

**A NEW SHERIFF IN TOWN:
ARMISTICE IN THE WAR ON DRUGS AND
STUDENTS' CIVIL RIGHTS**

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For nearly thirty years, the United States government has been at war with its children over their use of drugs in schools.¹ The government's victories in that war have been Pyrrhic and its victims many.² Setting aside for purposes of this analysis how the government became set on this course of war, one must acknowledge the weapons and battle strategies that the government has adopted, with both its costs and its failures.³ For instance, the millions of dollars the U.S. government has funneled into grants to pay for the Drug Abuse Resistance Education (DARE) program has been throwing good money after bad for years.⁴ In another instance, the Court's willingness to suspend students' civil rights in favor of in-school drug searches has proved to be a failure, both in principle and in fact.⁵ The strategies to date—touted by politicians and supported by the polity—have been antagonistic, costly, and futile.⁶

Schools should have known better than to turn that responsibility over to outside forces and influences. Instead, they should have relied on their own resources and their own missions—the educational

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¹ See generally Susan P. Stuart, *War as Metaphor and the Rule of Law in Crisis: The Lessons We Should Have Learned from the War on Drugs*, 36 S. ILL. U. L.J. 1 (2011) (discussing the war on drugs and its impact on students) [hereinafter *Stuart Metaphor*].

² See generally Susan P. Stuart, *When the Cure Is Worse than the Disease: Student Random Drug Testing & Its Empirical Failure*, 44 VAL. U. L. REV. 1055 (2010) [hereinafter *Stuart Drug Testing Failure*].

³ See *infra* Part II.

⁴ See *infra* notes 179-80 and accompanying text.

⁵ See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

⁶ See *infra* Part II.

function of teaching and training—as the better course of action. On the other hand, what public school is not desperate for additional federal funds, even if for purposes that are questionable at best? Now schools and school officials may not have a choice.⁷

The federal government has finally decided to scrap the battle plans for war and instead to engage school drug problems with prevention,⁸ a tactic that—although enjoying mixed success in the schools because the government has spent so little on prevention⁹—at least is neither a total failure nor a source of harm that the current tactics enjoy.¹⁰ In doing so, the government will require schools and school officials to retreat to their fallback position, the institution's true function of education, rather than to deal with drugs in schools in response to political expediency and fear. With the Obama Administration's change in focus on this country's problems with drugs, the government will encourage and perhaps even force schools to employ the arsenal that should be their most natural resource, education.

The government's new focus on school drug problems makes sense from the perspectives of both empirical evidence and philosophical strategy.¹¹ Long criticized for its improper focus on police enforcement and its treatment of students as combatants, the War on Drugs has proved time and time again to be futile and misguided, that its "stick" method of teaching abstinence through fear—a somewhat biblical premise that one should punish both the sin and the sinner—is an abject failure. Indeed, studies have shown that some of those tactics, like student drug testing, increase rather than decrease student drug use.¹² Such tactics are a bit hard to defend when the educational function works best

⁷ See *infra* notes 31-44 and accompanying text.

⁸ See *infra* notes 31-44 and accompanying text.

⁹ Martha Mendoza, *U.S. Drug War Has Met None of Its Goals*, MSNBC.COM (May 13, 2010), http://www.msnbc.msn.com/id/37134751/ns/us_news-security/ (noting that the U.S. has spent more on law enforcement than treatment and prevention).

¹⁰ See, e.g., *Stuart Drug Testing Failure*, *supra* note 2, at 1061-65 (describing the inadequacies and failures in student drug testing).

¹¹ See *infra* notes 40-44 and accompanying text.

¹² See RYOKO YAMAGUCHI ET AL., *YOUTH, EDUCATION, AND SOCIETY OCCASIONAL PAPERS: DRUG TESTING IN SCHOOLS: POLICIES, PRACTICES, AND ASSOCIATION WITH STUDENT DRUG USE* 5 (2003), available at http://www.monitoringthefuture.org/pubs/occpapers/yes-occ_paper02.pdf.

in the “carrot” environment, by embracing the sinner and teaching him how not to sin again. The premise of this Article, then, is that the U.S. government’s change in focus will require schools and school officials to reassess their punitive approach to school drug problems. In tandem with that reassessment, schools will have to embrace alternatives that are compliant with the new approach, alternatives that have always been available to schools but have been underused because there was no money in them.

Part I introduces the new paradigm that the Obama administration, and most experts, tout as the better approach to school drug problems.¹³ Part II contrasts the current militaristic and law enforcement approaches that school districts have employed for the past two or three decades.¹⁴ That discussion tackles the practical issues that have plagued school districts’ approaches to the War on Drugs in schools and notes the logical points of exit that will move school districts forward into the new legal paradigm.¹⁵ Last, Part III sets out some legal and policy considerations schools and school officials might consider in going forward and implementing the government’s new preventive approach.¹⁶ This effort, hopefully, will suggest policy and legal solutions for schools with school drug problems to employ, which will be congruent with the government’s new approach. These solutions will thereby root out the destructive elements planted by the War on Drugs that have proved so misguided and harmful to both students and the educational institutions and their true function.¹⁷

I. “HE RODE A BLAZING SADDLE, HE WORE A SHINING STAR”¹⁸

To date, the overall War on Drugs waged by the U.S. government has approached the problem from an aggressive law enforcement, indeed even militaristic, approach: drug users should be in jail, and student drug users should be punished. In what would seem to be a civil war against its own citizens, the United States has spent billions of

¹³ See *infra* Part I.

¹⁴ See *infra* Part II.

¹⁵ See *infra* Part II.

¹⁶ See *infra* Part III.

¹⁷ See *infra* Part IV.

¹⁸ *BLAZING SADDLES* (Warner Bros. Pictures 1974).

dollars of public money chasing an elusive perpetrator, who often turned out to just be a teenager. The flaws in this strategy were quickly apparent.¹⁹ However, in spite of the public's increasingly dim view of the war, the U.S. government continued to wage it:

While past research suggests that the public initially applauded this [criminal justice] approach, our data suggest that toward the end of the 1990's [sic] the public may have been changing its mind. Opposition to the war on drugs has been growing among elite and academic observers for some time. This opposition may be gaining popular support in a significant portion of the country. . . . [These results] suggest that the decision to embrace the drug war may not be as politically safe as was once assumed.²⁰

In addition, the public has not gotten its money's worth; for a war that has lasted nearly forty years and cost billions of dollars,²¹ little has changed in the nation's drug problem.²²

In the smaller microcosm of public schools, for instance, use of illicit drugs by seniors in the preceding twelve months took a roller coaster ride from the late 1970s to mid-1990s but now seems to be

¹⁹ See, e.g., Stuart *Drug Testing Failure*, *supra* note 2, at 1069-75 (discussing adolescent responses to drug-testing procedures).

²⁰ Eric D. Lock et al., *Battle Fatigue: Is Public Support Waning for "War"-Centered Drug Control Strategies?*, 48 CRIME & DELINQ. 380, 395 (2002), available at <http://cad.sagepub.com/content/48/3/380>.

²¹ The federal government alone budgeted \$238 billion for "substance abuse and addiction." NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUM. UNIV., SHOVELING UP II: THE IMPACT OF SUBSTANCE ABUSE ON FEDERAL, STATE AND LOCAL BUDGETS iii (2009), available at <http://www.casacolumbia.org/articlefiles/380-ShovelingUpII.pdf>. As for state spending, only public education out-ranks expenditures for substance abuse and addiction. *Id.* at ii.

²² A recent World Health Organization study shows that "[i]n general, the US ha[s] among the highest levels of use of all drugs." Louisa Degenhardt et al., *Toward a Global View of Alcohol, Tobacco, Cannabis, and Cocaine Use: Findings from the WHO World Mental Health Surveys*, 5 PUB. LIBR. SCI. MED. 1053, 1061 (2008), available at <http://www.plosmedicine.org/article/info:doi/10.1371/journal.pmed.0050141>.

stabilizing at approximately forty percent.²³ By the end of President George W. Bush's administration, nearly half of all high school seniors had tried illicit drugs before graduation, despite the war raging all around them.²⁴ The time was fast approaching to stop hitting ourselves over the head with that hammer.²⁵

President Nixon's original initiatives in the War on Drugs—at least in theory—were aimed at the treatment of drug addiction and slowing the demand for illegal drugs.²⁶ Later administrations gave lip service to the demand problem, while supply problems were heavily funded, perhaps because the latter were so politicized.²⁷ That politicization was partly philosophical but also practical.²⁸ For the past forty years, large government funding requests have faced a three-pronged fund-raising and political dilemma for getting money from Congress and thus from the American public: (1) no one questions costs attributable to “national defense” and hence for a war; (2) fighting the supply side of the drug war is more marketable as “tough on crime” because it yields tangible and instant results, whereas the slower efforts to treat and prevent demand are intangible and less marketable; and (3) intolerance, retribution, and punishment are more popular values in American public life than forgiveness, reminiscent of rock-ribbed Puritanical control as the best way to conduct a society.

As a result of these intertwined and “universally” held assumptions for funding the War on Drugs, the slower, more methodical, yet more successful approach of preventing drug use rather than punishing

²³ See RYOKO YAMAGUCHI ET AL., *supra* note 12, at 1.

²⁴ NAT'L INST. ON DRUG ABUSE ET AL., HIGH SCHOOL AND YOUTH TRENDS 3 (2011), available at <http://www.drugabuse.gov/pdf/infofacts/HSYouthTrends.pdf>. Perhaps worse yet, over seventy percent had used alcohol. *Id.*

²⁵ See, e.g., Mendoza, *supra* note 9 (noting that the United States has continued to spend more of its “drug budgets on law enforcement rather than treatment or prevention”).

²⁶ See Stuart *Metaphor*, *supra* note 1, at 5-8, 15 (explaining President Nixon's initial approach to the War on Drugs included treatment and prevention).

²⁷ See, e.g., Mendoza, *supra* note 9 (noting that, while President Obama has stated drug use is a public health issue and he will attempt to reduce drug use, he has also increased spending on “law enforcement to record levels both in dollars and in percentage” of money spent in the drug budgets).

²⁸ See, e.g., Stuart *Metaphor*, *supra* note 1, at 15-17 (setting out the political evolution in the executive branch for the War on Drugs).

it has gained little traction.²⁹ But the Obama Administration is taking a stab at this preventative approach.³⁰

Obama's drug czar, Gil Kerlikowske, is focusing on treatment over punishment, thereby focusing on the U.S. drug problem as a matter of public health.³¹ The first two fiscal-year drug-policy budgets of the Obama Administration revealed very little change in the focus of its expenditures from those of the previous administration.³² Indeed, the 2011 fiscal-year budget did not seem to have made any significant funding shifts,³³ but by fiscal year 2012, the increases in spending for prevention and treatment are offset by a significant decrease in spending for international law enforcement.³⁴

²⁹ See, e.g., Stuart *Metaphor*, *supra* note 1, at 18-23 (describing the emphasis on congressional spending for law enforcement efforts in schools).

³⁰ "Quietly, free of headlines and fanfare, the Obama White House is toning down the bellicose 'war-on-drugs' position that's defined the country's narcotics policy for the last 25 years." *Id.*

³¹ See, e.g., Gary Fields, *White House Czar Calls for End to 'War on Drugs'*, WALL ST. J., May 14, 2009, at A3.

³² Compare THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY: FY 2007 BUDGET SUMMARY 1-5 (2006), available at <http://www.ncjrs.gov/pdffiles1/ondcp/212977.pdf> (showing that domestic and international law enforcement expenditures to control supply constituted about two-thirds of the drug budgets from 2005 to 2007), with THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY: FY 2009 BUDGET SUMMARY 1-8 (2008), available at <http://www.ncjrs.gov/pdffiles1/ondcp/fy09budget.pdf> (showing that domestic and international law enforcement expenditures to control supply constituted about two-thirds of the drug budgets from 2007 to 2009), and THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY: FY 2010 BUDGET SUMMARY 1-9 (2009), available at <http://www.ncjrs.gov/pdffiles1/ondcp/fy10budget.pdf> (showing that domestic and international law enforcement expenditures still constituted nearly two-thirds of the drug budgets from 2008 to 2010).

³³ THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY: FY 2011 BUDGET SUMMARY 1-12 (2010), available at <http://www.ncjrs.gov/pdffiles1/ondcp/fy11budget.pdf>. This failure to radically change budget priorities has been criticized. See, e.g., Sam Hananel, *New Drug Control Strategy Signals Policy Shift*, BOSTON.COM (May 11, 2010), http://www.boston.com/news/nation/washington/articles/2010/05/11/new_drug_control_strategy_signals_policy_shift/ (noting that some believe President Obama's "focus on treatment and prevention . . . is more rhetoric than reality at this point").

³⁴ OFFICE OF NATIONAL DRUG CONTROL POLICY, NATIONAL DRUG CONTROL BUDGET - FY 2012 FUNDING HIGHLIGHTS (2012), available at http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/fy12highlight_exec_sum.pdf. The gap between supply funding and demand funding is closed further in the 2013 fiscal-year

Furthermore, in May 2010, at least two months after the President submitted budget documents, the White House revealed its inaugural National Drug Control Strategy for 2010,³⁵ documenting an effort to refocus the War on Drugs to a campaign that emphasizes treatment and prevention³⁶:

President Obama’s 2010 *National Drug Control Strategy* reflects a comprehensive approach to reducing drug use and its consequences. Endorsing a balance of prevention, treatment, and law enforcement, the *Strategy* calls for a 15-percent reduction in the rate of youth drug use over 5 years and similar reductions in chronic drug use and drug-related consequences such as drug deaths and drugged driving. . . . [S]ome brief highlights of the *Strategy* . . . harness[] the collaborative strength of local, State, tribal, and Federal agencies, community-based organizations, and other nongovernmental partners.³⁷

Those highlights include:

Strengthen Efforts to Prevent Drug Use in Communities

. . . .

