

WAR AS METAPHOR AND THE RULE OF LAW IN CRISIS: THE LESSONS WE SHOULD HAVE LEARNED FROM THE WAR ON DRUGS

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I. INTRODUCTION

The recent assassination attempt against Congresswoman Gabrielle Giffords¹ and the murder of a federal judge prompted a corollary discussion about the manifestation of political rhetoric, a war of words about words. The discussion, which strayed from sincere concern to inexplicable illogic at times, posed the not-surprising question: Did the hyperbole of conservative politicians and pundits precipitate the attack?² Given Loughner's mental instability, any direct link between specific exhortations of politicians and pundits and his acts is highly problematic. However, we cannot stop the discussion about the responsibility for Loughner's acts by assuming the intervening causation of his mental state cuts off responsibility, for doing so ignores the larger discussion about the use of militarized rhetoric and its effect on the behavior of others. Furthermore, that larger discussion must embrace what that rhetoric is doing to this country's fundamental democratic principles, especially the rule of law.

Rhetoric has long been employed to persuade, even goad, people to action. Speakers use powerful words and images to persuade people to sell a product, to vote for a candidate, to encourage collective action, to propagandize a political message, or to follow a religious creed. Rhetoric is fundamental to the movement of people, to the indoctrination of the crowd. Powerful rhetoric indeed was required to persuade a reluctant and loosely affiliated group of colonists to rebel against the most powerful country on earth to form a union of states that would protect the right to engage in that rhetoric. However, the problem posed by much of today's rhetoric—on both sides of the political spectrum although primarily on the right³—is that

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1. See, e.g., Marc Lacey & David M. Herszenhorn, *In Attack's Wake, Political Repercussions*, N.Y. TIMES, Jan. 8, 2011, <http://www.nytimes.com/2011/01/09/us/politics/09giffords.html>.

2. See, e.g., Brian Montopoli & Robert Hendin, *Sarah Palin Criticized over Gabrielle Giffords' Presence on "Target List,"* CBSNEWS, Jan. 8, 2011, http://www.cbsnews.com/8301-503544_162-20027918-503544.html.

3. The current militarized rhetoric tends to originate from the right; the left uses it defensively:

public policy discussions are no longer couched in the pragmatic rhetoric concerning the merits of ideas or solutions to problems facing the country. Instead, that rhetoric is couched in terms of war.

Such militaristic rhetoric has become increasingly common in advancing public policy agendas, perhaps most notably evolving with Cold War rhetoric in foreign policy.⁴ More troubling has become the use of war rhetoric “to elicit public consent for all sorts of disparate ventures.”⁵ For instance, President Lyndon B. Johnson’s War on Poverty was waged in the 1960s to gain support for sweeping civil rights reforms. The Cold War eventually resolved itself with the collapse of the Soviet Union, while the War on Poverty effected significant civil rights legislation. Both so-called wars, not real wars but causes deemed to be just, were resolved favorably to the United States and thereby confirmed the efficacy of militaristic rhetoric. At the time, therefore, the use of such rhetoric seemed justified, not problematic. World War II was the very recent past, and we assumed the public understood the distinction between the rhetoric’s metaphorical use in public policy positions and its literal use. We were, after all, still engaged in actual military operations in Korea and Vietnam during the 1950s and 1960s. We thought we recognized that militaristic rhetoric was a marketing ploy (pathos) to sell the logic of foreign policy and of social policy (logos). Especially with regard to social policy, we recognized that the militarized rhetoric was a metaphor for the struggle with an abstraction—civil rights and poverty. Although violence was an unfortunate outgrowth of the civil rights movement, President Johnson’s rhetoric was not a declaration of war against a literal enemy. However, today’s increasing use of militaristic rhetoric by politicians and pundits goes beyond its metaphorical use as a war against an abstraction. Instead, the use of such language is becoming

Americans tend to toss the word “war” around carelessly[.] . . . [T]he term “cultural war” was appropriated by neo-conservative intellectuals from the German term “Kulturkampf,” which referred to Bismarck’s campaign against the Roman Catholic Church in Germany in the 1870s and which suggests a Prussian harshness. Other parts of the social and political spectrum in the United States also use the term, at least in self-defense.

James F. Childress, *The War Metaphor in Public Policy: Some Moral Reflections*, in *THE LEADER’S IMPERATIVE: ETHICS, INTEGRITY, AND RESPONSIBILITY* 181, 193 (J.C. Ficarotta ed., Purdue e-Pubs 2001), available at http://docs.lib.purdue.edu/press_ebooks/7.

4. David Hoogland Noon, *Operation Enduring Analogy: World War II, the War on Terror, and the Uses of Historical Memory*, 7 *RHETORIC & PUB. AFFAIRS* 339, 342 (2004). “The swift transfer of military language (not to mention production) from World War II to the Cold War during the 1940s represents only the most portentous example of the tendency for policymakers to imagine the nation in the midst of a perpetual war.” *Id.*
5. *Id.*

literal, and that rhetorical shift matters. Today's militaristic rhetoric is increasingly identifying fellow citizens as enemies in a literal war.

The homology of literal war rhetoric and metaphorical war rhetoric arises from a potent source. In the modern United States, military images have extraordinary persuasive value:

Collective memory of war, more than any other genre of historical experience, has been central to the public culture of the modern United States as well as to the commercial realm of historical memory. Popular memories of war not only claim to preserve some heroic moment of the past, but they often make acute demands upon the living, who must periodically show themselves worthy of the gifts bestowed upon them by the wartime sacrifices of others.⁶

At some point, however, we have crossed the line from the marketing use of the metaphorical militarization to actual militarization. Somewhere in the last thirty or forty years, we have found it too easy to use militarized rhetoric without examining its consequences. Nowhere is that easy usage more apparent than in the War on Drugs, especially as it relates to children. What happened to children in the War on Drugs may even be part of the reason why our current public discourse is reaching a crisis point: A war against an abstraction found an enemy—a defenseless enemy—and fundamentally changed the rule of law to make engaging that enemy much easier.

At its inception, the War on Drugs had a public policy logos to market by its military pathos: The United States had a problem dealing with drug abuse when the War was declared. Hence, the War did not start as an end in and of itself. It was merely the means to curbing an abstract problem, not unlike the War on Poverty. Its militarized rhetoric did not start out as anything but a rhetorical ploy in changing public perception and therefore public policy. From the successes of that marketing strategy has emerged the new militarized rhetoric that has moved the metaphorical to the literal. Unfortunately, these renewed strategies seem utterly oblivious to the consequences of the abysmal failure that is the War on Drugs. Furthermore, the rhetoric of the War on Drugs has inured us to the moral implications of using such rhetoric and the personal responsibility that should go with it. Without that moral awareness, the new militarized rhetoric is much more dangerous as it becomes less metaphorical and more literal.

Thus, the thesis of this article is that the larger marketing strategy of public policy through militarized rhetoric does have consequences because,

6. *Id.*

ultimately, a specific enemy may be engaged and war-time exigencies may suspend the rule of law. Worse, we may have changed our schools into institutions where we teach children that militarized rhetoric is acceptable and without moral consequence. Part I describes the militarization of the War on Drugs and how and why the U.S. government's marketing strategy was first employed. Turning schools into literal battlegrounds in the War on Drugs is the subject of Part II. That analysis will examine how all three branches of government actually enabled the War on Drugs by both identifying children as enemies and legally justifying the war against them. Part III then explores the "Americanization" philosophy of the War, a philosophy that has not only contributed to the longevity of the War and turned public schoolchildren into the enemy but also acted as the abstraction that formed the basis of today's militarized rhetoric in the Culture War by painting the War as an "us-versus-them"-style struggle. Part IV then identifies the War on Drugs as one of the direct sources of today's hyper-militarized rhetoric in which war is both the means and the end of the marketing strategy and opines that that War deafened Americans to the moral implications of war as metaphor so that we now do have actual war among citizens of this country, the consequence of which may be a fundamental change in the rule of law.

