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A Moving Violation - Hypercriminalized Spaces and Fortuitous Presence in Drug Free School Zones

Lolita Buckner Inniss
Southern Methodist University, Dedman School of Law

A Moving Violation? Hypercriminalized Spaces and Fortuitous Presence in Drug Free School Zones

By: L. Buckner Inniss*

I. Introduction

Over the last thirty years, both the federal government and a majority of states have enacted statutes that prohibit certain types of conduct involving illicit drugs in or near schools, school buses, or other youth or family-related facilities and locales.[1] These statutes vary from jurisdiction to jurisdiction in terms of whether they stand alone as separate offenses or serve as a sentencing enhancement and in terms of the defenses available. The net effect of such statutes in either case is to "hypercriminalize" certain areas or spaces where drug activity takes place by increasing the length of incarceration after conviction. Such statutes have been subject to a number of challenges over the years. Chief among them are constitutional claims that such statutes are an invalid exercise of legislative or police power,[2] violate due process and equal protection guarantees,[3] violate the Eighth Amendment's prohibition on punishment that is grossly disproportionate to the crime,[4] violate double jeopardy provisions,[5] or are overbroad.[6] A number of other claims have been based upon the allegedly vague and arbitrary nature of statutes that punish persons who were found with drugs in their vehicles while passing through school zones[7]. A third set of claims point to the lack of a requirement that the offender intended to be present in the

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* Assistant Professor Cleveland State University Law School, A.B. Princeton University, J.D. University of California, Los Angeles. I am grateful for comments on earlier drafts received from participants in the 2001 American Society of Criminology Annual Meeting and from Professors April Cherry and Patricia Falk. I also thank participants in the 2003 Cleveland Marshall Faculty Luncheon forum and Holli Goodman for her superb secretarial assistance.

1. *See, e.g.* 21 U.S.C. §§ 841, 856, 860 (1994), ARIZ. REV. STAT. §§ 13-609, 13-3408 (2001), CAL HEALTH & SAFETY CODE § 11353.6 (2001), GA. CODE ANN. § 16-13-32.4 (2001), IND. CODE ANN. § 35-48-4-6 (2001); MD. ANN. CODE art. 27, § 286D (2001).

2. *See, e.g.*, State v. Hermann, 164 Wis. 2d 269 (Wis. Ct. App. 1991); State v. Burch, 545 So. 2d 279 (Fla. App. D4 1989).

3. *See, e.g.*, Smith v. State, 791 So. 2d 1064 (Ala. Crim. App. 2000) (due process claim based on lack of fair notice); State v. Brown, 648 So. 2d 872 (La 1995.); State v. Ward, 92 Ohio App. 3d 631 (Ohio Ct. App. 1993) (equal protection claims).

4. *See, e.g.*, United States v. Ortiz, 146 F.3d 25, 30 (1st Cir. 1998);,State v. Hermann, 474 N.W.2d 906 (Wis. Ct. App. 1991); Philips v. State, 578 So. 2d 40; (Fla. Dist. Ct. App. 1991) State v. Burch, 545 So. 2d 279 (Fla. Ct. App. 1959); ; State v. Brown, 547 A.2d 743 (N.J. Super. Ct. App. 1988); United States v. Holland, 810 F.2d 1215, 1220-22 (D.C. Cir. 1987).

5. *See, e.g.*, Riley v. South Carolina, 82 F. Supp. 2d 474 (D.S.C. 2000), State v. Otto, 717 A.2d 775 (Conn. App. Ct. 1998), State v. Dillihay, 601 A.2d 1149 (N.J. 1992).

6. *See, e.g.*, State v. Strong, 875 P.2d 166 (Ct. App. 1993).

7. People v. Townsend, 62 Cal. App. 4th 1390, 73 Cal. Rptr. 2d 438, 124 Ed. Law Rep. 965 (6th Dist. 1998), State v Patrick (1996) 42 Conn App 640, 681 A2d 380. Jackson v State (1990, Ala App) 570 So 2d 874

drug-prohibited zone.[8] To date, virtually none of these challenges have succeeded, and both federal and state schoolyard statutes are widely hailed as major weaponry in the war against drugs.[9]

In this article, I discuss these frequent challenges to schoolyard statutes in order to set the stage for what is a far more provocative and as yet unaddressed aspect of schoolyard statutes: the role of "hypercriminalization" of spaces. This article looks at schoolyard statutes and considers the problem of hypercriminalization of spaces as it affects two aspects of the statute. The first is the problem of persons possessing prohibited substances whose presence in the prohibited zone is due to luck or happenstance. Although there has been an uncanny degree of uniformity throughout courts' decisions to uphold schoolyard statutes against a wide variety of challenges, a review of the cases involving happenstance or fortuitous presence in school zones suggests that courts may, under particular circumstances, be unwilling to find liability for presence in the zone which is so fleeting, tangential, or fortuitous that there would be manifest injustice were the statute to be applied.[10] The second aspect of hypercriminalization which this article addresses is a less frequently litigated aspect of schoolyard statutes: liability for drug possession in or near school buses and public housing projects. Schoolyard statutes routinely extend liability to such areas. The question which grows out of this added liability for drug activity near schools or near other areas is whether justice and the goal of a drug-free America[11] clearly demand the creation of this hypercriminalized space and the consequent lengthened incarceration in such cases.

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8. *See, e.g.*, United States v. Falu, 776 F.2d 46 (2d Cir. 1985).

9. This success might be seen as the triumph of the war on drugs. See *infra* footnote 11.

10. *See generally* Andrew Little, Comment, *Caught Red-Handed: The Peculiarities Of The Federal Schoolyard Statute And Its Interpretation In The Fifth Circuit*, 31 TEXAS TECH. L. REV. 345 (2000); Sonja R. West, Comment, *"Possessing With Intent To Distribute" Under The Schoolyard Statute*, 64 U. CHI. L. REV.1399 (1997); Russell D. Hall, Note, *United States V. Wake: Fifth Circuit Hands Down Hard-Line Intent Requirement In Schoolyard Statute*, 10 T.M. COOLEY L. REV. 443 (1993); Shara Beth Mervis, Note, *Constitutional Law-Maryland's Drug-Free School Zone Statute, Which Increases Penalties for Distribution of Controlled Dangerous Substances Within 1000 Feet of School Property, Satisfies Due Process Requirements*, 24 U. BALT. L. REV. 385 (1993).

11. It is sometimes said that the ultimate goal of the "war on drugs" is a "drug free" America. Much research suggests, however, that at this point in our history such a goal is quixotic and cannot be realized, or perhaps, will not be realized as long as Americans remain ambivalent about whether drug use represents a legitimate moral scourge. As Thomas Szasz argues in his book JUST AND UNJUST WARS: THE WAR ON THE WAR ON DRUGS—SOME MORAL AND CONSTITUTIONAL DIMENSIONS OF THE WAR ON DRUGS AND OUR RIGHT TO DRUGS: THE CASE FOR A FREE MARKET, (1992) Americans are in thrall to a system of therapeutic and pharmacological paternalism in which "bad drugs" and "street drugs" are much maligned as the cause of societal ills, while drugs prescribed by doctors, regardless of whether such drugs truly alleviate any particular illness or

The first section of this article discusses the nature of criminalized and hypercriminalized spaces in general, and drug-free school zones as hypercriminalized spaces. The second section details the creation of federal schoolyard statutes and recurring challenges to their validity. The third section discusses congressional power to act in the area of drug interdiction. Section Four considers Equal Protection and Due Process claims arising from presence in schoolyard zones. Section Five examines several *mens rea* challenges to schoolyard statutes. The sixth section looks at Eighth Amendment challenges to school zone statutes. In section seven, I describe liability arising from proximity to school buses and housing projects and how hypercriminalization effectively "deperimeterizes" some locales. Finally, the article concludes with a discussion of how the various points under discussion in this paper relate to the notion of the hypercriminalization as a method of crime control.

II. Criminalized Spaces in General and Drug Free Zones--The Hypercriminalized Space

In this Section, I set forth my theory of hypercriminalized space by first describing and discussing the notion of criminalized space. Both are important to understanding the nature and function of drug free zones.

A. Criminalized Space

The general goal of criminal laws is to condemn certain immoral[12] or bad acts causing harm to society.[13] Thus, when we speak of criminal

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condition, are sacrosanct. *Id.* at 47-48. The result, says Szasz, is that the political elite have access to drugs through their "physician-suppliers" while others are denied access. *Id.* at 97. An early example of this is seen in the first federal drug control law, the Harrison Act, 38 Stat. 785 (1914) (codified as amended at 26 U.S.C. 4701-4706 (1964)) (repealed 1970). The Harrison Act required importers, producers, and distributors of opium and cocaine to register and pay an occupation tax. Only "legitimate" persons could register and obtain the required transfer forms to buy or sell the drugs. 26 U.S.C. §§ 34701 & 34703. The Harrison Act addressed primarily opiates and cocaine, and removed distribution of these substances from the hands of the public and placed distribution in the hands of physicians and pharmacists. *Id.*

12. Joel Fineberg HARMLESS WRONGDOING 4 THE MORAL LIMITS OF THE CRIMINAL LAW 10-17 (1988) (the "harm principle" while related to morality and the notion of evil, is distinct from it. "The harm principle *is*, obviously, a kind of moralistic principle, aimed at determining the moral values that may properly be enforced by the morality-shaping apparatus of the criminal law. But it still does not follow that the harm principle permits the criminal law to proscribe any and all kinds of wrongdoing, or any and all kinds of evil." There are, as Fineberg writes, an entire class of wrongs which, while imputable to human beings, do not give rise to personal grievances.)

13. Note that harm alone is generally not seen as a sufficient as a basis for criminalizing an offense. The "harm" principle has been explicated at length by a number of commentators. *See, e.g.* Douglas N. Husak, *The Nature And Justifiability Of*

prohibitions, we generally speak of particular acts that are to be condemned because of their harmful effect on others. It is often the case, however, that we condemn certain acts not simply because of the inherent wrongfulness of the act, but because of where the act takes place. The nature of the place thus adds to the harmfulness of the act. We criminalize not just the act but also the space in which it occurs; usually on the rationale that certain acts in certain places represent societal wrongs. I have termed statutes of this nature "criminalized-space" statutes.

The notion of criminalized space applies generally to prohibitions on acts in certain public places. The concept does not apply in the same way to certain private spaces because, as in the example of burglary laws or criminal trespass, the prohibitions on entry are founded upon ideals of security in private property and not so much upon the notion that the public is personally harmed when these crimes occur.[14] Some examples of criminalized public spaces and behavior include: no parking zones, maximum speed zones, illegal parking, juvenile curfew laws,[15] jaywalking,[16] public drunkenness,[17] public profanity,[18] loitering,[19] vagrancy,[20] sleeping in outdoor public areas,[21] camping or storage of

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Nonconsummate Offenses, 37 ARIZ. L. REV. 151, 155-158 (1995). At least one commentator has, however, suggested that the harm principle has become the sole justification basis for determining whether to criminalize particular acts. "Claims of harm have become so pervasive that the harm principle has become meaningless: the harm principle no longer serves the function of a critical principle because non-trivial harm arguments permeate the debate. Today, the issue is no longer whether a moral offense causes harm, but rather what type and what amount of harms the challenged conduct causes, and how the harms compare." Bernard E. Harcourt, *Criminal Law: The Collapse Of The Harm Principle* 90 J. CRIM. L. & CRIMINOLOGY 109, 113 (1999).

14. *See, e.g.*, WILLIAM BLACKSTONE, COMMENTARIES 223 (1769).

15. *See, e.g.*, Hodgkins v. Peterson, 175 F.Supp. 2d 1132 (S.D. Ind. 2000); Hutchins v. District of Columbia, 188 F.3d 531 (D.C. Cir. 1999); Qutb v. Bartlett, 11 F.3d 488 (5th Cir. 1993); People v. Chambers, 360 N.E.2d 55 (Ill. 1976).

16. *See, e.g.*, State v. Jones, 727 N.E.2d 886 (Ohio 2000).

17. *See, e.g.*, Maynard v. Commonwealth, 261 S.W. 10 (1924); Laboon v. State, 67 S.E. 2d 149 (1951); Berry v. Springdale, 381 S.W.2d 745 (Ark. 1964).

18. *See, e.g.*, Brendle v. City of Houston, 177 F. Supp. 2d 553 (N.D. Miss. 2001); Brown v. Edwards, 721 F.2d 1442 (5th Cir. 1984); Clay v. Wainwright, 470 F.2d 478 (5th Cir. 1972); Finn v. United States, 256 F.2d 304 (4th Cir. 1958).