Seek Early Intervention Opportunities in Health Care

. . . .

Integrate Treatment for Substance Use Disorders into Health Care, and Expand Support for Recovery

proposed budget. See THE WHITE HOUSE, NATIONAL DRUG CONTROL BUDGET: FY 2013 FUNDING HIGHLIGHTS 13 (2012), available at http://www.whitehouse.gov/sites/default/files/ondcp/fy_2013_budget_highlights.pdf.

³⁵ *Administration Drug Control Strategy Raises Civil Liberties Concerns, Says ACLU*, AM. CIV. LIBERTIES UNION (May 12, 2010), <http://www.aclu.org/drug-law-reform-racial-justice/administration-drug-control-strategy-raises-civil-liberties-concerns->.

³⁶ THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY 2010 iii (2010), available at <http://www.whitehousedrugpolicy.gov/publications/ndcs10/ndcs2010.pdf>.

³⁷ *Id.* at 1.

. . . .

Break the Cycle of Drug Use, Crime, Delinquency, and Incarceration

. . . .

Disrupt Domestic Drug Trafficking and Production

. . . .

Strengthen International Partnerships

. . . .

Improve Information Systems for Analysis, Assessment, and Local Management[.]³⁸

Specific strategies include a thirteen-percent increase in funding prevention programs, early intervention by health-care professionals, and community-based antidrug programs.³⁹

Although Obama’s modest strategy has come under fire for containing only small steps in a different direction,⁴⁰ the overall change in orientation does establish a foundation for changing the public’s view from a War on Drugs to a more manageable and realistic public health problem that evidence-based solutions can better manage.⁴¹ Obama’s

³⁸ *Id.* at 1-4; *see also* THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY 2012 i (2012), available at http://www.whitehouse.gov/sites/default/files/ondcp/2012_ndcs.pdf.

³⁹ Hananel, *supra* note 33.

⁴⁰ *See, e.g., Administration Drug Control Strategy Raises Civil Liberties Concerns, Says ACLU, supra* note 35 (arguing that the government cannot continue to “lock up minor drug offenders while common sense solutions remain underfunded”); Washunate, *The 2010 Drug Control Strategy is still Anti-Science*, DAILY KOS (May 25, 2010), <http://www.dailykos.com/story/2010/5/25/866295/-The-2010-Drug-Control-Strategy-is-still-Anti-Science> (arguing for the repeal of the Controlled Substance Act and a more scientific approach to fighting drug use).

⁴¹ THE WHITE HOUSE, *supra* note 33, at 7; *see also* Alex Kreit, *Toward a Public Health Approach to Drug Policy*, ADVANCE: J. AM. CONST. SOC’Y ISSUE GROUPS, Sept. 2009, at 43, 44; *APA Applauds Evidence-Based Approach in New National Drug*

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strategy is not yet a complete turnaround from the disastrous punitive approach we have been funding, but it is a start:

Is this the strategy that I would have written? Not by a long shot. But is it the best strategy produced since the process started in 1989? Incomparably. . . . What it shows is a White House that has gotten over the ‘drug war’ and is ready to think about managing the drug problem.⁴²

And to the extent that the drug warriors feel left behind, then, indeed, the Obama White House is starting to turn that boat around.⁴³ Nowhere is Obama’s strategy more evident than in the U.S. Department of Education’s new approach to school-based drug prevention, which counters the increasingly large commitment that preceding administrations made to law enforcement in schools.⁴⁴

II. THAT WAS THEN, THIS IS NOW⁴⁵

Communities and perhaps even the school districts themselves are going to have to make a huge attitude adjustment if they are to make

Control Strategy, AM. PSYCHOL. ASS’N (May 11, 2010), www.apa.org/news/press/releases/2010/05/drug-control.aspx.

⁴² Mark Kleiman, *The Obama Drug Strategy*, THE REALITY-BASED COMMUNITY (May 2, 2010), www.samefacts.com/2010/05/drug-policy/the-obama-drug-strategy/. Mark Kleiman is a professor of public policy, whose focus is drug abuse and crime control policy at UCLA. *About Us: Mark Kleiman*, THE REALITY-BASED COMMUNITY, <http://www.samefacts.com/about/> (last visited Apr. 16, 2012). Kleiman was impressed by the new strategy’s efforts to focus on mainstream health care as integral to its success rather than to throw more money at current, unsuccessful programs, such as DARE and onerous laws designed to punish those with drug convictions. Kleiman, *supra*.

⁴³ See Michael Isikoff, *The White House Drug Czar’s Diminished Status*, NEWSWEEK (Apr. 30, 2010), <http://www.newsweek.com/blogs/declassified/2010/04/30/the-white-house-drug-czar-s-diminished-status.html> (noting that the White House drug czar position has become increasingly less important, while at the same time the man in that position, R. Gil Kerlikowske, is pushing for increased funding for treatment and prevention).

⁴⁴ See Stuart *Metaphor*, *supra* note 1, at 18-23 (outlining congressional spending on law enforcement efforts in schools).

⁴⁵ S.E. HINTON, *THAT WAS THEN, THIS IS NOW* (Speak 2003) (1971). An award-winning young adult novel, *That Was Then, This Is Now* is a year-long snapshot into

a preventive strategy successful.⁴⁶ A preventive approach to schools' drug problems is not being "soft on crime." Indeed, it is hard, and it is painful. It requires taking ownership of the problem and fixing that problem, not just putting the problem in jail. Neither is the preventive approach some "namby-pamby" exercise in making children feel better about themselves or stroking their self-esteem. Preventive programs place responsibility on the individual for the consequences of his or her acts. Contrary to prevailing public attitudes, preventive programs are more cost effective; indeed, they are not the complete waste of time and money that being "tough on crime" and treating children as enemies in a war have turned out to be.⁴⁷

For schools in particular, the transformation of their attitudes will require a comprehensive and critical assessment of their underlying punitive philosophy.⁴⁸ Schools spent the past twenty-plus years transforming their approach to student drug problems from an educational function to a police function.⁴⁹ They have been on a war footing for so long that some administrators do not know any other approach to dealing with drugs in schools. Adapting to the 2010 National Drug Control Strategy will be no easy task.⁵⁰ The War on Drugs has put school boards and administrators on red alert for so long and has tasked them with doing so much during this prolonged and ultimately doomed war that they need a reorientation to what they do best. The war had everything to do with other national and political agendas and nothing to do with children, except insofar as they became the enemy in order to perpetuate those agendas.⁵¹ Schools also must understand that funding for

the difficulties a sixteen-year-old encounters and the painful choices he makes about personal relationships and responsibilities, choices that are not necessarily kind but those that a teenager trying to be adult might make. It is not a teenager's triumphalist book, but it is a wise book. *See generally id.*

⁴⁶ *See infra* notes 49-51 and accompanying text.

⁴⁷ *See supra* notes 19-22 and accompanying text.

⁴⁸ *See infra* notes 49-54 and accompanying text.

⁴⁹ *See* Stuart *Metaphor*, *supra* note 1, at 15-29 (explaining the pressure that the three branches of the federal government put on schools to employ law enforcement measures).

⁵⁰ *See infra* notes 71-74 and accompanying text.

⁵¹ *See* Stuart *Metaphor*, *supra* note 1, at 30-35 (noting that politicians use the word "war" to push political agendas and portray drug users as enemies).

war tactics will no longer be as readily available. Perhaps most importantly, schools will have to give up acting as military police.⁵²

As schools had the task of frontline responsibilities in the War on Drugs, school officials transformed from disciplinarians into law enforcement personnel. Schools were not just responsible for enforcing school rules and disciplinary policies; they were also encouraged to locate and punish lawbreakers. Just as many schools took upon themselves their communities' responsibilities to enforce the law in house,⁵³ others took it to the next level, by actually referring the students to law enforcement officials.⁵⁴ By doing either, schools took a reactive approach to the problem and undermined the very efforts they should have been engaged in, namely teaching students and preventing drug abuse. By acting like law enforcement and actively integrating discipline with law enforcement, schools created several problems: criminalizing school discipline, undermining students' constitutional rights, and creating penal institutions rather than educational institutions. Untangling that relationship and changing the school/law enforcement dynamic may be a daunting task, especially in communities that have come to view schools as law enforcement entities.

The most visible evidence of the school/law enforcement entanglement is the increasing presence of law enforcement personnel in the schools.⁵⁵ This presence may be either the use of local police officers in the school district qua officers or the use of school security personnel (often referred to as "school resource officers") qua officers.⁵⁶ In the

⁵² See *infra* notes 78-85 and accompanying text.

⁵³ E.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 649-50 (1995). In *Vernonia*, a local school district imposed mandatory drug testing on its athletes in an effort to ameliorate serious discipline problems attributed to drug use and a student drug culture. *Id.* Other efforts at control had failed so the community voted to give the schools the authority to test. *Id.*

⁵⁴ See Josh Kagan, *Reappraising T.L.O.'s "Special Needs" Doctrine in an Era of School-Law Enforcement Entanglement*, 33 J.L. & EDUC. 291, 294 (2004) (discussing the "increasingly complex relationship between schools and law enforcement" since the Supreme Court decided *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)).

⁵⁵ Kagan, *supra* note 54, at 305-06.

⁵⁶ *Id.*; Jacqueline A. Stefkovich & Judith A. Miller, *Law Enforcement Officers in Public Schools: Student Citizens in Safe Havens?*, 1999 BYU EDUC. & L.J. 25, 32; Lisa H. Thurau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. SCH. L. REV. 977, 978 (2009-2010).

context of student drug use, either presence translates into two problems.⁵⁷ One problem is that schools routinely call in police, especially canine units, to conduct searches under the aegis of law enforcement authorities.⁵⁸ The second and more alarming problem is that the courts evaluate individual student searches conducted by these officers at the lower standard of reasonable suspicion set out in *New Jersey v. T.L.O.*,⁵⁹ rather than the standard of probable cause, because school personnel instigated the searches.⁶⁰

Further complicating the problem are those school resource officers whose roles have taken on specifically educational responsibilities.⁶¹ Although concern for school safety rather than drug enforcement impelled the increased police presence in schools, the War on Drugs blurred those lines. As a result, school resource officers' roles began to evolve from purely police duties to educational duties.⁶² These officers' "school safety" responsibilities range from patrolling campuses and dealing with truancy to teaching about crime prevention and drug prevention.⁶³ "[T]hey have assumed a variety of roles that range from strict enforcers of rules and laws, to surrogate parents, to counselors and coaches, and to 'an extra pair of hands' for school administrators."⁶⁴ As the police function has become entangled with the institutional function, "the relational dynamics between law enforcement authorities and school officials have shifted to such an extent that it is no longer possible to distinguish . . . between the law enforcement and public school contexts."⁶⁵

⁵⁷ See *infra* notes 58-60 and accompanying text.

⁵⁸ E.g., Stefkovich & Miller, *supra* note 56, at 58-59; Thureau & Wald, *supra* note 56, at 1010.

⁵⁹ *New Jersey v. T.L.O.*, 469 U.S. 325, 345-46 (1985).

⁶⁰ Kagan, *supra* note 54, at 319-20. See generally Stefkovich & Miller, *supra* note 56, at 45-53.

⁶¹ See *infra* notes 62-65 and accompanying text.

⁶² Thureau & Wald, *supra* note 56, at 1000.

⁶³ Stefkovich & Miller, *supra* note 56, at 32.

⁶⁴ Thureau & Wald, *supra* note 56, at 978.

⁶⁵ Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067, 1096 (2003); see also Peter Price, Comment, *When Is a Police Officer an Officer of the Law?: The Status of Police Officers in Schools*, 99 J. CRIM. L. & CRIMINOLOGY 541, 549-50 (2009).

Indeed, in some instances, police officers are displacing school officials as school disciplinarians but with the power to arrest.⁶⁶ Although the frequency of in-school arrests usually relates to violence prevention, such arrests might also be for simple status offenses, such as failure to comply with a dress code or disrupting class.⁶⁷ “[P]olice officers . . . often transform our schools from nurturing learning environments into virtual detention centers. Across the country, an alarming number of students . . . are being removed from mainstream educational environments for nonviolent violations of school policy, which many would consider to be typical childhood behavior.”⁶⁸

Even when law enforcement is not called upon or omnipresent in the schools, school administrators have deputized themselves as a paramilitary force to undertake law enforcement responsibilities through state or local discipline policies that are increasingly criminalizing student behavior.⁶⁹ Discipline codes in the schools are becoming more like criminal codes, especially in the types of discipline meted out.⁷⁰ Similarly, some state and local policies require reporting certain school disciplinary actions to the local police as a matter of routine.⁷¹ Indeed, it is more common than reasonable for school officials to turn over evidence of drug usage to law enforcement as evidence of criminal conduct without the usual constitutional protections that police would

⁶⁶ See Deborah N. Archer, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y.L. SCH. L. REV. 867, 868 (2009-2010); Jennie Rabinowitz, Note, *Leaving Homeroom in Handcuffs: Why an Over-Reliance on Law Enforcement to Ensure School Safety is Detrimental to Children*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 153, 162-64 (2006).

⁶⁷ Rabinowitz, *supra* note 66, at 163; Thureau & Wald, *supra* note 56, at 1005-06. “Teachers overuse the police for kids misbehaving in class. Some schools just won’t handle the kids through the protocol and call us in to arrest them. These teachers need to learn more classroom management skills.” Thureau & Wald, *supra* note 56, at 1005-06 (quoting a police sergeant).

⁶⁸ Archer, *supra* note 66, at 868 (citations omitted).

⁶⁹ See *infra* notes 70-73 and accompanying text.

⁷⁰ See generally Augustina Reyes, *The Criminalization of Student Discipline Programs and Adolescent Behavior*, 21 ST. JOHN’S J. LEGAL COMMENT. 73 (2006) (discussing how Texas schools have discipline codes based on a criminalization model).