II. SOMETHING WICKED THIS WAY COMES⁷

The War on Drugs against children, teenagers in particular, has lasted longer than the reigns of the Roman Emperors Caligula through Nero. It did not start out as a war against teenagers, at least not explicitly. Rather, it started out as a way of scape-goating others for institutional failures and, ironically, as a backlash against President Johnson's War on Poverty and his civil rights successes in the 1960s. Nonetheless, teenagers got caught in the crossfire. They were the natural enemy in this War because it demanded complete obeisance to authority and subjugation to forces of unreasonable fear. However, the normal teenager is not wired to do either so the battle was joined.

7. RAY BRADBURY, *SOMETHING WICKED THIS WAY COMES* (1962); *see also* WILLIAM SHAKESPEARE, *MACBETH*, act 2, sc. 1. Bradbury's novel is a coming-of-age story of two thirteen-year-old boys reaching the gateway to maturity: one who reflects the brighter, trusting childhood side of that portal and the other, the darker, riskier adulthood side. Both are faced with decisions that can change their adolescence when a carnival comes to town that invites yet repels them with the Mephistophelean promise: they can grow up instantly by riding the carousel forward. Adults, on the other hand, are lured with the promise of renewed youth by riding the carousel backwards. The carnival feeds off people's fear, "living off the poison of the sins we do each other, and the ferment of our most terrible regrets." BRADBURY, *supra*, at 203.

The War on Drugs, declared by President Richard Nixon in the early 1970s, indeed was and is a war insofar as, these days, U.S. citizens are persuaded that we are at war with any enemy that might threaten or has threatened the polity. When U.S. citizens are frightened enough to envision any number of harms that such an enemy might cause, then, of course, we must be mobilized to fight that enemy. Citizens of this country tend not to carefully analyze those claims so long as we are frightened sufficiently by those we are supposed to trust and in whom we have imposed the trust of our national safety and security. War also tends to make us want to embrace a national unity, just as we did in World War II. Thus, we breathlessly await our marching orders to combat the enemy or, at the very least, take pre-emptive measures to make sure the enemy will not breach this nation's defenses. We as a people tend not to be very reflective about the truth underlying those claims or the wisdom of the actions we are asked to take because war "is an enticing elixir."⁸

The U.S. government's War on Drugs arose out of an actual, albeit over-hyped, need to solve problems posed by drug use and abuse in this country. This article is not intended to give short shrift to the harms caused by drug use, especially addiction, or to its ancillary impact on crime, both violent and opportunistic. Nor is the article intended to give short shrift to the government's original goal of twinning treatment with law enforcement because, at the outset, the War on Drugs actually did emphasize the need to fund treatment. But forty years later, the incessant drumbeat of war has sidelined the treatment, and hence the preventive, effort to combat drug abuse and has instead focused on a militaristic approach that has driven the War on Drugs into and through the nation's schools and has riven constitutional protections from children. Unfortunately, that driving impulse only thrived when the government implicitly framed the War as a struggle between good and evil for the soul of a nation and explicitly framed the War to play on the people's fears. This rhetorical use was also a ploy to divert the people's attention from the ravages of Vietnam to their Puritanical national self-image of being clean in body and mind.

The love-hate relationship between non-medical drug use and the United States government has existed since the founding of the Republic.⁹ As a new type of ingestible vice has been discovered, the government has

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8. CHRIS HEDGES, *WAR IS A FORCE THAT GIVES US MEANING* 3 (2002). "The enduring attraction of war is this: Even with its destruction and carnage it can give us what we long for in life. It can give us purpose, meaning, a reason for living." *Id.*
 9. See generally Elaine Casey, *History of Drug Use and Drug Users in the United States*, THE NAT'L DRUG ABUSE CTR. FOR TRAINING RES. & DEV. (Nov. 1978), <http://www.druglibrary.org/schaffer/History/CASEY1.htm>.

reacted to inhibit its use, from alcohol and tobacco to hemp and opiates.¹⁰ Early U.S. drug control efforts derived, for the most part, from a concern about the harms of overdosing on opiates, particularly the concern that citizens would misuse them without understanding their lethal tendencies or that people might even be drawn to them for committing suicide.¹¹ But just as surely as the government wanted to exercise its *parens patriae* role to protect citizens from harm, private social forces wanted to protect citizens from themselves and their tendencies to overindulge in pleasure. Indeed, Prohibition was one of the more remarkable efforts by the government to prevent citizens from indulging in a particular type of controlled substance on such paired impulses of sparing citizens both harm and pleasure.¹²

These two controlling visions of the government's role in Prohibition—and which implicitly informed the War on Drugs—might be attributable to any number of forces, on either end of the political spectrum. Both religious conservatives and progressives were driving forces behind protecting citizens from the harms of abusing alcohol—essentially a victimless vice.¹³ Interwoven throughout those visions is the U.S.'s Puritanical cultural tendency to control how others live and the underlying intolerance of those who do not ascribe to nor submit to that control.¹⁴ Prohibition's spectacular failure in protecting citizens from themselves presaged the problems that were systemic in the War on Drugs, posing similar issues of social and cultural control and intolerance.

Those social and cultural impulses go a long way toward explaining why drug addiction, whether recreational or medical, has long been deplored in the United States. Opium and morphine were readily available for purchase over the counter in the late nineteenth and early twentieth centuries, but those who overindulged—"opium drunkards"—were derided.¹⁵ These drug prohibition efforts came to a head after the Spanish-

10. See generally The 'Lectric Law Library, *A History of Drug Use and Prohibition*, <http://www.lectlaw.com/files/drg09.htm>; THOMAS SZASZ, CEREMONIAL CHEMISTRY: THE RITUAL PERSECUTION OF DRUGS, ADDICTS & PUSHERS, 183–212 (appx) (1974).

11. David F. Musto, M.D., *History of Legislative Control over Opium, Cocaine, and Their Derivatives*, SHAFFER LIBR. OF DRUG POL'Y, <http://www.druglibrary.org/schaffer/History/ophs.htm>.

12. See, e.g., Casey, *supra* note 9; RICHARD F. HAMM, SHAPING THE 18TH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880–1920, 19–20 (1995).

13. ANDREW SINCLAIR, PROHIBITION: THE ERA OF EXCESS, 91–94 (1962). That is not to say that alcohol abuse does not harm parties other than the drinker. However, the philosophical underpinnings for the early anti-drinking efforts targeted the individual's consumption rather than its consequences to others. *Id.*

14. See, e.g., JAMES MORONE, HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY 98–99, 494–97 (2003). Ironically, colonial Puritans did not oppose drinking alcohol. *Id.* at 284 (alcohol was the "goodly creature of God"); HAMM, *supra* note 12, at 34–35.

15. Musto, *supra* note 11.

American War when the United States took control of the Philippines. There, the government was confronted with a local, nonmedical opium market condemned by local missionaries.¹⁶ The government opted for prohibition.¹⁷

Notwithstanding modern variations of prohibition as a drug control tactic, recreational drug use exploded in the 1960s and went mainstream.¹⁸ Concerned by this explosion in illicit drug use, President Lyndon Johnson created the Bureau of Drug Abuse Control, the precursor to the Drug Enforcement Administration.¹⁹ Simultaneously, the government made special efforts to cut off the rising marijuana trade from Mexico.²⁰ By 1970, Congress had passed the Comprehensive Drug Abuse Prevention and Control Act.²¹ That legislation combined more than fifty pieces of disparate federal drug laws into one comprehensive act with a single system for controlling narcotics and psychotropics²² and provided for both criminal enforcement and drug treatment. When signing the Act into law, President Richard Nixon remarked on the need to “cure” drug addiction while at the same time addressing the need to add three hundred more law enforcement agents.²³ “But sensationalism rather than rationality . . . guided the national conversation”²⁴ about drugs.

In 1971, a report on heroin addiction among U.S. servicemen in Vietnam—which later proved to be wildly inaccurate—was released.²⁵

16. *Id.*

17. The prohibition movement against drugs was contemporaneous with the temperance and anti-saloon movements against alcohol. *Id.*

18. *Frontline: Drug Wars, Thirty Years of America's Drug War, A Chronology*, PBS.ORG (Oct. 2000), www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/.