19. Kolender v. Lawson, 461 U.S. 352 (1983) (holding a loitering law unconstitutionally vague). *See also* United States v. Cassiagnol, 420 F.2d 868 (4th Cir.) (upholding regulation barring loitering on government property). Modern loitering statutes avoid the charge of vagueness by more narrowly tailoring the statutes as to the time and place of prohibitions. *See also* Paul Ades, Comment, *The Unconstitutionality of "Antihomeless" Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CAL. L. REV. 595, 604-05 (1989).

20. Vagrancy, meaning the presence or wandering in public by idle persons, has long been a part of Anglo-American jurisprudence. *See, e.g.* Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 636-41 (1992) (exploring the history of English and American vagrancy laws); Foote, *Vagrancy-Type Law and its*

goods in public places,[22] sitting or lying in public,[23] public urination and defecation,[24] public nudity,[25] public indecency,[26] littering, graffiti, begging or panhandling,[27] soliciting employment in public,[28] and no smoking areas.[29] There are occasional "emergency safety zones" prohibiting presence in a particular area designated by police officials.[30]

Administration, 104 PA. L. REV. 603, 609 & n.7 (1956). In *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), the Supreme Court found such statutes unconstitutional.

21. *See, e.g.* Johnson v. City of Dallas, 860 F. Supp. 344 (N.D. Tex. 1994), rev'd and vacated for lack of standing, 61 F.3d 442 (5th Cir. 1995) (ordinance prohibiting sleeping in public is unconstitutional); People v. Davenport, 176 Cal. App. 3d Supp. 10 (Cal. App. Dep't Super. Ct. 1985) (ordinance prohibiting sleeping at certain times in certain places is constitutional); Pollard v. State, 687 S.W.2d 373 (Tex. Ct. App. 1985) (complaint alleging violation of ordinance prohibiting sleeping and dozing in public void for failure to include culpable mental state); Seeley v. State, 655 P.2d 803 (Ariz. Ct. App. 1982) (ordinance prohibiting lying, sleeping or sitting in public right-of-ways meets constitutional scrutiny); State v. Penley, 276 So. 2d 180 (Fla. Dist. Ct. App. 1973) (affirming a motion to suppress granted when a gun was found on a sleeping man roused by police for violating no sleeping ordinance).

22. Tobe v. City of Santa Ana, 892 P.2d 1145, 1160-66 (Cal. 1995) (the Supreme Court of California upheld the validity of a city ordinance that banned camping and storage of personal property in public areas. The court rejected allegations that the ordinance violated the right to travel, constituted status criminality, and was void for vagueness.) *See also* Portland v. Johnson, 651 P.2d 1384 (Or. Ct. App. 1982).

23. Berkeley Cmty. Health Project v. City of Berkeley, 902 F. Supp. 1084 (N.D. Cal.1995) (upholding a preliminary injunction of a statute which prohibited sitting or lying in public.).

24. *See, e.g.*, Littleton v. Detroit, 2002 U.S. Dist. LEXIS 16428 (E.D. Mich. 2002); Vigue v. State, 987 P.2d 204 (Ala. 1999).

25. *See, e.g.*, Colonial First Prop., LLC v. Henrico County, 166 F. Supp. 2d 1070 (E.D. Va. 2001).

26. *See, e.g.*, Armengau v. Cline, 7 Fed. App.. 336 (N.D. Ohio 2001).

27. Begging and panhandling statutes have long been part of Anglo American law. *See* Young v. New York City Transit Auth., 749 F. Supp. 341, 353-56 (S.D.N.Y. 1990), in which the court considers the history of begging in England and the United States: *See also* Robert Teir, *Maintaining Safety and Civility in Public Spaces: A Constitutional Approach to Aggressive Begging* 54 LA. L. REV. 285 (1993) (beggars divided into different classes and prescribing different terms of incarceration, ranging from six months to two years, for each. Begging or panhandling statutes often have specific provision about where such activity may not occur. *See, e.g.*, Baltimore, Md., Code art. 19, 249(d).

28. *See, e.g.*, Coalition for Humane Immigrant Rights v. Burke, 2000 U.S. Dist. LEXIS 16520.

29. U.S. v. Roberts, 735 F. Supp. 537, 541 n. 6 (S.D.N.Y. 1990). Nonsmoking laws raise an interesting question because smoking is viewed as a minor vice that is the subject of the criminal law only when users behave so as to subject others in public places to secondhand smoke. This is true even though smoking is one of the most harmful substances available in the legitimate marketplace, causing thousands of deaths and serious illnesses annually. As the court in *U.S. v Roberts* stated in reference to the illogic of imposing stringent penalties for possessing drugs with intent to distribute in school zones:

The vast majority of criminalized space offenses may be subsumed under the heading of "Quality of Life Violations" in that the violation of such ordinances is seen as an assault upon accepted standards of decency or propriety that are the foundation of a high quality life style.[31] Residents of all neighborhoods, rich or poor, should ideally be in favor of such laws, since, according to one commentator, laws addressing the quality of life in neighborhoods help to shape information about the beliefs and intentions of society about crime.[32] Those who wish to deter crime should concern themselves less about the effect of certain policies on the price of crime and more about the message conveyed by such policies.[33] It is argued that absence of such laws may result in disorder, and disorder may be "pregnant with meaning,"[34] sending signals not only about the individual law breaker, but about a community's ability or willingness to enforce certain norms of behavior.[35] This may be true regardless of whether such acts are in fact minor infractions. Scholar Jane Jacobs has posited that without access to safe and crime-free streets, a city becomes subject to a number of other ills.[36] Neighborhoods which fall prey to

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> Whereas distribution relates to supply and manufacturing implies both a foothold or some establishment leading to the supply of drugs within the vicinity of the school, possessing, while passing through the zone, with intent to deliver elsewhere, does nothing to adulterate the zone with a supply of drugs than a smoker having an unopened pack of cigarettes does to adulterate a nonsmoker section or zone.

30. Leonardson v. East Lansing, 896 F.2d 190 (6th Cir. 1990) (upholding an ordinance that allowed the chief of police or his designate to create "emergency safety zones").

31. *See, e.g.*, Joyce v. City of San Francisco, 846 F. Supp. 843 (N.D. Cal. 1994) (in which the City of San Francisco initiated a program to rigorously enforce laws against the homeless in order to address citizen complaints. In terming such offenses "Quality of Life" offenses, the city described them as being aimed at "a "type of behavior [that] tends to make San Francisco a less desirable place in which to live, work or visit"). *Id.* at 845. *See also* Debra Livingston, *Police Discretion and the Quality of Life in Public Places*, 97 COLUM. L. REV. 551 (1997).

32. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 351 (1997)

33. *Id.*

34. *Id.* at 370.

35. *Id.* at 371.

36. Jane Jacobs, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961). Jacobs writes:

> The bedrock attribute of a successful city district is that a person must feel personally safe and secure on the street among all these strangers. He must not feel automatically menaced by them. A city district that fails in this respect also does badly in other ways and lays up for itself, and for its city at large, mountain on mountain of trouble.

public lawlessness become susceptible to negative characterizations.[37] To combat such lawlessness, it becomes important to legislate behavior in public spaces to a degree which eliminates crime yet maintains vital freedoms. Robert C. Ellickson has argued that what is called for is more policing by officers with "significant discretion in enforcing general standards against disorderly conduct and public nuisances"[38] in keeping with community norms,or, in some circumstances, a system of formal city zoning of public spaces which strictly limits undesireable activities to certain areas, similar in some respects to the skid rows or "red light" districts of the past.[39]

Not withstanding such efforts at regulating public spaces ostensibly for the public good, it has been argued that, though such statutes are seemingly neutral and enforcement is part of the "order maintenance"[40] or "community care-taking"[41] function of law enforcement, there is much potential for abuse of police discretion because of the lack of specificity in many such ordinances.[42] Moreover,

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37. Wesley G. Skogan, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS (1990). Skogan writes that "visible physical and social disruption is a signal that the mechanisms by which healthy neighborhoods maintain themselves have broken down. If an area loses its capacity to solve even seemingly minor problems, its character becomes suspect." *Id.* at 48.

38. Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 Yale L.J. 1165, 1245 (1996).

39. *Id.* at 1244-1247. *See also* Pottinger v. City of Miami, 810 F. Supp. 1551, 1582 (S.D. Fla. 1992), where the court proposes that the city of Miami, Florida might avoid constitutional problems by providing an area where homeless persons could lawfully be present; McElroy v. Fort Lauderdale, No. 94-6266 (filed Mar. 30, 1994), (S.D. Fla. 1994); Maria Foscarinis , *Downward Spiral: Homelessness and Its Criminalization*, 14 Yale L. & Pol'y Rev. 1, 61 (1996).

Ellickson envisions a colored-coded zoning system consisting of three codes, red, green and yellow. The codes would be of of varying stringency in governing street behavior. A city's public spaces would be assigned to a zone paired with just one of these colors, with Red indicating "extreme caution to the ordinary pedestrian; Yellow, some caution; and Green, a promise of relative safety." Ellickson adds that "It must be stressed that these color codes are chosen with an eye to pedestrians of ordinary tastes, not to those inclined to engage in nuisance behavior. This usage is consistent with the phrase "Red Light District," which connotes disorderliness to an ordinary citizen, but not necessarily to a brothel patron." *Id.* at 1220-21.

40. *See* Livingston, *supra* note 31, at 581-84.

41. *See* e.g., South Dakota v. Opperman, 428 U.S 364, 368, 371 n.5 (1976); Cady v. Dombrowski, 413 U.S. 433, 447 (1973). Here, community care-taking refers to the general function of law enforcement to act to ensure the peace, safety, and health of the public. Note that the "community care-taking" function is one of the exceptions to the Fourth Amendment's warrant requirement.

42. *Id.* Note that another school of thought finds that the rigorous enforcement of such statutes leads to a more crime free society. This "Broken Windows" theory asserts that forceful policing of minor offenses will result in reducing more serious crimes in the same way that repairing broken windows in buildings helps to avoid more serious property damage. *See* James Q. Wilson & George L. Kelling, *Broken Windows*, THE ATLANTIC MONTHLY, Mar. 1982, at 29, 35; *see also* Bernard E. Harcourt, *Reflecting On*

because order maintenance policing implicitly relies upon the enforcement of a mainstream social norm, communities of persons who are outside of the mainstream such as racial minorities may be branded as "presumptively lawless" by the imposition of such norms.[43] Finally, laws which promote a high quality of life offer us an antiseptic model of living, where public interactions are carefully monitored and almost scripted so that the average "good citizen" avoids one aspect of what has been called "the tragedy of the common"—the possibility of messy or unpleasant social interactions because some persons will overuse public spaces to the detriment of others.[44] It has been argued that such minor unpleasantness is an important part of social vitality and thus these impulses towards to utopia should be checked.[45]

Criminalized space offenses are, in fact, most often found among the minor violations of various criminal codes and thus subject violators to relatively minor penalties. One explanation for the relatively minor penalties resulting from violation of criminalized space statutes is that the activities that are typically prohibited under such laws are, for the most part, otherwise legal. One noteworthy exception to the typically minor penalties assessed in criminalized space statutes is the Gun Free School Zones Act of 1990,[46] which makes it a federal crime to knowingly possess a firearm in a school zone. "School zone" is defined as in, or on the grounds of, a public, parochial, or private school or within a distance of 1,000 feet from the grounds of such a school.[47] Although under many circumstances gun possession is perfectly legal, this statute calls for heightened criminal penalties for gun possession in or near schools.[48] Because possession of many types of guns is otherwise legal, the statute allows for numerous exceptions that would permit possession of a firearm in a school zone.[49] While these

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43. Dorothy E. Roberts, Race, Vagueness, And The Social Meaning Of Order-Maintenance Policing 89 J. CRIM. L. & CRIMINOLOGY 775, 779 (1999). *See also* Stephen R. Munzer, *Ellickson* On "Chronic Misconduct" In Urban *Spaces:* Of Panhandlers, Bench Squatters, And Day Laborers, 32 Harv. C.R.-C.L. L. Rev. 1, 15-16 (1997).

44. Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243-48 (1968), reprinted in PERSPECTIVES ON PROPERTY LAW 132, 133 (Robert C. Ellickson et al. eds., 1995).

45. Allan B. Jacobs, GREAT STREETS 4, 8-9 (1993). Jacobs suggests that although public areas like streets should be safe, the streets should also function as areas for social interactions that are not always pleasant.

