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# THE DUTY TO PROTECT: BLACKSTONE'S DOCTRINE OF *IN LOCO PARENTIS*: A LENS FOR VIEWING THE SEXUAL ABUSE OF STUDENTS

Todd A. DeMitchell\*

*A central purpose of law is to protect the weak from the strong and to compensate victims for injuries caused by carelessness and neglect. Unfortunately, when confronted by child abuse in the schools, courts often fail to fashion effective remedies.\*\**

## I. INTRODUCTION

The sexual abuse of a child is a loathsome act.<sup>1</sup> That act is particularly heinous when it is perpetrated by a person who has power over the child due to a position of trust. In a child's life, parents and teachers hold recognized and dominant positions of trust.<sup>2</sup> The sexual abuse of a child by a parent is considered taboo in almost every society. Is the taboo regarding the sexual abuse of a student by his or her teacher similar to that involving the parent?

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\*\*Todd A. DeMitchell & Richard Fossey, *The Limits of Law-Based School Reform: Vain Hopes and False Promises* 102 (Technomic Publ. Co. 1997).

1. Child sexual abuse has been defined as "behavior that is sexual in nature, unwelcome, and in which the adult party holds some form of power or control over the minor party, as in a teacher-student relationship." Audrey Cohan et al., *Sexual Harassment and Sexual Abuse: A Handbook for Teachers and Administrators* 14 (Corwin Press, Inc. 1996).

2. For a discussion of the role of exemplar which society has placed on teachers see Todd A. DeMitchell, *Private Lives: Community Control vs. Professional Autonomy*, 78 Educ. L. Rptr. 187 (1993).

No harm betrays the trust between educator and student more than the sexual abuse of the student. Because of the special relationship that exists between student and educator, the harm from sexual abuse flows from the individual through the entire educational community leaving few untouched by the bitter taste of the ashes of betrayal.<sup>3</sup> Richard Riley, former United States Secretary of Education, summed it up when he stated, “[a]ny sexual harassment of a student—particularly sexual abuse by a teacher—is a basic breach of trust between the school and the student and family.”<sup>4</sup> It is a harm not easily tolerated by society. At least that is what we say. Yet there is a concern that students who attend school are not protected to the degree that they should be by either a professional ethos that covets children or a judicial presence that protects them.<sup>5</sup>

Parents have a cluster of rights regarding the upbringing of their children. From these rights accrue responsibilities.<sup>6</sup> Yet these rights may be fiduciary in that they must be exercised in the best interests of the children. When parents send their children to school, in accordance with compulsory education laws, the school, through its educators, assumes some of the duties owed by the parent to the child. In 1769, Sir William Blackstone captured the essence of this responsibility when he articulated the doctrine of *in loco parentis* by asserting that part of the authority of the parent is delegated to the schoolmaster.<sup>7</sup> According to the *in loco parentis* doctrine, a parent “may . . . delegate part of his [or her] parental authority . . . to

3. Gail Sorenson echoes this sentiment when she writes: “when teachers and other trusted professionals, year after year, are permitted to harass and abuse students in school, there will be ripple effects on all of us for an inestimable time to come.” Gail Sorenson, *Employee Sexual Harassment and Abuse of Students in Schools: Recent Developments in Federal Law*, 97 Educ. L. Rptr. 997, 1010 (1995).

4. Mark Walsh, *Riley Restates Rules Against Harassment*, 17 Educ. Week 30 (July 8, 1998) (available at <<http://www.edweek.org/ew/ewstory.cfm?slug=42harass.h17>>).

5. See Todd A. DeMitchell, *Sexual Abuse of Students: Actual Notice and Deliberate Indifference. The Supreme Court’s Title IX Standard for School District Liability*, 7 Intl. J. Educ. Reform 372 (1998).

6. See e.g. John Locke, *The Second Treatise on Civil Government*, in *On Politics and Education*, 75, 101 (Walter J. Black Inc. 1947) (“all parents [are], by the law of Nature, under an obligation to preserve, nourish, and educate the children they [have] begotten.”); Barbara Bennet Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents’ Rights*, 5 Geo. J. on Fighting Pov. 313 (1998) (discussing the rights of children as an outgrowth of parents’ responsibility to secure the well being of their children).

7. William Blackstone, *Commentaries* vol. 1, \*453.

the tutor or schoolmaster of his [or her] child; who is then *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.”<sup>8</sup> Schools assume custody of students while they are deprived of the protection of their parents while attending school.<sup>9</sup> “The doctrine *in loco parentis* encompasses the common law view of the legal status of minors in the public school setting.”<sup>10</sup>

Acting in the place of parents is an accepted and expected role assumed by educators and their schools. This doctrine has been recognized in state statutes<sup>11</sup> and court cases.<sup>12</sup> For example, the United States Supreme Court noted that there exists an “obvious concern on the part of parents, and school authori-

8. *Id.*

9. *Marquay v. Eno*, 662 A.2d 272, 278 (N.H. 1995) (“School attendance impairs both the ability of students to protect themselves and the ability of their parents to protect them. . . . Instead, the duty to protect falls upon employees who have a supervisory responsibility over students and who have thus stepped into the role of parental proxy.”); see e.g. Laura Beresh-Taylor, Student Author, *Preventing Violence in Ohio’s Schools*, 33 Akron L. Rev. 311, 320 n. 46 (2000); Kathryn R. Urbonya, *Determining Reasonableness Under the Fourth Amendment: Physical Force to Control and Punish Students*, 10 Cornell J.L. & Pub. Policy 397, 452 (2001) (“When children enter the public schools, they leave their parents behind and experience a unique context, one controlled by state officials. At school, these officials have temporary custody of students to further their primary goal—education.”).

10. J. Chad Mitchell, Student Author, *An Alternative Approach to the Fourth Amendment in Public Schools: Balancing Students’ Rights with School Safety*, 1998 BYU L. Rev. 1207, 1212 (footnote omitted).

11. *E.g.* Cal. Educ. Code Ann. § 44807 (West 1993) (a teacher can exercise the same degree of physical control over a student that a parent legally could); Ga. Code Ann. § 20-2-215 (2001) (classroom aides have authority of *in loco parentis* except regarding corporal punishment); Tenn. Code Ann. § 49-6-4203(b) (“The general assembly recognizes the position of the schools in loco parentis and the responsibility this places on principals and teachers within each school to secure order and to protect students from harm while in their custody.”); W. Va. Code § 18A-5-1 (2001) (teacher shall stand in the place of the parent in exercising authority over the school).

12. *E.g. Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995) (acknowledging that for many purposes school authorities act *in loco parentis*); *Gonyaw ex rel. Gonyaw v. Gray*, 361 F. Supp. 366, 369 (D. Vt. 1973) (“[o]f necessity, parents must delegate some disciplinary authority over their school children to . . . teachers.”); *In re Donaldson*, 75 Cal. Rptr. 220, 223 (App. 3d Dist. 1969) (holding that a school stands *in loco parentis* allowing the use of moderate force in disciplining students just as parents have the right to use moderate force to gain obedience from their children), *overruled*, *In re G.*, 709 P.2d 1287, 1292–93 (Cal. 1985) (holding that common law doctrine of *in loco parentis* was superseded by California Education Code Annotated § 44807); *Ran-niger v. Tex.*, 460 S.W.2d 181, 183 (Tex. Civ. App. 1970) (holding that a principal stood *in loco parentis* “with the parent’s duties, rights and responsibilities”).

ties acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.”<sup>13</sup> According to the Supreme Court, school officials have authority over students by virtue of *in loco parentis* and a concomitant duty of protection. It has been asserted that *in loco parentis* is a sub-set of government’s broad common law power of *parens patriae*.<sup>14</sup>

This paper will use Blackstone’s doctrine of *in loco parentis* as a lens for viewing the sexual abuse of a student by an educator. It will attempt to show that the current theories of responsibility—*respondeat superior*, special relationship, and Title IX—regarding the sexual abuse of students are inadequate. Blackstone’s *in loco parentis* theory of responsibility may provide a more appropriate vehicle for the protection of children in school. If educators act in the place of parents, should they be held to a similar duty to protect the children entrusted to their care?

## II. PARENTAL DUTY

Parental rights are not unfettered. They come with the duty to protect and care for the child.<sup>15</sup> Unfortunately, not all children are reared in loving homes by responsible parents. “There is growing public awareness of the victimization of children at the hands of their parents.”<sup>16</sup> For example, a mother’s parental

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13. *Bethel Sch. Dist. No. 403 v. Fraser ex rel. Fraser*, 478 U.S. 675, 684 (1986).

14. Maggie J. Randall Robb, Student Author, *A School’s Duty to Protect Students from Peer-Inflicted Abuse: Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996), 22 U. Dayton L. Rev. 317, 328 n. 114 (1997); see generally *Black’s Law Dictionary* 1114 (6th ed., West 1990) (“‘Parens patriae’ . . . refers traditionally to role of state as sovereign and guardian of persons under legal disability, such as juveniles. . . . *Parens patriae* originates from the English common law where the King had a royal prerogative to act as guardian to persons with legal disabilities such as infants. In the United States, the *parens patriae* function belongs with the states.”). Through this doctrine, the state has the power as well as the duty to protect its minor citizens. *Stanley v. Illinois*, 405 U.S. 645, 649 (1972). The doctrine of *parens patriae* supports the concept of schools acting *in loco parentis* to protect students.

15. 59 Am. Jur. 2d *Parent and Child* § 14 (1987).