⁷¹ Kagan, *supra* note 54, at 307-09.

have afforded the child if encountered on the street.⁷² Consequently, a violation of school rules can lead to juvenile, if not criminal, charges.⁷³

Perhaps the biggest culprit in the school/law enforcement entanglement is the increasingly common adoption of zero-tolerance policies in school disciplinary codes, especially related to drugs and violence in schools.⁷⁴ “Zero tolerance generally is defined as a school district policy that mandates predetermined consequences or punishment for specific offences [sic], regardless of the circumstances, disciplinary history or age of the student involved.”⁷⁵ These policies basically turn school discipline into a system of criminal justice, creating a penal code rather than a mitigating system of liability.⁷⁶ When children are arrested and even prosecuted for violating these policies, schools are equating the violation of school rules with the violation of law:

[M]any believe that zero-tolerance policies as applied not only suspend or expel children (some as young as

⁷² Eleftheria Keans, Note, *Student Interrogations by School Officials: Out with Agency Law and In with Constitutional Warnings*, 27 B.C. THIRD WORLD L.J. 375, 402-04 (2007).

⁷³ Paul Holland, *Schooling Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 LOY. L. REV. 39, 39 (2006).

⁷⁴ E.g., Nora M. Findlay, *Should There Be Zero Tolerance for Zero Tolerance School Discipline Policies?*, 18 EDUC. & L.J. 103, 106-07 (2008) (explaining how school zero-tolerance policies derived from U.S. drug enforcement then widened to encompass weapons and violence); Deborah Gordon Klehr, *Addressing the Unintended Consequences of No Child Left Behind and Zero Tolerance: Better Strategies for Safe Schools and Successful Students*, 16 GEO. J. ON POVERTY L. & POL'Y 585, 589 (2009) (discussing how schools have modeled their zero-tolerance policies after federal zero-tolerance law).

⁷⁵ David L. Stader, *Zero Tolerance as Public Policy: The Good, the Bad, and the Ugly*, 78 CLEARING HOUSE: J. EDUC. STRATEGIES, ISSUES & IDEAS 62, 62 (2004).

⁷⁶ Marsha B. Freeman, *Bringing up Baby (Criminals): The Failure of Zero Tolerance and the Need for a Multidisciplinary Approach to State Actions Involving Children*, 21 QLR 533, 535-36 (2002).

Juveniles who are suspended or expelled from school are frequently charged in the criminal justice system as adults for actions that they previously would never have been charged or, at the very least, would have been adjudicated as juveniles. Now, in an effort to propel zero-tolerance policies into the realm of criminal justice, the school districts' rigid standards, which basically eliminate degrees of liability, have literally superseded [sic] penal codes.

Id. (citations omitted).

kindergarten age) for what used to be considered normal, *innocent* childhood behavior, but often *criminalize* children by turning even first-time, non-violent offenders over for prosecution for actions schools should be, and previously were, handling on their own. Frequently, there seems to be collaboration between the schools and police departments, who arrest and charge students often without even bothering to investigate on their own, accepting the school's version, or, even worse, its interpretation of the severity of an incident.⁷⁷

As a result, these criminalistic policies have created a “school-to-prison pipeline,”⁷⁸ which increasingly sucks in those students who most need the educational function—special education students⁷⁹ and minority students.⁸⁰

In addition to the questionable value of the zero-tolerance policies is the zero-tolerance mentality of school officials, which creates a quasi-criminal legal system of detection and punishment.⁸¹ Under such

⁷⁷ *Id.* at 543-44 (citations omitted).

⁷⁸ Klehr, *supra* note 74, at 591; Dennis D. Parker, *Discipline in Schools after Safford Unified School District #1 v. Redding*, 54 N.Y.L. SCH. L. REV. 1023, 1027-28 (2009-2010).

⁷⁹ Freeman, *supra* note 76, at 538, 548-51.

⁸⁰ See, e.g., Eric Blumenson & Eva S. Nilsen, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER RACE & JUST. 61, 63 (2002) (arguing that there are “so few black men in college partly because so many are in prison”); Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned into a Nightmare? The American Dream’s Promise of Equal Educational Opportunity Grounded in Brown v. Board of Education*, 9 U.C. DAVIS J. JUV. L. & POL’Y 289, 295-96 (2005) (discussing the zero-tolerance policy and its effect on minority students); Russell J. Skiba et al., *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y.L. SCH. L. REV. 1071, 1086-1102 (2009-2010) (exploring racial and ethnic disparities in school discipline); Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 317 (2002) (noting that “African-American students are referred to the office for infractions that are more subjective to interpretation”).

⁸¹ See, e.g., A. Troy Adams, *The Status of School Discipline and Violence*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 147 (2000) (noting schools moved away from humane methods of punishment to a “sixteenth-century draconian practice[]” of zero-tolerance).

a system, school officials feel free to search students on a daily basis as a matter of routine, not just “to keep weapons and drugs out of the schools, but also to enforce school policies prohibiting students from possessing money in excess of five dollars, jewelry, combs, lip balm, house keys, and sanitary napkins and other personal hygiene products.”⁸² This only exacerbates the dichotomy between a powerful, authoritarian institution and weak and powerless children. It also serves to increase school crime and disruption of the educational function.⁸³ Under the guise of the special circumstances and environments of schools, school officials have deprived students of the very civil rights the schools are meant to encourage and have turned schools into armed camps. Besides the sheer absurdity of that altered environment, school officials are going to have to sort out their confusion about their role as either educators or as police.⁸⁴ Indeed, they may have to change that school-student dynamic as a matter of law because they can no longer depend on the War on Drugs as evidence of their inherent state interest in order to outweigh their students’ constitutional rights.⁸⁵

III. DINKY HOCKER SHOOTS SMACK!⁸⁶

If we are truly honest about the underlying failure in the War on Drugs in reducing teenage drug use, we understand that its single and

⁸² Parker, *supra* note 78, at 1030.

⁸³ “[S]ecurity/enforcement, or strategies used to secure the environment and enforce rules (e.g., security guards, suspension), was associated with more incidents of school crime and disruption.” Amanda B. Nickerson & Matthew P. Martens, *School Violence: Associations with Control, Security/Enforcement, Educational/Therapeutic Approaches, and Demographic Factors*, 37 SCH. PSYCHOL. REV. 228, 238-39 (2008).

⁸⁴ Freeman, *supra* note 76, at 534-35.

The point is not that it is wrong to want to ensure safety for our children, but that educators should remain educators, seeking to determine the facts of specific behaviors, and should not be elevated to the status now enjoyed by police officers—including powers of automatic arrest and mandatory prison terms for students.

Id. at 561.

⁸⁵ See *supra* notes 46-84 and accompanying text.

⁸⁶ M.E. KERR, *DINKY HOCKER SHOOTS SMACK!* (HarperTeen 2009). Written in 1972, *Dinky Hocker Shoots Smack!* is also an award-winning young adult novel, recognized by the *School Library Journal* as one of the top 100 teen books of the twentieth century. *One Hundred Books that Shaped the Century*, SCH. LIBR. J. (Jan. 1, 2000), <http://www.schoollibraryjournal.com/article/CA153035.html>. The title derives from

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simplistic paramilitary solution was never going to work.⁸⁷ It had no chance in hell of working, premised as it was on trying to make teenagers something they are not. The war envisioned a pliable enemy that would not challenge authority and would not take risks. It therefore was “a ‘war’ of sorts between well-intentioned adults and teenagers over how far young people can stretch the envelope of dangerous recreational drug use, and how far adults will go to stop them.”⁸⁸ But this teenage “army” will never back down:

This means the adults in their lives have two choices: (1) return fire by never letting their children out of sight, constantly searching personal belongings for drugs, and even forcing their own children to submit to random drug tests, or (2) dismantle these intrusive weapons in enlightened recognition that a futile drug war with their own children merely destroys any possibility of developing a relationship of trust and respect.⁸⁹

As their primary battle plan for the war, schools have sent two messages to students: we will teach you and we will arrest you.⁹⁰ Trust and fear can rarely coexist peacefully, especially in schools.

Schools used to know that. Schools used to accept that. Indeed, schools commonly employ educational personnel, such as the school social worker, psychologist, and counselor, to increase student trust and reduce student fear.⁹¹ Teaching success relies on developing personal

the graffiti message spray painted by a non-drug-using teenager as a plea for her mother’s attention. Marilyn Kaye, *Recurring Patterns in the Novels of M.E. Kerr*, 7 CHILD. LITERATURE 226, 230-31 (1978). In the wake of *Morse v. Frederick*, 551 U.S. 393 (2007), Dinky likely would have been suspended from school for her graffiti and the book removed from school library shelves!

⁸⁷ See *infra* notes 88-106 and accompanying text.

⁸⁸ Tony LaCroix, Comment, *Student Drug Testing: The Blinding Appeal of In Loco Parentis and the Importance of State Protection of Student Privacy*, 2008 BYU EDUC. & L.J. 251, 252 (2008).

⁸⁹ *Id.* (footnote omitted).

⁹⁰ See Freeman, *supra* note 76, at 561.

⁹¹ See, e.g., Thomas A. Mayes, *Confronting Same-Sex, Student-to-Student Sexual Harassment: Recommendations for Educators and Policy Makers*, 29 FORDHAM URB. L.J. 641, 673 (2001) (enumerating student support services for sexual minority students).

relationships with students.⁹² The nature of an institution whose sole purpose is to deal with adolescents will always depend on the ability to prepare them for adulthood while simultaneously accommodating their wildly divergent behavior, their search for independence, and their refusal to accept adult help.⁹³ Adolescents have no choice but to attend school under compulsory attendance laws.⁹⁴ Schools are not like churches, which attract like-minded individuals who choose the guidance of a community with common beliefs and behavior. The political and judicial forces arrayed against students, however, never understood that distinction. Instead, these forces drew an authoritarian—near religious—line in the sand and said, “Thou shalt not.” Adolescents are no more likely to obey that edict than they are to fight their raging hormones.⁹⁵ So adolescents engaged in guerilla warfare in response: If you forbid us from using drugs, we will ignore you; if you test us for illegal drugs, we will abuse legal drugs.⁹⁶ As the Redcoats found out to their dismay during the War for Independence so did the U.S. government discover in this war—American guerrilla warfare is ingenious and nonpareil.

That is the gist of the punitive approach’s failure in the schools: the government co-opted the school-student relationship without consulting those who should have known better.

⁹² See, e.g., CTR. FOR SOC. & EMOTIONAL EDUC., SCHOOL CLIMATE RESEARCH SUMMARY – JANUARY 2010, at 3 (2010) available at http://www.schoolclimate.org/climate/documents/SCBrief_v1n1_Jan2010.pdf (“Safe, caring, participatory and responsive school climates tend to foster a greater attachment to school and provide the optimal foundation for social, emotional, and academic learning for middle school and high school students.”).

⁹³ See, e.g., Reyes, *supra* note 98, at 90.

⁹⁴ All jurisdictions have compulsory attendance laws. NATIONAL SURVEY OF STATE LAWS 261-76 (Richard A. Leiter ed., Gale Group 6th ed. 2008).

⁹⁵ See Janet Elise Rosenbaum, *Patient Teenagers? A Comparison of the Sexual Behavior of Virginity Pledgers and Matched Nonpledgers*, 123 PEDIATRICS: OFFICIAL J. AM. ACAD. PEDIATRICS 110 (2009), available at <http://pediatrics.aappublications.org/content/123/1/e110.full.pdf>.

⁹⁶ See generally 1 LLOYD D. JOHNSTON ET AL., MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE, 1975-2008 (2008), available at http://www.monitoringthefuture.org/pubs/monographs/vol1_2008.pdf (providing statistics to show the amount of drug abuse amongst adolescents in the United States); James Pavisian, Note, *The Case for Human Ingenuity: How Adderall Has Sullied the Game*, 48 WASHBURN L.J. 175 (2008).

Most educators know that a variety of educational methods and policies are appropriate for the institution. However, this War on Drugs experience shows that educators were persuaded—especially with the promise of funding—that simple lines can be drawn and anyone who crosses over is a lawbreaker. And lawbreakers must face punishment. This bright-line, black-letter approach lacks the subtlety to recognize the reality of running an educational institution. Those who “know” the law and want to make the law in schools about behavior typically adhere to two erroneous schools of thought: fundamental ignorance of education and teaching, and amnesia about how schools have always been.⁹⁷ Unfortunately, school officials have been seduced into believing that, contrary to their own training and experience, the punitive (and “legal”) approach was a simple solution to drug problems in schools.

The educational function is not that simple, especially in the War on Drugs.⁹⁸ Schools are hard. Education is hard. School drug problems are hard. The War on Drugs’ simplistic punitive approach only made the problems harder, by not taking the principled effort of trying to understand the institution and its very real problems. Anyone who has taught in the public schools knows that; anyone who has parented an adolescent knows that; and now the new directives from the government will require that school districts and educational leaders know that.⁹⁹

⁹⁷ For example, Justice Thomas’s concurrence in *Morse v. Frederick*, 551 U.S. 393, 412 (2007) (Thomas, J., concurring), hearkened back to the good old days when “[t]eachers commanded, and students obeyed.” Not only is Thomas historically wrong, he is engaging in “restorative nostalgia.” David Blacker, *An Unreasonable Argument Against Student Free Speech*, 59 *EDUC. THEORY* 123, 137, 142 (2009).

⁹⁸ See *infra* note 99 and accompanying text.

