and subject to wide mood swings." See Rutherford, supra note 235, at 727. She also noted that some teens will be able to control their impulses, while others will not:
If a teen has had relatively little experience with violence, she is less likely to read social cues as threatening (perhaps naively so) thereby putting less strain on her prefrontal lobe. As a result, she will be more able to control her impulses. However, if a teen has had a number of violent experiences, he is likely to read cues as more threat-
IV. IMPACT: TEENS ARE SENT THE WRONG MESSAGE

Part IV will discuss the significant impact on adolescents in the United States as a result of the above mentioned inconsistent decisions offered by the Supreme Court. This impact can only be described as destructive to the lives of adolescents. The message sent to teens is that they are not as valuable to society as adults and that we will no longer seek to rehabilitate juvenile offenders. Additionally, school districts are given an incentive to remain ignorant about sexual abuse or harassment by teachers, because if the school district does not actually know about the behavior, it cannot be held liable for allowing it to happen. This incentive will thus create an environment in which teens are not encouraged to talk about the inappropriate behavior of their teachers, further relegating them to a position in society at which adolescents enjoy fewer rights but just as much responsibility as adults.

A. By Not Giving Teens the Same Constitutional Protections, We Are Teaching Them That They Are Not as Important to Society as Adults

It is at school that children learn a great deal about who they are and how they fit into society. School plays an important role in shaping the adult into which the young person will grow. School is also where students learn about the Constitution, and unfortunately, how it does not always apply to them. As Justice Stevens wrote in his dissent in *T.L.O.*:

> Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. If the Nation's students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have been dealt with unfairly.245

Justice Stevens went on to argue that it would be an important lesson to our children to apply constitutional criminal procedure to their ac-

tions and to their schools.\textsuperscript{246} He felt that because the student had been searched without a warrant, the evidence found against him should be excluded pursuant to the exclusionary rule.\textsuperscript{247} Justice Stevens stated that to apply the exclusionary rule “in criminal proceedings arising from illegal school searches makes an important statement to young people that ‘our society attaches serious consequences to a violation of constitutional rights’ and that this is a principle of ‘liberty and justice for all.’”\textsuperscript{248}

When we teach our children and teens that they are less valuable members of society, they will begin to believe it. When teens begin to believe that they are less valuable in society, clearly, problems can develop. Teens will then be taught not to value themselves, and when this happens, teens get into trouble. As a result, an increase in violence and dropout rates may occur. Justice Stevens, in his dissent in \textit{T.L.O.}, was also concerned about the values that students learn at school. He noted that “[t]he schoolroom is the first opportunity most citizens have to experience the power of government.”\textsuperscript{249} Through this powerful teaching and learning vehicle—the school—the Court allows the state to teach the wrong lesson to adolescent students; Justice Stevens commented that the majority decision in \textit{T.L.O.} “is a curious moral for the Nation’s youth.”\textsuperscript{250}

As one scholar has pointed out, children need to feel in control of their personal belongings: privacy is very important to teens, and when parents and teachers do not respect that, teens may become angry.\textsuperscript{251} This privacy “may be crucial to their healthy development.”\textsuperscript{252} Also, teens should be treated on par with adults, as they will soon be the future civic leaders of this country.\textsuperscript{253} The danger of the current state of the law is that “compromising the privacy interests of the young could hamper their later ability to function with full recognition

\textsuperscript{246} \textit{Id.}

\textsuperscript{247} \textit{Id.} The exclusionary rule states that when evidence is obtained illegally, it will not be admitted in a federal prosecution, in order to enforce the Fourth Amendment. Mapp v. Ohio, 367 U.S. 643, 648 (1961). The rule was created by the Court, however, and does not appear in the text of the Fourth Amendment.

\textsuperscript{248} \textit{T.L.O.}, 469 U.S. at 374 (citing Stone v. Powell, 428 U.S. 465, 492 (1976); 36 U.S.C. § 172 (2000) (Pledge of Allegiance to the Flag)). It is interesting to note that students are required to say the Pledge of Allegiance at school, which includes this phrase, “liberty and justice for all.” \textit{id.}; but justice is not really for all; the phrase does not include the very people (students) required to recite this oath.

\textsuperscript{249} \textit{Id.} at 385 (Stevens, J., concurring in part and dissenting in part).

\textsuperscript{250} \textit{Id.} at 386. Justice Stevens was joined in his opinion by Justice Marshall and in part by Justice Brennan.