16. Colleen McMahon, *Due Process: Constitutional Rights and the Stigma of Sexual Abuse Allegations in Child Custody Proceedings*, 39 Catholic Law. 153, 153 (1999); see Howard A. Davidson, *Protecting America’s Children: A Challenge*, 35 Tr. 23, 24 (Jan., 1999) (“[m]uch has been written and discussed in the child welfare community about how policies favoring family preservation have too often come at the expense of children’s safety.” (footnote omitted)); Mark Strasser, *Fit to be Tied: On Custody, Discretion, and Sexual Orientation*, 46 Am. U. L. Rev. 841, 863 (1997) (“[g]iven the grow-

rights were terminated where she refused to believe the allegations of sexual abuse against the father despite overwhelming evidence, and she failed to protect the children from their father.<sup>17</sup> Furthermore, one commentator argued, “[p]arents who do not acknowledge abuse and continue to expose their children to known abusers should be held liable for the resulting abuse the child suffers.”<sup>18</sup>

Parents clearly owe a duty to protect their children, and a breach of that duty may result in adverse action against the parent, such as the loss of parental rights or authority. For example, California Welfare and Institutions Code Annotated § 366.26 provides for the termination of parental rights. According to the California Supreme Court, all minors have a compelling right to be protected from abuse and neglect.<sup>19</sup> Parental rights may be terminated when the welfare of the child is at risk. Therefore, the welfare of the child is considered more important than the rights of the parent.<sup>20</sup>

In addition to the states’ ability to remove parental rights in its capacity of *parens patriae*, in some states children have the right to sue their parents for negligence, thus abrogating parental immunity from suit.<sup>21</sup> For example, in 1967, the doctrine of parental immunity was first recognized in Arizona.<sup>22</sup>

ing number of reported child abuse cases, courts must be sensitive to concerns that children can be hurt severely or even killed by their parents.” (footnotes omitted)).

17. *Gallupe v. Roanoke City Dept. of Soc. Servs.*, 1998 WL 864424 (Va. App. Dec. 15, 1998) (unpublished).

18. Amy L. Nilsen, Student Author, *Speaking Out against Passive Parent Child Abuse: The Time Has Come to Hold Parents Liable for Failing to Protect Their Children*, 37 Hous. L. Rev. 253, 262 (2000).

19. *In re H.*, 851 P.2d 826, 833 (Cal. 1993).

20. Kerry L. McBride, Student Author, *A Minor’s Right to “Divorce” His or Her Parents: Fundamental Liberty Interest and Standing of a Minor Who Is Dependent on the Courts to bring Termination of Parental Rights Proceedings*, 17 J. Juv. L. 68, 78 (1996).

21. *E.g. Gibson v. Gibson*, 479 P.2d 648, 653–54 (Cal. 1971) (abolishing the doctrine of parental immunity); *Flynn ex rel. Turner v. Turner*, 304 N.W.2d 786, 788 (Iowa 1981) (abolishing the doctrine of parental immunity). The first case to recognize the doctrine of parental immunity was *Hewellette v. George*, 9 S. 885, 887 (Miss. 1891) (reasoning that “[t]he peace of society, and of the families composing society . . . forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.”), *overruled*, *Denton ex rel. Glaskox v. Glaskox*, 614 S.2d 906, 912 (Miss. 1992).

22. *Purcell ex rel. Frazer v. Frazer*, 435 P.2d 736, 739 (Ariz. App. 1967) (holding that an unemancipated minor child cannot sue a parent for negligent operation of a motor vehicle because of parental immunity), *overruled*, *Streenz ex rel. Francy v. Streenz*, 471 P.2d 282, 285 (Ariz. 1970) (holding “that an unemancipated minor child

Three years later, the Arizona Supreme Court overruled the 1967 decision thereby allowing a child to sue her parents for injuries sustained in a car accident.<sup>23</sup> The Arizona Supreme Court later refined its previous holding by adopting a reasonable parent standard for suits brought against parents by their child.<sup>24</sup> While announcing the reasonable parent standard, the court noted that the traditional parental immunity doctrine did not apply, *inter alia*, “if the parent is acting outside his [or her] parental role and within the scope of his [or her] employment; if the parent acts willfully, wantonly, or recklessly; . . . and if the tortfeasor is standing *in loco parentis*, such as a grandparent, foster parent, or teacher.”<sup>25</sup> The Arizona Supreme Court acknowledged the parental duty to protect a child through the concept of a reasonable parent standard. The concept of teachers standing *in loco parentis* holds them to the same standard of reasonableness as parents. This is important because in cases of students being sexually abused by an educator, the imputation of *in loco parentis* to educators does not arise within the need to discipline the child. Protecting a child is not asserted as a right of the parent or surrogate, but rather as a duty owed to the child/student.

Because children spend large amounts of time in school, Blackstone’s doctrine of *in loco parentis* is central to the duty owed to children. In Blackstone’s time, the concept of public schools had not developed into the concept of today’s free common school supported by the state. Today, the role of public schools in America is complex. Education is both a private benefit and a public good. Because the concept of a public school has morphed to meet this complexity, the school as an *in loco parentis* has also undergone a transformation since Blackstone articulated the concept.<sup>26</sup>

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has a right of action against her parents for injuries incurred in an accident allegedly caused by [a parent’s] negligent driving”).

23. *Streenz ex rel. Franczy v. Streenz*, 471 P.2d 282, 285 (Ariz. 1970), overruled, *Broadbent ex rel. Broadbent v. Broadbent*, 907 P.2d 43, 50 (Ariz. 1995).

24. *Broadbent ex rel. Broadbent v. Broadbent*, 907 P.2d 43, 50 (Ariz. 1995).

25. *Id.* at 46.

26. See *Knox County Bd. Of Educ. Assn. V. Bd. of Educ.*, 158 F. 3d 361, 366 (6th Cir. 1999) (“While serving in their *in loco parentis* capacity, teachers are on the ‘frontline’ of school security including drug interdiction.”).

III. IS *IN LOCO PARENTIS* DEAD OR ALIVE?

Blackstone referred to a schoolmaster who was often the sole individual responsible for the child's education. The modern analogy in the United States, Australia, Canada, and South Africa is the school or school district. Educational policy, formulated by school districts, is carried out and translated and transformed by educators.<sup>27</sup>

Some commentators have raised the question: is *in loco parentis* dead?<sup>28</sup> However, news of the doctrine's death is premature. As recently as 1996, a New York court wrote, "the school, once it takes over physical custody and control of the children, effectively takes the place of their parents and guardians."<sup>29</sup>

The modern day doctrine of *in loco parentis* has been defined and shaped by two public school search and seizure cases. In *New Jersey v. T.L.O.*, the United States Supreme Court noted that "[i]n carrying out searches and other disciplinary functions pursuant to [mandatory educational and disciplinary] policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment."<sup>30</sup> The Court did not dissolve the *in loco parentis* relationship; rather it encapsulated it. The Court did not say that the school never acts in the place of the parent.<sup>31</sup> The Court

27. See Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (Russell Sage Found. 1980).

28. E.g. Kelly Frels, *Balancing Students' Rights and Schools' Responsibilities*, 37 Hous. L. Rev. 117, 120 (2000) ("Is *in loco parentis* dead?" (emphasis added)); Michael Imber & Tyll Van Gell, *Education Law* 106 (2d ed., Lawrence Erlbaum Assoc. 2000) ("the doctrine of *in loco parentis* has been largely abandoned." (emphasis added)); Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 Geo. Wash. L. Rev. 49, 60 (1996) ("[w]hen the Tinker Court declared that constitutional rights followed students through the schoolhouse gate, the notion that school power was like that of a parent—the common-law doctrine of *in loco parentis*—slipped out the back door." (emphasis added)); see also Timothy L. Jacobs, *School Violence: An Incurable Ill that Should Not Lead to the Unconstitutional Compromise of Students' Rights*, 38 Duq. L. Rev. 617, 620 (2000) (An oblique view of the demise of *in loco parentis*: "The United States Supreme Court has discarded this doctrine, but recent school shootings may prompt a reemergence of the doctrine of *in loco parentis*.").

29. *Garcia v. City of N.Y.*, 646 N.Y.S.2d 508, 509 (App. Div. 1st Dept. 1996).

30. *N.J. v. T.L.O.*, 469 U.S. 325, 336–37 (1985).

31. The strength of this assertion is found in *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1268 (10th Cir. 2001) (quoting *T.L.O.*, 469 U.S. at 336 ("However, 'school personnel do not

said that within the special context of search and seizure, the school functions as a representative of the state. *In loco parentis* may be “in tension with contemporary reality”, but the Court did not find it in opposition to contemporary reality.<sup>32</sup> The role of school authorities encompasses, but is not restricted to, the functions of the parent. School officials are also state actors furthering “publicly mandated educational and disciplinary policies.”<sup>33</sup>

One year after *T.L.O.*, the Supreme Court in *Bethel School District No. 403 v. Fraser ex rel. Fraser*, a major student free speech case, noted that schools act *in loco parentis* to protect students.<sup>34</sup> This maintains the viability of *in loco parentis* by adding weight to the argument that the High Court in *T.L.O.* did not abolish the doctrine.

The school also acts as a sovereign, protecting the constitutional and statutory rights of students. The Supreme Court supported its position in *Bethel* in a later search and seizure case involving drug testing of students. The Court in *Vernonia School District 47J v. Acton* referred to Blackstone’s *in loco parentis* doctrine but acknowledged that public schools exercise a state power greater than parental power over their students.<sup>35</sup> Parental rights are not subject to constitutional restraints, but public schools must respect the constitutional rights of students.<sup>36</sup> However, the Court did not assert that the schools never act *in loco parentis*. In fact, the court, citing *Bethel*, wrote, “we have acknowledged that for many purposes ‘school authorities ac[t] *in loco parentis*’.”<sup>37</sup> The schools, while in the role of educator, act as a parent by instructing and disciplining their students.