46. 18 U.S.C § 922 (2002)

47. *Id.*

48. *Id.*

49. 18 U.S.C § 922 (q)(2)(B) (2002) provides for the following exceptions:

exceptions do make allowances for the sometimes legal nature of gun possession, courts have made clear that portions of § 922 which criminalize gun possession do not otherwise violate the Second Amendment right to bear arms because that right is not an individual right but a collective one; applying to the right of the state to maintain a militia.[50] This has been the position of other federal circuits considering the question as well.[51] Nonetheless, to demand penalties for activities which would be legal in other locales seems to violate a fundamental notion of liberty.[52]

Another thing which these "criminalized space" statutes have in common is that most can be described as examples of nonconsummate crimes. Nonconsummate crimes are those that do not cause harm each

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(B) Subparagraph (A) does not apply to the possession of a firearm--

(i) on private property not part of school grounds;

(ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtains such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license;

(iii) that is--

(I) not loaded; and

(II) in a locked container, or a locked firearms rack that is on a motor vehicle;

(iv) by an individual for use in a program approved by a school in the school zone;

(v) by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;

(vi) by a law enforcement officer acting in his or her official capacity; or

(vii) that is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities.49 United States v. Napier, 233 F.3d 394, 401-02 (6th Cir. 2000)

51. *See* United States v. Chavez, 204 F.3d 1305 (11th Cir. 2000); Gillespie v. City of Indianapolis, 185 F.3d 693, 709 (7th Cir. 1999); Fraternal Order of Police v. United States, 173 F.3d 898, 906 (D.C. Cir. 1999) (holding that the militia service of all police officers, only of domestic violence misdemeanants whose convictions have not been expunged"); United States v. Waller, 218 F.3d 856 (8th Cir. 2000) ("it is now well-settled that Congress did not violate the Second Amendment" in enacting 18 U.S.C. § 922(g)(1)); United States v. Smith, 171 F.3d 617, 624 (8th Cir. 1999); United States v. Mack, 164 F.3d 467, 473 (9th Cir. 1999); United States v. Three Winchester 30-30 Caliber Lever Action Carbines, 504 F.2d 1288, 1290 n. 5 (7th Cir. 1974); United States v. Johnson, 497 F.2d 548 (4th Cir. 1974) ; Cody v. United States, 460 F.2d 34 (8th Cir. 1972) (§ 922(a)(6) does not violate the Second Amendment)

52. *See, e.g.* Berkeley Cmty. Health Project v. City of Berkeley, 902 F. Supp. 1084, 1089 (N.D. Cal. 1995) (enjoining enforcement of California ban on begging near ATMs because "solicitation of donations is a form of speech, protected under both the federal and state constitutions"). This has, in fact been the basis of a number of challenges to the "Quality of Life" ordinances—that they are vague and overbroad, violate equal protection, or infringe on the other liberties such as freedom of speech or assembly.

time that they are committed.[53] According to Douglas Husak, drug crimes would fall into the category of nonconsummate crimes,[54] and would moreover be "simple" nonconsummate crimes. As Professor Husak points out however, it may be possible to conceive of drug crimes as consummate, that is, causing harm each time such crimes are committed.[55] While it is possible to view drug crimes in this way, it is nonetheless, "implausible."[56] Because this would require a belief that the existence of elicit drugs in our society is in itself a grave harm or moral wrong. While such a belief is often at the heart of drug prohibitions, it is not clear that such a premise bears scrutiny in light of the many other harmful substances that are possessed or distributed legitimately, such as cigarettes and alcohol.

Nonconsummate crimes are not to be confused with inchoate crimes. Inchoate crimes are incomplete crimes such as attempt or conspiracy. In the case of inchoate crimes, the criminal actor engages in a series of activities towards a particular criminal goal, but somehow falls short of the goal.[57] Though inchoate crimes may be seen as a subcategory of nonconsummate crimes,[58] nonconsummate crimes are more broadly cast, because they encompass all crimes that cause risk of harm rather than actually causing harm.[59] Criminalized space cases, however, do raise the fundamental question seen in the discussion of other nonconsummate crime cases: whether such sweeping government regulation is justified when the harm is not always realized.

Both federal and state schoolyard statutes take to high art form the notion of criminalizing spaces. Indeed, the ambit of federal and state schoolyard statutes usually includes both public and private spaces, as the creation of perimeters around schools or other facilities does not make allowances for activities which occur in private homes and some provisions criminalize certain drug activities around publicly funded housing projects. Nonetheless, in the case of schoolyard statutes, the argument cannot as easily be made that such prohibitions violate some

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53. Douglas N. Husak, *The Nature And Justifiability Of Nonconsummate Offenses*, 37 ARIZ. L. REV. 151, need pinpoint cite (1995):

> [A]n offense is consummate if the conduct it proscribes causes harm on each occasion on which it is performed. The paradigm, "core" examples of crimes in any jurisdiction, Anglo-American or otherwise, satisfy this description. But not all crimes are consummate. Some offenses proscribe conduct that does not cause harm on each occasion in which it is performed. Such offenses might be called nonconsummate.

54. *Id.* at 178.
55. *Id.* at 179.
56. *Id.*
57. See Joshua Dressler, UNDERSTANDING CRIMINAL LAW (2 ed. 1995) 347-48.
58. *Id.* at 166-67; *see also* Husak, *supra* note 44 at 166.
59. Husak, *supra* note 44, at 165.

fundamental liberty interest, for in almost no instance is the distribution or even the possession with intent to distribute illicit narcotics legal in any space.

Note that the concept of criminalizing space thus contrasts sharply with the effort by some municipalities to control illicit drug activity by excluding persons convicted of certain drug offenses from certain areas based on the higher incidence of drug-related crimes in those areas. In *Johnson v. City of Cincinnati*,[60] a municipal ordinance excluded individuals for up to ninety days from the "public streets, sidewalks, and other public ways" in all drug-exclusion zones if the individual is arrested or taken into custody within any drug-exclusion zone for one of several enumerated drug offenses.[61] The ordinance extended the exclusion for a year if the individual was convicted of the drug offense. Variances could be granted by the chief of police for persons who, prior to the drug arrest, resided in, were employed in, or owned a business in the drug exclusion zone.[62] Variances could also be granted by or by social services agencies for reasons relating to the health, welfare, or well-being of the person excluded or for drug abuse-related counseling services.[63] The variance was rendered void if the holder violated its terms or was subsequently arrested for a drug offense.[64]

Because the ordinance barred excluded individuals from each and every public space and roadway in the designated areas, the Federal Court of Appeals upheld the ruling of the trial court in striking down the ordinance as an impermissible burden on the right to intrastate travel. However, the court left open the possibility that a more narrowly tailored version of the ordinance that was supported by a clearer record, could withstand strict scrutiny. The court clearly sympathized with Cincinnati authorities who drafted the ordinance: "Temporary exclusion is an extreme measure, but we recognize that municipalities like the City of Cincinnati face formidable challenges in improving the safety and well-being of its citizens in high crimes areas."[65]

If, in an effort to protect the right to access public spaces; or the sanctity of private homes, we were to posit that illicit drug activity be prohibited only in certain places, it would derogate from the very nature of our existing drug laws. Indeed, one might argue that permitting drug distribution, possession or use in even limited spaces is an act which is rife with the potential for creating more societal problems than it cured,

60. 310 F.3d 484 (6th Cir 2002)
61. *Id.* at 487-488
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id* at 506

if the example of those countries which have experimented with decriminalizing drug use in certain areas is at all instructive.[66]

B. Hypercriminalized Spaces

Because schoolyard statutes call for heightened penalties over and above those for committing an act outside the designated zone, it can be said that schoolyard statutes *hypercriminalize* certain spaces. In addition, schoolyard statutes, hypercriminalization is seen in the example of increased penalties for possessing guns in school zones,[67] and speeding in construction zones.[68] To account for the loss of liberty from criminalized space, even in the case of schoolyard drug cases, imposing such penalties should significantly reduce the harm of the illicit activity in the stated areas. To date, however, it is not at all clear that such hypercriminalization significantly reduces the incidences of the prohibited activityin those designated areas.[69]

Hypercriminalization is not to be confused with the concept of overcriminalization which has been discussed in criminal law literature.[70] Overcriminalization has been described as improperly applying criminal sanctions to "morally neutral" conduct."[71] Of course, one must define just what comprises "morally neutral" conduct. It may simply be that moral neutrality is found somewhere in the nebulous middle ground of the classic distinction between *mala in se* and *mala prohibitum* crimes.

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66. Consider, for example, the experience of the Netherlands where drug use was allowed in certain zones. *See, e.g.* Eric Thomas Berkman, *Sacrificed Sovereignty?: Dutch Soft Drug Policy in the Spectre of Europe without Borders*, 19 B.C. INT'L & COMP. L. REV. 173 (1996). *See also* Henk van Vliet, *The Uneasy Decriminalization: A Perspective on Dutch Drug Policy*, 18 HOFSTRA L. REV. 717 (1990).

67. 18 U.S.C. 922(q) (West 2002).

68. *See, e.g.* MISS. CODE ANN. § 63-3-516 (2001); CODE OF ALA. § 32-5A-176.1 (2001); HAW. REV. STAT. § 291C-104 (2001); (N.H. REV. STAT. ANN. 265:6-a (2002); TENN. CODE ANN. § 55-8-153 (2001); UTAH CODE ANN. § 41-6-13 (2001). (Note, however, that many cases involving speeding in construction zones may differ in one significant way from schoolyard drug cases and cases involving guns in school zones: statutes that heighten penalties for speeding in construction zones often limit increased penalties to those times when construction workers are actually present in the zone.) *But see* Col. Rev. Stat. 42-4-614 (2001) (workers need not be present as long as construction zone signs placed within four hours of time work will be taking place); Mo. Rev. Stat. § 304.580 (2001).

69. *See e.g.*, Ethan A. Nadelmann, *Drug Prohibition in the United States, Costs, Consequences, and Alternatives*, 245 SCI. 939 (1989).

70. *See e.g.*, Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157 (1967).

71. Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1535 (1997).

Mala in se describes those crimes which are wrong in and of themselves; *mala prohibitum* are those crimes which typically are not wrongful in themselves, but are, for various reasons related to health, safety, or welfare, deemed criminal by legislators).[72] It has been lamented that overcriminalization leads, for example, to a narrowing of the gap between tort and crime, so much so that crime loses its stigma.[73]

Nevertheless, a number of violations which could be characterized as criminalized space cases could equally be considered as examples of overcriminalization. Consider the matter of jaywalking. Jaywalking criminalizes crossing the street in areas not designated for pedestrian crossing, or crossing in designated areas at times when such crossing is not permitted.[74] Walking, or walking across streets, is of course morally neutral conduct so much so that jaywalking is paramount among those crimes to which virtually no stigma attaches. It is in fact frequently referenced as an example of a minor crime.[75]

Thus, we have the drug free school zones existing not only as examples of criminalized space cases but also as a clear example of hypercriminalization. If viewed as part of the same trend as other criminalized space offenses, then we could see drug free school zone laws as merely additional tools in creating and maintaining a "high quality lifestyle." The more typical criminalized space offense results, however, in the imposition of a relatively minor penalty. This cannot be said of drug free school zone cases. A facile justification for this is that neither illicit drug possession with intent to distribute, actual distribution, nor illicit drug manufacturing are legal under virtually any circumstance, and so significant penalties should be applied for violations. But here it becomes necessary to unpack what is intended by deeming such offenses

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72. *See e.g.*, Morrissette v. U.S., 342 U.S. 246, 269 (1952)

73. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 249-364 (1968); Sanford Kadish, *Some Observations on the Use of Criminal Sanctions To Enforce Economic Regulations*, 30 U. CHI. L. REV. 423 (1963); Henry Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS., Winter 1958, at 401, 431.

74. *See e.g.*, Cal. Veh. Code § § 21954, 21955 (Deering 2003); NY CLS Veh & Tr § 1152 (NY Consolidated Law Service 2002); S.D. Codified Laws § 32-27-4 (2002).