19. U.S. Drug Enforcement Admin., *1970–1975*, http://www.justice.gov/dea/pubs/history/deahistory_01.htm. The DEA is the “offspring” of the Bureau of Prohibition, an agency of the U.S. Department of the Treasury. *Id.*

20. *Frontline Chronology*, *supra* note 18.

21. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242 (1970); *Frontline Chronology*, *supra* note 18.

22. *DEA 1970–1975*, *supra* note 19.

23. President Richard Nixon, Remarks on Signing the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Oct. 27, 1970), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=2767>.

24. BARRY GLASSNER, *THE CULTURE OF FEAR: WHY AMERICANS ARE AFRAID OF THE WRONG THINGS: CRIME, DRUGS, MINORITIES, TEEN MOMS, KILLER KIDS, MUTANT MICROBES, PLANE CRASHES, ROAD RAGE, & SO MUCH MORE*, 131 (Basic Books 1999).

25. *Frontline Chronology*, *supra* note 18; MORGAN F. MURPHY & ROBERT H. STEELE, *THE WORLD HEROIN PROBLEM: REPORT OF SPECIAL STUDY MISSION*, H.R. REP. NO. 92-298 (June 22, 1971), *available at* www.vietnam.ttu.edu/star/images/239/2391101003A.pdf. This House Report turns out to have grossly exaggerated troop heroin usage in Vietnam at 10–15%. *Id.* at 1. One of the Report’s authors, Congressman Robert H. Steele, later recanted his representations, opining that servicemen’s heroin usage was more likely only 5%, one-half to one-third of the original estimate. That recantation was borne out by the results of Operation Golden Flow, a urinalysis program imposed on returning servicemen that yielded only a 4.5% positive result for drug use. Jeremy

Now President Nixon had a national security issue to which he could tie his anti-drug efforts. A month after the report's release, the President took his first war-like stance against drugs in a press conference on June 17, 1971: "America's public enemy number one in the United States is drug abuse. In order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive."²⁶ His employment of war analogies was clearly no accident and was a theme he used regardless of his audience²⁷ throughout the remainder of his presidency,²⁸ although the phrase "war on drugs" did not become the coin of the realm until September 22, 1972.²⁹ By March 1973, Nixon had crafted the DEA, exhorting Congress that "[t]his Administration has declared all-out, global war on the drug menace. As I reported to the Congress earlier this month in my State of the Union message, there is evidence of significant progress on a number of fronts in that war."³⁰ By that time, Nixon's drug treatment agenda was no longer in evidence; only the criminal enforcement agenda had the President's and the country's attention.

Beyond Nixon's war-like rhetoric, "War on Drugs" really did not become the brand name until succeeding presidencies. Confining oneself to a simple search of officially recorded statements from the American Presidency Project, one finds that President Gerald Ford—in a much shorter presidency than Nixon's—used the term in at least three official

Kuzmarov, *From Counter-Insurgency to Narco-Insurgency: Vietnam and the International War on Drugs*, 20 J. OF POL'Y HIST. 344, 353 (2008); *See also Frontline Chronology*, *supra* note 18.

26. President Richard Nixon, Remarks to the American People about an Intensified Program for Drug Abuse Prevention and Control (June 17, 1971), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=3047>; *see also* President Richard Nixon, Special Message to the Congress on Drug Abuse Prevention and Control (June 17, 1971), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=3048>.
27. Nixon used this refrain with media executives. *See, e.g.*, J.C. Oleson, Comment, *The Punitive Coma*, 90 Calif. L. Rev. 829, 831 n.2 (2002). He also used this refrain with children. *See, e.g.*, President Richard Nixon, Telephone Remarks to Students and Educators Attending a Drug Education Seminar in Monroe, Louisiana (Oct. 4, 1971), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=3179>. Further, he used this refrain with athletes. *See, e.g.*, President Richard Nixon, Remarks to Athletes Attending a White House Sponsored Conference on Drug Abuse (Feb. 3, 1972), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=3674>.
28. President Richard Nixon, Radio Address on Crime and Drug Abuse (Oct. 15, 1972), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=3631>.
29. President Richard Nixon, Statement about Drug Abuse Law Enforcement (Sept. 22, 1972), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=3590>.
30. President Richard Nixon, Message to the Congress Transmitting Reorganization Plan 2 of 1973 Establishing the Drug Enforcement Administration (Mar. 28, 1973), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=4159>.

statements.³¹ Under a similar search, President Jimmy Carter never (or at least rarely) used that term. But the rhetoric intensified exponentially under President Ronald Reagan and went supernova under President George H.W. Bush.³²

President Reagan's engagement in the War on Drugs focused on choking off the supply of drugs, from both the street and abroad, under the logic that if the U.S. stops the illegal supply, then the demand will automatically vanish. Reagan's direct references to the War on Drugs in official statements and speeches surpassed President Ford's by a factor of seven. Although Reagan couched his War in terms of saving American lives, especially children's lives, his rhetoric nevertheless focused on taking the war to the suppliers. Reagan's allusions to war tactics were often less than subtle, using terms like "battlefield," "military intelligence,"³³ "the deployment of the armed forces,"³⁴ "battle,"³⁵ and "crusade."³⁶ Perhaps Reagan was no more warrior-like than in his tribute to law enforcement officers slain during the War on Drugs:

America's liberty was purchased with the blood of heroes. Our release from the bondage of illegal drug use is being won at the same dear price. The battle is ultimately over what America is and what America will be. At our founding, we were promised the pursuit of happiness, not the myth of endless ecstasy from a vial of white poison. We won our personal freedom so that we could serve God and man, so that we could freely produce and create and build a nation of strong families, rich farms, and

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31. President Gerald Ford, Statement on Drug Abuse (Feb. 23, 1976), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=5609>; President Gerald Ford, Special Message to the Congress on Drug Abuse (Apr. 27, 1976), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=5875>; President Gerald Ford, Remarks at the Annual Conference of the International Association of Chiefs of Police in Miami Beach, Florida (Sept. 27, 1976), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=6374>.
 32. A keyword search of the American Presidency Project for documents of George H.W. Bush reveals 130 "official" entries using the term "war on drugs" and thirty-four using "drug war." See Am Presidency Project, *available at* <http://www.presidency.ucsb.edu/ws/index.php>.
 33. President Ronald Reagan, Radio Address to the Nation on Federal Drug Policy (Oct. 2, 1982), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=43085>.
 34. President Ronald Reagan, Radio Address to the Nation on Drug Abuse (Oct. 6, 1984), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=39198>. In contrast to military forces tasked with stopping the supply of drugs, Nancy Reagan was tasked with stopping demand. *Id.* See also President Ronald Reagan, Remarks at the United States Coast Guard Academy Commencement Ceremony in New London, Connecticut (May 18, 1988), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=35847>.
 35. President Ronald Reagan: Remarks to Media Executives at a White House Briefing on Drug Abuse (Mar. 7, 1988), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=35521>.
 36. President Ronald Reagan, Remarks at a White House Ceremony Honoring Law Enforcement Officers Slain in the War on Drugs (Apr. 19, 1988), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=35698>.

great cities. We struggled for liberty in order to cherish it and defend it and transmit it undiminished to our children and theirs.³⁷

Reagan also explicitly framed the War as a struggle between “us” against “them,” a struggle of national values against some unnamed terror.