Accordingly, the Court in *Vernonia*, referring to *New Jersey v. T.L.O.*, emphasized that the nature of the power over stu-

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merely exercise authority conferred on them by individual parents.”) *Earls* by way of *T.L.O.* acknowledges that schools have conferred upon them the role of *in loco parentis*. However, that role is no the only source of authority.).

32. *Id.* at 336.

33. *Id.*

34. *Bethel Sch. Dist. No. 403 v. Fraser ex rel. Fraser*, 478 U.S. 675, 684 (1986).

35. *Vernonia Sch. Dist. 47J v. Action*, 515 U.S. 646, 655 (1995).

36. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969) (students do not “shed their constitutional rights . . . at the schoolhouse gate.”)

37. *Vernonia Sch. Dist. 47J v. Action*, 515 U.S. 646, 655 (1995) (brackets in original) (quoting *Bethel Sch. Dist. No. 403 v. Fraser ex rel. Fraser*, 478 U.S. 675, 684 (1986)).

dents "is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."<sup>38</sup> Custodial power over children is the power often associated with parental control over children. A dictionary definition of "custodian" refers to a keeper or guardian.<sup>39</sup> "Tutelary" means "having the position of guardian or protector of a person, place, or thing."<sup>40</sup> Both the definitions of "custodian" and "tutelary" refer to a guardian. According to Black's Law Dictionary, "guardian" means, among other definitions, "[o]ne who legally has responsibility for the care and management of the person, or the estate, or both, of a child during its minority."<sup>41</sup> Also, a guardian is someone who "guards, protects, or preserves. . . . [A] person legally entrusted with the care of another's person or property, as that of a minor."<sup>42</sup> By describing the relationship between student and school as custodial and tutelary, the Court is essentially saying that the school acts as a guardian. Schools act as guardians for students by protecting them from harm. Because schools act as guardians, it is clear that the schools have some duty of *in loco parentis*. The Court has opined that the relationship is not exclusively *in loco parentis*, but that for many purposes school authorities do act in that capacity.<sup>43</sup> Rossow and Stefkovich asserted that *in loco parentis* is invigorated by *Vernonia*.<sup>44</sup>

Parents and schools acting *in loco parentis* owe a duty to protect children/students. In *Hinson v. Holt*, a case out of Alabama, a teacher who was sued for assault and battery raised a defense of parental immunity based on the doctrine of *in loco parentis*.<sup>45</sup> The teacher argued that the Alabama Supreme

38. *Id.*

39. *Random House Webster's College Dictionary*, 326 (Sol Steinmetz et al. eds., 2d ed., Random H. 1997).

40. *Id.* at 1388.

41. *Black's Law Dictionary* 706 (6th ed., West 1990).

42. *Random House Webster's College Dictionary*, 576 (Sol Steinmetz et al. eds., 2d ed., Random H. 1997).

43. The statement of the Court in *Vernonia* that school officials do not "exercise only parental power over their students" clearly indicates that the High Court believes that school officials exercise *in loco parentis* responsibilities in addition to other powers and responsibilities. 515 U.S. at 655.

44. Lawrence F. Rossow & Jacqueline Stefkovich, *Vernonia School District v. Acton: Suspicionless Drug Testing*, 102 Educ. L. Rptr. 897, 907 (1995); see Ira Mickenberg, *Court Settles on Narrower View of 4th Amendment*, Natl. L. J. C8 (July 31, 1995) (noting the *Vernonia* Court's heavy reliance on the school's *in loco parentis* responsibility).

45. *Hinson v. Holt ex rel. Holt*, 776 S.2d 804, 811 (Ala. Civ. App. 1998).

Court in *Suits v. Glover* recognized a qualified privilege for an educator's discipline of a student.<sup>46</sup> The defense argued that if the teacher stands *in loco parentis*, then the responsibilities and the rights of the parent must accrue to the teacher standing *in loco parentis* to the student. Thus, the teacher is protected by the traditional parental immunity doctrine, which is still recognized in Alabama. Under Alabama law, the parental immunity doctrine prohibits suits brought by minor children against their parents.<sup>47</sup> The lone exception to this immunity doctrine in Alabama occurs when the allegation against the parent is one of sexual abuse.<sup>48</sup> The court in *Hinson* held that foster parents, like educators, are not legal parents.<sup>49</sup> They act *in loco parentis* and are "entitled to only a 'qualified form' of parental immunity."<sup>50</sup>

The schools and its educators stand *in loco parentis* bearing the responsibility of the duty to protect students. Both duty and privilege are imputed to educators. As seen in *Hinson*, a concomitant duty of the parent may be some qualified form of parental immunity.<sup>51</sup> The funeral pyre of *in loco parentis* should not be lit; it lives, influences, and structures the school's relationship to its students.

Parents have a duty to protect their children on penalty of termination of parental rights. The schools, when acting in place of the parent, have a similar duty to protect students placed in their charge. This paper will explore three causes of action that have attempted to assert this duty to protect students with consequences for breach of that duty. But first, it is important to put a story and a face with the issue of sexual abuse of a student perpetrated by an educator.

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46. *Id.*; see *Suits v. Glover* 71 S.2d 49, 50 (Ala. 1954) ("[a] schoolmaster is regarded as standing *in loco parentis* and has the authority to administer moderate correction to pupils under his care.").

47. *Hinson*, 776 S.2d at 811; *Mitchell v. Davis*, 598 S.2d 801, 803 (Ala. 1992).

48. *Hinson*, 776 S.2d at 811. For a discussion of the parent-child immunity doctrine see Dena M. Dietrich, Student Author, *Eagan v. Calhoun: A Child May Bring a Wrongful Death Action Against a Parent for the Intentional Killing of the Other Parent*, 28 U. Balt. L. Rev. 235, 237 (1998).

49. 776 S.2d at 811.

50. *Id.* (quoting *Mitchell*, 598 S.2d at 806).

51. *Id.*

## IV. ALIDA'S PLIGHT: THE STORY OF A VICTIM

In the spring of 1991, Frank Waldrop, a teacher at Lago Vista High School, made sexually suggestive remarks to students during after-school book discussion sessions at his high school.<sup>52</sup> Alida Star Gebser had received permission to attend the sessions even though she was an eighth grader in a middle school in the same school district.<sup>53</sup> When Gebser attended the high school in the fall as a freshman, she was assigned to Waldrop's classes both semesters.<sup>54</sup> Waldrop continued to make inappropriate remarks to his students, and he started to target Gebser for many of the more suggestive comments.<sup>55</sup> In the spring of Gebser's freshman year, Waldrop visited Gebser's home, ostensibly to give her a book.<sup>56</sup> He kissed and fondled her.<sup>57</sup> The two had sexual intercourse soon after on a number of occasions during the remainder of the school year, through the summer, and into the following school year.<sup>58</sup> They often had intercourse during class time although never on school property.<sup>59</sup> During the summer, Gebser was Waldrop's only student in an advanced placement class and the two often had sexual intercourse during the time allotted for the class.<sup>60</sup> It wasn't until January of 1993 that a police officer discovered Waldrop and the minor Gebser having sexual intercourse that the abusive situation came to light.<sup>61</sup>

Alida did not report the abuse to school officials testifying that "while she realized Waldrop's conduct was improper, she was uncertain how to react and she wanted to continue having him as a teacher."<sup>62</sup> Gebser stated that she declined to report the sexual relationship because "if I was to blow the whistle on that, then I wouldn't be able to have this person as a teacher anymore" and that Waldrop "was the person in Lago admini-

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52. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).

53. *Id.*

54. *Id.*

55. *Id.* at 277-78.

56. *Id.* at 278.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

stration . . . who I most trusted.”<sup>63</sup> She trusted her teacher and that trust provided the lever for her abuse. The trust that a child gives to a teacher is not unlike the trust that the child has for a parent.

## V. THREE THEORIES WHERE THE DUTY TO PROTECT HAS BEEN ASSERTED

### A. Respondeat Superior: *The Vicarious Liability of the Employer*

Vicarious liability of an employer for an employee's act has a long history in English law in which masters were responsible for the acts of their servants. The Latin term is *respondeat superior* or “let the master answer.” In certain instances, an employer can be liable under agency principles not only for employees' negligent acts but for criminal acts as well.<sup>64</sup>

The modern justification for vicarious liability is a policy of allocation of risk. Prosser and Keeton noted that vicarious liability is placed on the employer because having engaged in an enterprise which will, on the basis of past experience, involve harm to others through the actions of its employees, it is better that the employer bear the costs than the innocent injured plaintiff.<sup>65</sup> It is a cost of doing business because the employer is better able to absorb the costs and to distribute them through increased prices to the community at large. “Added to this is the makeweight argument that an employer who is held strictly liable is under the greatest incentive to be careful in the selection, instruction and supervision of his servants, and to take every precaution to see that the enterprise is conducted safely.”<sup>66</sup> Should a school be held to a lesser standard when it comes to the acts of its employees sexually abusing students? The selection, instruction, and supervision of school employees to provide a safe school environment should be a public policy worth pursuing at least as much as selecting employees to maintain a safe marketplace.

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63. *Id.* at 299–300 n. 10 (Stevens, Souter, Ginsburg & Breyer, JJ., dissenting).