75. *See, e.g.* Cuffley v. Mickes, 208 F.3d 702, 709 (Ct., year) (references the spectrum of crime "from murder and mayhem to joyriding and jaywalking"); Jaywalking is the paradigm "trivial" crime. *See also* Caterpillar, Inc. v. Herman, 131 F.3d 666, 668 (1997) ("Trivial violations deserve trivial fines, but the Secretary [of Labor] is entitled to insist on some exaction even for the equivalent of jaywalking"); Deibler v. Rehoboth Beach, 790 F.2d 328, 337 (1986) ("sewer assessments, parking fines, dog law violations, jaywalking and other minor infractions"); United States v. Mills, 472 F. 2d 1231, 1239 (1971) ("A huge proportion of the public is guilty of some sort of petty infraction almost every day - jaywalking, exceeding the 25-mph limit, using high beams, parking in a loading zone, among many others."); Brinson v. Florida. 273 F. Supp. 840, 845 (S.D. Fla. 1967)(" Such a construction could lead to the appointment of counsel for misdemeanors not normally considered criminal, such as overparking and other petty traffic offenses, jaywalking, dropping trash upon the sidewalk, and like offenses").

criminal. Is it, that such behavior is immoral or evil? Or is it that here are instances where we focus on the harms caused by such behavior? If it is the latter, then we run up against the problem of nonconsummate crimes detailed above. If it is the former, then we risk upsetting the drug prohibition applecart by challenging whether in fact such drug offenses can rightfully be viewed as immoral or evil since such terms are reflections of society's values and thus frequently subject to revision. In either case, it would seem clear that the hypercriminalized space created by drug free school zones is not an effective weapon in the arsenal of the war on drugs.

III. The Creation of the Federal Schoolyard Drug Statutes and Recurring Challenges to Validity

Nothwithstanding what appears to be the dubious success of other anti-drug strategies, the federal schoolyard statute is yet another facet of the war on drugs. It is just one of many types of federal penalty enhancement provisions.[76] Like many others, it is based on the notion that penalty enhancement and corresponding incarceration will ultimately reduce crime.[77] The creation of such penalties is only one way in which the so-called "war on drugs" has been waged in this country.[78]

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76. *See, e.g.* 21 U.S.C. § 861(a)(1-2) enhancement provisions for employing a person under the age of 18 in a the commission of a drug offense; 18 U.S.C. § 924(c) provides for additional consecutive five year terms for offenders who carry firearms in the commission of certain crimes, the Armed Career Criminal Act, 18 U.S.C. § 924(e) provides for an enhanced penalty of a mandatory fifteen-year minimum for those persons who have three qualifying prior violent felony convictions; the Gun-Free School Zones Act of 1990 forbids "any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone," 18 U.S.C. 922(q)(1)(A). Note that in *United States v. Lopez*, 514 U.S. 549 (1995), the U.S. Supreme Court held that the Commerce Clause does not provide Congress the authority to prohibit the possession of a firearm within 1000 feet of a public school. The Gun-Free Schools Act of 1994, however, mandates that states pass legislation requiring local education agencies to expel from school for at least a year students possessing weapons in school. Exceptions are allowed on a case-by-case basis.

77. *See generally* Rudolph J. Gerber, *On Dispensing Justice*, 43 Ariz. L. Rev. 135 (2001); Susan N. Hermann, *Measuring Culpability By Measuring Drugs? Three Reasons To Reevaluate The Rockefeller Drug Laws*, 63 ALB. L. REV. 777 (2000); Tracey L. Meares, *Social Organization And Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191 (1998).

78. The "war on drugs" is conducted chiefly through the White House Office of National Drug Control Policy (ONDCP), a part of the Executive Office of the President. The ONDCP is headed by a director or "drug czar" as he is more popularly known. This office was established by the Anti-Drug Abuse Act of 1988. "The principal purpose of ONDCP is to establish policies, priorities, and objectives for the Nation's drug control program. The goals of the program are to reduce illicit drug use, manufacturing, trafficking, drug-related crime and violence, and drug-related health consequences. To achieve these goals, the Director of ONDCP is charged with producing the National Drug Control Strategy. The Strategy directs the Nation's anti-drug efforts and establishes a

The federal schoolyard statute was the model for most subsequent state schoolyard statutes. It was created in its earliest form as part of the Comprehensive Drug Abuse Prevention and Control Act (commonly known as the Controlled Substances Act) of 1970.[79] The statute prohibits the "distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility."[80] Section 841(a) of the Act sets forth the substantive drug offenses under judicial law, and prohibits the manufacture, distribution, dispensation, or possession with intent to manufacture, distribute, or dispense a controlled substance,[81] as well as the creation, distribution, dispensation, or possession with intent to distribute or dispense a counterfeit substance.[82] Section 856 prohibits knowingly opening or maintaining any place for the purpose of manufacturing, distributing, or using any controlled substance, as well as managing or controlling any building, room, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, and knowingly and intentionally renting, leasing, or making available for use, with or without compensation, the building, room, or enclosure for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.[83]

There was, and still is, much disagreement as to whether such penalty enhancements can significantly decrease crime.[84] At least one

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program, a budget, and guidelines for cooperation among Federal, State, and local entities." *See About ONDCP—Office of National Drug Control Policy Enabling* at http://www.whitehousedrugpolicy.gov/about/legislation.html. The Budget recommendation for the ONDCP for fiscal year 2002 is estimated at $19.2 billion, an increase of $1.1 billion over the 2001 fiscal year budget of $18.1 billion. Id. For further discussion of the "War on Drugs" and the initiatives developed to combat the growth of drug trafficking and use, see generally Congressman Bob Barr, Eric Sterling, and Juan Williams, Debate: The War on Drugs: Fighting Crimes or Wasting Time, 38 Am. Crim. L. Rev. 1537 (2001); Debate: Mandatory Minimums In Drug Sentencing: A Valuable Weapon In The War On Drugs Or A Handcuff On Judicial Discretion? 36 Am. Crim. L. Rev. 1279 (1999); Mathea Falco, Toward a More Effective Drug Policy, U Chi Legal F 9 (1994); Diane-Michele Krasnow, To Stop the Scourge: The Supreme Court's Approach *to the War on Drugs*, 19 AM. J. CRIM. L. 219, 220 (1992); Charles Rangel, *Our National Drug Policy*, 1 STAN. L. & POL'Y REV. 43, (1989).

79. 21 U.S.C.A. § 880 (2003)

80. 21 U.S.C. §§ 841,856, and 860 (2003)

81. 21 U.S.C § 841(a)(1).

82. 21 U.S.C § 841(a)(2).

83. 21 U.S.C § 856(a-b).

84. Some have suggested, for example, that the war on drugs has done little to end the pandemic of drug use in some low income urban areas. One of the clear results of United States drug policy is an increase the population of jails, while there is no clear

commentator has adopted a metaphor of drug dependency in suggesting that the reliance on increased incarceration to reduce drug-related crime is nothing less than an obsession which has morphed into a societal "incarceration addiction."[85] Another commentator has assailed heightened criminal penalties for drug involvement as part of the "supply-side seduction" of such policies, a reference to the commonly held belief that drug use can be eliminated by focusing on suppliers both foreign and domestic.[86] Others, however, have found clear rationales for the increase in incarceration as a crime preventative.[87]

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correlation between such increases and the reduction of drug crime or use. *See, e.g.*, Doug Bandow, *War On Drugs Or War On America*, 3 STAN. L. & POL'Y REV. 242, 244-45 (1991); *see also* Rangel, supra note 71at 51-52. This is true notwithstanding the fact that federal drug offenders on the average serve more time than those convicted of sexual abuse, assault, manslaughter, burglary, and arson. Scott K. Peterson, Comment, *The Punishment Need Not Fit The Crime: Harmelin v. Michigan And The Eighth Amendment*, 20 PEPP. L. REV. 747 (1993).

85. Margaret P. Spencer, *The Sentencing Controversy: Punishment And Policy In The War Against Drugs, Sentencing Drug Offenders The Incarceration Addiction*, 40 VILL. L. REV. 335, 339 (1995) The author terms the dependency on increased incarceration to solve the problem of crime an addiction because there is, she argues, no rationale for such dependence.

86. Falco, *supra* note 71 at 10-11. In a growing trend, however, courts and social services have come to see that a focus on the demand-side of the drug trade may be equally as effective in combating drug use. Thus, courts are increasingly looking to treatment alternatives to sentencing in minor drug cases. *See, e.g.* Pamela L. Simmons, Comment, *Solving the Nation's Drug Problem: Drug Courts Signal a Move Toward Therapeutic Jurisprudence*, 35 GONZ. L. REV. 237 (2000).

87. *See, e.g.* Theodore Caplow and Jonathan Simon, *Understanding Prison Policy And Population Trends*, 26 CRIME & JUSTICE 63, 64, (1999), where the authors cite several authorities for the proposition that increased incarceration has, at the very least, a specific deterrent effect upon those criminals who are incarcerated. *Id.* However, the authors also point to the fact that political opportunism and efforts to cope with changes in economic, racial and gender hierarchies could equally as well be a factor major factors in the growth of incarceration, as such societal changes recall to some commentators nineteenth century fears of the rise of the "dangerous classes". *Id.* at 65-66. This is particularly true as we look at the history of drug prohibition in the United States. As one commentator has written of the early twentieth century and drug prohibition:

> [T]he notion that using cocaine would heighten the desire of black men to rape white women was widely proclaimed. The same was held to be true with regard to the use of opium by Chinese men. Fears of "hopped up Negroes" and "opium smoking Chinamen" fueled anti-drug sentiment, especially in the South and West. Despite the fact that, at the time, the majority of addicts were actually those white housewives hooked on patent medicines, the alleged threat to "our women," viewed as poor innocents, was used to heighten moral outrage over intoxication.

Lynne M. Paltrow, *The War On Drugs And The War On Abortion: Some Initial Thoughts On The Connections, Intersections And The Effects*, 28 S.U. L. REV. 201, 207 (2001). See also See Ronald Hamoway, ILLICIT DRUGS AND GOVERNMENT IN DEALING WITH DRUGS: CONSEQUENCES OF GOVERNMENT CONTROL 9 (Ronald Hamoway ed. 1987) in

The federal schoolyard statute was enacted its original form in 1984.[88] It provided for an enhanced penalty for the distribution of drugs within 1,000 feet of a school.[89] The 1984 statute, introduced by Senator Paula Hawkins of Florida,[90] was intended to reduce the presence of drugs *in* the schools by threatening those who distributed drugs *near* schools drugs with heavy penalties.[91] In 1986, the statute was amended to prohibit both manufacturing and distributing within 1,000 feet of a school.[92] The 1986 amendment also broadened the scope of educational institutions where such penalties applied.[93] A particular concern of the drafters of the 1986 amendments was the threat of crack cocaine near schools.[94] In 1988, the statute again underwent changes, this time to prohibit possession with intent to distribute within 1,000 feet of a school.[95] The impetus of Congress seems to have again been the fear of having large quantities of drugs near schools.[96]

IV. Congressional Power to Legislate in the Area of Drug Interdiction

One of the chief concerns in assessing the federal schoolyard statute is whether in fact Congress has the power to act in this area. The schoolyard statute is in the nature of a police power measure: that is, it acts to protect the health, morals, and welfare of persons. Such powers are presumably left to the states via the Tenth Amendment.[97] Those concerns which are "traditionally local" should not, ideally, be the subject of federal legislation based upon the Commerce Clause. Yet many, if not most, federal criminal laws and sanctions seemingly affect such local concerns. The Supreme Court has, nonetheless, sustained the validity of such criminal laws, relying chiefly upon an "affecting commerce" rationale applied increasingly in police power situations such

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which the author discusses the ready availability of opiates and cocaine via legal sources such as mail order and general stores. One of the earliest laws to outlaw such substances was an 1875 San Francisco law aimed at Chinese opium dens, which outlawed the use of opiates.

88. 21 U.S.C. § 845(a) (1984).

89. *Id.*

90. Elected to the Senate in 1980, she was the first woman to be elected to the United States Senate without a husband or father preceding her. Paula Hawkins was one of the frontline warriors in the war on drugs. In her memorable final campaign for the Senate, she ran Miami Vice style ads featuring "sirens and gun-wielding police." Michael Hedges, "*A Decade of* Drugs," WASH. TIMES, December 28, 1989, at B8.

91. 130 CONG. REC. S559 (daily ed. Jan. 31, 1984).

92. 132 CONG. REC. H11219 at § 1104 (1986).

93. *Id.*

94. 132 CONG. REC. S10426 (daily ed. Aug. 6, 1986).

95. 134 CONG. REC. S15785-01 at §. 2254 (1988).

96. 134 CONG. REC. S17360 (daily ed. Nov. 10, 1988).

97. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918).

as modern criminal legislation.[98] This was seen in the case of *United States v. Thornton*,[99] in which the court observed that the basic federal drug statute, 21 U.S.C. § 841(a), was a constitutional exercise of the federal legislative power to regulate interstate commerce even when the distribution is entirely intrastate. The test there was whether such activities had an affect on interstate commerce and drug trafficking, whether within one state or between states.[100]

Such a challenge to a Congressional exercise of power in an area involving police power has, nonetheless, been successfully raised. This was the case in *U.S. v. Lopez*,[101] where the Supreme Court struck down a criminal conviction under the Gun-Free School Zones Act of 1990 as beyond congressional authority under the Commerce Clause. Because the Schoolyard Statute, 21 U.S.C. § 845a (now 21 U.S.C. § 860) is an enhancement of 841(a) and it would seem that it should be equally vulnerable to such an attack. In *U.S. v. Rodgers*,[102] the Seventh Circuit Court of Appeals also confronted such a challenge. There the defendant argued that *Lopez* stood for the proposition that Congress could not impose a penalty for drug activity that affects minors or takes place near schools. The Court, however, rejected this argument, finding that the Supreme Court's holding in *Lopez* did not apply where the subject of the prohibition was drugs instead of guns.[103] Drug dealing, said the *Rogers* court, is an economic activity that affects interstate commerce, and "courts have uniformly upheld regulation of drugs near schools."[104] Although this is offered as a means of distinguishing guns from drugs, the distinction is not terribly persuasive. While guns may certainly be said to effect interstate commerce, so, too, do drugs. Such drug-related commerce clause claims have in fact failed in every circuit which has addressed them.[105]

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98. *See, e.g.*, Perez v. United States, 402 U.S. 146 (1971), concerning the Consumer Credit Protection Act, which made it illegal to engage in "extortionate credit transactions" better known as loan-sharking. The Supreme Court upheld the statute against a Commerce Clause challenge although the transaction had occurred entirely within one state. *Id.*

99. 901 F.2d 738 (Cal Ct. App. 1990).

100. *Id.*

101. *See generally* U.S. v. Lopez, 514 U.S. 549 (1995).

102. 89 F.3d 1326, 1338 (7th Cir. 1996).

103. *Id.*

104. *Id.* at 1338.

105. *See* United States v. Zorrilla, 93 F.3d 7, 8-9 (1st Cir. 1996); United States v. Clark, 67 F.3d 1154, 1165-66 (5th Cir. 1995); United States v. Tucker, 90 F.3d 1135, 1139-41 (6th Cir. 1996); United States v. Rogers, 89 F.3d 1326, 1338 (7th Cir. 1996); *see also*, United States v. Garcia-Salazar, 891 F. Supp. 568, 569-72 (D. Kan. 1995); United States v. Lopez, 2 F. 3d 1342, 1366 n.50 (5th Cir. 1993), aff'd, 514 U.S. 549, (1995) (noting the differences between 18 U.S.C.§ 922(q), the Gun-Free School Zones Act, and 21 U.S.C. § 860, the Schoolyard Statute). United States v. Baucum, 66 F.3d 362 (DC Cir. 1995), *reh'g denied*, 80 F.3d 539 (DC Cir. 1996). In *Baucum*, defendant sought to raise a

V. Due Process, Equal Protection, and Presence in Schoolyard Zones

The schoolyard statute has been the subject of numerous claims invoking due process and equal protection provisions of both federal and state constitutions. One series of cases attacks the decision to prosecute such cases in federal as opposed to state court when there is dual jurisdiction. Because the federal schoolyard statute operates as a penalty enhancement and not as a separate offense, it is sometimes the case that federal prosecutors may choose to charge an offense under only Section 841(a) and not the auxiliary Section 860. The exercise of such discretion has itself been the basis of constitutional challenge, as it has been argued that this level of discretion violates a defendant's due process rights.[106] Because most states now have analogous schoolyard statutes incorporated into their own criminal codes, federal authorities may defer to state prosecutions under certain circumstances.[107] Given the fact that

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Commerce Clause objection upon post conviction appeal, urging it as a jurisdictional matter which could not be waived. The court, however, did not reach the merits of the defendant's claim because the issue was not raised in a timely fashion in proceedings below. *Id.*

106. United States v. Pitts, 908 F2d 458, (Wash. Ct. App. 1990).

107. Although the Attorney General's Manual (U.S. DEPT. OF JUSTICE, U.S. ATTORNEYS' MANUAL §§ 9-27.000 to 9-27.750B) lists several factors to be considered in making the decision as to whether to bring a federal case where there is concurrent state jurisdiction, such matters are entirely discretionary. The manual indicates, for example, that "[a] United States attorney may modify or depart from the principles set forth herein as necessary in the interests of fair and effective law enforcement within the district." *Id.* at § 9-27.140. Such jurisdictional decisions are typically unreviewable. *See*, e.g., United States v. Armstrong, 48 F.3d 1508, 1514 (9th Cir. 1995); United States v. Smith, 30 F.3d 568, 572 (4th Cir. 1994); United States v. Jacobs, 4 F.3d 603, 604-05 (8th Cir. 1993); *See also* Ellen A. Peters, *State-Federal Judicial Relationships: A Report From the Trenches*, 78 VA. L. REV. 1887, 1891 (1992); *see generally* Tobin J. Romero, *Prosecutorial Discretion*, 83 GEO. L.J. (1995). An interesting example of choosing between state and federal prosecutorial forums is the "Federal Day" sweep tactics used from 1983 to 1989 by federal officials in New York under former United States Attorney Rudolph Giuliani. Under this program, relatively minor crimes which would typically be prosecuted by state authorities were prosecuted by federal authorities. *See, e.g.* United States. v. Agilar, 779 F. 2d 123, 125 2nd Cir. 1985). Thought the court in Agilar upheld the validity of the "Federal Day" sweep, it was clearly critical of the program:

> Though we are urged in other contexts to tolerate missed deadlines because of the enormous burdens placed upon limited numbers of federal law enforcement personnel. on "federal day" there are apparently enough federal prosecutors available with sufficient time to devote to $30 drug cases that have been developed solely by state law enforcement officers. Be that as it may, the case is lawfully within the jurisdiction of the federal courts and must be decided."

conviction of a federal crime may subject defendants to harsher penalties in some instances,[108] the decision to pursue either a state or federal prosecution also been the subject of challenges.[109]

The schoolyard statute has also been the subject of due process claims. One series of cases argues that the statute violates due process because it creates an irrebuttable presumption that any sale of drugs within the statutorily defined range should be subject to an enhanced penalty.[110]

Other cases have raised due process claims based upon the fact that no *mens rea* as to knowledge of the distance from the school is required.[111] Still other claims have raised equal protection challenges, typically of two varieties: over-or underinclusiveness, or various types of discrimination.[112] A number of the claims of over-or underinclusiveness have routinely raised the fact that the original statute and some of its

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See also United States v. Aiello, 589 F. Supp 740, 745 (S.D.N.Y. 1984). A national "Federal Day" was at one time proposed. *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1137-45 (1995).

108. See Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 982 (1995); Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389 (1993) (exploring some of the civil liberties implications of the "war on drugs"); Robert Eldridge Underhill, *Sentence Entrapment: A Casualty of the War on Crime*, 1994 ANN. SURV. AM. L. 165 (1994).

109. An act which is a crime under both state and federal laws may be prosecuted in either state or federal court. There are, nonetheless, "certain due process restrictions to a prosecutor's discretion in selecting a forum." United States v. White, 1990 U.S. Dist. LEXIS 17781 (CT. 1990) "Specifically, when a prosecutor selects one forum over another simply to ensure a harsher sentence upon conviction, then there is a violation of the defendant's right to due process." *Id.* Despite these precedents, success for defendants in such selective prosecution cases is relatively rare, even where the challengers assert that the government has acted to violate due process or equal protection because of the selective nature of the prosecution. United States v. Oakes; United States v. Cyprian, 23 F.3d 1189, 1195 (7th Cir.)("To obtain an evidentiary hearing [on a selective prosecution claim], the factual basis for these claims must be more than colorable. In other words, a defendant must proffer 'sufficient evidence to raise a reasonable doubt that the government acted properly in seeking the indictment.'")

110. *See, e.g.* United States v. Agilar, 779 F.2d 123 (2nd Cir. 1985); United States v. Nieves,608 F.Supp. 1147 (S.D.N.Y. 1985); United States v. Dixon, 619 F.Supp. 1399 (S.D.N.Y. 1985); United States v. White 1990 U.S. Dist. LEXIS 17781; ; United States v. Crew, 916 F.2d 980 (5th Cir. 1990); United States v. Cross, 900 F.2d 66 (6th Cir.1990); United States v. Thornton , 901 F.2d 738 (9th Cir. 1990).

111. *See, e.g.* United States v. Agilar, 779 F.2d 123 (2nd Cir. 1985); United States v. Cunningham,615 F.Supp. 519 (S.D.N.Y. 1985); United States v. Cross,) 900 F.2d 66 (6th Cir. 1990); United States v. Haynes, 881 F.2d 586 (8th Cir. 1989); United States v Pitts, 908 F.2d 458 (9th Cir. 1990); United States v Holland, 810 F.2d 1215 (U.S. App. D.C. 1987).

112. Most of the claims have asserted disparate impact on urban residents in densely populated urban areas, or racial minorities who live disproportionately in urban areas. Courts have, however, rejected such claims. *See, e.g.* United States v. Agilar, 779 F.2d 123 (2nd Cir. 1985); United States v. Nieves, 608 F.Supp. 1147 (S.D.N.Y. 1985); United States v. Dixon , 619 F.Supp. 1399 (S.D.N.Y. 1985).

subsequent amendments only focused on school areas, when in fact children faced drug perils in other non school places which they frequented, faced drug perils outside of the 1,000 foot range, and arguably did not face drug perils when, for example, only adults were involved in private residences and when school was not in session.[113] As some commentators have argued, such drug legislation effectively becomes a policy "fig leaf," which covers the seamy underside of urban decay and neglect, as "drug problems" become the scapegoat for societal ills which policy makers cannot or will not address through more narrowly tailored legislation.[114] Many of the equal protection and due process claims are based upon cases which I have termed "fortuitous presence" or "happenstance" cases, in that they involve persons who were present in or lived in areas which were termed drug free school zones.

Several cases at both the federal and state level, which raise equal protection or substantive due process claims, involve defendants who argue that their living conditions are such that they cannot reasonably live outside of a drug prohibited zone. Their presence is, to a great degree, merely happenstance. Thus, they argue, they are treated differently than persons who are able to live elsewhere. For example, in *United States v. White*,[115] the defendant raised substantive due process and equal protection claims based upon a portion of an indictment charging him with violation of 21 U.S.C. Section 845a. This statute provides for sentence enhancement for a conviction of narcotics distribution within 1,000 feet of a school. The alleged narcotics distribution took place in the city of New Haven, Connecticut, where almost all the city falls within the protected 1,000 foot school zone. The defendant argued that the existence of such widespread prohibited zones failed to comport with the intent of the legislation, which was to create drug free zones around schools in particular. The court disagreed with the defendant, finding that application of the statute met with legislative intent, and that there was no reason to "carve out an exception" for New Haven even given its numerous schools throughout the city.

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113. *See, e.g.* United States v. Cattouse, 846 F.2d 144 (2d Cir. 1988); United States v. Crew 916 F.2d 980 (5tth Cir. 1990); United States v. Cross, 900 F.2d 66 (6tth Cir. 990); United States v. Thornton, 901 F. 2d 738 (9th Cir. 1990); United States v. Pitts, 908 F.2d 458 (9th Cir. 1990); United States v. McDougherty, 920 F.2d 569 (9thCir.1990); United States v. Holland U.S. App. D.C. (1987). Some of these concerns have been to some extent assuaged by the inclusion of liability for persons who commit the proscribed activities within 100 feet of playgrounds and other enumerated places where children may be present.

114. Lynn M. Paltrow, *The War on Drugs and The War on Abortion: Some Initial Thoughts on the Connections, Intersections, and The Effects*, 28 S.U. L. Rev. 201, 223 (Fall 2001).

115. 1990 U.S. Dist. LEXIS 17781.