⁹⁹ See U.S. DEP’T OF EDUC., *A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 31-34* (2010) [hereinafter U.S. DEP’T OF EDUC.], available at <http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf>; see also U.S. DEP’T OF EDUC., *REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT: OVERVIEW* (2011), available at <http://www2.ed.gov/about/overview/budget/budget12/justifications/a-eseaoverview.pdf>. At the time this Article went to press, reauthorization of the Elementary and Secondary Education Act was five years overdue and still not reauthorized. See ASCD, *ESEA—A TOUGH ACT TO FOLLOW* (2012), available at http://www.ascd.org/ASCD/pdf/journals/policy/priorities/pp_v18n01_infographic_pdf.pdf.

After nearly twenty-five years of the federal government's punitive approach to school drug problems, school districts must refocus their strategies on students and prevention, rather than on arrest rates and law enforcement.¹⁰⁰ The Obama Administration's plan for the Elementary and Secondary Education Act's reauthorization incorporates an amalgam of goals under *A Blueprint for Reform*.¹⁰¹ In accomplishing drug-free schools, the new emphasis is on "successful, safe, and healthy" students, not on discipline and law enforcement.¹⁰² Instead of the troubling convergence of violence and drug use, school programs must educate safe and healthy students by "[u]sing data to improve students' safety, health, and well-being, and increasing the capacity of states, districts, and schools to create safe, healthy, and drug-free environments."¹⁰³ The "Safe and Drug-Free Schools and Communities program" will become the "Successful, Safe, and Healthy Students [Program]" and will provide at least "\$410 million [from] which states and districts would assess families' experiences with and attitudes on school engagement, school safety, and the overall school environment. This school-level information would be made publicly available and would help direct funds to identify local needs, which could include improving family engagement."¹⁰⁴ Instead of the post hoc accountability that has existed for years, the program will use "data-driven decision making to identify needs, target funds, and support evidence-based programs that best meet the needs of their students and communities."¹⁰⁵ If

¹⁰⁰ See *infra* notes 101-06 and accompanying text.

¹⁰¹ See generally U.S. DEP'T OF EDUC., *supra* note 99, at 31-34 (explaining the new school goals from the Department of Education).

¹⁰² *Id.* at 33.

¹⁰³ *Id.* at 31.

¹⁰⁴ U.S. DEP'T OF EDUC., SUCCESSFUL, SAFE, AND HEALTHY STUDENTS 13 (2010) [hereinafter SUCCESSFUL], available at <http://www2.ed.gov/policy/elsec/leg/blueprint/successful-safe-healthy.pdf>; U.S. DEP'T OF EDUC., SUPPORTING FAMILIES AND COMMUNITIES: REAUTHORIZING THE ELEMENTARY AND SECONDARY EDUCATION ACT 3 (2010), available at <http://www2.ed.gov/policy/elsec/leg/blueprint/faq/supporting-family.pdf>.

¹⁰⁵ SUCCESSFUL, *supra* note 104, at 13. "States, districts, and schools that administer school climate surveys . . . have found them to be powerful tools for developing programs that address local needs to reduce and prevent drug, alcohol, and tobacco use; reduce and prevent bullying, harassment, and violence; and improve school climate and family involvement." *Id.* at 15.

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a school cannot justify the worth of the program, that school will not receive funding.¹⁰⁶

New strategies for dealing with student drug use under this program will call upon all the ingenuity and flexibility educators can muster. School officials, particularly school boards, and their constituent communities must both adapt to the new reality and become more involved. If nothing else, they must abandon their law enforcement approach to student drug use.

A. *Law Enforcement*

The misguided notion that schools can and should be the law enforcement arm of the community in service to the War on Drugs must change, at least with regard to student drug use.¹⁰⁷ Law enforcement is not subtle, nor is it designed to be. School officials must reassess their decision to involve police officials or, in the alternative, their own law enforcement strategies vis-à-vis student drug problems. Of course, schools should call law enforcement when necessary, but schools must make those calls more judiciously when it comes to drug use.¹⁰⁸ School officials properly engage law enforcement in matters that create a dangerous environment for students, and on-campus drug dealing is such a danger.¹⁰⁹

Simple drug use, however, is more of a public health-education issue rather than a law enforcement priority.¹¹⁰ Call it a teachable mo-

¹⁰⁶ See *id.* at 13.

¹⁰⁷ See *infra* notes 108-34 and accompanying text.

¹⁰⁸ See, e.g., Parker, *supra* note 78, at 1028-30 (discussing the law enforcement practices in schools). Police security practices, particularly drug searches, have done much harm to students with little deterrence. *Id.* at 1030. Similarly, law enforcement techniques have done little to decrease violence. Kristin D. Eisenbraun, *Violence in Schools: Prevalence, Prediction, and Prevention*, 12 AGGRESSION & VIOLENT BEHAV. 459, 465 (2007). They are not only ineffective, but they may lead to more school violence. *Id.*

¹⁰⁹ Finding evidence of dealing, however, is unlikely to be gathered from police-driven locker searches. See Thurau & Wald, *supra* note 56, at 1010.

¹¹⁰ See, e.g., Juan R. Torruella, *Déjà Vu: A Federal Judge Revisits the War on Drugs, or Life in a Balloon*, 20 B.U. PUB. INT. L.J. 167, 204 (2011) (noting that drugs are a public health issue and treating them as such frees up law enforcement to “engage in the prevention and apprehension of ‘normal’ criminal activities”).

ment. Drug use is among those things that really must be handled in-house, which will require that schools distinguish unpleasant behavior from criminal behavior.¹¹¹ When school resource officers have the task of doing such work—as opposed to local police officers—they must have clear guidance on the distinction between their police duties and their educational duties,¹¹² not the least of which is that any law enforcement encounter with a student should be clothed in full constitutional protections. Under those circumstances, neither schools nor students really view them as anything other than law enforcement.¹¹³ Resource officers will need to learn the law.

The lowered level of cause to justify student searches—reasonable suspicion—may be acceptable only when a school official is flying “solo,” acting as a school official.¹¹⁴ But even those solo runs need to be revisited and perhaps curtailed. School officials need to stop acting like they have been deputized. Instead, they need to focus on searches that really have a safety function in the school. Thus, in relation to drug searches, school officials’ searches should be confined to dealing with matters that will likely, at that instant, cause a problem. Sometimes, the breach of a school rule is not enough.¹¹⁵ Reasonable suspicion, although a flawed test insofar as it suggests that educators are not capable of recognizing probable cause, is a much better measure of an official’s response to an emergency situation.¹¹⁶ All other instances require either a much higher standard, akin to probable cause, or referral to law enforcement. A court’s assertion that school officials have the where-

¹¹¹ Freeman, *supra* note 76, at 552.

¹¹² Thureau & Wald, *supra* note 56, 1017-20; *see also* Price, *supra* note 65, at 568-69 (noting this clear guidance will also help clarify to students if they are speaking to a resource officer in the role of school employee or police officer).

¹¹³ *See* Price, *supra* note 65, at 567-69.

¹¹⁴ *See* New Jersey v. T.L.O., 469 U.S. 325, 341-42 (1985).

¹¹⁵ *See infra* notes 116-17 and accompanying text.

¹¹⁶ *See* New Jersey v. T.L.O., 469 U.S. 325, 341-43 (1985). In *New Jersey v. T.L.O.*, the Supreme Court articulated a lower standard of cause required by a school official who searches a student without a warrant because he suspects the student of having violated a school rule. *Id.* at 341-42. The Court held that such a search is justified if it was “justified at its inception” and if its scope was reasonably related to the objective of the search. *Id.* Although students maintain their Fourth and Fourteenth Amendment rights in school, they are not entitled to a higher standard of probable cause in view of the school’s need to be nimble in action and in discipline. *Id.* at 340.

withal to determine, on the fly, the “special needs” of the school environment¹¹⁷ cannot simultaneously aver that those same school officials cannot understand the subtleties of probable cause. School officials make a living working with adolescents. They know probable cause when they see it.

The gray area includes whether an exigent circumstance requiring the intervention of law enforcement exists for mere possession as opposed to the potentially more dangerous act of dealing. A student holding more than he needs for personal use may well be dealing.¹¹⁸ However, criminal statutes make distinctions between “use” weight and “sale” weight.¹¹⁹ “Sale” weight might, in the context of student drug trafficking, be smaller amounts than constrained by the law. As a consequence, school officials will need to be attentive to evidence of dealing as opposed to just holding. In the absence of clear connections to dealing, decisions on where the community wants to draw the line may shape school officials’ responses;¹²⁰ what discretion has the community reposed in the local prosecutor to decide the relative dangers of possession, and the often disparate sentencing that goes with that discretion.¹²¹ Communities still under the sway of the War on Drugs may be more willing to criminalize that which is in actuality a juvenile status offense. In their stead, schools may have to take an enlightened stance and use their discretion to weigh the merits of embracing law enforcement interference when the school’s educational jurisdiction might be the better solution: At what point is it not worth the candle when there is so little

¹¹⁷ The Supreme Court has recognized the school’s “special needs” in this particular institutional environment as being of sufficient state interest to justify curtailing students’ Fourth Amendment rights. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). That special need in the context of drug testing is premised, at least in part, on ongoing student drug problems. *See, e.g., Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 829, 834 (2002).

¹¹⁸ *See, e.g., Beverly J. Wolfe, Constitutional and Policy Concerns Pertaining to Weight-Based Statutory Classifications for Minnesota Controlled Substance Offenses*, 15 *HAMLIN J. PUB. L. & POL’Y* 81, 81 (1994) (noting the different weight classifications for possession of illegal drugs between personal use and dealing).

¹¹⁹ *See id.*

¹²⁰ *See infra* Part III.E.

¹²¹ *See Anders Walker, American Oresteia Herbert Wechsler, the Model Penal Code, and the Uses of Revenge*, 2009 *WIS. L. REV.* 1017, 1046 (2009).

eventuality that mere possession will disrupt the function of the schools?

Apart from the possession and dealing issues is the schools' jurisdiction over those who are under the influence. Students who are simply under the influence may only pose a personal health concern. Students who are breaking the law and pose a danger to themselves and to others may prompt law enforcement action, but they might equally be dealt with as a school disciplinary matter. This part of the schools' discretion will require them to extricate their concerns about student drug use from their concerns about violence, an entanglement that the government has needlessly promoted.¹²² School violence may be associated with drug *dealing*,¹²³ but other than their simultaneous existence in schools, the empirical evidence is mixed in showing a nexus between violence and drug *use*.¹²⁴

Perhaps the best that can be said is that adolescent drug use and violence are "mutually reinforcing."¹²⁵ Although drug use is a predictor of violent behavior, students who consume alcohol are four times more likely to be violent, especially as they are more likely to carry weapons.¹²⁶ Additionally, studies that lump all illegal drugs into one cohort under the erroneous assumption that all drugs have the same pharmacological impact muddy this connection further.¹²⁷ The more significant connection is that those who behave violently while under the influence

¹²² See *infra* notes 123-24 and accompanying text.

¹²³ Peter J. Venturelli, *Drugs in Schools: Myths and Realities*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 77-78 (2000).

¹²⁴ *Id.*

¹²⁵ Andrew O. Johnson et al., *Violence and Drug Use in Rural Teens: National Prevalence Estimates from the 2003 Youth Risk Behavior Survey*, 78 J. SCH. HEALTH 554, 555 (2008). A survey of the violence-drugs literature shows three distinct conclusions: (1) drug use causes violence; (2) violence causes drug use; and (3) there is no relationship. Michele Cooley-Strickland et al., *Community Violence and Youth: Affect, Behavior, Substance Use, and Academics*, 12 CLINICAL CHILD & FAM. PSYCHOL. REV. 127, 135 (2009).

¹²⁶ Robert Nash Parker & Kathleen Auerhahn, *Alcohol, Drugs, and Violence*, 24 ANN. REV. SOC. 291, 307 (1998).

¹²⁷ *Id.* at 293. For example, heroin, amphetamines, and phencyclidine (PCP) have rare if any violent effects. *Id.* at 295, 297. Cocaine use results in mixed violent behaviors, depending upon the method of ingestion, but usually not sufficient enough for sustained violent activity. *Id.* at 296-98.

of drugs are those more likely to be violent when not under the influence.¹²⁸ Drug users who are violent pose a legitimate law enforcement concern when school disciplinary measures otherwise will not work. However, schools need to evaluate the violence, not the drug use. Ironically, if there is any causal connection, it is the statistically significant relationship between drug use and victims of violence.¹²⁹

As a practical matter, educational discipline and tactics that teachers learn in their training have a more positive effect on the behavior of students than calling on law enforcement. Teachers, in particular, are a greater deterrence to criminal behavior than the police.¹³⁰ Because teachers establish personal connections to their students, students believe that they care.¹³¹ Law enforcement erodes that relationship and its inherent trust, thereby increasing the likelihood of adolescent antisocial behavior as well as resistance to authority.¹³² School officials must reduce their addiction to law enforcement tactics. The power of the institution should be enough. The better the school understands its own power and that of its teaching personnel, the less likely it will cede that power to either students or law enforcement.¹³³ Schools have to stop feeding into their own fears and thereby fanning their community's fears that schools are not safe.¹³⁴

B. Student Drug Testing

Student drug testing has become part and parcel of school districts' law enforcement approach to student drug use. And, it does not work. Unlike methods of regulating adult behavior that require some empirical relevance before courts find them constitutionally accept-

¹²⁸ Sharon M. Boles & Karen Miotto, *Substance Abuse and Violence: A Review of the Literature*, 8 *AGGRESSION & VIOLENT BEHAV.* 155, 157 (2003).

¹²⁹ Johnson et al., *supra* note 125, at 555.

¹³⁰ See, e.g., Jane Clark Lindle, *School Safety: Real or Imagined Fear?*, 22 *EDUC. POL'Y* 28, 35 (2008) (noting that teachers can have a powerful impact on students by connecting with students).

¹³¹ *Id.*

¹³² *Id.* at 35-36.

¹³³ *Id.*

¹³⁴ See generally *id.*

able,¹³⁵ drug testing has never had to undergo such examination, perhaps because there is no empirical relevance. Faith-based belief in their efficacy apparently requires no proof, and adolescents apparently merit no courtesies.