64. *Restatement (Second) of Agency* § 231 (1958).

65. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 500–01 (W. Page Keeton ed., 5th ed., West Publ. Co. 1984).

66. *Id.* at 501.

In general, an employer will be liable for the tortuous conduct of an employee when the employer has actual or constructive knowledge of the employee's acts. Actual knowledge exists when a supervisory employee has witnessed the tortuous act or actually engages in the act. An employer is also deemed to have actual knowledge if a complaint about the employee's conduct is delivered to a supervisor especially when the employer fails to take action on the complaint. An employer is considered to have constructive knowledge of an employee's wrongful conduct if the employer could have learned about the conduct through reasonable supervision. The pervasiveness of the act may also provide the basis for an employer's constructive knowledge. For example, in *Sims v. Montgomery County Commission*, sexual harassment in the workplace was "so open and pervasive that all those in supervisory authority should have known about it."<sup>67</sup>

*Respondeat superior* is a "bare formula" used to cover the unordered and unauthorized acts of the servant for which the master must bear the burden of paying.<sup>68</sup> "It refers to those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment."<sup>69</sup> This is often referred to as acting within the scope of ones employment or doing those things that the employee is employed to perform.<sup>70</sup> It would appear that the servant/employee would be acting outside the scope of his employment if his conduct serves his own purpose rather than the concerns of his master/employer, as in the case of an educator sexually abusing a student.

For example, in a 1984 decision, the District of Columbia Court of Appeals dismissed a complaint against the District of Columbia School District arising from the sexual assault of a blind, deaf, mute student by the coordinator of the program.<sup>71</sup> The court found that the school district employee's conduct was outside the course of his duties; thus the district was not liable

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67. *Sims v. Montgomery County Commn.*, 766 F. Supp. 1052, 1075 (M.D. Ala. 1990).

68. Keeton, *supra* n. 65, at 502.

69. *Id.*

70. See *Restatement (Second) of Agency* § 228.

71. *Boykin v. D.C.*, 484 A.2d 560, 561 (D.C. App. 1984).

under respondeat superior.<sup>72</sup> Similarly, in 1990, the Massachusetts Supreme Judicial Court found, in a case involving accusations of child abuse at a private day school, that the school could not be held liable for sexual assaults allegedly committed at the school.<sup>73</sup> The court wrote, "these acts obviously were not 'of the kind [the employees were] employed to perform,' nor were they 'motivated, at least in part, by a purpose to serve the employer'."<sup>74</sup>

Although no clear general pattern has emerged with regard to *respondeat superior* liability for an employee's sexual misconduct, a trend does seem to be developing in the law enforcement and health care occupations. In several cases, courts have been willing to hold employers vicariously liable for the actions of the employee even though the employee is not motivated by a purpose to serve the employer.

A California Supreme Court case, *M. v. City of Los Angeles*, is the leading case in this area.<sup>75</sup> In *M.*, a woman was driving home alone late one night when a police officer stopped her for erratic driving.<sup>76</sup> The officer was on duty, in uniform, wore a badge and a gun, and was driving a black-and-white police car.<sup>77</sup> *M.* had been drinking and performed poorly on the field sobriety test that the police officer asked her to perform.<sup>78</sup> She began to cry and pleaded with the officer not to be taken to jail.<sup>79</sup> The officer ordered her to get into the front seat of the police car, and then he drove her home.<sup>80</sup> After entering her home, the police officer told the woman he expected "payment" for taking her home instead of to jail.<sup>81</sup> The woman tried to run away, but the officer grabbed her, threw her on the couch, and

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72. *Id.*

73. *Worcester Ins. Co. v. Fells Acres Day Sch. Inc.*, 558 N.E.2d 958, 967 (Mass. 1990).

74. *Id.* (brackets in original) (quoting *Wang Laboratories, Inc. v. Bus. Incentives, Inc.*, 501 N.E.2d 1163, 1166 (Mass. 1986)).

75. *M. v. City of L.A.*, 814 P.2d 1341 (Cal. 1991).

76. *Id.* at 1342.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

raped her.<sup>82</sup> He was subsequently convicted of rape and sentenced to prison.<sup>83</sup>

The woman brought a civil suit against the officer and the City of Los Angeles, which she won at the trial court level.<sup>84</sup> The appeals court reversed the judgment, holding, as a matter of law, that the officer was acting outside the scope of his employment when he committed the rape.<sup>85</sup>

On appeal, the California Supreme Court reversed, holding that the city could be held vicariously liable for the officer's sexual assault.<sup>86</sup> "Respondeat superior," the court observed, "is based on a "deeply rooted sentiment" that it would be unjust for an enterprise to disclaim responsibility for injuries occurring in the course of its characteristic activities."<sup>87</sup> Although the doctrine only applies if the employee is acting within the scope of his employment, the court made it clear that an employee can sometimes be acting within the scope of his employment even when his tortious conduct violates his official duties or disregards the employer's express order.<sup>88</sup>

The California court then cited the rule for deciding if an employee's tortious conduct was committed within the scope of employment.<sup>89</sup> "A risk arises out of the employment," the court wrote, "when . . . 'an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business'."<sup>90</sup> Germane to the *in loco parentis* power and the power of the state that educators wield over students, the California Supreme Court held:

[W]e observed that society has granted police officers extraordinary power and authority over its citizenry. An officer who detains an individual is acting as the official representative of the state, with all of its coercive power. As visible symbols of

82. *Id.* at 1342-43.

83. *Id.* at 1343.

84. *Id.*

85. *Id.*

86. *Id.* at 1347.

87. *Id.* at 1343 (quoting *Rodgers v. Kemper Constr. Co.*, 124 Cal. Rptr. 143, 148 (App. 4th Dist. 1975) (quoting *Ira S. Bushey & Sons, Inc. v. U.S.*, 398 F.2d 167, 171 (2d Cir. 1968))).

88. *Id.* at 1344.

89. *Id.*

90. *Id.* at 1344 (quoting *Perez v. Van Groningen & Sons, Inc.*, 719 P.2d 676, 678 (Cal. 1986) (quoting *Rodgers*, 124 Cal. Rptr. at 149)).

that power, an officer is given a distinctively marked car, a uniform, a badge, and a gun. . . . The cost resulting from misuse of that power should be borne by the community, because of the substantial benefits that the community derives from the lawful exercise of police power.<sup>91</sup>

In addition to law enforcement agencies, courts have been increasingly willing to hold health care enterprises vicariously liable for sexual misconduct committed by their employees. For example, in *Doe v. Samaritan Counseling Center*, the Alaska Supreme Court held that a counseling center could be held liable for the averred sexual misconduct of one of its therapists.<sup>92</sup> In that case, Jane Doe accused a counselor of misusing the transference phenomenon to bring about a sexual relationship that began about a month after Doe terminated her therapy.<sup>93</sup> No sexual intercourse occurred during the therapeutic relationship, and all sexual liaisons took place off the premises of the counseling center.<sup>94</sup>

The counseling center petitioned the court to dismiss Jane Doe's *respondeat superior* claim as well as the negligence claim.<sup>95</sup> The center argued that it could not be vicariously liable for the counselor's sexual misconduct because the counselor was acting purely in furtherance of his own interests and not the interests of his employer.<sup>96</sup>

The Alaska Supreme Court was persuaded by a Ninth Circuit opinion where the court reasoned that although a social worker had not been authorized to become sexually involved with his patients, nonetheless, sexual misconduct occurred in conjunction with his legitimate counseling activities, and, therefore, the employer could be liable.<sup>97</sup> The high court in Alaska held that a jury might reasonably find that the counselor's sexual misconduct "arose out of, and was reasonably incidental to counseling activities authorized by and of potential benefit to [the counseling center]."<sup>98</sup>

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91. *Id.* at 1349.

92. *Doe v. Samaritan Counseling Ctr.*, 791 P.2d 344, 345 (Alaska 1990).

93. *Id.*

94. *Id.*

95. *Id.* at 346.

96. *Id.*

97. *Id.* at 348; *Simmons v. U.S.*, 805 F.2d 1363, 1369-70 (9th Cir. 1986).

98. *Doe*, 791 P.2d at 348 n. 7.

In a 1992 case involving a hospital employee's sexual assault on a 16-year old psychiatric patient, the Louisiana Court of Appeals held that the hospital was vicariously liable for its employee's act.<sup>99</sup> According to the court, the incident occurred while the assailant was on duty taking care of the patient's well being, and his misconduct was reasonably incidental and closely connected to his employment duties.<sup>100</sup>

A trend is emerging where health care providers and law enforcement agencies are held vicariously liable for sexual assaults committed by their employees regardless of whether the employer was negligent.<sup>101</sup> In many of these cases, courts have stressed the fact that the employees exercise considerable control over their victims.<sup>102</sup> The courts have also found that it is reasonable to anticipate sexual misconduct in those settings, and that *respondeat superior* liability would encourage the employers to take effective preventative measures.<sup>103</sup>

If adult victims are protected by the use of *respondeat superior* by forcing employers to be more vigilant or to face the economic consequences of a lawsuit, should children who are entrusted to a educator's care and compelled to attend school receive the same measure of protection from educators that adults are starting to receive from health care workers and the police?

Despite the expansion of liability for law enforcement and health care, sexual assaults perpetrated by school employees on students have been consistently found to be outside of the scope of employment, thus shielding the school district from *respondeat superior* liability. Unfortunately, courts do not appreciate that school employees are aided in their misconduct by the power and authority they have over children given to them by virtue of their school employment and its attendant *in loco parentis* status. While the courts have not accepted this connection between authority by virtue of employment and the sexual abuse of a student, the United States Department of

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99. *Samuels v. S. Baptist Hosp.*, 594 S.2d 571, 574 (La. App. 4th Cir. 1992).