\textsuperscript{251} \textit{See Ringel, supra} note 219, at 300.

\textsuperscript{252} \textit{Id.}

\textsuperscript{253} \textit{See id.}
of their rights as adult citizens and alienate them from a system which should serve them.”

Since T.L.O., the Court has gone a step further in allowing blanket, suspicionless searches in Acton and Earls. Justice O’Connor, in her dissenting opinion in Acton, stated that this kind of search, which amounts to a blanket search, or general warrant, was exactly what the framers wanted to avoid when they wrote the Fourth Amendment. Thus, we are teaching our students to disregard the original intent of the Constitution, or that this intent was not meant for them, and still does not apply to them today.

Justice Ginsburg, dissenting in Earls, argued that the majority’s allowance of such searches was completely out of place. These students, whose rights were being subjected to the will of the school district, were precisely the students that the district should be the least concerned about in terms of drug use. If the school was concerned about students using drugs, it should have shifted its focus to the students who were not involved in extra-curricular activities, because those students are much more likely to be at risk for drug use. Therefore, the impact on students is not really to protect them—as the Court purports to do. The realistic impact upon students is to deprive them of their rights and to teach them that their rights are not as important in this society as the rights of the adults who are making these decisions for them.

B. More Teens Will Be Executed in This Country

The juvenile justice system was established to rehabilitate criminals and to prevent crime, not only to exact retribution. Although the teens who are sentenced to death are tried as adults, they are still teens, who we, as a country, at one time wanted to help and to rehabilitate, not to kill. Several scholars have offered alternative solutions to imposing the death penalty on young offenders.

In the midst of these solutions is a theory that teens and their parents need to be empowered and need to feel a sense of value and self-esteem. Schools need to teach these values to children and teens, so that, as future parents, they can instill such values in their own chil-

254. Id.
257. Acton, 515 U.S. at 669 (O’Connor, J., dissenting).
259. See id.
260. See id.
Another scholar advocates for youth empowerment as a long term solution. Youth empowerment programs should begin in preschool and continue throughout a child's school career. Programs such as Head Start, which gain community support through the school, are a good starting point because they work to create empowerment among children at a very young age.

To continue to allow capital punishment as an appropriate sentence for teens is to send the message to adolescents that we have no faith in young offenders, no faith that they can become productive members of society. This can only have a snowball effect on other teens who are on the verge of trouble with the law. Messages from adults are an important influence in the lives of our young citizens, especially those who do not have the advantage of healthy parents who are capable of caring for their children. The Court, by its conclusion that the execution of juveniles does not constitute cruel and unusual punishment, has sent a message to adolescents that they will no longer be protected from the ultimate punishment. So why bother protecting them from anything else? And why should they bother to protect themselves?

C. Teen Girls May Not Be Protected or Compensated by Their School Districts if They Become Victims of Sexual Harassment at School

Because the Court has held that school districts are not liable under Title IX for damages to students who are sexually abused by teachers unless the district actually knew of the abuse, school districts may now have an incentive to turn their backs to possible abuse or rumors about a specific teacher. This may potentially have a devastating impact on teen girls because, while schools attempt to limit their civil liability, abusive teachers may escape criminal sanctions in the process; if students are not encouraged to talk about the abuse or harassment, there exists a chance that no one, not even the police, will ever know what the student has endured.

The actual knowledge standard imposed by the Court implies that the victim has the obligation to report the abuse in order to recover

262. See Jackson, supra note 221, at 429-30.
263. Id.
264. See id. at 436.
265. Id.
from the school district. Expecting a young girl to report sexual abuse by an authority figure, like a teacher, is futile and unreasonable.\textsuperscript{267}

There are two reasons for this. First, she may be afraid of her teacher, and if she is a good student, afraid of the effect on her grades and college admission. Second, a girl in high school may not view this sexual relationship as abuse; she may view it as a romantic affair and not want to report it. It is abuse, however, and the teacher and school officials who let it happen must be held liable.

The doctrine of \textit{in loco parentis} poses some problems here. While a school has custody of a child during the school day, it is said to be \textit{in loco parentis}, in place of the parent.\textsuperscript{268} The problem presented is that if a parent were to sexually abuse his or her child, society would not allow it, the child would likely be taken from the parent. But when a school teacher, acting in place of the parent, abuses a child, the Court has allowed the teacher's employers, the school district, to escape liability easily. The individual teacher may still be punished, but we should be protecting our students to the fullest extent possible. Holding school districts liable also creates an incentive for schools to attempt to prevent such abuse and harassment.