George H.W. Bush brought with him to the Presidency the warrior mindset to which he had devoted himself as Vice President as tip of the spear in the Reagan administration’s War on Drugs. With well over one hundred official references in just a limited search of the American Presidency Project documents, the War on Drugs brand name and the phrase “drug wars” were ubiquitous in the Bush lexicon. Shortly after he was sworn in, President Bush made remarks after the swearing-in ceremony of the first “drug czar,”³⁸ William Bennett,³⁹ to oversee the new executive Office of National Drug Control Policy.⁴⁰ In his statement, Bush joined the trajectory of increasingly explicit war references to the U.S.’s drug problem:

Bill is the first Director of the National Drug Council [sic] Policy—you, soldiers of this crusade. And drug abuse assaults the mind and the spirit of America, leaving damaged lives and destroyed careers. So, we’ve got to mobilize our moral, spiritual, and economic resources to force a decline in drug trafficking and in drug abuse.⁴¹

President Bush was probably at his most martially stirring with the following:

Well, the soldiers in the drug battle have been risking their lives. Too often bureaucratic conflict here in Washington has hobbled our national effort. So, this has got to end. No war was ever won with two dozen generals acting independently. And I have chosen Bill Bennett to be the commanding general in the drug war. It is his responsibility, working with the departments and agencies headed by those you see here with me

37. *Id.*

38. Historically, “czar” refers to either a Russian emperor or an autocrat. Its contemporary meaning is “one in authority.” WEBSTER’S II NEW COLLEGE DICTIONARY, 284 (Houghton Mifflin Co. 1995).

39. *Drug War History and Issues in a Nutshell*, DRUG ACTION NETWORK (2002–2003), <http://drugactionnetwork.com:16080/history/?content=drugwar>. Bennett’s appointment was more than a little ironic given his addictions to smoking and gambling as well as his penchant for drinking. *Id.*

40. *Id.*

41. President George Bush, Remarks Following the Swearing-in Ceremony for William J. Bennett as Director of National Drug Control Policy (Mar. 13, 1989), *available at* www.presidency.ucsb.edu/ws/index.php?pid=16769.

and others, to develop a strategy for this war. So, I charge him with putting all the parts of the Federal Government in harness, pulling together in a life-and-death struggle against a deadly enemy. I will not tolerate, and the country cannot afford, bureaucratic infighting that forces us to fight this battle with one arm tied behind our back.⁴²

Bennett responded in kind:

The President has asked for total effort. He has asked for action on each and every front. . . . We want to see waiting lines for drug treatment reduced and prison cells for drug pushers increased. . . . [T]his administration wants to work with all the good citizens of America to win the war.⁴³

As a consequence, highlights of Bush's War on Drugs included a 50% increase in military spending to combat drug trafficking and the U.S. invasion of Panama to arrest General Manuel Noriega on trafficking, racketeering, and money laundering charges.⁴⁴

President Bill Clinton seemed rarely to make official reference to the War on Drugs except at press briefings, but his administration was keen to continue the progress in reducing the U.S.'s drug problems. Part of Clinton's silence resulted from a deliberate policy to tone down the overheated anti-drug rhetoric and thereby redirect the War's efforts to treatment and prevention.⁴⁵ Unfortunately, he found de-politicizing, or perhaps de-militarizing, the War to be difficult, and he was unable to get the then-Republican Congress to redirect money from interdiction and law enforcement.⁴⁶ Additionally unfortunate were the political attacks during his 1996 re-election campaign that his "liberal" drug policies were not working. As a consequence, Clinton increased his anti-drug rhetoric to outshout his opponent, Bob Dole.⁴⁷ Indeed, the Clinton presidency is notable for its significant up-tick in military and law-enforcement operations, including the arrests of leaders of the Colombian Cali cartel and of Mexican bankers for money-laundering (Operation Casablanca).⁴⁸ And in harmony with the adage that "no politician has ever seen his approval ratings decline

42. *Id.*

43. *Id.*

44. *Frontline Chronology*, *supra* note 18.

45. GLASSNER, *supra* note 24, at 136.

46. Michael Kramer, *The Political Interest: The Phony Drug War*, *TIME*, Sept. 2, 1996, <http://www.time.com/time/magazine/article/0,9171,985050,00.html>.

47. GLASSNER, *supra* note 24, at 136–37.

48. *Frontline Chronology*, *supra* note 18.

by being tough on drugs,⁴⁹ the Clinton administration expanded federal law enforcement dramatically with “hard-line penal policies.”⁵⁰

That hard-line approach did not change during the presidency of George W. Bush. But during his two-term presidency, Bush was less of a cheerleader in the War on Drugs and more of an enabler. A mere handful of months into his first term, Bush had a War on Terror to fight so he handed off the important combat operations of the War on Drugs to appointees. Employing the services of the Department of Justice, Attorney General John D. Ashcroft early on vowed to oppose teen drug use,⁵¹ but his rhetoric was nevertheless war-like: “Well, I want to escalate the war on drugs. I want to renew it. I want to refresh it, relaunch it if you will.”⁵² Bush’s first appointee to head the DEA, Asa Hutchinson, viewed the War on Drugs as a crusade, having spent a significant amount of time as a Congressman on drug war issues while favoring an escalation of the War in Colombia and refusing to retreat from draconian sentencing for drug users.⁵³ Likewise, Bush’s Drug Czar, John Walters, brought a background that relied extensively on the “Andean Strategy,” a decade-long plan costing billions of dollars and escalating the War’s military operations in Latin America.⁵⁴

Unfortunately, the War on Terror intensified the fervor for the War on Drugs. Not to be outdone by the attention paid to the War on Terror, the drug warriors had to up the ante. Less than a month after the September 11 attacks, a State Department director testified to links between the Taliban and financing terrorist activities through drug trade.⁵⁵ At a criminal justice

49. Kramer, *supra* note 46.

50. Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693, 1740 (2006).

51. David A. Vise & Dan Eggen, *U.S.: Violence, Teen Drug Use Are Ashcroft Priorities*, WASH. POST, Feb. 8, 2001, <http://www.mapinc.org/drugnews/v01/n228/a04.html?1267>.

52. *President Bush Appoints Drug Warriors to High Administration Positions*, COMMON SENSE FOR DRUG POL’Y, available at www.csdp.org/news/news/warcabinet.htm; GOTTSCHALK, *supra* note 50, at 1740.

53. COMMON SENSE, *supra* note 52.

54. *Id.*

55. RAPHAEL F. PERL, CONG. RESEARCH SERV., RS 21041, TALIBAN AND THE DRUG TRADE 4 (2001), available at <http://fpc.state.gov/documents/organization/6210.pdf>; William Bach, Director, Office of Asia, Africa, Europe, NIS Programs, Testimony Before the Committee on Government Reform U.S. House of Representatives Subcommittee on Criminal Justice, Drug Policy and Human Resources (Oct. 3, 2001), available at http://avalon.law.yale.edu/sept11/testimony_001.asp; see also Doug Stokes, “Iron Fists in Iron Gloves”: *The Political Economy of U.S. Terrorocracy Promotion in Colombia*, 8 BRITISH J. POL. & INT’L STUD. 368 (2006) (positing that U.S. long-term interests in financing counter-insurgency efforts in Colombia conveniently shifted from an anti-communism rationale to anti-drug and anti-terrorism).

conference in London during Summer 2002, Asa Hutchinson likened the War on Drugs to the combating of terrorism:

I am here to speak about another war today—the war on drugs. It is perhaps not as intriguing as the war on terrorism—but as we know—drug trafficking and terrorism are two evils that exist in the same jungle. . . . The nations represented in this room understand the human suffering that comes with war. We know that war should be avoided, but not at the sacrifice of freedom. We know wars are fought to sustain democracy, but they are not without costs. We know that the costs of war must be weighed against what is lost when evil triumphs.

These realities of war are common in democratic societies. We know they are also true when it comes to our shared struggle against illegal drugs. If we avoid war, then democracy will suffer; if we flinch at the costs, then a greater price will be paid by families, by communities, and by our nations.⁵⁶

Not to be outdone, Attorney General Ashcroft went on an extended crusade against drug paraphernalia⁵⁷ and medical marijuana,⁵⁸ taking the War to new heights of law enforcement power.⁵⁹ By 2005, federal and state governments were spending nearly sixty times more on cleaning up after substance abuse problems than on prevention.⁶⁰

Nearly forty years into the War on Drugs, its victories are Pyrrhic at best. Experts criticized its misdirection early⁶¹ and continually.⁶² Aside from the geopolitical disaster it caused, the War's effect on the U.S. itself

56. Asa Hutchinson, Director, Env'tl. Prot. Agency, Speech at Modernizing Criminal Justice Conference (June 18, 2002), available at www.justice.gov/dea/speeches/s061802p.html.