The sticking point for drug-testing advocates is that statistically reliable and valid studies reveal there are no benefits but only significant harms from student drug testing.¹³⁶ The largest such study, dated 2003, analyzed data from five years, 100,000 students, and nearly 900 schools.¹³⁷ It concluded that drug testing has no statistical effect on student drug use.¹³⁸ A smaller study showed positive results on the deterrence for past-year use but also indicated an increased risk for future drug use.¹³⁹ A 2010 government survey showed similarly dismal results.¹⁴⁰ As an assessment report for government-funded mandatory-random drug tests on students participating in selected extracurricular activities,¹⁴¹ the survey revealed only one positive outcome: lower past-month use of drugs than in schools without mandatory-random drug testing.¹⁴² However, such testing had “no statistically significant impact on any other student- or school-level outcome, including students’ perceived consequences of substance use, the proportion of students who participate in covered activities, students’ connection to school, or the number of disciplinary incidents reported by schools.”¹⁴³ More critically, there was no “spillover” effect on those students in the

¹³⁵ Cf. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (holding Delaware failed to show any significant contribution to highway safety by having license and registration checkpoints).

¹³⁶ YAMAGUCHI ET AL., *supra* note 12, at 5 (noting that drug testing could lead to mistrust, resistance, and hesitance to participate in extracurricular activities or sports).

¹³⁷ *See id.* at 15.

¹³⁸ *Id.* (“Even if we took the observed values to be true, they would suggest only a 5% to 7% reduction in the prevalence of marijuana use associated with testing and, disturbingly, a larger proportional *increase* in the use of other drugs . . .”).

¹³⁹ *Id.* at 5 (referring to the Student Athlete Testing Using Random Notification (SATURN) study).

¹⁴⁰ *See* SUSANNE JAMES-BURDUMY ET AL., U.S. DEP’T OF EDUC., NCEE 2010-4025, THE EFFECTIVENESS OF MANDATORY-RANDOM STUDENT DRUG TESTING 56 (2010), available at <http://ies.ed.gov/ncee/pubs/20104025/pdf/20104025.pdf>.

¹⁴¹ *Id.* at 53. This report is an example of the previously acceptable post-funding accountability operated by the Office of Safe and Drug-Free Schools. *Id.* at xvii.

¹⁴² *Id.* at 53.

¹⁴³ *Id.* at 56.

mandatory-random-testing school who were not in the target population.¹⁴⁴ In fact, drug use in the untested population was as high as or higher than those schools without a mandatory-random drug testing program.¹⁴⁵

These results show that student drug tests, in and of themselves, cause harm by seeming to encourage drug use.¹⁴⁶ Although this conclusion seems counterintuitive, it is completely consistent with the population tested. Flouting authority is a condition of adolescence, and trying to beat the test is just one of the many competitions they are willing to play.¹⁴⁷ Despite the fact that school officials (or perhaps the community) feel the need to test,¹⁴⁸ adolescents do not share that feeling.¹⁴⁹ Adolescents plan drug use around their surrounding circumstances; for example, they change their drug of choice to avoid specific tests or shave themselves bald to avoid giving hair samples.¹⁵⁰ Prohibiting something is an open invitation for adolescents to take the risk anyway. They feel invulnerable and never anticipate they will be caught.¹⁵¹ Adolescents thrive on the risk.¹⁵²

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at xxiii.

¹⁴⁶ *See id.* at 56 (“Students in treatment schools were as likely as students in control schools to report that they ‘definitely will’ or ‘probably will’ use substances in the next 12 months.”).

¹⁴⁷ *See Stuart Drug Testing Failure, supra* note 2, at 1069-74 (describing adolescent efforts at evading detection in drug testing regimes).

¹⁴⁸ “[N]eed is not the only factor influencing administrators’ decisions to conduct drug searches.” Ryoko Yamaguchi et al., *Relationships Between School Drug Searches and Student Substance Use in U.S. Schools*, 26 *EDUC. EVALUATION & POL’Y ANALYSIS* 329, 340 (2004).

¹⁴⁹ *See Stuart Drug Testing Failure, supra* note 2, at 1071.

¹⁵⁰ *See, e.g., id.* at 1070-75 (describing ways adolescents circumvent drug testing in schools).

¹⁵¹ Mary E. Wickman et al., *The Adolescent Perception of Invincibility and Its Influence on Teen Acceptance of Health Promotion Strategies*, 23 *J. PEDIATRIC NURSING: NURSING CARE CHILD. & FAM.* 460, 460 (2008).

¹⁵² *Id.* at 463 (“Teens reported a feeling of being high when doing something risky and likened that feeling to an ‘adrenaline rush.’”).

Drug testing for public health purposes is also a nonstarter.¹⁵³ Those students whom schools target—those involved in extracurricular activities, including athletics—are the ones least likely to be taking drugs.¹⁵⁴ The population that schools should target for public health reasons is beyond the bounds of the law for the time being.¹⁵⁵ Regardless, drug testing's public health benefits are speculative.¹⁵⁶ Early detection through testing might lead to early intervention and treatment, but the treatment rates vary and the success with students, especially in the short term, appears to be minimal.¹⁵⁷ Given the costs, the current public health benefits of student drug testing are unknown to nil.¹⁵⁸

Abandoning the drug-testing ship is appropriate at this point if for no other reason than to save resources. The cost of student drug testing is not negligible.¹⁵⁹ So long as the federal government's new focus is prevention rather than catching "perpetrators," drug testing has no further place in the public schools. If nothing else, school officials could save face by simply no longer playing the "game."

C. Discipline

Criminalization of student discipline must also stop.¹⁶⁰ Without even detailing the precise rules and regulations that must be modified to better reflect care and supervision instead of crime and punishment, schools need to readjust themselves with regard to enforcement of those rules, especially to align themselves with the new public health approach. Global data shows that the United States has higher uses of alcohol, marijuana, and cocaine because of two things: greater afflu-

¹⁵³ See Floralynn Einesman & Howard Taras, *Drug Testing of Students: A Legal and Public Health Perspective*, 23 J. CONTEMP. HEALTH L. & POL'Y 231, 257-63 (2007).

¹⁵⁴ *Id.* at 261.

¹⁵⁵ *Id.*

¹⁵⁶ See, e.g., *id.* at 263 (noting that there is no difference in results from students who are drug tested in school and those who are not).

¹⁵⁷ *Id.* at 262.

¹⁵⁸ *Id.* at 263 ("[I]t can be concluded that student drug screening programs fail to meet several key criteria as a justifiable public health screen.").

¹⁵⁹ See Stuart *Drug Testing Failure*, *supra* note 2, at 1065 n.49 (discussing the average cost per student of administering drug tests).

¹⁶⁰ See *infra* notes 161-72 and accompanying text.

ence and punitive policies for use and possession.¹⁶¹ Punitive disciplinary policies, or at least a punitive approach to implementing those policies, can only have a similar effect of encouraging adolescent drug use. Better, more realistic, practical discipline policies would recalibrate the relationship by returning legitimate authority to the adults while simultaneously reducing student drug use, and perhaps even violence, in schools.

The first step is eliminating zero-tolerance policies. Those schools with such provisions in their disciplinary policies are typically less safe than those without.¹⁶² Zero-tolerance measures may actually increase school violence: “The tendency to clamp down on disruptive students merely establishes an escalating spiral of mayhem that affords little protection to nonviolent students, personnel or communities, and in fact, ensures antisocial development among the offenders.”¹⁶³ Thus, it is imperative to remove these provisions from any school disciplinary code.

Effective student disciplinary codes should also be adapted to serve several philosophical and psychological considerations.¹⁶⁴ First, discipline codes work better if they are fair so that students’ rights are acknowledged.¹⁶⁵ Second, they must also embrace the distinct needs and character of the community; disciplinary policies are not efficient if

¹⁶¹ Degenhardt et al., *supra* note 22, at 1062.

The US, which has been driving much of the world’s drug research and drug policy agenda, stands out with higher levels of use of alcohol, cocaine, and cannabis, despite punitive illegal drug policies, as well as (in many US states), a higher minimum legal alcohol drinking age than many comparable developed countries.

Id. “[C]ountries with more stringent policies toward illegal drug use did not have lower levels of . . . drug use than countries with more liberal policies.” *Id.* at 1065.

¹⁶² Freeman, *supra* note 76, at 553.

¹⁶³ Lindle, *supra* note 130, at 38.

¹⁶⁴ See CIVIL RIGHTS PROJECT, HARVARD UNIV., OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE 9-10 (2000), available at <http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf>.

¹⁶⁵ See *id.* at 3-7 (illustrating the consequences of harsh punishments that do not acknowledge the rights of students).

they all look alike.¹⁶⁶ Third, prevention is better than reaction, so the U.S. Department of Education has created the Center for Positive Behavior Interventions and Supports to assist schools in creating positive environments to prevent problems before they occur.¹⁶⁷ One of the Center's features is the creation of an "ownership" society in the students.¹⁶⁸ School districts employing these techniques "show decreases in disciplinary referrals; up to 50% greater work satisfaction from school staff; reduction in anti-social behavior, vandalism, and aggression; and increases in school engagement and academic achievement on the part of students."¹⁶⁹ Last, effective discipline integrates the entire school organization.¹⁷⁰ Indeed, school management is crucial, especially when community resources are not supportive.¹⁷¹ Schools that have more teachers, fewer students, organizational cooperation, and higher systemic student expectations are more likely to succeed in creating a good educational environment with a less punitive disciplinary code.¹⁷²

Fundamentally, student discipline reformation must restore due process to students.¹⁷³ "Students feel more secure in an environment in which the 'rule of law' reigns This type of system begins with reasonable and clear rules."¹⁷⁴ Schools must clearly articulate what drug-related behavior will violate a school rule. This does not mean the wholesale adoption of criminal drug use statutes. Otherwise, school districts risk elevating the equivalent of a status offense into a crime. Behavior that threatens the school environment is fair game, especially

¹⁶⁶ Parker, *supra* note 78, at 1031.

¹⁶⁷ *Id.*

¹⁶⁸ *See id.*

¹⁶⁹ Klehr, *supra* note 74, at 609; Parker, *supra* note 78, at 1031.

¹⁷⁰ *See generally* Howard M. Knoff, *Best Practices in Strategic Planning, Organizational Development, and School Effectiveness*, PROJECT ACHIEVE, available at http://www.projectachieve.info/assets/files/pdfs/Best_Practices_in_OD_Chapter_1206.pdf (discussing how a school should be organized and managed to improve the school environment).

¹⁷¹ *See infra* note 172 and accompanying text.

¹⁷² Lawrence W. Sherman, *The Safe and Drug-Free Schools Program*, 2000 BROOKINGS PAPERS ON EDUC. POL'Y 125, 134, available at http://muse.jhu.edu/journals/brookings_papers_on_education_policy/v2000/2000.1sherman.pdf.

¹⁷³ *See infra* notes 174-75 and accompanying text.

¹⁷⁴ Miriam Rokeach & John Denvir, *Front-Loading Due Process: A Dignity-Based Approach to School Discipline*, 67 OHIO ST. L.J. 277, 291 (2006).

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violent behavior either relating to, dealing with, or arising from having ingested a drug. However, in the absence of evidence that minor drug possession and “past” drug ingestion present a clear and present danger, interventions other than discipline are more appropriate.

Procedurally, students need clear and understandable notice of the regulated behavior and the consequences of violation. Logic is not always wasted on the adolescent. Notice can be part of the educational process and is integral to any drug education program.¹⁷⁵ “Here’s why we have these rules. Here’s who they are intended to protect.” Such an approach will not only engage the students but also give them ownership of the process, which is why student honor courts have proved successful. Related to the rationale for clear notice is the principle that enforcement must be fair and consistent but with discretion to accommodate individual circumstances. Otherwise, zero-tolerance policies might actually have worked. Students must have clear notice of possible extra-institutional consequences when the school district and the community agree that the school cannot adequately remediate certain unlawful behavior. In so doing, students understand the behaviors expected while in the institution may escalate into behaviors that the community believes are better handled in the legal system. Ideally, of course, prevention programs should alleviate pressures on having to discipline at all.

D. Prevention Programs

Government funding will now be allocated only for student drug use prevention programs that are effective. Accountability will be a precondition for the receipt of funds: the product must work before we will purchase it. The sad fact is that, for nearly twenty-five years, states and local school districts have been given funding without having to account for their programs’ effectiveness.¹⁷⁶ Consequently, very little

¹⁷⁵ See, e.g., *id.* at 288-89 (“[S]tudents should be made aware of what they can and cannot do.”).

¹⁷⁶ David L. Kirp et al., *A Quarter-Century’s Experience with Sex, Alcohol, Tobacco and Drug Education in Schools or How Great Expectations for Prevention Programs Are Dashed in 15,000 School Districts or Not-So-High Hopes*, in PETER REUTER & P. MICHAEL TIMPANE, *OPTIONS FOR RESTRUCTURING THE SAFE AND DRUG-FREE SCHOOLS AND COMMUNITIES ACT: REPORT WITH BACKGROUND PAPERS AND FOCUS GROUP SUMMARY* 73, 87, 93-94 (2001).

systematic analysis of the results exists.¹⁷⁷ The meager number of accountability reports that do exist tell no happy stories.¹⁷⁸ For instance, the federal government has poured millions of dollars in the DARE program without positive results,¹⁷⁹ but DARE remains a popular program—perhaps because it is based on refusal-skills training led by police officers, a neat combination of abstinence instruction from people who intimidate students.¹⁸⁰ Or perhaps because DARE dominates the media.¹⁸¹ Thus, with little research available and no official accounting, successful prevention programs may be hard to find. The government has published a list of those programs with some “proven” success at the National Registry of Evidence-Based Programs and Practices.¹⁸² The bottom line is that what these “successful” programs reveal and what the research literature suggests are that any viable drug prevention program must be tailored to both the audience and the community.¹⁸³

In tailoring such a program, Sun Tzu’s maxim, “Know the enemy,” is apt.¹⁸⁴ Even if there had been no War on Drugs, adolescents would still be the enemy. However, the war spent so much time dehu-

¹⁷⁷ Establishing such a collection of evidence is imperative. *See, e.g.*, DENISE DION HALLFORS, *POLICIES TO PREVENT DRUG PROBLEMS: A RESEARCH AGENDA FOR 2010-2015*, at 20-25 (2009) (discussing research areas to be explored in the area of drug prevention policies and programs).