A variant of this argument had been previously seen in *United States v. Pitts*,[116] where the defendant contended that to apply 21 U.S.C. Section 845a to him would violate the Equal Protection Clause because the topography of Spokane, Washington was such that eighty percent of the city was in a school zone. The court found that there was no classification for purpose of equal protection analysis, stating there was no "evidence of a public authority applying the statute with an unequal hand that discriminates among persons in similar circumstances. Without evidence of how section 845a(a) has been applied to persons, we cannot find a classification."[117] Moreover, the court discounted defendant's claim that eighty percent of the city of Spokane was within prohibited zones, indicating that he had improperly included some locations in the calculation.[118]

A similar happenstance or fortuitous presence claim was raised in *United States v. Nieves*.[119] There, a defendant argued that the schoolyard statute denied him equal protection of the laws because the statute's enhanced penalties had a greater impact upon racial minorities who, he argued, were more likely to live in high density inner city areas where there are likely to be more schools than in other places.[120] The court, however, rejected this argument, finding that even assuming there to be some statistical validity to defendant's claim, this disparate impact alone would not be the basis of an equal protection claim.[121]

This argument was raised again in *United States v. Crews*,[122] where a defendant lived across the street from a school was charged with violation of the schoolyard statute. It was again rejected. It was yet again tried in *United States v. Agilar*, where defendant argued "that the statute has a disproportionate impact on members of racial minorities, more of whom live, it is asserted, within 1,000 feet of schools than do non-minority residents, a smaller proportion of whom live in densely populated urban areas."[123] Calling this assertion a "strained theory,"[124] the court soundly rejected it.

The converse of such arguments regarding the location of schools in dense urban areas was raised in *State v. Moore*,[125] where the defendant was prosecuted under Utah's schoolyard statute for distributing drugs within 1,000 feet of a middle school. The defendant argued that the statute violated equal protection because it treats drug dealers in small

116. United States v. Pitts, 908 F.2d 458 (9th Cir. 1990).
117. *Id.* at 460
118. *Id.* n.4.
119. 608 F. Supp. 1147 (S.D.N.Y. 1985).
120. *Id.* at 1150.
121. *Id.*
122. 445 U.S. 463 (1980).
123. *Id.* at 126.
124. *Id.*
125. 782 P.2d 497 (Utah 1989).

towns differently than those in big cities. People living in small towns are more likely to be within the prohibited zone.[126] The court found, contrary to defendant's claim, that this increased proximity did not make him dissimilar to other persons in the state. The court argued that, after all, the defendant could have distributed drugs elsewhere outside of the zone.[127]

Claims such as these are a variant of the fortuitous or happenstance presence case in that the essence of the defendants' argument is that given the circumstances of their residences and their racial backgrounds, they are more frequently subject to schoolyard statutes. Courts have been uniformly scornful of such claims, often because even if such claims could be validated, defendants had not asserted any discriminatory purpose.[128] Nonetheless, one wonders whether there may yet be a court which might take seriously fortuitous presence claims, as it becomes more clear that schoolyard statutes often grossly affect persons of color and other distinct classes.[129] The spaces which are hypercriminalized by the application of schoolyard laws are often isolated urban ghettos which house large numbers of the nation's poor racial minorities.[130] Such neighborhoods are, hence, established black

126. *Id.* at 503.

127. *Id.*

128. *See, e.g.*, *Agilar*, 779 F.2d at 126; Crews, 916 F.2d at 984; *Nieves*, 608 F.Supp. at 1150-51.

129. *See, e.g.*, a series of Illinois laws which called for the adult prosecution of juveniles who violated certain drug zone laws, beginning with the Illinois Safe Schools Act of 1985, ILL. COMP. STAT. 702/7(6)(a) (West 1986) (repealed 1988); *see also* People v. M.A., 529 N.E.2d 492, 497 (Ill. 1988) (upholding the Safe School Act, which was passed by the legislature in 1995) . In an ironic twist perhaps not clearly seen by Illinois legislators, the Safe Schools Act, by mandating that 15-and 16-year-olds charged with delivery of a controlled substance within 1,000 feet of a school be tried in adult court, punished many of the same persons who were to be protected under school zone drug laws. In 1987, the Illinois legislature incorporated these school drug zone provisions into the Juvenile Courts Act, and in 1989 public housing projects were characterized by statute as drug free zones. Some commentators have argued that these laws have had an intensely disproportionate impact on black youth in Illinois. In 1992, the Chicago chapter of the Lawyers Committee for Civil Rights brought suit challenging the youth transfer law, asserting that, of the juveniles automatically transferred for drug crimes within 1,000 feet of public housing in Illinois in 1992, all were African-American. In 1999, approximately 85% of the youth automatically transferred to adult court for drug crimes in drug free zones were African-American. *See* Jason Ziedenberg, "Drugs and Disparity: The Racial Impact of Illinois' Practice of Transferring Young Drug Offenders to Adult Court: Building Blocks for Youth," http://www.buildingblocksforyouth.org/illinois/illinois.html. *See generally* Thomas F. Geraghty Will Rhee, *Learning From Tragedy: Representing Children In Discretionary Transfer Hearings*, 33 WAKE FOREST L. REV. 595 (1998).

130. *See, e.g.*, DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 75-77 (1993)(asserting that 41% of all blacks live in urban areas and 35% of all blacks live in the largest urban areas in highly segregated neighborhoods.)

and brown "racialized spaces"[131] where drugs and crime are viewed, if not as the norm, then as expected hazards. This is contrasted with racialization of space inhabited by whites. White areas are, according to Alastair Bonnett, socially transparent, normative, neutral, banal, dull, noncontroversial, normal,[132] and, I add, by implication, crime free, and specifically drug free.

Such racialization of spaces resulted largely from housing segregation. Though such segregation is no longer sanctioned by law, as Professor Deborah Kenn has stated, "[i]t is now well-established and indisputable that housing segregation as we know it today remains the result of deliberate and systematic racist programs and policies of the federal government, assisted in its institutional racism by the banking, real estate, and insurance industries."[133] In circumstances where housing patterns are often societally imposed, it is difficult to posit that equal protection challenges to schoolyard statutes which punish persons living within forbidden zones may be discounted because of the lack of discriminatory intent. Indeed, one may well wonder if "discriminatory intent" analysis yields a just result in drug jurisprudence.[134]

VI. The *Mens Rea* Challenge to Schoolyard Statutes

A. Federal Schoolyard Statutes

131. I refer here to the notion that certain geographic areas "are carried and placed on racial identity," in that they become closely associated with the characteristics and norms of the inhabitants of that area. John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair,"* 143 U. PA. L. REV. 1233, 1271 (1995).

132. Alastair Bonnett, *Geography, 'Race' and Whiteness: Invisible Traditions and Current Challenges*, 29 AREA 193, 199 (1997).

133. Deborah Kenn, *Institutionalized, Legal Racism: Housing Segregation And Beyond*, 11 B.U. PUB. INT. L.J. 35, 39 (2001).

134. Such discussions have recently been raised with reference to the application of 21 U.S.C. § 841(b)(1)(A)(iii), which provides for heightened penalties for the possession of cocaine base (crack cocaine.) For example, in *United States v. Clary*, 846 F. Supp. 768 (E.D. Mo.), rev'd, 34 F.3d 709 (8th Cir. 1994), the trial court considered the fact that possession of crack cocaine carried a penalty vastly higher than that imposed for possession of powder cocaine under 21 U.S.C. § 841(b)(A)(ii)(II). Because crack cocaine was used far more often by blacks, the court found that they were frequently subject to the harsher penalty without any clear rationale. The court alluded to "unconscious racism" which could be seen as the source of the discriminatory purpose of the statute. Thus, the court held that provisions which mandated such excessive provisions for crack cocaine possession were invalid. Even given the ultimate reversal of this decision, the impact of the trial court decision still resonates as a source for furthering the discourse in this area. *See generally* Richard Dvorak, *Cracking The Code: "De-Coding" Colorblind Slurs During The Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611 (2000); William Spade, Jr. *Beyond The 100:1 Ratio: Towards A Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233 (1996).

Besides the constitutional challenges to the validity of the statute, there have also been a number of challenges to the construction and application of the schoolyard statute which falls into the fortuitous or happenstance category. One of the more frequently made assertions has been that the statute should not apply to persons who do not intend to distribute drugs in proximity to schools or other statutorily relevant localities. Essentially, this is another variant of the argument that *mens rea* should be required for criminal liability, particularly where conviction results in harsh penalties. In *United States* v. *Falu*, the Court of Appeals for the Second Circuit became the first court to interpret 21 U.S.C. Section 845a.[135] *Falu* was clear in stating that the *mens rea* requirement was provided by the underlying statute and that the enhancement provision incorporated that underlying statute. Hence, to interpret the enhancement provision without *mens rea* was not violative of due process, as the enhancement did not criminalize behavior which would otherwise be innocent.[136] Accordingly, the court's analysis in *Falu* does not take into account the idea that our typical Benthamian system of assigning criminal penalties features heightened penalties as the seriousness of the crime grows.[137] In other circumstances, seriousness of crime is intimately tied in with *mens rea.* Those crimes committed without *mens rea* are often viewed as non-criminal accidents or only criminal to only a minor degree.[138] Thus, the hypercriminalized space of drug-free school zones would seem to be an exception to our usual methods of penalizing criminal behavior.

Falu found that the purpose of the statute—deterrence of drug distribution in and around schools—was clear from the legislative history. Thus, a finding that a defendant must have knowledge that his activity was within the prohibited area "would undercut this unambiguous legislative design."[139] In *Falu*, the court seemingly had no sympathy for the problem of fortuitous presence in school zones. Participants in the drug trade run the risk that their activities would take them into such areas:

> Although we are aware that some schools are not clearly recognizable as such from all points within the 1,000-foot radius, Congress evidently intended that dealers and their aiders and abettors bear the burden of ascertaining where

135. 776 F.2d 46 (2d Cir. 1985).

136. *Id.*

137. Jeremy Bentham, "An Introduction to the Principles of Morals and Legislation." *See* http://www.econlib.org/library/Bentham/bnthPML14.html (*last visited August 22, 2002*)

138. *Id.*

139. *Falu*, 776 F.2d at 50.

> schools are located and removing their operations from those areas or else face enhanced penalties.[140]

This issue was taken up in the Court of Appeals for the Ninth Circuit by *United States* v. *Pitts*, where the defendant was convicted of possession of cocaine with intent to distribute within 1,000 feet of a school.[141] *Pitts* expressly followed the reasoning of *Falu*. In *Pitts*, the defendant argued that Section 845a(a) violates the Due Process Clause in that it did not require the prosecution to prove the *mens rea* element, that the accused had actual knowledge of the proximity of a school. Thus, the defendant urged, the statute failed to provide fair notice that such conduct is subject to enhanced penalties. The court rejected this argument, and expressly adopted the reasoning of *Falu*, indicating that the legislative history of the statute showed Congress's unambiguous intent to deter drug distribution in and around schools. Therefore, the absence of an express *mens rea* requirement for the proximity of the offense was in keeping with the purpose of the statute. In fact, requiring a *mens rea* element would undercut that purpose.[142] Finally, the court noted that the statute did not criminalize otherwise innocent activity because it incorporated Section 841(a)(1).[143] That statute required the *mens rea* element of knowingly or intentionally distributing a controlled substance.

A number of other federal courts have reached this conclusion as well. For example, in *United States* v. *McDonald*,[144] the defendant was convicted of possession of cocaine with intent to distribute under 21 U.S.C. Section 860. The court found that no proof need be adduced as to whether the defendant intended to distribute in a school zone.[145] The purpose of the enhancement statute is "to give students increased protection from the violence often accompanying serious drug offenses, and from the threat of having their lives corrupted through proximity to drug traffickers and their wares."[146]

Some circuits, however, have found that application of the federal schoolyard statute in certain circumstances involving fortuitous presence in the zone was a misapplication of the statute.[147] Noteworthy is *United*

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140. *Id.*

141. 908 F.2d 458 (9th Cir. 1990).

142. *Pitts*, 908 F.2d at 461, citing Falu, 776 F.2d at 49-50.

143. *Id.*

144. 991 F.2d 866 (D.C. Cir. 1993).

145. *Id.* at 868-71.

146. *Id.* at 869.