57. Jesse Katz, *White House Tries to Ban the Bong*, ROLLING STONE, 54 (July 24, 2003).

58. *Gonzales v. Raich*, 545 U.S. 1 (2005).

59. In his crusading zeal, Ashcroft even used the full weight of the Justice Department to convey his displeasure against any federal judges perceived as not committed enough to the War:

In 2004, Republicans on the House Judiciary Committee led a successful effort to force the United States Sentencing Commission to provide Congress with the names of federal judges who departed from [drug] sentencing guidelines. In August 2003, the Justice Department announced it would begin compiling data on judges who mete out lighter sentences than the federal guidelines prescribe, a move some critics likened to the creation of a “blacklist” of judges.

Gottschalk, *supra* note 50, at 1740.

60. Nat'l Ctr. on Addiction & Substance Abuse at Columbia U., *Shoveling Up II: The Impact of Substance Abuse on Federal, State and Local Budgets*, ii (May 2009).

61. See generally Merrill A. Smith, *The Drug Problem—Is There an Answer?*, 52 FED. PROBATION 3 (1988).

62. Ben Wallace-Wells & Eric Magnuson, *How America Lost the War on Drugs*, ROLLING STONE, 90 (Dec. 13, 2007).

has been enormous. The criticisms range from the economic⁶³ to the cynical, including the view that the War is merely a political game to position politicians for re-election.⁶⁴ Others criticized its emphasis on law enforcement rather than on public health.⁶⁵ One typically astringent observation is that the War was waged without examining the effectiveness of the weapons⁶⁶ while another is that the U.S. now has an unthinkable huge prison population, bloated by the increasingly harsh and indefensible criminal penalties for drug offenses⁶⁷ that are racist.⁶⁸ As all these critics and critiques agree, “Drug abuse is bad, but the drug war is worse.”⁶⁹ Perhaps worst of all is that the pride of the U.S. government, its rule of law, went missing in action.⁷⁰

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63. See, e.g., Matthew A. Christiansen, *A Great Schism: Social Norms and Marijuana Prohibition*, 4 HARV. L. & POL’Y REV. 229 (2010); Cynthia S. Duncan, Note, *The Need for Change: An Economic Analysis of Marijuana Policy*, 41 CONN. L. REV. 1701 (2009); Mary Carmichael, *The Case for Treating Drug Addicts in Prison*, NEWSWEEK (June 29, 2010), <http://www.newsweek.com/2010/06/29/the-case-for-treating-drug-addicts-in-prison.html>.
64. Ross C. “Rocky” Anderson, *We Are All Casualties of Friendly Fire in the War on Drugs*, 13 UTAH B. J. 10, 10 (Nov. 2000).
65. See, e.g., NEW YORK COUNTY LAWYERS’ ASS’N, REP. AND RECOMMENDATIONS OF THE DRUG POL’Y TASK FORCE: III. PUB. HEALTH CONSEQUENCES OF CURRENT DRUG POL’Y (Oct. 1996), available at <http://www.drugtext.org/New-York-County-Lawyers-Association/iii-public-health-consequences-of-current-drug-policy.html>.
66. Anderson, *supra* note 64, at 12.
67. See, e.g., Eric Schlosser, *More Reefer Madness*, THE ATL. MONTHLY, (April 1997), available at <http://www.theatlantic.com/past/docs/issues/97apr/reef.htm>. “The war on drugs has helped turn the United States into the country with the world’s largest prison population. . . . The U.S. has 5% of the world’s population and around 25% of the world’s prisoners.” Bernd Debusmann, *Einstein, Insanity and the War on Drugs*, THE GREAT DEBATE (Dec. 3, 2008, 10:02 PM), blogs.reuters.com/great-debate/2008/12/03/Einstein-insanity-and-the-war-on-drugs/.
68. See, e.g., Andrew D. Black, Note, “*The War on People: Reframing “The War on Drugs” by Addressing Racism within American Drug Policy Through Restorative Justice and Community Collaboration*,” 46 U. LOUISVILLE L. REV. 177 (2007–2008); Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALA. L. REV. 703 (2000).
69. *Drug Abuse is Bad, But the Drug War Is Worse*, CHRISTIANSAGAINSTPROHIBITION.ORG (Aug. 8, 2010), http://christiansagainstoprohibition.org/LEAP_Drug_War_Worse_Handout.
70. See, e.g., Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389 (1992–1993); Roger Pilon, *Tenants, Students, and Drugs: A Comment on the War on the Rule of Law*, 2002 CATO SUP. CT. REV. 227, 227 (2002).

III. GO ASK ALICE⁷¹

The War-on-Drugs trope in schools did not focus on militarized language at the outset because one of the underlying themes of the War was to protect children's health and safety by keeping them away from drugs and by reducing the violence that allegedly accompanies drug abuse and dealing in the schools. These good intentions did not have any real focus until it became the First Lady's project under Nancy Reagan in the mid-1980s. Simultaneously, her husband began to frame the War in schools as just one part of the overall battle plan. That framing escalated into mission creep until, today, school officials often view themselves as warriors with individual military tasks and view students as the military objectives. The fault lies with all three branches of the federal government and their individual responses to the militarized metaphor, crossing the line from metaphorical marketing to literal application.

A. The Executive: "Uncle Sam Wants You"⁷²

From the beginning, the U.S.'s pursuit of the enemy in the War on Drugs has targeted those engaged in drug trafficking, with legislation and government agencies designed for interdiction through law enforcement and military engagement.⁷³ Although Nixon's vision was to include drug treatment as a War strategy, the U.S. government did not prioritize prevention as a strategy, instead focusing on supply rather than demand. In the mid-1970s, a parental movement against teen drug abuse had loosely coalesced, and the National Institute of Drug Abuse joined the parents'

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71. ANONYMOUS, GO ASK ALICE (1971); see also JEFFERSON AIRPLANE, *White Rabbit, on SURREALISTIC PILLOW*, (RCA Victor 1967). *Go Ask Alice* is a young adult book about the perils of drug addiction, published just as the War on Drugs was beginning its windup. It "was published in 1971 as a 'real diary' about a good girl who is turned on to drugs by friends, runs away, trades sex for fixes and dies." Mark Oppenheimer, *Just Say 'Uh-Oh,'* N.Y. TIMES, 1 (Nov. 15, 1998), available at <http://www.nytimes.com/books/98/11/15/reviews/981115.15oppenht.html>. Originally touted as the actual diary of a teenage girl, the book is now listed by the publisher as fiction after its "editor," Beatrice Sparks, conceded that the book is not entirely true. Further inquiry suggests that none of it is true. Lina Goldberg, "Curiouser and Curiouser": *Fact, Fiction, and the Anonymous Author of Go Ask Alice*, 2 (Oct. 2002), available at <http://www.linagoldberg.com/goaskalice/html>. The book became and remains, to a certain extent, a popular teen book. *Id.* at 5. Unfortunately, the book reflects the overly simplistic framing of the teen drug problem adopted during the War: "Fall in with the wrong crowd and you will do drugs, turn against America and dishonor your parents." Oppenheimer, *supra*, at 2.
72. James Montgomery Flagg, *I Want You for the U.S. Army*, LESLIE'S WEEKLY cover (July 6, 1916), available at <http://www.loc.gov/exhibits/treasures/trm015.html>.
73. See generally *Frontline Chronology*, *supra* note 18.

effort.⁷⁴ But their strategy did not really focus on reducing demand, especially not on the source of risky and addictive behavior in adolescence. Instead, these national efforts targeted Hollywood and the media as the enemies and took them to task for glamorizing drugs as the cause for teen drug use.⁷⁵ Eventually, attacking these hard targets was not enough because its focus was wrong-headed and did not directly engage the real enemy.