¹⁷⁸ *See infra* notes 179-83 and accompanying text.

¹⁷⁹ Kirp et al., *supra* note 176, at 87.

¹⁸⁰ *Id.* at 88-89, 94.

¹⁸¹ Now called Take Charge of Your Life (TCYL), the revamped DARE program still utilizes police officer instructors and “resistance” training. DARE, NEW DARE “TAKE CHARGE OF YOUR LIFE” (2006), available at http://www.dare.com/home/resources/documents/ValueofDAREDeliveryNetwork-July06_000.pdf. The results of a recent study on TCYL are mixed. *See generally* Peggy C. Stephens et al., *Universal School-Based Substance Abuse Prevention Programs: Modeling Targeted Mediators and Outcomes for Adolescent Cigarette, Alcohol and Marijuana Use*, 102 *DRUG & ALCOHOL DEPENDENCE* 19 (2009) (discussing the failings of drug prevention programs in schools).

¹⁸² SUBSTANCE ABUSE & MENTAL HEALTH SERVICE ADMIN., NAT’L REGISTRY EVIDENCE-BASED PROGRAMS & PRACS., <http://www.nrepp.samhsa.gov/> (last visited Apr. 18, 2012).

¹⁸³ Kirp et al., *supra* note 176, at 91-94.

¹⁸⁴ SUN TZU, *THE ART OF WAR* 84 (Samuel B. Griffith trans., Oxford Univ. Press, 1963).

manizing and criminalizing all its enemies that even some school officials no longer recognize, or at least know how to handle, the unique, ubiquitous, and universal characteristics of this particular enemy. That failure to recognize the adolescent condition has had the unfortunate consequence of ignoring what impels students to make life-changing decisions about taking drugs and not taking drugs, often without the maturity or knowledge to know the difference. School officials must reacquaint themselves with the teenage condition, that period of life in which children are trying to achieve adulthood through a series of startling and disruptive psychological, biological, and social changes.¹⁸⁵ “This period of ‘storm and stress’ results in distancing from parental authority and increasing intimacy with peers.”¹⁸⁶ As they are torn between wanting to be part of a group (but which group?) and trying to make individual choices (what should I do?), adolescents are further crippled by “persistent low self-esteem, depression, and other severe emotional disturbances.”¹⁸⁷ School districts that treat all these offenders the same fail in their educational function; they fail to recognize that those adolescents who have difficulty making these maturational adjustments often are unwilling or unable to ask for help—a typical adolescent dilemma—and turn to other coping methods that either make the choices easier or at least easier to ignore.¹⁸⁸ This is typical adolescent nondecision.¹⁸⁹

Taking drugs is one of these coping mechanisms:

The reason why students elect to use drugs has to do more with the meaninglessness of school, and of life in general, at a time when they are going through large biological and social transformations. In this context, drugs provide the means to cope or even to gain some control over life’s problems Indeed, for many teenagers, the motivation for using drugs is to help cope with and escape from problems. Violence is neither the motiva-

¹⁸⁵ See Venturelli, *supra* note 123, at 83-84.

¹⁸⁶ *Id.* at 83.

¹⁸⁷ *Id.* at 84.

¹⁸⁸ *Id.*

¹⁸⁹ See *id.*

tion nor the effect of their quest for tranquility and transcendence from the boredom of day-to-day existence.¹⁹⁰

In tailoring and implementing prevention programs for this enemy, some school districts are in for a challenge, not necessarily because of the abstract difficulty or even because of the economics.¹⁹¹ Rather, it will be a difficult process because it will be harder than the currently simplistic approach of delegating adolescent insolence to someone else, especially to law enforcement, bright-line zero-tolerance policies, and privately supported “Just Say No” clubs. Adolescent insolence is part of the educational constituency. Abandoning this insolence to others for so many years has made some schools ill equipped to deal with that constituency. It is not impossible because it has been undertaken before; it is part of the educational function. But it will take time and usually will take a systemic approach both within and without the schools.¹⁹² Schools are not inherently the cause of adolescent problems, although their war efforts may have made them so. Prevention programs will be hard, but school districts have been left with no choice.

Finding prevention programs that work has become more difficult because, for years, the weapons du jour in the War on Drugs did not focus on prevention.¹⁹³ Those few preventive efforts that actually did exist, like DARE, had no scientific basis for effectiveness and so did not succeed.¹⁹⁴ Programs that neglect the adolescent condition and are irrelevant to that condition are doomed, such as programs based only on factual information, scare tactics, and self-esteem building.¹⁹⁵ Programs based on “moralistic and absolutist conceptualization of the problem” do not work.¹⁹⁶ And worst of all, programs based on abstinence do not work, especially in long-term, lifetime outcomes.¹⁹⁷ Adolescents are willing to accept and perhaps even respect others who do not take drugs

¹⁹⁰ *Id.* at 84-85.

¹⁹¹ For example, the salary of a substance abuse counselor is about the same as the cost of a year’s worth of drug testing. *See* NAT’L SCH. BDS. ASS’N, STUDENT DRUG TESTING 10 (2005).

¹⁹² Kirp et al., *supra* note 176, at 91-94.

¹⁹³ *Id.* at 80-82.

¹⁹⁴ *See supra* notes 176-83 and accompanying text.

¹⁹⁵ Kirp et al., *supra* note 176, at 82.

¹⁹⁶ *Id.* at 77-79.

¹⁹⁷ *Id.*

for practical reasons relating to specific goals that might be thwarted by drug use: sports, college, or employment. But abstinence for the sake of abstinence does not compute with most adolescents. Adolescence is about taking risks. “[S]urveys of adolescent behavior make clear that harm prevention is a virtually unachievable objective.”¹⁹⁸ Pledging abstinence only defers the risk, but does not eliminate it.¹⁹⁹ Complete prohibition may in fact lead to the opposite behavior: “Indeed, emphasizing the terrible consequences of sex, drugs or smoking can have the perverse effect of inclining adolescents, who are naturally given to resisting adult authority even as they claim adult prerogatives, to experimentation.”²⁰⁰ If adolescents fear their parents, religion, or law enforcement, abstinence training will work, but challenging or removing any of these authorities will only break the pledge. Adolescence is all about challenging authority and showing no fear even if only to question their relevance. In the bizarre world of teen peer group decision making versus individual decision making, teens who accept abstinence without engaging in either are quislings, and likely to grow up to push the War on Drugs on other adolescents.

Research shows that the success of a prevention program requires a systemic institutional approach rather than individual missile strikes.²⁰¹ One such comprehensive program is the Student Assistance Program, modeled after similar programs in industry and business to promote early substance abuse identification and prevention.²⁰² When adapted to schools, these programs use existing resources or outside, trained personnel to create a preventive environment.²⁰³ Similarly, Project Success has enjoyed some long-term success with high-risk students, using a four-component program that consists of lessons, counseling, parental involvement, and community agency referrals.²⁰⁴ Generally, the most effective prevention programs incorporate strategies

¹⁹⁸ *Id.* at 78.

¹⁹⁹ *Id.* at 78-79.

²⁰⁰ *Id.* at 91-99.

²⁰¹ Eric F. Wagner et al., *Implementing School-Based Substance Abuse Interventions: Methodological Dilemmas and Recommended Solutions*, 99 *ADDICTION* (SPECIAL ISSUE: SUPP. 2) 106, 111 (2004).

²⁰² *Id.*

²⁰³ *Id.* Also, the research data is weak but supportive. *Id.* at 116.

²⁰⁴ Heddy Kovach Clark et al., *Project SUCCESS’ Effects on the Substance Use of Alternative High School Students*, 35 *ADDICTIVE BEHAVIORS* 209, 210 (2010). The

that include stressing broader personal and social skills; providing basic and clear information about immediate harmful consequences; communicating a clear message and identifying clear social norms; presenting the materials in a variety of ways; adapting the teaching to the culture, experience, and age of the audience; integrating the programs into longer term curricula; and employing trained instructors who buy into the program.²⁰⁵ Unfortunately, the strength of a good prevention program—comprehensiveness—is also its Achilles’s heel: school districts face limited resources, limited school board support, limited community support, and limited funds for a trained drug-use-prevention coordinator.²⁰⁶

One strategy to offset those limitations is adoption of a comprehensive program that addresses all the prevention behaviors—drugs, alcohol, smoking, sexual activity, and violence.²⁰⁷ If all adolescent risk-taking behavior is under one programmatic umbrella, a greater likelihood exists for a better cost-benefit ratio by pooling advocates and funding.²⁰⁸ One programmatic umbrella also has the added virtue of being more pedagogically sensible.²⁰⁹

E. Community Buy-In

In conjunction with tailoring a prevention program to the audience, one must coordinate with the community as both source of the problem and source of the solutions.²¹⁰ If schools are not the source of the student drug problem (and they are not), then the schools must address the real root cause, which is often the community itself.²¹¹ One of the reasons the War on Drugs was not successful in schools and actually exacerbated their problems is that the underlying assumption was

program has proved rather successful in the regular high school environment, but its effectiveness in alternative educational settings seems short term only. *Id.* at 213-14.

²⁰⁵ Kirp et al., *supra* note 176, at 83-85; Wagner et al., *supra* note 201, at 108.

²⁰⁶ Dana L. Wenter et al., *Comprehensiveness of Substance Use Prevention Programs in U.S. Middle Schools*, 30 J. ADOLESCENT HEALTH 455, 455 (2002).

²⁰⁷ Kirp et al., *supra* note 176, at 95.

²⁰⁸ *Id.* at 95-97.

²⁰⁹ *Id.* at 97.

²¹⁰ See Sherman, *supra* note 172, at 132-33 (discussing the role that the community plays in the causes of school trouble and violence).

²¹¹ *Id.*

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wrong, that the student-enemy is engaged in the battle voluntarily and must therefore take sole responsibility for and bear the consequences of that voluntary engagement. And that may be true up to the point where we can say adolescents take drugs out of defiance to authority and regardless of the risks. But if we do not trust adolescents to vote in elections, how did we come to the point that we made them wholly responsible for graver, systemic, and more influential life-and-death problems? In other words, why did schools become a battlefield by default?

There are any number of reasons why this may be so, but for the purpose of rectifying the situation and without resorting to laying the blame on specific societal issues, let us assume the problem came about because school districts took on that responsibility as part of their educational function, voluntarily or involuntarily. For better or for worse, school districts have been tasked not just with educating children but raising them also. When parents are absent, this makes a limited amount of sense. However, forcing schools to take on child-rearing responsibilities because parents choose not to, as in Vernonia, makes much less sense. The community apparently rejected, out of hand, outside intervention or more extreme measures in what was becoming a distressing discipline problem in the schools.²¹² Nor were parents apparently willing to discipline their children themselves.²¹³ So instead, the community decided that drug testing in the schools would solve everybody's problem.²¹⁴

Now, at the time the Vernonia community adopted that policy, the War on Drugs in schools was just getting warmed up so we can assume that the community believed both this delegation of authority and the methods of control would work. At that time, the community likely perceived student drug testing as both a cutting-edge solution and a compromise that would not criminalize students but would punish them if caught. Majority rule seemed the best solution although clearly anathema to the civil rights of at least one individual who challenged

²¹² See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648-50 (1995) (giving the background on the administrator and community's actions taken in response to a drug epidemic in Vernonia schools).

²¹³ *Id.*

²¹⁴ *Id.*

the policy.²¹⁵ But it also meant that the community was unable to make the hard decisions, neither as individual parents who might have to administer drug tests to their own children nor as a collective that might have responsibilities to its young. Instead, the community abdicated its responsibilities and foisted yet another “special need” on schools. Twenty years on, we now know that reactive responses to drugs in schools do not address the root causes.²¹⁶ On the other hand, focusing on prevention will minimize reactive responses to those necessary to protect the institutional function but will not become a primary school district responsibility.

Such notions that it takes a collective responsibility to attack the roots of the problem rather than just defoliating the coverage will be met with skepticism in many communities. Some communities will simply respond that the punishments will be more successful if they are swifter and harsher, except perhaps when it involves one’s own child. Some communities simply do not have the cohesiveness to care one way or the other. So any prevention program will require that the elected officials—the school boards—get educated first then spread the gospel, each in their own idiosyncratic ways. But it really does take a community to prevent student drug use.

First, school officials must be attuned to their respective constituencies: “[S]chool management is highly correlated with community characteristics. The most disorganized schools are found in the most disorganized communities.”²¹⁷ Next, school officials must examine their collective resources and community commitment, examining the community’s “informal control, social ties, social capital, and collective efficacy.”²¹⁸ Third, school officials must advocate the merits of preventive policies over punitive approaches because a natural response in some communities, especially those with absolutist philosophies, is that by “liberalizing” punitive policies schools send the “wrong message to

²¹⁵ See *id.* at 651-52 (describing the complaint of James Acton against the drug testing that the Vernonia administrators and community approved).

²¹⁶ See Sherman, *supra* note 172, at 132-33 (arguing that community factors are a large underlying role in the proliferation of drugs and violence in schools).

²¹⁷ *Id.* at 134.