147. *See also* West, *supra*, at 1409. West also looks at several of these cases, terming them "transient offender" cases. Her hypothesis is that when comparing the cases of those charged with schoolyard violations where drugs are found in their permanent residence were more likely to have the statute applied to their activities than those who were "transient offenders," or were otherwise simply passing through the zone. I consider more generally the notion of happenstance or fortuitous presence. My view of

States v. Liranzo in the Court of Appeals for the Second Circuit.[148] In *Liranzo*, the court dismissed a schoolyard drug charge where the defendant was arrested in a Port Authority bus terminal in Manhattan while en route to Pennsylvania. The court looked to the fact that the defendant was simply en route elsewhere, stating that "[b]ecause the purpose of the statute was to deter drug distribution in and around schools, including transactions which took place near where students gather, there is no policy reason to conclude that Congress sought to punish those possessing a controlled substance within 1,000 feet of a school, but intending to distribute it elsewhere."[149]

Similarly, in *United States v. Roberts*, defendant Roberts and two others were arrested at Penn Station in New York City and charged with conspiracy to distribute cocaine and possession with intent to distribute cocaine under 21 U.S.C. Section 845a.[150] Declining to find liability, the *Roberts* court rejected a reading of the statute that would call for schoolyard liability even where, for example, a car containing drugs were passing through the zone.[151] The court also explicitly rejected the government's position that in drafting the schoolyard statute, "Congress sought to erect a cordon sanitaire to bar dealers from even fleetingly or accidentally passing within 1000 feet of a school."[152] Indeed, the *Roberts* court found the government's position quite unpersuasive:

> Accordingly, states the government, the interpretation rationally relates to the maintenance of this zone because dealers who merely possess drugs that are intended to be distributed elsewhere could be followed by someone brandishing an "uzi" shooting wildly at innocent bystanders or dealers may accidentally drop some of their "stash. " Accepting these scenarios, a rational nexus between the punishment provided and the government's interpretation would exist only if one were to accept that the purpose of the statute was the creation of an antiseptically "drug-free zone" as opposed to the prevention of the supply of drugs to those attending or who may gather near a school.[153]

The court used language which makes clear that the court gave no credence to a broad reading of the purpose of the school zone statute. In

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such cases might take into account and explain, for example, *United States v. Testa*, *infra*, in which the court found that a defendant who stored drugs in a "stash house" which happened to be in a school zone would not be liable under the schoolyard enhancement.

148. 729 F. Supp. 1012 (S.D.N.Y. 1990).

149. *Id.* at

150. 735 F. Supp. 537 (S.D.N.Y. 1990).

151. *Id.* at 541 n.6 (citing *Liranzo*, 729 F. Supp. at 1014 n.1).

152. *Id.*

153. *Id.*

the court's view, the ills of passing through the zone with drugs are comparable to the ills of passing through the zone with cigarettes. Such a drug courier "does nothing to adulterate the zone with a supply of drugs than a smoker having an unopened pack of cigarettes does to adulterate a nonsmoker section or zone."[154] Thus, the *Roberts* court seems to reject the imposition of the hypercriminalized zone as it relates to drugs in school zones.

The Second Circuit again rejected the hypercriminalization of space founded upon fortuitous presence in *United States v. Coates*,[155] defendants were at the gate of the Amtrak station in Penn Station in New York City when they were observed by agents of the Drug Enforcement Agency. When the departure of their train was announced, the defendants boarded, and were followed by the agents. The agents approached the defendants and asked them for identification. They also searched the defendants' luggage. Inside one bag the agents discovered narcotics. Because Penn Station was located within 1,000 feet of the Taylor Business School, a nearby technical school, defendants were charged with conspiracy to possess with intent to distribute 500 grams or more of cocaine and with possessing with intent to distribute 4,018 grams of cocaine within 1,000 feet of a school, in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1) (B), and 845a(a). The court dismissed the charge brought under the schoolyard statute, finding that defendants were in the train station and thus within the school zone simply because that is a departure point for trains. As the court noted, to impose schoolyard liability in such circumstances "stretches the scope of the statute beyond logical and acceptable bounds."[156] The court further stated that the defendants' presence was in the school zone was "undoubtedly unknowing" and that to "posit liability under § 845a in these fortuitous circumstances is simple overreaching. To hold otherwise would be to mandate charging a schoolhouse count every time defendants on trains, or any other means of transportation, speed by a school on their way to a narcotics sale."[157]

In *United States v. Testa*,[158] the Northern District of Illinois reached a result similar to that seen in the Southern District of New York. In *Testa*, defendant maintained a house in a prohibited school zone area which was expressly and solely for the purpose of storing drugs. The *Testa* court relied on *Liranzo*, *Coates* and *Roberts* in finding for defendants. Unlike those cases, however, *Testa* did not involve merely passing through the zone. Some have thus suggested that *Testa* is so factually dissimilar as to make it difficult to reconcile with the Second

154. *Id.*
155. 739 F. Supp. 146 (1990).
156. *Id* at 153.
157. *Id.*
158. 768 F. Supp. 221 (N.D. Ill. 1991).

Circuit cases. One might find greater parity, however, by focusing not simply upon the defendant's happenstance presence, but rather upon the happenstance presence of the drugs. The house where the drugs were found was not primarily a residence; rather, it served as a "stash" house where the drugs were kept before distribution to various points.[160]

B. State Mens Rea Challenges

As at the federal level, challenges have been made in state cases to the seeming absence of a *mens rea* requirement where school zone penalties are imposed. In *People v. Atlas*, defendant appealed his conviction for possession of a cocaine base for sale, within 1000 feet of a school under Section 11353.6(b) of the California Health & Safety Code.[161] The defendant contended that the trial court committed reversible error by failing to instruct the jury that the intent to sell narcotics had to occur within 1,000 feet of a school in order for Section 11353.6(b) to apply. The court affirmed the conviction, finding that Section 11353.6(b) did not have on its face a *mens rea* requirement that required the state to prove that the defendant intended to sell narcotics within 1,000 feet of a school.[162] The court held that the defendant bore the burden of ascertaining where schools were located.[163]

In making its findings, the court in *Atlas* considered a number of cases that concern the matter of intent in schoolyard statutes, beginning with an Indiana case, *Williford v. State.*[164] In *Williford*, an Indiana court held that a similar statute did not require the state to prove that the defendant was knowingly or intentionally within the proscribed area at the time he committed the drug offense.[165] The statute at issue there, Indiana Code Section 35-48-4-10, provided that a person who "knowingly or intentionally manufactures or delivers marijuana"

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160. A stash house is a place, usually a residential unit or other innocuous place, where drugs or proceeds from drug sales are stored until transit to another location. See, e.g. United States v. Gallego, 247 F.3d 1191, 1195 (11th Cir. 2001); Greg Kekorian & Jose Cardenas, FBI Arrests Twelve, Seizes Ten Tons of Pot, L A Times, Mar. 20, 2002, at Part II., P.1; Houston Police online, http://www.ci.houston.tx.us/departme/police/stash_house.htm; John J. Farmer, "Currency Smuggling and Money Laundering in New Jersey," http://www.house.gov/financialservices/51500far.htm. Stash houses may be seen in other contexts as well. For example, undocumented aliens are sometimes kept in stash houses immediately after arriving in the United States, and are restrained there until they are transported on to other locations. See e.g. Gregory Alan Gross, Thousands of Illegals Smuggled on Buses, Feds Say, San Diego Union-Tribune, Dec. 12, 2001, at B2.

161. 75 Cal. Rptr. 2d 307 (Dist. Ct. App. 1998).

162. *Id.* at 309.

163. *Id.* at 312.

164. 571 N.E.2d 310 (Ind. Ct. App. 1991).

165. *Id.* at 312-13.

commits a Class A misdemeanor, but that the offense is a Class C felony "if . . . the person delivered marijuana . . . in or on school property or within one thousand (1000) feet of school property or on a school bus."[166] The defendant's request for an instruction stating that the statute required that he acted knowingly or intentionally with regard to being within 1,000 feet of school property was refused.[167] The trial court instead used the prosecutor's proffered instruction, stating that the prosecution was "not required to prove the defendant was knowingly or intentionally within 1000 feet of school property at the time the marijuana was delivered."[168]

The *Williford* court found that "the clear legislative intent was to increase the severity of drug offenses occurring on or around school property," and that the Indiana statute "resembles the federal 'schoolyard statute,'" 21 U.S.C. § 845a, enacted in October 1984, which was "[d]esigned to 'send a signal to drug dealers that we will not tolerate their presence near our schools.'"[169] The court based its decision on the *Falu* court's conclusion that the federal schoolyard statute had no *mens rea* requirement.[170]

In a similar case, *Commonwealth v. Murphy*, a Pennsylvania court held that an analogous statute did not require the prosecution to prove that the defendant intended to be within 1,000 feet of a school when he possessed controlled substances with intent to deliver.[171] That statute, 204 Pennsylvania Consolidated Statutes Section 303.9(c)(2), provided for increased penalties when the court found that the defendant "possesses with intent to deliver a controlled substance within 1000 feet of a . . . school. . . ."[172] The defendant claimed that his presence in the prohibited area "was 'an accident, an [*sic*] happenstance, a coincidence.'"[173] According to the court, the statutory language did not "read 'possession, with intent to deliver within 1000 feet of a school,'" and therefore did not require the government to prove the defendant intended to be within 1,000 feet of a school.[174] Such a requirement would defeat the purpose of the legislation, which was to "create a drug-free zone around schools and to signal to drug traffickers that their presence in this zone would subject them to longer sentences upon conviction."[175]

166. IND. CODE ANN. § 35-48-4-10(b)(2) (West 2002).
167. *Williford*, 571 N.E.2d at 531.
168. *Id.* at 310-11.
169. *United States v. Falu*, 776 F.2d 46, 48 (2d Cir. 1985).
170. *Atlas*, 75 Cal. Rptr. 2d at 529-30.
171. *Commonwealth* v. *Murphy*, 592 A.2d 750 (Pa. Super. Ct. 1991).
172. 592 A.2d at 754.
173. *Id.* at 755
174. *Id.*
175. *Id.*

In *State v. Ivory*, a New Jersey court concluded that a similar enhancement statute lacked an intent requirement.[176] In remarking upon the fortuitous nature of the defendant's presence in the school zone, the court observed, "[s]ome would argue that the statute was never intended to apply to those like [the defendant] who happened to be riding his bicycle through a safety zone. However, that is precisely what was intended."[177] The court clearly rejected the notion that a happenstance presence while traveling through the zone would insulate the defendant from schoolyard drug zone liability.

The *Atlas* court's conclusion, that Section 11353.6(b) should not be read to include an intent requirement, is supported by another California case, *People v. Price*.[178] In *Price*, the court considered whether an earlier version of the enhancement statute, Section 11370.4, required that the prosecution prove that the defendant had actual knowledge of the quantity or the intent to possess the specific quantity involved.[179] The *Price* court concluded that, once the defendant was convicted of an enumerated underlying offense, no special intent or knowledge was required under the enhancement statute, stating that "the enhancement does not require specific intent. It merely provides when the amount sold is more than a certain amount, an enhanced sentence may result."[180] *Price*, in turn, relied on *People v. DeLeon*,[181] which upheld imposition of an excessive taking enhancement under Penal Code Section 12022.6 in the absence of knowledge of the amount taken.

The trial court in *Atlas* relied on *United States v. Pitts*, and *People v. Meza*, in refusing appellant's proposed instruction. Both *Pitts* and *Meza* cited *Falu* for the proposition that

> elimination of a mens rea requirement in the enhancement statute under consideration did not violate due process because the mens rea element was contained in the underlying statute which was incorporated in the enhancement provision.[182]

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176. 124 N.J. 582 (1991).

177. *Id.* at 594.

178. 259 Cal. Rptr. 282 (Cal. Ct. App. 1989).

179. Section 11370.4 provided for a five-year enhancement when the defendant was convicted of Sections 11351 or 11352 and the amount of contraband exceeded ten pounds.

180. *Id.* at 1193-194; *see also People* v. *Meza*, 45 Cal. Rptr. 2d 844 (Cal. Ct. App. 1995) (imposing strict liability for weight enhancement regardless of knowledge of quantity). In *Meza*, the court overruled *Price* to the extent that it "seems to require clarification instructions" as to the scope of the defendant's knowledge or intent regarding the quantity of contraband. *Meza*, 45 Cal. Rptr. 2d at 847-48.

181. 188 Cal. Rptr. 63 (Cal. Ct. App. 1982).

182. *Atlas*, 75 Cal. Rptr. 2d at 311.