100. *Id.*

101. Richard Fossey & Todd A. DeMitchell, "Let the Master Answer": Holding Schools Vicariously Liable when Employees Sexually Abuse Children, 25 J.L. & Educ. 575, 580 (1996).

102. *Id.* at 586.

103. *Id.* at 592.

Education's Office of Civil Rights issued guidelines that do.<sup>104</sup> The Sexual Harassment Guidance notes that school districts are liable for quid pro quo sexual discrimination when the employee acted with apparent authority or was aided in carrying out the abuse by his or her position of authority within the institution.<sup>105</sup> A teacher or principal is aided in the sexual abuse of a student through his or her employment. School employment allows for access to and provides power over students.

Sexual assaults in schools, like those that take place in police cruisers, hospitals, and therapists' offices, often involve an abuse of job-created power. Sexually abusive teachers, like sexually abusive police officers and health care workers, misuse the authority of their positions when they sexually molest children under their control. If it makes sense to hold police departments and health care employers vicariously liable for these assaults, it may make sense to hold school districts liable for them as well.<sup>106</sup>

Although the courts give no uniform explanation for imposing vicarious liability on law enforcement agencies and health care providers, two themes are woven through this line of cases. First, the courts have concluded that sexual assaults in law enforcement and health care settings are foreseeable given the nature of the employer's mission.<sup>107</sup> Second, the courts view the victims of these assaults as being particularly vulnerable due to the perpetrator's authority over the victim—authority they obtained from their employment status.<sup>108</sup>

In contrast, courts have not held schools vicariously liable for their employees' sexual assaults because the courts consider such assaults to be unforeseeable aberrations that schools cannot anticipate or guard against.<sup>109</sup> Likewise, courts do not appreciate that school employees are aided in their misconduct by the power and authority they have over children given to them by virtue of their school employment. Should the same legal

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104. *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034, 12037 (Mar. 13, 1997).

105. *Id.*

106. Fossey & DeMitchell, *supra* n. 101, at 598.

107. *Id.* at 592.

108. *Id.* at 590.

109. *R. v. Oakland Unified Sch. Dist.*, 769 P.2d 948, 955 n. 9 (Cal. 1989); *Young ex rel. Whitson v. Oakland Unified Sch. Dist.*, 176 Cal. Rptr. 287, 291–92 (App. 1st Dist. 1981).

reasoning that applies in law enforcement and health care situations also apply to children in school districts?

Under the theory of *respondeat superior*, the employer is only responsible for the actions of its employee when he or she is acting within the scope of employment. The sexual abuse of a student is never within the scope of employment. However, it is the employment that gives abusers access to student victims. It is also the authority attached to the employment in the schools that helps to render students powerless to protect themselves from assault.<sup>110</sup>

The custodial or supervisory control that an educator wields over a student is similar to that of a parent.<sup>111</sup> The role of the parent does not encompass sexually abusing his or her own child or allowing child to be abused. However, society will take action against the parent who sexually abuses his or her child by temporarily or permanently revoking parental rights. If those rights can be terminated as a means of holding the parent accountable for the welfare of the child, should not schools be similarly held responsible when acting in the role of the parent?

### B. A Constitutional Duty to Protect

The second area of investigation in which the interests of children appear not to be served is the constitutional duty to protect. The first section looked to *respondeat superior* / agency theories as its legal foundation for employer liability whereas this section looks to the Constitution of the United States to ascertain what duty of protection the state and its entities, such as schools, owe its students.

As a general proposition, government agencies do not have an affirmative duty under the Constitution to protect citizens from injury. However, the United States Supreme Court has recognized certain exceptions to this rule.<sup>112</sup> States have an affirmative duty to protect those with whom they have a custodial relationship. Specifically, states have an affirmative duty

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110. See Richard Fossey, *Law, Trauma, and Sexual Abuse in the Schools: Why Can't Children Protect Themselves?*, 91 Educ. L. Rptr. 443 (1994).

111. See generally *Krampen v. Va.*, 510 S.E.2d 276, 278 (Va. App. 1999) (defendant could be convicted of taking indecent liberties with a child because the mother's entrustment of the victim child to the defendant for transporting to and from church placed him in a custodial or supervisory relationship).

112. *Deshaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 200 (1989).

to protect incarcerated prisoners and hospitalized mental patients from harm because those persons are unable to care for themselves.<sup>113</sup> It has sometimes been said that the state has a "special relationship" with persons it holds in custody. This "special relationship" requires the state to assume responsibility for the safety and general well being of these persons.<sup>114</sup>

Courts generally have not been willing to extend the protection of a "special relationship" to encompass school children.<sup>115</sup> For example, in a 1990 case involving accusations of abuse by three students against a teacher, the United States Court of Appeals for the Seventh Circuit rejected the analogy between school children and prisoners or mental patients.<sup>116</sup> Prisoners and mental patients, the court wrote, "are unable to provide for basic human needs like food, clothing, shelter, medical care, and reasonable safety."<sup>117</sup> In contrast, the state merely requires a child to attend school, which does not prevent the child from meeting her basic human needs. By mandating school attendance, the court said, "the state . . . has not assumed responsibility for [the children's] entire personal lives; these children and their parents retain substantial freedom to act."<sup>118</sup> The Seventh Circuit concluded that school children are not entitled to the special constitutional protection given to prisoners and mental patients. "The analogy of a school yard to a prison may be a popular one for school-age children," the court observed, "but we cannot recognize constitutional duties on a child's lament."<sup>119</sup> Similarly, the Third Circuit in *D.R. ex rel. L.R. v. Middle Bucks Area Vocational Technical School* reasoned that the school did not have a constitutional duty to protect students from the sexual harassment of other students because, despite the *in loco parentis* authority of the school, the students' parents remained the primary caregivers.<sup>120</sup>

By refusing to equate school children with prisoners and mental patients, the federal courts advance a good argument.

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113. *Id.*

114. *Id.* at 194.

115. James M. Kemp, *DeShaney and Its Progeny—The Failure to Mandate that Public School Officials Protect Our Tender Youth*, 24 J.L. & Educ. 679 (1995).

116. *J.O. v. Alton Community Unit Sch. Dist.* 11, 909 F.2d 267, 272–73 (7th Cir. 1990).

117. *Id.* at 272.

118. *Id.*

119. *Id.*

120. *D.R. ex rel. L.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1370–72 (3d Cir. 1992) (en banc).

In fact, a school child's status is far different from that of a prisoner or a confined mental patient. Unlike prisoners and mental patients, schoolchildren are not physically confined, and they are not in full-time custody; they can go home at the end of the school day. As several courts have noted, if children are sexually assaulted, they are free to leave the school grounds, call their parents/guardians, or seek other outside help.

However, as Fossey has pointed out, if we look deeper, we are compelled to ask whether there is something about the dynamics of sexual abuse itself that renders some school children helpless and prevents them from seeking and finding effective assistance.<sup>121</sup> "If there is, then the federal courts are wrong to suggest that school children can protect themselves from assault."<sup>122</sup> The trauma of sexual molestation, especially by a trusted individual, may diminish a child's ability to fend off further abuse. Richard Kluft, who studied incest victims who were later sexually exploited by their therapists, called the phenomenon the "sitting duck syndrome."<sup>123</sup> Sexual abuse impairs a child's thought processes in ways that may increase his or her vulnerability to further harm. Victims may develop pathological attachments to their abusers, inhibiting them from reporting the abuse to their parents or teachers. "Finally, child abuse victims may exhibit tendencies of 'learned helplessness,' a reduced capacity to protect themselves from exploitation and a tendency to recreate the original trauma, even by enduring more abuse."<sup>124</sup>

Robb, in her note, utilized an *in loco parentis* analysis to conclude that there was a constitutional duty to protect Jamie Nabozny who had "endured four years of such torture as his classmates repeatedly harassed him, beat him, urinated upon him, and performed a mock rape on him because he was gay."<sup>125</sup> Her note argued that state laws and school policies grounded in *in loco parentis* limited Nabozny's freedom to act on his own behalf against the abuse from his classmates.<sup>126</sup>

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121. Fossey, *supra* n. 110, at 449.

122. *Id.*

123. Richard P. Kluft, *Treating the Patient Who Has Been Sexually Exploited by a Previous Therapist*, 12 *Psychiatric Clinics of N. Am.* 483, 486 (1989).

124. Fossey, *supra* n. 110, at 453.

125. Randall Robb, *supra* n. 14, at 317.

126. *Id.* at 325.

Specifically, Ashland School adopted and exercised its *in loco parentis* power with these policies which prohibited Nabozny from leaving school in dangerous situations or from fighting back. The school gave him no options as the power rested with the school.<sup>127</sup>

School children who are sexually abused by the very people who are entrusted with caring for them while at school are quite like prisoners, "made captive by the condition of their dependency," and are shackled by confusion, shame, isolation, and fear.<sup>128</sup> "Schoolchildren are particularly vulnerable to mistreatment at the hands of adults, especially where those adults are cloaked with the authority of the state."<sup>129</sup>

Students enjoy the protection of their parents. The parental duty of custodial supervision is transferred to the school under *in loco parentis*. However, the Third Circuit in *Middle Bucks* reasoned that the state's *in loco parentis* statute provided authority to public school teachers but did not "impose a duty upon them."<sup>130</sup> Governmental authority exercised through public schools without a duty or responsibility to the subjects of the authority seems a thin gruel on which to base such an important public service. The potential of authority without responsibility, at best, allows for mischief and, at worst, abuse of those situated with the least ability to protect themselves. It is a poor profession that does not owe a duty of responsibility or care to its clients. If the school assumes the duty of the parent then it can be argued that students must turn to the school for "reasonable security" from sexual abuse while at school. The state as an educator has a different relationship with students than when the state acts as a sovereign. In the role of educator, the state essentially acts as a parent.