²¹⁸ Justin Hayes-Smith & Rachel Bridges Whaley, *Community Characteristics and Methamphetamine Use: A Social Disorganization Perspective*, 39 J. DRUG ISSUES 547, 551 (2009).

children,” thereby encouraging them to use drugs. Unfortunately, it is too late to worry about that now because social acceptance of drug use is already a “social norm” for students.²¹⁹

As a consequence, some communities may be less amenable to changing disciplinary policies. Communities where the leading voices belong to more fundamentalist religious groups tend to encourage more punitive disciplinary measures and to employ them with their own children.²²⁰ Those communities also tend to produce more school violence in absolute terms:

Children and youths are more likely to die in school shootings in states permitting schools to practice corporal punishment than in states in which the practice has been prohibited. The more physically punitive discipline

²¹⁹ See Matthew A. Christiansen, *A Great Schism: Social Norms and Marijuana Prohibition*, 4 HARV. L. & POL'Y REV. 229, 246-47 (2010). Adolescent acceptance of drug use, at least of marijuana, has grown during the past two decades. *Id.* at 237-38. For good or ill, much of that attitude reflects their elders' acceptance at both ends of the political spectrum. *Id.* at 240-41. Both Justice Clarence Thomas and Bill Clinton did not have issues during their candidacies regarding prior marijuana use. *Id.* President George W. Bush, at the very least, did not deny using marijuana, and rampant speculation existed that he had abused more harmful drugs. Jefferson Morley, *Bush Gets Stoned by the World Media*, WASH. POST (Feb. 24, 2005), www.washingtonpost.com/wp-dyn/articles/A48042-2005Feb23.html. In addition, the increased recreational use of marijuana proved many of the scare tactics, designed to “prevent” student drug use, false in many respects. See Christiansen, *supra*. As a consequence, nearly forty-two percent of high school seniors reported trying marijuana. *Id.* at 247. If a community wishes to inhibit such risk-taking behavior, it is better served by having its schools address drug use as a health measure rather than a prohibition. *Id.* at 241-42, 247. If further proof is needed, the dismal results of prohibition education on adolescent sexual behavior should be a cautionary tale: failing to educate about the risks does not change the underlying adolescent urge but instead increases the health risks of sexually transmitted disease. Rosenbaum, *supra* note 95, at 114.

²²⁰ Harold G. Grasmick et al., *Support for Corporal Punishment in the Schools: A Comparison of the Effects of Socioeconomic Status and Religion*, 73 SOC. SCI. Q. 177, 184, 185 (1992). “Our findings raise the possibility that religious beliefs are at the root of a wide range of calls for harshness toward those who would break the rules.” *Id.* at 185. Actual church affiliation drives those results rather than personal religiosity, and the organization itself is the more likely source of community activism concerning school discipline rather than individual advocacy. *Id.* at 184.

is practiced in the schools, the more likely students are likely [sic] to die in school shootings.²²¹

The empirical evidence directly links school violence to harsh discipline, violent environments, and family aggression²²²: “[p]arental fear and violence increase[] student risk” of school violence.²²³

School officials wanting to reform their student drug prevention strategies must signal to the community to take ownership of some of the underlying behavioral problems. Schools cannot do it alone. Although parents may have expectations about what their children are doing in school because that is where they spend so much of their day, parents can be equally oblivious to the reality of what their children are doing when under their own charge: “Parents never know what all their kids do. Not in the old days, not now, not tomorrow. It’s a law.”²²⁴ To suggest that an institution with a limited function—the school—should have a better handle on an individual adolescent’s behavior than parents themselves do shows the extent to which individual parents, and even whole communities, are disconnected from reality, not to mention personal responsibility. Schools as institutions educate adolescents, making them good citizens and training them for productive lives. However, schools are increasingly being asked to raise children as a

²²¹ Doreen Arcus, *School Shooting Fatalities and School Corporal Punishment: A Look at the States*, 28 *AGGRESSIVE BEHAV.* 173, 179-80 (2002). The correlation was greatest in the South where interpersonal violence is more acceptable and is viewed as integral to childhood socialization. *Id.* at 174, 180. “Individual occurrences of fatal school shootings are no doubt multiply determined; however, the sanctioning of violence toward children as an acceptable means of socialization and discipline in public institutions seems to contribute to the likelihood that such incidents will occur.” *Id.* at 182. This may go a long way toward explaining why one Georgia lawmaker wanted to allow teachers to carry guns to school. Freeman, *supra* note 76, at 552.

²²² Boles & Miotto, *supra* note 128, at 156; *see also* Kathryn R. Urbonya, *Determining Reasonableness Under the Fourth Amendment: Physical Force to Control and Punish Students*, 10 *CORNELL J.L. & PUB. POL’Y* 397, 438 (2001) (“[C]orporal punishment tends to teach students to solve their problems through deviousness and aggression.”).

²²³ Lindle, *supra* note 130, at 35. Similarly, communities institutionalizing tough-on-crime policies against youthful offenders have lost perspective: in one recent year, the State of Florida arrested more than 100 five-and six-year-olds. Freeman, *supra* note 76, at 554.

²²⁴ HINTON, *supra* note 45, at 76.

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parent would and to protect them from all the bad in the world, from all the evil and immoral influences, and from all the other badly behaving children.

Consequently, courts have assigned the schools not only tutelary responsibilities but also custodial responsibilities. But consider exactly what parents and courts want schools to do: although parents would not think of drug testing the neighbor's kid before letting their child play with him or her, this is what parents hope schools will do for them. However,

it is not the schools that are responsible for drug abuse. Drug abuse is merely a problem that appears serious in school because, in the social environment of the school, students are the majority of the population, and a noticeable percentage of students are often using drugs or under the influence of drugs on school premises.²²⁵

Instead, parenting is the positive correlation to adolescent drug use.²²⁶ "More global parenting practices such as monitoring; discipline and communication are likely to play significant roles in protective [sic] youth from drug use."²²⁷

In addition to understanding their direct responsibility for student drug use, communities must also understand that they do not have some special immunity from that responsibility because of their socio-economic status, location, and perceived safety. The empirical evidence reveals that no community is "safe" from drug abuse problems and that the stereotypes of safety are untrue.²²⁸ For instance, "[p]arents believe that suburban public schools provide children with safer, more orderly, and more wholesome environments than their urban counterparts. . . .

²²⁵ Venturelli, *supra* note 123, at 84.

²²⁶ See Araxi P. Macaulay et al., *Parenting Practices and Adolescent Drug-Related Knowledge, Attitudes, Norms and Behavior*, J. ALCOHOL & DRUG EDUC., June 2005, at 67, 68-69.

²²⁷ *Id.* at 75.

²²⁸ See Jay P. Greene & Greg Forster, *Sex, Drugs, and Delinquency in Urban and Suburban Public Schools*, EDUC. WORKING PAPER 4, Jan. 2004, at Executive Summary, available at http://www.manhattan-institute.org/html/ewp_04.htm.

[T]hose perceptions are unfounded.”²²⁹ Urban and suburban school environments are nearly indistinguishable when it comes to adolescent sexual activity, alcohol use, illegal drug use, and other delinquent behaviors.²³⁰ The myth of the drug problem being a logical result of urban blight and poverty is clearly untrue. In fact, Caucasian students are considerably more likely to be substance abusers than African American students.²³¹ The data also suggest that “personal threats at school are inversely related to high crime neighborhoods. . . . [S]tudents from high crime areas report fewer personal threats at school than do those from safer communities.”²³²

Likewise, student drug problems are nearly the same in urban, suburban, and rural settings because, although one might try to take the child out of the risk, one cannot take the risk out of the child. The drug of choice may differ from community to community—a cohort that may depend upon the community’s adult drug problem²³³—but the risk-taking behavior persists.²³⁴ If a suburban community has greater sociological problems associated with a particular drug, its adolescent drug problem will likely arise from that drug.²³⁵ For example, “[p]oor, highly mobile, predominantly white (and less racially diverse) communities had more methamphetamine users compared to other communities.”²³⁶ Rural communities have their own unique issues because their adolescents are as or more likely than urban and suburban adolescents to use drugs while also being more prone to violence, being victimized

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ Yamaguchi et al., *supra* note 148, at 339.

²³² Lindle, *supra* note 130, at 35.

²³³ Hayes-Smith & Whaley, *supra* note 218, at 549, 565 (explaining that “social context affects substance use”); see also Russel S. Falck et al., *Variability in Drug Use Prevalence Across School Districts in the Same Locale in Ohio*, 72 J. SCH. HEALTH 288, 290 (2002). “Findings confirmed that significant variation in drug use prevalence existed among a cohort of same-aged teen-agers attending schools in close proximity.” Falck et al., *supra*.

²³⁴ Hayes-Smith & Whaley, *supra* note 218, at 568.

²³⁵ *Id.* at 565. By removing one particular suburban locale from their test results, the researchers discovered similar drug use among suburban, urban, and rural populations. *Id.* at 566. Thus, adding that locale spiked suburban statistics significantly, primarily from white meth users. *Id.*

²³⁶ *Id.* at 565.

by violence, and being more likely to commit suicide.²³⁷ Rural teens had similar drug problems with cocaine, inhalants, heroin, steroids, and methamphetamines as their urban and suburban counterparts.²³⁸

Higher socioeconomic standards also do not vaccinate adolescence. “Although research clearly indicates that poverty represents risk for poor developmental outcomes[,] . . . some problematic outcomes, like substance use, may occur as frequently, if not more so, among children living in affluent, suburban communities.”²³⁹ Such “privileged” teens abuse drugs to cope with “depression, anxiety, delinquency, and peer acceptance that . . . may be specific to this social ecology.”²⁴⁰ A sizable group of “popular” kids may be persistent drug abusers because of “higher levels of emotional-behavioral difficulty[] and relatively poor school adjustment.”²⁴¹ It is indeed ironic that the racial and economic stereotypes advanced by proponents of the War on Drugs got it so wrong, that moving to “our” better neighborhoods to avoid the influence of “their” bad neighborhoods was so dramatically wrong. The enemies were “real” Americans after all.

As the approach to student drug use moves into the realm of becoming a public health issue, the community clearly must become more involved. Schools cannot and should not be doing this alone. This is not one of those tasks that would normally come under their purview but for the characteristics of the adolescent population they serve. That adolescent population did not arise in a vacuum nor are schools the cause of its drug use problems. School officials must include community stakeholders because those stakeholders have had a greater role in creating the problem than the institution upon which they have foisted the cleanup operations. Community stakeholders have to own up to those responsibilities and become a solution rather than a hindrance.

²³⁷ Johnson et al., *supra* note 125, at 560. Rural adolescents were also less likely to have been in a fight but more likely to carry weapons, to engage in suicidal behavior, and to be coerced into having sex. *Id.* at 557.

²³⁸ *Id.*

²³⁹ See Thomas J. McMahon & Suniya S. Luthar, *Patterns and Correlates of Substance Use Among Affluent, Suburban High School Students*, 35 J. CLINICAL CHILD & ADOLESCENT PSYCHOL. 72, 72 (2006).

²⁴⁰ *Id.* at 83.

²⁴¹ *Id.*

F. Liability Issues

Prevention and community integration into the solution may also solve a looming litigation disaster that school districts may have to address if they do not soon extricate themselves as the sole entity responsible for solving student drug problems. Ordinarily, schools have no more tort responsibility to students than what might arise from the duty to supervise. However, in their efforts to thwart students' civil rights in the name of the War on Drugs, their state interest has been determined to be their duty to protect students from themselves and from each other. Oddly enough, the school district's law enforcement acts may be the culprit in triggering tort liability for failure to fulfill that duty.

The reality is that when school districts are assigned or voluntarily undertake law enforcement responsibilities for eliminating adolescent drug use, society in general and communities in particular come to depend upon that lone soldier doing its job. The reasons for this assignment or undertaking might be for convenience, expedience, or economics, but those reasons become lost in the mists of times when parents rely on that undertaking. Despite protestations and caveats to the contrary (especially to avoid constitutional tort liability), the Supreme Court clearly sent that message when it referred to the schools' "special need" to protect innocent students from other students who use or to protect users from their own bad decisions.²⁴² In so doing, the Court cast schools' special needs as a legitimate rationale, and not just a function, of student drug-testing regimens in order to protect children from drugs.

The corollary arguments are consistently made by advocates who expect schools to protect students from violence, particularly bullying,²⁴³ although without much success. The difference with drug usage

²⁴² See *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 829-30 (2002).

²⁴³ See, e.g., Thomas L. Sullivan & Richard L. Bitter, Jr., *Abused Children, Schools, and the Affirmative Duty to Protect: How the DeShaney Decision Cast Children into a Constitutional Void*, 13 *GEO. MASON U. C.R. L.J.* 243, 244 (2003) (arguing the Constitution needs to provide students with protection when states fail to protect them); Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 *TEMP. L. REV.* 641, 643 (2004) (arguing that both the legislature and the courts need to impose an affirmative duty on schools to prevent and punish bullying).

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is that the school districts have made these arguments themselves. In the hope of some broader success in limiting their students' constitutional rights, they have defined, conceded, and even embraced a responsibility to their students and drug use that the antibullying forces have not yet been able to achieve. As a consequence, parents believe that schools have that responsibility, that the school-student relationship creates a responsibility to save their children from their own bad drug decisions:

The 10 top reasons . . . to support student drug testing:

Adam, 18, deceased.

Mark, 24, deceased.

Garrett, 22, deceased.

David, 26, deceased.

Billy, 17, deceased.

Cooper, 22, deceased.

Ian, 21, deceased.

Angela, 18, deceased.

Michael, 22, deceased.

Stephanie, 19, deceased.

The parents of these young people believe their children might still be living had their school systems supported their parental message of "no drugs" by drug testing the students.²⁴⁴

They believe that if these children died from drug use, then schools are at fault by not doing more to protect them.²⁴⁵

²⁴⁴ Joyce Nalepka, *Just Say No*, WASH. TIMES, Mar. 23, 2002, at A11.