President Reagan made no secret of the fact that schools themselves were battlefields in the War on Drugs.⁷⁶ However, it was not until 1984 that the women's auxiliary undertook its wartime task when Nancy Reagan adopted her campaign against student drug use, following an appearance at an Oakland, California school.⁷⁷ In the oft-repeated story, a ten-year-old student asked Mrs. Reagan what she should do if someone were to offer her drugs. Mrs. Reagan responded, "Just say no."⁷⁸ From that incident, "Just Say No" clubs sprang up all over the country, backed by the government but funded by private and corporate donors.⁷⁹ Thereafter, President Reagan repeatedly referenced Mrs. Reagan's war efforts whenever he spoke about the War on Drugs.⁸⁰ The "Just Say No" campaign was an essential part of

74. *Id.* If the War on Drugs could be said to have any war profiteers, Dr. Robert DuPont, head of the Nat'l Inst. of Drug Abuse from 1973 to 1978, would be one of them. Since leaving government, DuPont has reaped significant commercial benefit as a leading proponent of urinalysis testing. DuPont's company—Bensinger, DuPont Associates—manages alcohol and drug testing in the workplace. See <http://www.bensingerdupont.com/>; Ryan Grim, *Blowing Smoke: Why random drug testing doesn't reduce student drug use*, SLATE (Mar. 21, 2006, 1:13 PM), www.slate.com/toolbar.aspx?action=print&id=2138399.

75. See, e.g., *Frontline Chronology*, *supra* note 18; see also H. Republican Pol'y Comm., *Clinton Raises White Flag: Policy Statement on How to Win the War on Drugs*, http://www.fas.org/irp/news/1996/hrpc_drugs.htm (last updated October 1, 2006).

76. Remarks to Media Executives at a White House Briefing on Drug Abuse, *supra* note 35.

77. *Frontline Chronology*, *supra* note 18; Claire Suddath, *The War on Drugs*, TIME, Mar. 25, 2009, available at www.time.com/time/printout/0,8816,1887488,00.html.

78. Suddath, *supra* note 77; President Ronald Reagan, Remarks at a Campaign Rally for Senator James T. Broyhill in Raleigh, North Carolina (Oct. 8, 1986), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=36567>; President Ronald Reagan, Remarks at a White House Briefing for Senior Staff on the Congressional and Gubernatorial Election Results (Nov. 6, 1986), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=36695>; President Ronald Reagan, Remarks at the National Conference on Corporate Initiatives for a Drug Free Workplace (June 9, 1988), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=35950>.

79. *Frontline Chronology*, *supra* note 18; Suddath, *supra* note 77; President Ronald Reagan, Remarks on Signing the Just Say No to Drugs Week Proclamation (May 20, 1986), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=37306>.

80. Remarks on Signing the Just Say No to Drugs Week Proclamation, *supra* note 79. Reagan's remarks about his wife's involvement in the War on Drugs was not unlike the publicity of Eleanor Roosevelt's participation in the "Knitting for Victory" campaign during World War II. Paula Becker, *Knitting for Victory—World War II*, HISTORYLINK.ORG (Aug. 19, 2004), http://www.historylink.org/index.cfm?DisplayPage=output.cfm&File_Id=5722; *Knitting During*

Reagan's War, but no commitment existed to coordinate what was essentially a volunteer army to any specific government effort to prevent drug abuse in schools. His successor would become the chief recruiter of drug warriors in schools.

From the beginning of his term, President George H. W. Bush specifically incorporated schools into his drug-war rhetoric and battle plans. He started out moderately: "To spread the word and thus stem demand, we're going to need more money for education and prevention. . . . And we need to educate, involve parents, teachers, and communities."⁸¹ Barely a week later, Bush explicitly recruited students in the War: "You have partners in your community and in others across the United States, and you have partners in the war on drugs in Washington, right there on Pennsylvania Avenue. . . . I need your help."⁸² One of those partners would be law enforcement in the schools:

I mentioned that I'm going to talk about enforcement later on today, but I don't want to leave here without saying to you the enforcement side of this equation is absolutely essential, whether it's in the corridors of this outstanding high achievement school or whether it's downtown Lancaster or wherever it is. The authorities must enforce the law, and we must make an example of those who are pushing drugs onto the lives of the others around here. . . . The war on drugs will ultimately be won one day, one battle at a time—the battles each and every one of us wage to keep our families and communities free from drug abuse. . . . And so, let these banners be a battle cry . . . we will join together, turn the tide, and bring the epidemic to an end with finality—over—history.⁸³

Not only were students recruited as co-combatants, but school employees were the warrior-leaders: "As I look around here today, I see some of the top commandos in the war on drugs: our teachers, principals, community leaders, parents, and students."⁸⁴ The cause had been joined.

World War II, NAT'L WWII MUSEUM, http://www.nationalww2museum.org/calendar/knit-your-bit.html#Knitting_during_World_War_II.

81. Remarks Following the Swearing-In Ceremony for William J. Bennett as Director of Nat'l Drug Control Pol'y, *supra* note 41.

82. President George Bush, Remarks to Students at Conestoga Valley High School in Lancaster, Pennsylvania (Mar. 22, 1989), *available at* www.presidency.ucsb.edu/ws/index.php?pid=16823.

83. *Id.*

84. President George Bush, Remarks at the Presentation Ceremony for the Drug-Free Schools Awards (June 19, 1989), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=17168>.

B. The Legislature: “Are YOU Doing All You Can?”⁸⁵

An army, however, needs artillery and munitions, so Congress complied by enacting mandates to help schools prevent drug abuse, usually obliquely and nominally, but mainly to force them to become drug-free. Although Congress passed numerous statutes designed to curb youth drug abuse,⁸⁶ the primary legislation to focus on schools derived from the Reagan-era Drug-Free Schools and Communities Act of 1986, a component of the Anti-Drug Abuse Act of 1986.⁸⁷ The latter Act was but one of several in the Drug-Free America Act of 1986,⁸⁸ touted by President Reagan as essential to “this national crusade, [in which] each of us is a critical soldier.”⁸⁹ That version of the Drug-Free Schools Act focused on “enforcement, prevention, and intervention to reduce illegal drug use”⁹⁰ and provided funding for schools to reduce student drug abuse.⁹¹ State and local grants were funded and awarded to “encourage and support broad-based cooperation among schools, communities, parents, and governmental agencies.”⁹² Unfortunately, the Drug-Free Schools Act is now characterized as one of the strategies for “fuel[ing] the war on drugs and

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85. Libr. of Cong., General Cable Corp. poster (1942), available at <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/homefront/gallery.html>.
86. See U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO/HEHS-98-3, SAFE AND DRUG-FREE SCHOOLS: BALANCING ACCOUNTABILITY WITH STATE AND LOCAL FLEXIBILITY 7–9 (1997) [hereinafter 1997 GAO ACCOUNTABILITY REP.]; see also U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO/T-HEHS-97-166, SUBSTANCE ABUSE AND VIOLENCE PREVENTION: MULTIPLE YOUTH PROGRAMS RAISE QUESTIONS OF EFFICIENCY AND EFFECTIVENESS 1–2 (1997); see generally EDITH FAIRMAN COOPER, CONG. RESEARCH SERV., RS 20532, THE SAFE AND DRUG-FREE SCHOOLS AND COMMUNITIES PROGRAM: BACKGROUND AND CONTEXT 2 (2002).
87. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat 3207 (1986); COOPER, *supra* note 86, at 1 n.4.
88. President Ronald Reagan, Message to the Congress Transmitting Proposed Legislation to Combat Drug Abuse and Trafficking (Sept. 15, 1986), available at www.reagan.utexas.edu/archives/speeches/1986/091586b.htm.
89. *Id.*
90. Melody Lark, *The Drug-Free Schools and Communities Act of 1986: Policy, Formation, Causation, and Program Implementation*, 1 (1995) (paper presented at Annual Meeting of Am. Educ. Res. Ass'n), available at <http://www.eric.ed.gov/PDFS/ED389994.pdf>.
91. Peter Reuter & P. Michael Timpane, *Options for Restructuring the Safe and Drug-Free Schools and Communities Act* in PETER REUTER ET AL., OPTIONS FOR RESTRUCTURING THE SAFE AND DRUG-FREE SCHOOLS AND COMMUNITIES ACT: REPORT WITH BACKGROUND PAPERS AND FOCUS GROUP SUMMARY 4 (RAND Monograph Rep. 2001), available at http://www.rand.org/pubs/monograph_reports/MR1328.1/MR1328.1.options.pdf [hereinafter REUTER RAND MONOGRAPH].
92. SARAH M. BENNETT-HARPER, ET AL., CHARACTERISTICS OF SDFSCA SEA AND GOVERNORS' PROGRAMS: VOL. I, SUMM. OF THE 1999–2000 DATA COLLECTION 1-1 (U.S. Dep't. of Educ. 2002), available at <http://www2.ed.gov/admins/lead/safety/9900staterreport/report.pdf>.