The Constitutional view of this "special relationship" or duty to protect, however, has not prevailed. Instead of the common law view that the school is acting in the place of the parent, courts have likened the constitutional relationship between school and student to be one of a third party lacking a special relationship. If students are nothing more than third

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127. *Id.* at 329 (emphasis added).

128. Judith Lewis Herman, *Trauma and Recovery* 74 (BasicBooks 1992).

129. *Doe ex rel. Knackert v. Estes*, 926 F. Supp. 979, 988 (D. Nev. 1996).

130. 972 F.2d at 1371 (quoting *Pa. St. Educ. Assn. v. Dept. of Pub. Welfare*, 449 A.2d 89, 92 (Pa. Cmmw. 1982), *overruled*, *Pa. v. Gerstner*, 656 A.2d 108, 113-14 (Pa. 1995)).

parties, the state, through its schools, owes no duty to protect them. The student is no different than any one who happens to visit the school; there is no special relationship, no bond, and no trust upon which the student may rely. This would be similar to a situation in which a parent's relationship to his or her children would be one of two strangers where no duty exists.

### C. *Title IX*

The last theory to be discussed is the federal anti-discrimination statute, Title IX. The sexual abuse of Alida Gebser by her teacher Waldrop provides the fact pattern for the Supreme Court's decision on the application of Title IX to teacher-student sexual abuse. The Court's opinion explains what duty is owed to students by educators under Title IX.

Congress passed Title IX as part of the Education Amendments of 1972. It was enacted after extensive hearings by the House Special Subcommittee on Education in 1970 revealed pervasive discrimination against women with respect to educational opportunities.<sup>131</sup> Title IX seeks to avoid the use of federal funds to support discriminatory practices and "to provide individual citizens effective protection against those [discriminatory] practices."<sup>132</sup> The law provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>133</sup> Thus, the law applies to virtually every school district and college in the United States.

Title IX is an anti-discrimination statute, modeled after Title VI of the Civil Rights Act of 1964.<sup>134</sup> According to Senator Bayh, Title IX's sponsor, the statute was intended to:

[P]rovide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those

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131. 118 Cong. Rec. 5804 (1972).

132. *Cannon v. U. of Chi.*, 441 U.S. 677, 704 (1979).

133. 20 U.S.C. § 1681 (1994).

134. See generally 42 U.S.C. § 2000d (1994) (Title VI prohibits discrimination on the basis of race, color, or national origin in institutions benefiting from federal funds).

skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.<sup>135</sup>

Until the mid-1990s, there have been few court cases involving sexual harassment or abuse of students under Title IX. The primary reason for this dearth of cases was uncertainty whether the law authorized plaintiffs to recover money damages for a Title IX violation. The paucity of cases led one commentator to observe that "Title IX as a statutory remedy has proven to be virtually without bite."<sup>136</sup> One reason for this lack of bite is because unlike tort actions and lawsuits for constitutional deprivations, which can be brought against both school districts and individual school employees, Title IX lawsuits can only be brought against public entities.<sup>137</sup> Thus, in a Title IX claim, the school district is the only defendant. Another reason for the lack of bite is that the express statutory means of enforcing Title IX is termination of federal funds to the school district.

The Court handed down its ruling in *Gebser v. Lago Vista Independent School District* on June 22, 1998, giving, for the first time, a definitive ruling on what standard a plaintiff student could prevail in a Title IX action alleging sexual abuse perpetrated by an educator.<sup>138</sup> The Court in a five to four decision held:

[D]amages may not be recovered in those circumstances [teacher-student sexual harassment in an implied private action under Title IX] unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct.<sup>139</sup>

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135. 118 Cong. Rec. 5808 (1972).

136. Kimberly A. Mango, Student Author, *Students Versus Professors: Combating Sexual Harassment under Title IX of the Education Amendments of 1972*, 23 Conn. L. Rev. 355, 411 (1991).

137. See *Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607, 611 (8th Cir. 1999) (Title IX will not support an action against a teacher in her individual capacity.). 135.524 U.S. 274.

139. *Id.* at 277.

### 1. *The Majority's Opinion in Gebser*

Justice O'Connor delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas joined. Justice Stevens filed a dissenting opinion, in which Justices Souter, Ginsberg, and Breyer joined. Additionally, Justice Ginsburg filed a dissenting opinion, in which Justices Souter, and Breyer joined.<sup>140</sup>

The plaintiff, Gebser, asserted that the standards used under Title VII, covering discrimination in the workplace when a supervisor sexually harasses an employee, should guide the Court. The plaintiff pointed to *Franklin v. Gwinnett County Public Schools* where the Court analogized Title IX to Title VII as follows: "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex.' We believe the same rule should apply when a teacher sexually harasses and abuses a student."<sup>141</sup> Plaintiff, relying on the comparison in *Franklin* of teacher-student harassment with supervisor-employee harassment, argued that agency principles/*respondeat superior* should apply.

The plaintiff and *amicus curiae* advanced two possible standards under which the school district would be liable for Waldrop's sexual abuse of Gebser. First, relying on a 1997 "Policy Guidance" issued by the Department of Education, a school district would be held liable under Title IX where a teacher is "aided in carrying out the sexual harassment of students by his or her position of authority with the institution" irrespective of whether school district officials had any knowledge of the harassment and irrespective of their response upon becoming aware.<sup>142</sup> This rule is an expression of vicarious liability in which a teacher's authority over a student facilitates the harassment.<sup>143</sup> The second theory advanced by the plaintiff was

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140. *Id.* at 276.

141. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75 (1992) (citation omitted) (brackets in original) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

142. *Gebser*, 524 U.S. at 282 (quoting 62 Fed. Reg. at 12039).

143. *Id.*

constructive knowledge.<sup>144</sup> Under this theory, the school district would be liable when the school authorities knew or should have known about the harassment but failed to uncover it and eliminate it.<sup>145</sup> Both of these theories expand the range of situations under which the school district would be held liable. The court of appeals rejected these theories in favor of an actual knowledge standard.<sup>146</sup>

The majority's analysis of the petitioner's asserted rights of recovery began with a clarification of the *Franklin* decision. The Court argued that *Franklin* did not resolve whether Title IX was violated under vicarious liability or constructive notice standards.<sup>147</sup> The quotation from *Franklin* citing *Meritor Savings Bank FSB v. Vinson* was made with regard to the general proposition that sexual harassment can constitute discrimination based on sex under Title IX.<sup>148</sup> Moreover, the Court stated that the agency principle aspect of Title VII rests on an aspect of that legislation that is missing in Title IX.<sup>149</sup> Therefore, Title IX contains no comparable reference to an educational institution's agents; thus agency principles or *respondeat superior* do not apply in Title IX cases.<sup>150</sup>

The Court further distanced Title IX from Title VII by noting that Title VII contains an express private cause of action and provides for relief in the form of monetary damages.<sup>151</sup> As Congress made no specific provisions for Title IX, the private right of action against an institution that violates Title IX is judicially implied.<sup>152</sup> Because the private right of action under Title IX is judicially implied, the courts "have a measure of latitude to shape a sensible remedial scheme that best comports with the statute."<sup>153</sup> It is this "measure of latitude" that went unfulfilled in the eyes of the dissent.<sup>154</sup> The majority ascertained that a judicially implied remedy called for the Court to

144. *Id.*

145. *Id.*

146. *Doe ex rel. Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223, 1226 (5th Cir. 1997), *aff'd*, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 293 (1998).

147. *Gebser*, 524 U.S. at 283.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 283-84.

153. *Id.* at 284.

154. *Id.* at 293 (Stevens, Souter, Ginsburg, & Breyer, JJ., dissenting).

fashion a remedy that was not at odds with the statutory structure and the purpose of the law. The purpose of Title IX is to rid educational institutions that receive federal funds of gender-based discrimination. It is difficult to imagine a more gender-based discriminatory act than an employee with whom the school entrusts its students sexually abusing a student while aided in the abuse by the teacher-student relationship. Unfortunately, the majority developed a different viewpoint.

The majority acknowledged that the general rule in *Franklin* was that all appropriate relief is available in an action brought to vindicate a federal right; however, it immediately clarified this position by stating that the rule must be reconciled with congressional purpose.<sup>155</sup> "The 'general rule,'" they asserted, "yields where necessary to carry out the intent of Congress or to avoid frustrating the purposes of the statute involved."<sup>156</sup> Even though the High Court quoted Title IX objectives as "avoid[ing] the use of federal resources to support discriminatory practices" and providing "individual citizens effective protection against those practices,"<sup>157</sup> the majority held that recovery for sex discrimination perpetrated by a teacher could not be permitted under the theories of *respondet superior* or constructive notice without actual notice to a school official.<sup>158</sup> In other words, even though a school is prohibited from discriminating against students, a school district is not liable for the actions of an employee when he or she sexually abuses one of his or her students even though it was the employment relationship that aided the abuse. Also, a school district is not liable for violating Title IX unless the school officials received actual notice of the abuse, which often takes place in secret. The school district is not liable if through supervisory diligence it should have known about the abuse. If the school officials do nothing and the student who is being sexually exploited by a teacher does not come forward, chances are the abused student will have no recourse to appropriate relief for the injury.