Appellant Atlas's argument was much like the argument made by the defendant in *People v. Price*.[183] In *Price*, the defendant urged that the weight enhancement required proof of knowledge or intent because, under *People v. Beeman*,[184] a conviction of the *charged crimes* as an aider and abettor required the finding that he acted with the requisite knowledge and intent. The court in *Price*, however, rejected this claim, stating, "[n]o special intent or knowledge is required under the [enhancement] statute or under *Beeman*."[185] Similarly, neither Section 11353.6 nor Section 11351.5 requires a finding of intent to possess for sale within 1,000 feet of a school in order for the enhancement to apply.[186]

Those cases which have evaluated the matter of required *mens rea* would seem to have resolved this issue of fortuitous or happenstance presence, suggesting for the most part that if in fact the statute seemingly requires no particular intent to possess or sell drugs in the school zone, this is in line with the legislative intent of such statutes. As the defendant in *State v. Brown*[187] argued, however, such statutes "if read literally," allow

> the conviction of persons who possess drugs which they intend to distribute, not within 1,000 feet of a school, but miles away as, for instance, the occupants of an airplane who unwittingly fly 500 feet above school property, or the occupants of a moving automobile who unknowingly pass within 1,000 feet of a school bus on a highway or country road. These situations, it is asserted, do not create potential harm to school children and demonstrate that the statute is too broad.[188]

The *Brown* court responded to this challenge by citing to cases that support the proposition that statutes are generally overbroad if they reach not only illegal conduct, but also constitutionally protected conduct. The response of the court in *Brown* does not, however, get at the heart of the matter. If schoolyard statutes, at either the state or the federal level, truly intend that persons flying over drug free school zones in airplanes be liable under such statutes, does this achieve the objective of drug control? Is the objective any more likely to be reached when persons stopped by police while walking or driving through school zones are

183. 259 Cal. Rptr. 282 (Cal. Ct. App. 1989).
184. 674 P.2d 1318 (Cal. 1984).
185. *Price*, 259 Cal. Rptr. at 288.
186. *Id.*
187. 547 A.2d 743 (N.J. Super. Ct. Law Div. 1988).
188. *Id.* at 745.

liable although police directed the individual into the school zone for the stop?[189]

These latter few questions have been raised in several cases, among them *Polk v. State*, an Indiana case.[190] In *Polk*, defendant was a passenger in a car stopped for a traffic violation in early morning hours in a school zone. Drugs and drug paraphernalia were subsequently found in the car and on his person. The defendant argued, among other things, that given such facts, the statute should not be literally applied.[191] He also argued that if liability were found in his case, this would encourage police to stop vehicles in school zones for the express purpose of penalty enhancement.[192] The *Polk* court rejected both of these contentions, stating first that in the only reported cases with facts similar to defendants, those courts rejected such arguments.[193] As to the argument that police would be encouraged to make "bad faith" stops, the court responded that it is the place of the *violation* which was instrumental, not the place of *apprehension*:

> However, the enhancement is triggered by possession within the zone, whether or not the defendant is pulled over within the zone. It is the act of entering the zone, and not the police action of pulling the defendant over, that triggers the enhancement. Nothing forces drug offenders to drive within the drug-free zone created by the legislature. To the contrary, they pass there at their own peril and in jeopardy of their own penal interests.[194]

Moreover, in those cases where courts have considered the issue of pretextual stops calculated to effect a search for drugs or to place defendant in a prohibited zone, courts have been uniform in rejecting such challenges.[195]

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189. Note that at least one court has held that when a defendant is first seen in a school zone and flees from it, and immediately thereafter is apprehended with drugs in his possession, a finder of fact is entitled to infer that the defendant possessed the drug in the school zone. Anderson v. State, 649 N.E.2d 1060 (Ind. Ct. App. 1995).

190. Polk v. State, 683 N.E.2d 567 (Ind. 1997).

191. *Id.* at 570.

192. *Id.* at 571.

193. State v. Ogar, 551 A.2d 1037 (N.J. Super. App. Div. 1989) (passenger passing through zone apprehended for drug offense); State v. Brown, 547 A.2d 743 (N.J. Super. Law Div. 1988) (driver apprehended).

194. *Polk*, 683 N.E.2d at 571-72.

195. *See, e.g.*, Whren v. United States, 517 U.S. 806 (1996), where the defendant was stopped for a traffic violation and subsequently charged with violation of drug laws after an officer observed narcotics in plain view. The Supreme Court affirmed the District of Columbia Court of Appeals and rejected the appellant's argument that he should not be subject to drug charges (among them a violation of the schoolyard statute) because the stop was merely a pretext to stop the vehicle and search for drugs.

In one instance, the District Court in *United States v. Murdaugh* addressed the defendant's assertion that a charge brought under 21 U.S.C. § 845a should be dismissed because the government had tried to enhance the penalties against him by intentionally stopping him in a school zone.[196] Although the court suggested that one might imagine a case "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction," the court concluded that this was not such a case.[197] There would have been, the court noted, federal jurisdiction in this case even had the transaction not taken place within 1,000 feet of a school.[198] Further, the site of the sale was near the defendant's place of employment, and evidence showed that it was the defendant rather than the government agent who chose the location.[199] There was, finally, no evidence that the agent was aware until after the fact that the location was within 1,000 feet of a school.[200]

VII. Eighth Amendment Challenges

Like federal statutes, state schoolyard statues have also been subjected to a wide variety of constitutional challenges. One interesting challenge which has also been made in a reported case at the federal level is the assertion that a state school zone statute violates a prohibition against cruel and unusual punishment because the penalty for offenses under such statutes was disproportionate to those meted out for similar crimes outside of school zone statutes. In *State v. Burch*, one defendant was charged with selling, and another with purchasing cocaine within 1000 feet of a school.[201] Defendants faced a maximum sentence of thirty years in prison if convicted.[202] Because persons convicted of arguably more serious crimes such as first degree murder and manslaughter had the same sentencing exposure, the defendants argued that the potential penalty under the school zone statute was so vastly disproportionate to the act that the sentence was "shocking and outrageous."[203]

Another challenge that has been raised is the assertion that a state school zone statute violates a prohibition against cruel and unusual punishment because the penalty for offenses under such statutes was disproportionate to those meted out for similar crimes outside of school zone statutes. For example, in *State v. Brown*, the defendant argued that the penalty was disproportionate to the offense and thus constituted cruel

196. 1989 U.S. Dist. LEXIS 1354 (S.D. N.Y. 1989).
197. *Id.* at 2.
198. *Id.*
199. *Id.*
200. *Id.*
201. 545 So.2d 279 (Fla. Dist. Ct. App. 1989).
202. *Id.* at 284.
203. *Id.*

and unusual punishment.[204] The court held, however, that a statute[205] that provides that the possession of a controlled dangerous substance with intent to distribute within 1,000 feet of any school property or school bus is a crime of the third degree and proscribing a mandatory imprisonment with a parole ineligibility period, did not constitute cruel and unusual punishment in violation of the federal and state constitutions.[206] The court noted, however, that the purpose of the statute was to reduce the availability of drugs for schoolchildren and to lessen the exposure of schoolchildren to the criminal drug milieu, which were rational findings and determinations that could not seriously be questioned in this day and age.[207]

VIII. Proximity to School Buses, Housing Projects, and the Problem of "Deperimeterizing"

Both federal law and several state laws contain provisions for liability when certain drug activities occur in or near school buses or public housing projects. While the legislative history of schoolyard statutes focuses on the ills of drugs near schools, the frequently stated rationales seem to weaken when school buses and housing projects are considered. Indeed, the inclusion of both school buses and housing projects as possible bases for "zone liability" seems to threaten to take the zone out of the zone. Areas become completely deperimeterized in ways only hinted at even in those cases which complained of the high density of schools, and hence the higher likelihood of schoolyard liability.

The concept of criminalizing or hypercriminalizing spaces by necessity means creating areas or zones where certain crimes will not be permitted, or where they will by punished to a greater degree. As seen above, the general rationale for such zoning is that the safety and welfare of the public is greatly enhanced. It appears, paradoxically, that while criminalization of spaces seems to deter certain behaviors, hypercriminalization of spaces does not deter behaviors to an increased degree. This is very likely because of the fact that, as in the example of schoolyard drug statutes, behaviors which are penalized are those which, for a variety of reasons, are difficult for actors to lay aside. With the inclusion of school buses and housing projects, the possibilities for liability become so broad that for some individuals in certain neighborhoods, it indeed becomes futile to hope to avoid heightened penalties.

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204. 547 A.2d 743 (N.J. Super. Ct. Law Div. 1988).
205. N.J. STAT. ANN. 2C § 35-7 (West 2002).
206. *Brown*, 547 A.2d at 748.
207. *Id.*

A. "Run, the bus is coming"—The Quintessential Moving Violation

One issue which has not been taken up either at the federal or state level is the problems which may occur in those jurisdictions whose schoolyard statute includes liability for persons whose vehicles come into the zone of school buses when those vehicles have drugs inside.[208] This was raised in dicta in *State v. Brown*.[209] *Brown* concerned the New Jersey schoolyard statute, New Jersey Statutes Annotated 2C section 35-7, which provides that the possession of a controlled dangerous substance with intent to distribute within 1,000 feet of any school property or school bus is a crime of the third degree.[210] The court suggested that it could be the case that the statute would be deemed to go too far in the case of, for example, liability for occupants of airplanes or of automobiles which pass moving school buses.[211] Because neither of these scenarios were present in *Brown*, the court left those problems to be addressed if and when they arose.[212]

A somewhat related issue was seen in a Washington state case, *State v. Davis*.[213] In *Davis*, the defendant appealed convictions for drug and weapons possession.[214] He was charged with making drug sales within 1,000 feet of a school bus stop.[215] The defendant argued that sentence enhancement under the Washington statute violated due process because there was no way of knowing that the stop had been designated a bus stop.[216] The stop in question was a municipal bus stop which had, in this instance, been designated a school bus stop.[217] The buses which served the children at the stop were public buses and not standard yellow school buses.[218] The court in *Davis* rejected the argument of the defendant, citing a similar case, *State v. Coria*.[219] In *Coria*, the court upheld the sentencing enhancement against constitutional challenge, holding that the location of school bus stops can be learned by "observing the gathering of schoolchildren waiting for their school buses, or contacting local schools or the director of transportation for the school district."[220]

208. *See, e.g.*, New Jersey and Indiana.
209. 547 A.2d 743 (N.J. Super. Ct. Law Div. 1988).
210. N.J. STAT. ANN. 2C § 35-7 (West 2002).
211. *Brown.*, 547 A.2d at 747.
212. *Id.*
213. State v. Davis, 970 P.2d 336 (Wash. Ct. App. 1999).
214. *Id.* at 337.
215. *Id.*
216. *Id.*at 338.
217. *Id.*
218. *Id.*
219. 839 P.2d 890 (Wash. 1992).
220. *Id.* at 897.

Although the school bus stop cases may suggest the outcome of school zone cases based upon presence in or near a school bus, the two cases are not completely apposite. There is, for one, the essential difference that a school bus is mobile, and thus presumably takes the zone with it wherever it goes. This, indeed, may give a whole new meaning to the phrase "run, the bus is coming." One could not so easily make the argument, as seen in *Coria*, that it is somehow possible to gain notice of the precise route of the bus, given the possibility of variations in travel. It may well be then that school bus cases would fall within that set of "extreme" cases of happenstance or fortuitous presence—where the interests of justice would require that there be no liability.

B. Liability for Drugs in Housing Project Zones

In *Davis v. State*, the appellant was convicted on two counts of unlawfully distributing a controlled substance, violations of Code of Alabama section 13A-12-211, and sentenced to ten years' imprisonment for each conviction.[221] In addition, each conviction was enhanced ten years pursuant to sections 13A-12-250 and 13A-12-270 because the sales took place within 3 miles of a school and within three miles of a housing project.[222] In that case, appellant did not contest his sentencing on both schoolyard and "housing project" drug zone laws, but rather contested other aspects of his sentence and the proceedings below.[223] This is doubtless because there were in fact two separate statutes which created the zones, unlike the case with the federal school yard statute and the schoolyard statute of other states. Nonetheless, the appellant in Davis received the "double whammy," which results when the locale of drug activity falls into two forbidden zones. Given the presence of both schools and public housing projects in certain areas, it becomes difficult indeed to avoid liability. Of course, such challenges may be met with the same response to those raised in other due process equal protection cases that complained of density.[224] If, in fact, the intent of such statutes is to protect families in residential areas, why then would not *all* residential areas be deemed drug free zones?

IX. Conclusion–The Moving Violation and "Zoning" as a Method of Crime Control

Although there is a long history of adherence to the "crime zoning" method of crime control, as is seen in both the cases of drug free school

221. 673 So. 2d 845 (Ala. Crim. App. 1995).
222. *Id.* at 846.
223. *Id.*
224. *See, e.g., United States v. Nieves*, 608 F. Supp. 1147 (S.D.N.Y. 1985).

zones and gun free school zones, it is not clear that such methods offer little more than psychic relief to the drug problem. It would appear that there are at least some cases of the "moving violation variety" where justice and fairness demand that defendants not be convicted. The problem for courts is that the existence of such cases threatens to undermine much of the jurisprudence in school zone cases if any doubts arise as to the fairness of applying such statutes. It seems clear that, just as there is no clear correlation between incarceration for drug crimes and the reduction of drug use in general, there is no correlation between heightened incarceration for drug activity in school zones and reduced use of drugs by juveniles. The hypercriminalization of space may well have to give way to a new model.