perpetuat[ing] it in schools throughout the nation.”⁹³ It and related state policies are criticized for being “[in]compatible with the perspectives of the education administrators or the experiences of the target group—students,”⁹⁴ particularly because the federal funding was intended to finance law enforcement in the schools instead of prevention programs.⁹⁵

In 1988, Congress did try to focus more on drug use prevention and education when it moved the Drug-Free Schools Act to the Elementary and Secondary Education Act of 1965 (ESEA),⁹⁶ and amended it with the Anti-Drug Abuse Act of 1988⁹⁷ and later with the Drug-Free Schools and Communities Act of 1989.⁹⁸ The 1988 amendments were to furnish additional resources for states and local agencies to use for “drug abuse prevention, early intervention, rehabilitation referral, and education in elementary and secondary schools.”⁹⁹ However, Congress’s attention ineluctably moved back to militarization of the War on Drugs, even in schools. In 1990, President Bush and the governors adopted six millennial goals for the nation’s schools to achieve.¹⁰⁰ Goal number six asserted that, by 2000, “every school in America will be free of drugs and violence and will offer a disciplined environment conducive to learning.”¹⁰¹ The group promoted education and community involvement as two resources to achieve this goal, but the most prominent resource was discipline.¹⁰² Perhaps this route was adopted because of public testimony in its favor:¹⁰³ the “written testimony [for goal six] focused disproportionately on discipline,”¹⁰⁴ and the teachers’ unions linked school discipline with student

93. Lark, *supra* note 90, at 1.

94. *Id.* at 16.

95. *Id.*

96. Elementary and Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27 (1965); COOPER, *supra* note 86, at 1. The Elementary and Secondary Education Act (ESEA) was originally enacted in 1965, as part and parcel of the War on Poverty. As a spending act, ESEA requires reauthorization every six years. Its current iteration includes the No Child Left Behind Act. *A Glossary of School Finance Terms*, EDSOURCE 5 (Aug. 2004), http://www.llesd.k12.ca.us/EEE_FinanceTerms.pdf.

97. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988); HAW. ST. DEP’T. OF EDUC., OFFICE OF INSTRUCTIONAL SERV., DRUG-FREE SCHOOLS AND COMMUNITIES ACT OF 1986, PART 2, HANDBOOK 1 (1989).

98. Drug-Free Schools and Communities Act Amendments of 1989, Pub. L. No. 101-226, 103 Stat. 1934 (1989).

99. HAW. ST. DEP’T OF EDUC., *supra* note 97, at 1.

100. JAMES B. STEDMAN ET AL., CONG. RESEARCH SERV., ED 359634, NATIONAL EDUCATION GOALS: WHERE ARE WE NOW? 6 (1990), available at <http://www.eric.ed.gov/PDFS/ED359634.pdf>.

101. *Id.* at 21.

102. *Id.* at 23.

103. NAT’L EDUC. GOALS PANEL, MEASURING PROGRESS TOWARD THE NATIONAL EDUCATION GOALS: PUBLIC TESTIMONY, VOL. 2: SUMM. OF TESTIMONY ON MEASURES FOR 1991 PROGRESS REP. 23 (1991), available at <http://www.eric.ed.gov/PDFS/ED334275.pdf>.

104. *Id.*

drug problems.¹⁰⁵ In so doing, student drug use became inextricably—and incorrectly—linked to school safety rather than standing as a singular problem with its own unique solutions.

When Congress reauthorized the ESEA in 1994, as the Improving America's Schools Act,¹⁰⁶ it re-branded the Drug-Free Schools and Communities portion of the ESEA by incorporating it with the Safe Schools Act to become, together, the Safe and Drug-Free Schools and Communities Act of 1994 (SDFSC).¹⁰⁷ The purpose of this marriage of acts was to “help the nation's schools provide a disciplined environment conducive to learning by eliminating violence in and around schools and preventing illegal drug use.”¹⁰⁸ Congress thereby expressly linked state and local grants for student drug problems with violence reduction and school safety.¹⁰⁹ SDFSC also incorporated accountability standards to review the use of those funds.¹¹⁰ By making that link, Congress hoped to achieve schools entirely free of violence, drugs, alcohol, and guns by the year 2000.

Unfortunately, accountability proved ephemeral.¹¹¹ A Congressional Research Service report noted the following:

In 2000, a national evaluation of the SDFSC program by [the Department of Education] was released. Surveyors found that the efforts of several [local educational agencies] to reduce school violence and drug use through the program were haphazard, and federal funds might be spread too thin. Also, it was found that only 50% of the 600 [local educational agencies] canvassed have a definitive goal in place for prevention efforts, such as changing student behaviors or attitudes toward violence and drug use; [local educational agencies] with a goal lacked quality data to assess

105. *Id.* at 25.

106. Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 4029 (1994); 1997 GAO ACCOUNTABILITY REP., *supra* note 86, at 5.

107. Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (1994); COOPER, *supra* note 86, at 1; 1997 GAO ACCOUNTABILITY REP., *supra* note 86, at 1.

108. 1997 GAO ACCOUNTABILITY REP., *supra* note 86, at 1.

109. The states' allotments were divided into 20% for governors' grants and 80% for local schools. Lawrence W. Sherman, *The Safe and Drug-Free Schools Program*, in BROOKINGS PAPERS ON EDUC. POL'Y: 2000 125, 142 (2000), available at http://muse.jhu.edu/journals/brookings_papers_on_education_policy/v2000/2000.1sherman.pdf. Lawrence Sherman suggests that this discretionary funding was “wasted on performing magicians, fishing trips, and school concerts—and on methods (such as counseling) that research shows to be ineffective.” *Id.* at 126. Whether or not Sherman's comments are hyperbole, it is true that three years after the 1994 enactment of SDFSC, DOE had completed no overall evaluation of the grants program. 1997 GAO ACCOUNTABILITY REP., *supra* note 86, at 4.

110. 1997 GAO ACCOUNTABILITY REP., *supra* note 86, at 3, 9.

111. *See id.* at 5; Robert B. Charles, *Back to the Future: The Collapse of National Drug Control Policy and a Blueprint for Revitalizing the Nation's Counternarcotics Effort*, 33 HARV. J. ON LEGIS. 339, 403 (1996).

progress; and only 9% had implemented prevention programs based on research. Others used programs like D.A.R.E., which has been found by some analysts to be ineffective. The [Department of Education] concluded that it was questionable to what extent [local educational agencies] were complying with the Principles of Effectiveness that require grantees to use program funds to support research-based drug and violence prevention programs for youth.¹¹²

Nevertheless, Congress persisted in repeating the same mistakes in the War in schools.

The 2002 ESEA reauthorization—the No Child Left Behind Act (NCLB)¹¹³—once again incorporated the Safe and Drug-Free Schools and Communities Act, this time as an integral part of ESEA’s Title IV – 21st Century Schools.¹¹⁴ This iteration of the drug-free schools effort focuses on both state and federal grants¹¹⁵ to “prevent the illegal use of alcohol, tobacco, and drugs . . . [and] to foster a safe and drug-free learning environment that supports student academic achievement.”¹¹⁶ Local school districts can apply for funds to finance discipline, law enforcement, and prevention, including “security activities”; “student testing and data reporting”; “education activities”; “counseling, mentoring and other student support activities”; “training and monitoring of school personnel”; and “family, community, and emergency activities.”¹¹⁷ The receipt of funds is conditioned on the local school district’s providing a plan for keeping its schools drug- and violence-free, and this plan should include school discipline policies that prohibit disorderly conduct and illegal possession of drugs and weapons; security procedures; prevention activities for a safe environment; a crisis management plan; and a code of conduct.¹¹⁸ Thus, in order to get funds, schools must conflate violence with student drug use: “[T]he program . . . embodies confusion of purposes among drug prevention, violence prevention, and school safety.”¹¹⁹ As a result, schools

112. COOPER, *supra* note 86, at 27–28.

113. No Child Left Behind Act of 2001, Pub. L. 107-110, 115 Stat. 1425 (2002).

114. COOPER, *supra* note 86, at 2; GAIL MCCALLION, CONG. RESEARCH SERV., RS 34496, SAFE AND DRUG-FREE SCHOOLS AND COMMUNITIES ACT: PROGRAM OVERVIEW AND REAUTHORIZATION ISSUES 1 (2008).