The Court analyzed what it thought Congress would have said had it addressed the issue of a private right of recovery of

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155. *Id.* at 285.

156. *Id.* (quoting *Guardians Assn. v. Civ. Serv. Commn. of City of N.Y.*, 463 U.S. 582, 595 (1983) (plurality)).

157. *Id.* at 286 (quoting *Cannon*, 441 U.S. at 704).

158. *Id.* at 292.

damages for violation of Title IX. "When Title IX was enacted in 1972, the principal civil rights statutes [referring to Title VII] containing an express right of action did not provide for recovery of monetary damages at all, instead allowing only injunctive and equitable relief."<sup>159</sup> Congress did not make damages available under Title VII until 1991 and then limited the amount recoverable in any one case.<sup>160</sup> The Court argued that since Congress limited damage awards for Title VII, Congress did not intend to make available unlimited damage awards under Title IX.<sup>161</sup>

This contractual framework distinguishes Title IX from Title VII, "which is framed in terms not of a condition but of an outright prohibition."<sup>162</sup> Title VII applies to all employers having over fifteen employees without regard to federal funding and aims broadly to eradicate discrimination throughout our economic system. To further distinguish Title VII from Title IX, the Court noted that Title VII seeks to make persons whole for injuries suffered through past discrimination.<sup>163</sup> Whereas Title VII seeks to compensate victims of discrimination, Title IX focuses on protecting individuals from discriminatory practices.<sup>164</sup> The reasoning of the majority seems somewhat convoluted and paints a picture of a Congress that clearly will interfere in a "free-market" system to gain an objective—the protection of adults from discrimination. How the eradication of discrimination is different from protecting individuals from discriminatory practices does not seem apparent, yet it is one of the defining differences between the two pieces of civil rights legislation that dictates the degree of protection that the federal government is willing to extend, according to the majority of the Court. This view also supports the contention that the federal government is more willing to regulate and hold non-recipients of federal funds more accountable for their actions than they are willing to hold those entities that receive direct federal assistance accountable. This seems to be an anomalous situation. On the one hand, if a business is not receiving any federal help, the government will oversee it with greater scru-

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159. *Id.* at 285.

160. *Id.* at 285–86.

161. *Id.* at 286.

162. *Id.*

163. *Id.* at 287.

164. *Id.*

tiny than those entities that receive a direct subsidy. It would appear that the government, through complicity of financial assistance, is less willing to further federal objectives with those whom it supports directly than those with whom the relationship is tangential. It should also be noted that Title VII is aimed at the adult population while Title IX clearly targets a student population. In other words, according to the Court, Congress is more willing to protect adults (Title VII) than children (Title IX).

Amy Busa compared the standard of liability under Title VII in *Faragher v. City of Boca Raton* and *Burlington Industries v. Ellerth* with the *Gebser* standard.<sup>165</sup> *Faragher* and *Burlington* utilized employer liability through agency principles, a theory of recovery denied to schoolchildren. "This is true despite the fact that a school has a greater duty to protect its students than an employer has for its employees."<sup>166</sup>

The contractual nature of Title IX became the touchstone for the Court's argument. The Court was concerned that recipients of federal funds had not received notice of potential liability for damages under Title IX.<sup>167</sup> Justice O'Connor believed that Congress did not intend to allow recovery in damages on the principles of vicarious liability or constructive notice because their means of enforcement are not predicated on actual notice to the officials.<sup>168</sup> Since the statute envisions enforcement through an administrative agency, the agency cannot withhold federal funds until the appropriate school officials had been notified of possible non-compliance.<sup>169</sup> Upon notification of a violation of Title IX, the recipient may be required to take effective remedial action but is not required to pay monetary damages.<sup>170</sup>

Presumably, a central purpose of requiring notice of the violation "to the appropriate person" and an opportunity for voluntary compliance before administrative enforcement proceed-

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165. Amy Busa, Student Author, *Two Steps Forward, One Step Back: The Supreme Court's Treatment of Teacher-Student Sexual Harassment in Gebser v. Lago Vista Independent School District*, 34 Harv. Civ. Rights-Civ. Libs. L. Rev. 279 (1999); see *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Gebser*, 524 U.S. 274.

166. Busa, *supra* n. 165, at 280.

167. *Gebser*, 524 U.S. at 287.

168. *Id.* at 288.

169. *Id.*

170. *Id.* at 288-89.

ings can commence is to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures.<sup>171</sup>

The argument is that where a school district had no knowledge of the teacher's discriminatory actions, the school district had no opportunity to take corrective action to end or limit the harassment.

The Court concluded that the express remedial scheme under Title IX is predicated upon notice to an "appropriate person."<sup>172</sup> The Court defined an appropriate person as one who "has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf."<sup>173</sup> In addition, after an appropriate school official has received actual knowledge of the sexual abuse, the response to the complaint must amount to deliberate indifference.<sup>174</sup> In other words, the school official receiving notice of the alleged abuse "refuses to take action to bring the recipient into compliance."<sup>175</sup>

This is a high standard to meet for a statute aimed at protecting individuals from discriminatory practices in educational settings. This decision by the Supreme Court was made within the context of concluding statements, which acknowledged that "[t]he number of reported cases involving sexual harassment of students in schools confirms that harassment unfortunately is an all too common aspect of the educational experience."<sup>176</sup> Justice O'Connor noted the "extraordinary harm" a student suffers when subjected to abuse by a teacher and that the teacher's

171. *Id.* at 289.

172. *Id.* at 290.

173. *Id.*

174. *Id.*; see *Kinman*, 171 F.3d at 610 (deliberate indifference is "turn[ing] a blind eye and dol[ing] nothing" (quoting *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 467 (8th Cir. 1996), *overruled*, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998)); *Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 219 (5th Cir. 1998) ("[t]he deliberate indifference standard is a high one. Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference."); *Ericson v. Syracuse U.*, 35 F. Supp. 2d 326, 328 (S.D.N.Y. 1999) (deliberate indifference is the "purposeful failure . . . to adequately respond"); *Doe ex rel. Doe v. U. of Ill.*, 138 F.3d 653, 667-68 (7th Cir. 1998) ("it should be enough to avoid Title IX liability if school officials investigate aggressively all complaints of sexual harassment and respond consistently and meaningfully when those complaints are found to have merit."), *vacated*, 526 U.S. 1142 (1999).

175. *Gebser*, 524 U.S. at 290.

176. *Gebser*, 524 U.S. at 292.

reprehensible conduct undermines the basic purpose of the educational system.<sup>177</sup> However, until “Congress speaks directly on the subject . . . we will not hold a school district liable in damages under Title IX for a teacher’s sexual harassment of a student absent actual notice and deliberate indifference.”<sup>178</sup>

## 2. *Dissenting opinion in Gebser*

In pertinent part, the dissent argued that the Supreme Court has stood for the proposition that sexual harassment of a student by a teacher violates the duty of Title IX—assumed by the school district in exchange for federal funds—not to discriminate on the basis of sex. Justice Stevens asserted in the dissent that the unanimous decision in *Franklin* was not explicitly overturned by the majority in *Gebser* and is, therefore, precedent.<sup>179</sup> *Franklin* stated that a teacher’s intentional acts of sexual abuse of a student violate Title IX.<sup>180</sup> Therefore, because Waldrop’s sexual abuse of Gebser was also intentional, the abuse was a violation of Title IX. Furthermore, Waldrop’s acts “occurred during, and as part of, a curriculum activity in which he wielded authority over Gebser that had been delegated to him by [the school district]. Moreover, it is undisputed that the activity was subsidized, in part, with federal moneys.”<sup>181</sup>

After establishing the viability of *Franklin*, the dissent returned to the issue of agency principles discussed in *Franklin*—“when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor “discriminate[s]” on the basis of sex.’ We believe that the same rule should apply when a teacher sexually harasses and abuses a student.”<sup>182</sup> The analogy of supervisor to teacher and subordinate in the workplace to student is clear. From that starting point, Justice Stevens argued that the majority’s rejection of *respondeat superior* liability is unfounded. The majority’s holding “is at odds with settled principles of agency law, [the law governing respondeat

177. *Id.*

178. *Id.* at 292–93.

179. *Id.* at 297 (Stevens, Souter, Ginsburg, & Breyer, JJ., dissenting).

180. *Franklin*, 503 U.S. at 74–75; *Gebser*, 524 U.S. at 298–99 (Stevens, Souter, Ginsburg, & Breyer, JJ., dissenting).

181. *Gebser*, 524 U.S. at 298 (Stevens, Souter, Ginsburg, & Breyer, JJ., dissenting).

182. *Id.* at 297 (Stevens, Souter, Ginsburg, & Breyer, JJ., dissenting) (citations omitted) (brackets in original) (quoting *Franklin*, 503 U.S. at 75 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986))).

superior or vicarious liability] under which the district is responsible for Waldrop's misconduct because 'he was aided in accomplishing the tort by the existence of the agency relation'.<sup>183</sup> The sexual abuse of Gebser by her teacher was made possible because of the powerful influence that a teacher has over a student by reason of the *in loco parentis* authority that the school district had delegated to him. "As a secondary school teacher, Waldrop exercised even greater authority and control over his students than employers and supervisors exercise over their employees. His gross misuse of that authority allowed him to abuse his young student's trust."<sup>184</sup> The tutelary authority that Waldrop exercised over Gebser was not unlike that wielded by a parent over a child.