²⁴⁵ *See id.*

In the not-too-distant future, a school district is going to face litigation on this issue, if it has not already occurred.²⁴⁶ With pending changes in the *Restatement (Third) of Torts*,²⁴⁷ parents might have more than just social expectations of their children's safety in school. Parents might have the law on their side for both protecting children from their own drug usage and protecting them from drug users, via a special relationship created around student drug use that is more specific and less benign than the mere duty to supervise.

Schools as municipal institutions do not usually enjoy complete immunity from tort liability.²⁴⁸ Unless there is a state statute giving schools complete cover, there are interstices of behavior for which they may be held liable.²⁴⁹ Under classic municipal tort law, a statutory duty or voluntarily undertaking a duty may create liability to a class of protected people.²⁵⁰ If one follows the analogy of police liability, police have no duty to protect citizens from crimes²⁵¹ so long as they do not create a special relationship with an individual or act negligently.²⁵² Just as children are a protected class to whom the state owes a duty of

²⁴⁶ See *infra* note 247 and accompanying text.

²⁴⁷ The proposed *Restatement (Third) of Torts* includes the following: "Special relationships giving rise to the duty [of reasonable care with regard to risks that arise within the scope of the relationship] include: . . . (5) a school with its students." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40(b)(5) (Proposed Final Draft No. 1, 2007).

²⁴⁸ See, e.g., Robert Weisberg, *Preventing Crime: Private Duties, Public Immunity*, 2 J.L. ECON. & POL'Y 365, 377 (2006) (stating that municipalities do not usually enjoy categorical immunity in tort liability cases).

²⁴⁹ See *id.* (stating that courts apply immunity principles either under common law or statutory law).

²⁵⁰ Such instances might include acting so that an individual relaxes self-protection or increasing the threat of harm through actual reckless or intentional conduct. *Id.* at 378-79.

²⁵¹ *Id.* at 365. One of the more interesting arguments opposing the War on Drugs comes from gun-rights advocates, who blame the war for diverting resources to victimless crimes and leaving citizens to fend for themselves against violent crimes. *Id.* at 366.

²⁵² Horace B. Robertson, Jr., *Municipal Tort Liability: Special Duty Issues of Police, Fire, and Safety*, 44 SYRACUSE L. REV. 943, 946 (1993). Examples include duties to informers, witnesses, undercover agents, individuals protected by court order, and those injured by a prisoner's release. *Id.* at 948; see also Michele H. Berger, Comment, *Negligence or State-Created Danger: Two Avenues for Injured Student Informants Pursuing School Liability*, 30 U. LA VERNE L. REV. 94, 95-96 (2008)

safety under child-abuse reporting statutes,²⁵³ so might one characterize children as a protected class under federal statutes that require schools to educate about illegal drugs.²⁵⁴ Or perhaps those federal statutes have created a special relationship between the schools and their students. The Court said as much in *Morse v. Frederick*.²⁵⁵ In that decision, the First Amendment took a back seat to the school's special needs because federal statutes imposed an obligation to educate students about drug abuse and "school officials [were] working to protect those entrusted to their care from the dangers of drug abuse."²⁵⁶ The Court acknowledged a statutory obligation and a protected class, thereby creating a special relationship arising from the special needs.²⁵⁷ Thus, the greater the obligations schools take upon themselves beyond their educational function, the greater the likelihood that they have undertaken affirmative duties to do something more, to nearly ensure that students will not use drugs.²⁵⁸

Similarly analogous is municipal liability arising from the special relationship created by safety inspections.²⁵⁹ The Court has characterized student drug testing as custodial, with two prongs: to protect those who are using drugs and to protect the nonusers from the users.²⁶⁰ Insofar as the Court has increasingly relied on custodial obligations as the state interest underlying student drug testing, it has moved schools closer and closer to imposing a duty not just to supervise but also to monitor. The community in *Vernonia* apparently did just that when it tasked the schools with the responsibility to curb their apparent drug

(proposing a tort duty for schools that use students as informants for drugs and weapons in schools).

²⁵³ Weisberg, *supra* note 248, at 378.

²⁵⁴ See, e.g., 20 U.S.C. § 7115 (2006) (requiring schools to engage in qualified illegal drug education programs in order to receive funding under the Act).

²⁵⁵ See *Morse v. Frederick*, 551 U.S. 393, 408 (2007) (stating that "Congress has declared that part of a school's job is educating students about the dangers of illegal drug use," and thus this special interest allows a school to restrict a student's freedom of expression).

²⁵⁶ *Id.*

²⁵⁷ See *id.*

²⁵⁸ See *supra* notes 248-57 and accompanying text.

²⁵⁹ See *Robertson*, *supra* note 252, at 952-53 (noting some municipalities receive immunity for safety inspections).

²⁶⁰ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 662 (1995).

problem rather than referring the students to law enforcement, especially as the Court continues to clothe that duty with the features of the previously moribund *in loco parentis* doctrine.²⁶¹ And the evidence is more and more convincing that parents are relinquishing their parental obligations for their children as they come to rely on schools to protect their children instead. Perhaps this is the quid pro quo for their giving up their children's civil rights.

G. Restoring Civil Rights

Schools have no more important duty than to educate students, but especially to educate them to be good citizens:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.²⁶²

It is the genius of U.S. public education that schools teach all students, regardless of race, culture, creed, gender, disability, religion, or any other characteristic that may distinguish one student from any other. It is the genius of U.S. public education that schools teach children not just to succeed individually but to succeed as a polity.

²⁶¹ *Id.* at 654, 662 (characterizing the school's duty to employ drug searches for the protection of "children for whom it has undertaken a special responsibility of care and direction").

²⁶² *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

The U.S. polity is dependent upon its success through both the individual rights and collective action envisioned by the Constitution. This founding document is the core of citizenship. It is taught in school. But it is no longer effective in schools, an example of “collateral damage in the War on Drugs.”²⁶³

Four interrelated threads are involved with the War on Drugs and the Constitution. First is the ineluctable and undisputed conclusion that citizens of the United States voluntarily (and involuntarily) have given up their rights under the Constitution for the sake of a fraudulent and unwinnable war with an implacable enemy, their children. What government asks this of its citizens? And what citizens would accede? “[I]n 1989, a Washington Post-ABC News Poll found that 62% of Americans would be willing to give up a few of their freedoms in order to fight the war on drugs.”²⁶⁴ Parents have voted, en masse, to search their children’s bodily excretions with no evidence it will work and which intuition suggests was destined to fail. Children mimic their parents’ response by asserting drug testing is no big deal; if I have not done anything wrong, then why resist? “My school is considering drug tests that cost \$15 each . . . Certainly, we value our freedom. But if there’s one thing we’ve learned . . ., it is that our freedom has a price. If that means drug testing, so be it. It’s a price I’m willing to pay.”²⁶⁵ Parents who resist drug testing in schools find themselves unexpectedly calling upon the ACLU to assist them: “The Linkes joke that they have always viewed the Indiana Civil Liberties Union as ‘the devil,’ although, as mother Noreen Linke puts it now, ‘When the devil is on the right side,

²⁶³ Graham Boyd, *Collateral Damage in the War on Drugs*, 47 VILL. L. REV. 839, 840 (2002).

²⁶⁴ *Id.* at 840 (describing cases abridging freedom of religion, freedom of speech, freedom from unreasonable searches and seizures, all of which involved drugs).

²⁶⁵ C. E. EDWARDS, DRUG-FREE PROJECTS COALITION, INC., STUDENT RANDOM DRUG-TESTING PREVENTION PROGRAMS: DO THESE PROGRAMS WORK? 4 (2008) (alterations in original), available at <http://www.studentdrugtesting.org/SDT%20does%20it%20work%20article%2008.pdf>. The more realistic student response is: “Drug testing is costing a lot of taxpayer money; but anything that’s going on around here would be out of your system by the time you’re tested.” Janelle Brown, *Why Drug Tests Flunk*, SALON (Apr. 22, 2002), http://www.salon.com/life/feature/2002/04/22/drug_testing/print.html.

where are you supposed to be?’”²⁶⁶ We have now reached the point that asserting one’s constitutional rights is socially suspicious.

The second thread is related to the first because the power to limit students’ civil rights has been ceded—either voluntarily or involuntarily—to the schools during the War on Drugs. That dynamic creates enormous contradictions between what schools should be and what they have become. Because no one is willing to take responsibility, the institution where children are the dominant population has become ground zero for the war. The schools did not cause this war and did nothing to encourage the war. They just happened to be where the enemy “camped out.” Instead of being the allies of that constituency—pursuant to the profound truths of *Brown v. Board*—schools have become battlegrounds. Or worse yet, another American Gulag.²⁶⁷

Third, schools were never designed to be battlegrounds so their generals are ill prepared to do battle.²⁶⁸ Instead, school officials have engaged the enemy only because they have been exhorted to do so by their government, regardless of whether they have either the training or temperament to do so.²⁶⁹ As a consequence, they are not very effective warriors: their tools are ill suited to deal with an enemy whose response is recalcitrance, belligerence, disrespect, and ingenuity.²⁷⁰ But commu-

²⁶⁶ *Brown*, *supra* note 265.

The Linkes’ lawsuit sent a tremor of scandal through their small community. The parents were snubbed by conservative friends, and the family’s mailbox filled with anonymous letters in strange handwriting, most of which accused them of thinking they were better than everyone else. At the same time, the girls discovered that many students and even some teachers were thrilled about the case; as a bonus, Rosa even had some new admirers. “I was very popular among the druggie crowd,” she says wryly.

Id.; *see also* *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972, 986 (Ind. 2002) (upholding the policy).

²⁶⁷ *Cf. Boyd*, *supra* note 263, at 839 (“[A]lmost two million people fill U.S. prisons and jails due largely to harsh sentencing laws for drug crimes, especially low-level nonviolent offenses. This vast American Gulag ranks as the 35th most populous state, just surpassing Nevada’s 1.99 million residents.”).

²⁶⁸ *See supra* notes 87-99 and accompanying text (addressing that the primary function of schools is to educate students).

²⁶⁹ *See supra* notes 53-54 and accompanying text.

²⁷⁰ *See supra* Part III.B (noting that drug testing, one of the tools used by school officials, is not effective in part because of how students react).

nities and the courts have looked the other way, telling them that even if they do the job badly, it is not their fault.²⁷¹ When they cannot accomplish the military mission successfully, someone will bend the rules of engagement. Despite what these school officials teach their students, the Constitution will fold under the pressure.²⁷²

And that leads to the fourth proposition: this war has always been about undifferentiated fear, so school officials are becoming instruments of sowing that fear. Not only is this proposition contrary to its educational mission, it is destructive of that educational mission. Children know the difference between power arising from fear and power arising from a mutually respectful relationship. The war may be successful for those children who are made afraid, but that makes the schools responsible for teaching a fearful citizenry. Those children who do not fear will likely never fear. Instead, they will increase their risk-taking behavior. And the institutional “memory” is short. The population always changes every year. That means every year, each school district has to renew its efforts. A school that runs on fear has already lost the battle.

Education is a mission that is hard enough without telling its leaders that they must wage war on its constituency.²⁷³ Insofar as we are more and more becoming a citizenry that should succumb to fear of one sort or the other,²⁷⁴ then perhaps schools really are accomplishing their mission. Insofar as we continue to view ourselves as a “shopping nation,” then perhaps fear serves us well.²⁷⁵

²⁷¹ See *supra* note 224 and accompanying text (arguing that communities need to be involved and take some of the blame for drug problems).

²⁷² See, e.g., JENNIFER KERN ET AL., *MAKING SENSE OF STUDENT DRUG TESTING: WHY EDUCATORS ARE SAYING NO* 20 (2d ed. 2006) (arguing that students “are guilty until proven innocent”).

²⁷³ See *supra* note 267 and accompanying text (noting that schools are “ground zero” for a war they did not cause).

²⁷⁴ See BARRY GLASSNER, *THE CULTURE OF FEAR: WHY AMERICANS ARE AFRAID OF THE WRONG THINGS: CRIME, DRUGS, MINORITIES, TEEN MOMS, KILLER KIDS, MUTANT MICROBES, PLANE CRASHES, ROAD RAGE, & SO MUCH MORE* 135 (1999) (noting historical times of drug scares).

²⁷⁵ See JAMES A. MORONE, *HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY* 98-99, 495-97 (2003) (explaining how reactions to fear have steered politics in America).

**IV. “HE MADE HIS BLAZING SADDLE A TORCH
TO LIGHT THE WAY”²⁷⁶**

Schools are being bombarded almost daily with more and more complaints about their educational function. They have bigger, more systemic issues to deal with than the War on Drugs.²⁷⁷ One would think schools would be relieved to not have that burden so they can get back to their real business.²⁷⁸ This is what the Obama Administration is trying to effect.²⁷⁹ Of course, some school officials will have difficulty making the adjustment from being law enforcement officials.²⁸⁰ Based on the new direction taken by the Obama Administration, those school officials will instead have to focus on preventive measures to deal with school drug problems.²⁸¹ Making this change will not be easy, especially given the pervasiveness of the legal and policy emphases over the past twenty to thirty years that focused on crime and punishment approaches in the War on Drugs.²⁸² However, whence goes the money, so goes the policy. Untangling all the punitive policies will take a lot of effort and, where possible, increased community involvement.²⁸³ But if schools will only receive funding for proven prevention programs, the incentives for change are clear.

²⁷⁶ BLAZING SADDLES, *supra* note 18.

²⁷⁷ *See supra* Part I.

²⁷⁸ *See supra* Part III.E.

²⁷⁹ *See supra* notes 31-44 and accompanying text.

²⁸⁰ *See supra* Part II.

²⁸¹ *See supra* notes 31-44 and accompanying text.

²⁸² *See supra* Part II.

²⁸³ *See supra* Part III.E.