The result in \textit{Gebser} has prompted some scholars to call for statutory modification of Title IX.\textsuperscript{269} These modifications would include the dissent's position in \textit{Gebser} that standard agency law should apply, with affirmative defenses available to the defendant and a monetary

\textsuperscript{267} See Graham, supra note 176, at 587.

\textsuperscript{268} WILLIAM BLACKSTONE, COMMENTARIES *453 (1765). One scholar has also noted:

\begin{quote}
According to the \textit{in loco parentis} doctrine, a parent "may . . . delegate part of his [or her] parental authority . . . to the tutor or schoolmaster or his [or her] child; who is then \textit{in loco parentis}, and has such a portion of the power of the parent committed to his charge, . . . that of restraint and correction, as may be necessary to answer the purposes for which he is employed . . . ."
\end{quote}

Todd A. DeMitchell, \textit{The Duty To Protect: Blackstone's Doctrine of In Loco Parentis: A Lens for Viewing the Sexual Abuse of Students}, 2002 BYU Educ. & L.J. 17, 18-19 (2002). Schools protect the students while they are at school, as parents would at home. \textit{Id.} at 19. This reflects the view of the "legal status of minors in a public school setting." \textit{Id.} This view, however, can present problems. If the school is supposed to take the place of the parent and protect the child, then clearly, it is permitted to take some rights away from the students. This is the crux of the tension explored here. Schools are trying so hard to protect teens from themselves, and yet it does not seem to be working, while the Court is not protecting teens enough, and yet allowing schools to take rights away from the teen population for the purpose of protecting it.

\textsuperscript{269} Daniel P. Colling, Note, \textit{Statutory Modification Needed for Title IX in Light of Gebser v. Lago Vista Independent School District}, 45 WAYNE L. REV. 1565 (1999). Colling argues that "[t]he Supreme Court's policy choice to faithfully extend vicarious liability under Title VII, but yet, anomalously foreclose that very idea under Title IX is unjustified." \textit{Id.} at 1594. Colling's modification calls for incorporating traditional agency principals, allowing the defendant an affirmative defense, and creating a cap on monetary damages under Title IX. See \textit{id.} at 1594-97.
cap on damages. If this were to happen, the impact on teen girls might be measurable; but as it stands now, the impact must be unfavorable, even without hard data to verify it. One need only use common sense to know that schools and school districts will do what they need to in order to protect themselves from liability and a large judgment for damages, which is understandable. Unfortunately, this result is only in the best interest of the school districts, and not in the best interests of the students who are being victimized.

V. Conclusion

The treatment of teens by the United States Supreme Court is inconsistent. If teens need to be held to adult responsibility, then they should be afforded the same constitutional rights and protection that adults are afforded. If their rights are to be taken away because we need to protect our youth, then we should protect them. We should try to help a troubled sixteen-year-old child who is so disturbed as to take another's life. We cannot have it both ways, and to try to do so is not in the best interests of our children and society.

The Court should think of the bigger, broader picture when making its decisions. While the Justices are not social workers, their decisions can, and certainly do, affect the lives of adolescents in this country. The Court has the power to make parents' lives and teens' lives easier, and to help teens make sense of the world at a time when many things do not make sense. If the Court makes its decisions with this in mind, it will go a long way in sending more consistent and appropriate messages to our teen population. This, in turn, will go a long way in helping to solve some of the issues that teens face today, including violence and sexual abuse. We must help adolescents to feel more like a valuable part of society, and we as a society must believe that they are valuable because it is these young people who will, in the near future, be the leaders of our communities.

Suzanne Milne Alexander*

270. Id.; Gebser v. Lago Vista, 524 U.S. 274, 302 (1998) (Stevens, J., dissenting). Change, however, is slow. This is unfortunate, because, even without data, it is plausible to assume that this kind of abuse is happening every day in our public schools. One need only spend some time with high school girls to learn this sad truth.

* DePaul University College of Law, J.D., 2004. Special thanks to my family, friends, and the Editorial Board of the DePaul Law Review for bright insight and support. I would also like to thank Professor Jane Rutherford for giving me the idea for this Comment and for her mentorship throughout my law school career.