The dissent relied on the guidelines from the United States Department of Education as support for the applicability of agency principles when a teacher sexually abuses a student. The guidance from the Department of Education, the agency with authority over the administration and enforcement of Title IX, stated that if one of a school district's teachers "was aided in carrying out the sexual harassment of students by his or her position of authority with the institution" the school district violates Title IX.<sup>185</sup> The Department of Education's interpretation of Title IX supports the conclusion that the school district is liable for Waldrop's sexual abuse of his student, which was made possible only by Waldrop's affirmative misuse of his authority as her teacher. This is the essence of agency liability; when an employee entrusted with authority by an employer harms another person through the exercise of the granted authority, the employer is liable. This is what Waldrop did. He harmed his student through the authority of his position as a teacher. Without that authority it is unlikely that Waldrop would have had the means and opportunity to harm Gebser.

Agency theory, through common law, imposes liability on employers to induce them to adopt and enforce practices that will minimize the danger to third parties. The dissent argued that the majority created the opposite incentive. "As long as

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183. *Id.* at 298-99 (Stevens, Souter, Ginsburg, & Breyer, JJ., dissenting) (footnote omitted) (quoting *Restatement (Second) of Agency* § 219).

184. *Id.* at 299 (Stevens, Souter, Ginsburg, & Breyer, JJ., dissenting).

185. *Id.* at 300 (Stevens, Souter, Ginsburg, & Breyer, JJ., dissenting) (quoting 62 Fed. Reg. at 12039).

school boards can insulate themselves from knowledge about this sort of conduct, they can claim immunity from damages liability.”<sup>186</sup> The dissent went so far as to state that the majority bears the burden of justifying its “dramatic” departure from the established common law rule of agency, and in the opinion of the dissent, the majority failed to shoulder that burden.<sup>187</sup> The dissent supports many of the arguments advanced in the *respondeat superior* section of this paper.

### 3. *Critique of Gebser*

Education is one of the great helping professions. It is founded on a trust given by society and parents that the well being of children will be primary and that the best interests of students shall be served by the actions of those in the profession. It is hard to imagine a viler act of a professional educator than the sexual abuse of those that have been placed in his or her charge. Title IX has been recognized as a tool and a remedy to help make our classrooms safe from discrimination in its overt and covert forms. While it is well settled that schools cannot ensure the safety of their students, they can be held accountable when they do not act in a reasonable and professional manner.

The majority’s standard of actual knowledge of discriminatory behavior by an official with authority to remedy the situation who acts with deliberate indifference to the complaint is too high a standard to protect our nation’s schoolchildren. Title IX was enacted to prevent the abuse of students through discriminatory conduct. When the bar of relief is set so high, the student is denied access to the relief.<sup>188</sup> The majority did not take into consideration the special conditions that exist in a school which allow the sexual perpetrator to hide his or her actions from view and the relative powerlessness of students to speak out on such matters. The dissent of Justice Stevens shreds the majority’s position and properly asserts the viability of *respondeat superior* through agency principles. For all practical purposes, the majority has rendered Title IX as a private

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186. *Id.* at 300–01 (Stevens, Souter, Ginsburg, & Breyer, JJ., dissenting).

187. *Id.* at 301 (Stevens, Souter, Ginsburg, & Breyer, JJ., dissenting).

188. Busa, *supra* n. 165, at 309 (“[b]y applying such a harsh standard for a school district’s liability under Title IX, the Court has not only created a high hurdle for a potential plaintiff, but also ensured that Title IX will not be enforced effectively”).

right of recovery toothless. The dissent was correct when it asserted, “[a]s a matter of policy, the Court ranks protection of the school district’s purse above the protection of immature high school students.”<sup>189</sup> This decision does not send a clear message to school officials that the sexual abuse of our students will not be tolerated. The Supreme Court should have sent that message.

## VI. SCHOOL AS PARENT: THE DUTY TO PROTECT

Schools, like parents, have a duty to protect children entrusted to their care. “The public expects schools to provide a safe haven that takes the place of parents during school hours, protect their children, and provide their children with a proper learning environment.”<sup>190</sup> Every state has recognized the parents’ duty, in part, by passing child abuse statutes.<sup>191</sup> Parents who fail to protect their child may have their parental rights terminated. This is not a matter of little import. The United States Supreme Court in *Prince v. Massachusetts* held that “[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”<sup>192</sup> Yet parental rights are terminated when parents fail to protect their children. In Tyler, Texas two girls were awarded \$3.4 million when they successfully sued their parents for sexual abuse.<sup>193</sup> The stepfather was molesting the girls an average of two or three times a month.<sup>194</sup> When the girls told their mother, she simply replied they should say “no” the next time.<sup>195</sup> In Kentucky, it was established that parents

189. *Gebser*, 524 U.S. at 306.

190. Cary Silverman, *School Violence: Is It Time to Hold School Districts Responsible for Inadequate Safety Measures?* 145 *Educ. L. Rptr.* 535, 553 (2000).

191. See Julie Solomon Rappaport, Student Author, *The Legal System’s Response to Child Abuse: A “Shield” for Children or a “Sword” Against the Constitutional Rights of Parents?*, 9 *N.Y.L. Sch. J. Hum. Rights* 257, 265 (1991).

192. *Prince v. Mass.*, 321 U.S. 158, 166 (1944).

193. Amy L. Nilson, Student Author, *Speaking Out Against Passive Parent Child Abuse: The Time Has Come to Hold Parents Liable for Failing to Protect Their Children*, 37 *Hous. L. Rev.* 253, 254 (2000).

194. *Id.*

195. *Id.*

have an affirmative duty to prevent physical injury to children.<sup>196</sup>

In addition, children in jurisdictions that do not recognize the doctrine of parental immunity can sue their parents.<sup>197</sup> Schools act *in loco parentis*. But, is there a comparable duty between the parent and schools serving *in loco parentis*? Parents face a devastating loss for their failure to protect. For example, in an Illinois case, a mother lost custody of her son when her boyfriend broke the boy's leg.<sup>198</sup> However, when a school fails to protect a child there is no remedy against the school that is comparable to the parent losing custody of the child. The child has a property right to attend school. Consequently, removing a child from an abusive school is not possible, unlike removing a child from an abusive home. This would cause double harm to the child. However, should the school avoid its custodial and tutelary guardian role by not being held accountable in some manner when a school employee sexually abuses a student?

*Respondeat superior* has consistently failed to hold schools liable in state courts. Likewise, no constitutional duty to protect students has been imposed. Turning to the federal government for a redress of harms suffered at the hands of a state employed educator has resulted in the Title IX bar being set so high that for most children it is out of reach. The dissent, not the majority, found an opportunity to hold schools accountable for the sexual abuse of a child. The dissent noted the connection of trust involved in the sexual abuse of a student; a trust derived, in part, from the educator acting in the place of the parent. Similarly, the Supreme Court of New Hampshire anchored the duty to protect students on the "role of schools as parental proxies over minor students."<sup>199</sup>

It takes no intuitive leap or well-reasoned analysis to conclude that children should be able to attend school and be free from sexual abuse visited upon them by their teachers, princi-

196. *Lane v. Ky.*, 956 S.W.2d 874, 875 (Ky. 1997).

197. E.g. *Petersen v. City and County of Honolulu*, 462 P.2d 1007 (Haw. 1969); *Nocktonick ex rel. Matson v. Nocktonick*, 611 P.2d 135 (Kan. 1980); *Wood ex rel. Wood v. Wood*, 370 A.2d 191 (Vt. 1977); *Elkington ex rel. C v. Foust*, 618 P.2d 37 (Utah 1980).

198. *Ill. v. Stanciel*, 606 N.E.2d 1201, 1204-05 (Ill. 1992). The mother continued the relationship with the boyfriend after she regained custody and allowed the boyfriend to discipline the child. Eventually, the boyfriend beat the child to death. The Illinois Supreme Court found that the mother's conduct supported a showing of common criminal design sufficient to convict her of murder based on accountability.

199. *Schneider v. Plymouth St. College*, 744 A.2d 101, 106 (N.H. 1999).

pals, or school bus drivers. Reform efforts that target curriculum, school funding, and teacher preparation, but do not help to make the classroom a more secure place for children make a false promise of improvement. Efforts that target improving the workplace for adults but neglect students offer little hope of improving our schools in any meaningful way.<sup>200</sup> If there is any place where a child can go and be free from the fear of sexual abuse and sexual harassment, it should be the public schools. Instead, public schools are an environment where the students are too often harassed by their peers and even molested and assaulted by school personnel.

Parents are held responsible for their duty to protect their children. The dissent in *Seal v. Morgan* argued that “in addition to their duty to educate, schools act *in loco parentis*.”<sup>201</sup> The dissent in *Seal* used *in loco parentis* to support a strict zero-tolerance policy to ensure students’ safety.<sup>202</sup> The doctrine of *in loco parentis* supports the school’s duty to protect students from harm in general, including the sexual abuse perpetrated by a school employee. Should not schools be held similarly responsible when they act in the role of the parent discharging its custodial and tutelary role and fail to protect students from sexual abuse perpetrated inside the schoolhouse gate?

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200. See Todd A. DeMitchell & Richard Fossey, *The Limits of Law-Based School Reform: Vain Hopes and False Promises* (Technomic Publ. Co. 1997).

201. *Seal v. Morgan*, 229 F.3d 567, 582 (6th Cir. 2000) (Suhrehrich, J., dissenting in part).

202. *Id.*