115. MCCALLION, *supra* note 114, at 1.

116. 20 U.S.C. § 7102 (2006).

117. MCCALLION, *supra* note 114, at 3–4; 20 U.S.C. § 7115(b)(2) (2006).

118. 20 U.S.C. § 7114(d)(7) (2006).

119. REUTER & TAMPANE, *supra* note 91, at 5; 20 U.S.C. § 7115(b)(2)(E) (Supp. 2011) (“drug and violence prevention activities that may include the following . . .”). Similarly suspect are efforts to couple student drug use with academic failure under No Child Left Behind and to thereby advocate adding to the Act a new and selective assessment for an additional sub-population of students. See Judy Kreamer et al., *The Overlooked Cause of Children Being Left Behind: Drug Use Compromising Academic Success*, EDUCATING VOICES, INC. (Feb. 2008),

are incorrectly encouraged to merge law enforcement with educational prevention strategies to address their student drug problems.

This conflation of violence and drug use did little more than increasingly militarize the efforts to contain student drug problems. Although student drug abuse is likely systemic, violence is not. Schools are much safer than political forces make them out to be: “Any school violence is too much, but it is disastrous to make policy on misinterpretation of data. Comparisons of violence in various settings indicate that schools are one of the safest institutions for children.”¹²⁰ Furthermore, the research-based evidence does not conclusively link drug use to school violence or, at the very least, cannot conclusively establish causation.¹²¹ The crucial connection is that a violent student is more likely to use drugs; a student’s predisposition to violence may also predispose him to drug use.¹²² However, solving one problem does not necessarily solve the other. So when the government is willing to fund drug testing and locker searches in the War on Drugs,¹²³ the government is erroneously suggesting to school officials that punitive law enforcement strategies designed to curb violence

<http://www.studentdrugtesting.org/EVI%20education>

%20and%20drug%20use%20white%20paper%20jul08.pdf. There is no dispute that drugs may have serious physiological and psychological effects on the user although those effects will vary depending upon the drug. However, to urge that drug use is the sole cause of or even any cause of academic failure is an overly simplistic conclusion to a problem that has so many more variables. *See id.* at 7–11. The authors’ own professional experiences should have suggested a more nuanced—and more comprehensive—policy prescription than to increase schools’ already onerous assessment responsibilities under NCLB. *See id.* at 16. Besides, at least one empirical study indicates that student drug use, by itself, adversely affects neither behavior nor academic performance. Thomas J. McMahon & Sunya S. Luthar, *Patterns and Correlates of Substance Use Among Affluent, Suburban High School Students*, 35 J. CLINICAL CHILD & ADOLESCENT PSYCHOL. 72, 85-86 (2006).

120. Irwin A. Hyman et al., *Policy and Practice in School Discipline: Past, Present and Future*, 4 (1994), <http://www.eric.ed.gov/PDFS/ED383960.pdf>.
121. *See, e.g.*, Sharon M. Boles & Karen Miotto, *Substance Abuse and Violence: A Review of the Literature*, 8 AGGRESSION & VIOLENT BEHAV. 155, 165 (2003); Robert Nash Parker & Kathleen Auerhahn, *Alcohol, Drugs, and Violence*, 24 ANN. REV. SOC. 291, 306–307 (1998); *see also* Michele Cooley-Strickland et al., *Community Violence and Youth: Affect, Behavior, Substance Use, and Academics*, 12 CLINICAL CHILD FAM. PSYCHOL. REV. 127 (2009); *but see* Kristin D. Eisenbraun, *Violence in Schools: Prevalence, Prediction, and Prevention*, 12 AGGRESSION & VIOLENT BEHAV. 459, 462 (2007); Richard Lowry et al., *School Violence, Substance Use, and Availability of Illegal Drugs on School Property among US High School Students*, 69 J. SCH. HEALTH 347 (2009). Alcohol is the more likely culprit in causing violent behavior in general while drug dealing is the more likely culprit in violent behavior associated with drugs. Boles & Miotto, *supra*, at 161, 165.
122. Peter Venturelli, *Drugs in Schools: Myths and Realities*, 567 Annals Am. Acad. Pol. & Soc. Sci. 72, 77 (Jan. 2000). Adolescent violence is linked to other impulsive and risk-taking behaviors. Boles & Miotto, *supra* note 121, at 157.
123. MCCALLION, *supra* note 114, at 3. As part of their drug prevention strategies, school districts can get funding for drug testing and locker searches. 20 U.S.C. § 4115(b)(2)(E)(xiv) (2006).

will be just as successful at solving their student drug problems. That fallacious linkage is specifically contrary to the traditional educational philosophy that prevention strategies in student violence are more successful than punitive strategies.¹²⁴ “These debates reveal the extent to which we ignore and/or distort social science data and support punitive practices such as corporal punishment, school suspensions and expulsions, and questionable measures such as metal detectors, strip searches, and draconian sentencing for minors.”¹²⁵ And that fallacious linkage is clearly contrary to the empirical evidence that Congress’s war-time efforts are an abysmal failure; by 2006, the Office of Management and Budget rated the state grants program for Safe and Drug-Free Schools as “not performing: results not demonstrated.”¹²⁶

C. The Judiciary: “Do Your Bit for America”¹²⁷

The Executive branch specially enlisted lawyers as warriors in the War on Drugs.¹²⁸ As a consequence, courts were already prepared to engage the enemy. The Supreme Court, in particular, has enthusiastically embraced the opportunity to do its bit in the War on Drugs, especially given the Court’s limited capacity for direct combat operations. At the very least, the Court has acted as the enabler for the school drug-warriors in a series of cases that have suspended the civil liberties of students in favor of advancing the War,¹²⁹ not unlike Lincoln’s war-time suspension of habeas

124. Hyman et al., *supra* note 120, at 1. NCLB has taken its own share of the blame for exacerbating school violence problems because of its “overly intense spotlight on academic progress to the detriment of attention to social development of young people, which arguably leads to student alienation, violence, and tragedy. . . . Indeed, the testing-focused culture of NCLB is indicted for creating the elements of fear and powerlessness that generate resistance and violence.” Jane Clark Lindle, *School Safety: Real or Imagined Fear?*, 22 EDUC. POL’Y 28, 37 (2008).

125. *Id.*

126. U.S. OFFICE OF MGMT. & BUDGET, PROGRAM ASSESSMENT: SAFE AND DRUG FREE SCHOOLS STATE GRANTS (2006), *available at* <http://www.whitehouse.gov/omb/expectmore/detail/10000200.2006.html>; *see also* MCCALLION, *supra* note 114, at 5 n.10. OMB similarly found the SDFSCA state grant programs to be “ineffective” in 2002. *Id.*

127. President Woodrow Wilson, Proclamation to the American People (Apr. 16, 1917) (following the U.S.’s declaration of war), *available at* <http://www.firstworldwar.com/source/doyourbit.htm>; President Woodrow Wilson, Address to the Nation (Apr. 16, 1917), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid= 65399>.

128. President Ronald Reagan, Remarks to the Federalist Society for Law and Public Policy Studies (Sept. 9, 1988), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid= 36352>.

129. Not all courts were so sanguine about the necessity of suspending constitutional rights for the War on Drugs. One court likened warrantless police searches employed in the War as reminiscent of Hitler’s Berlin, Stalin’s Moscow, and apartheid’s South Africa. *Bostick v. State*, 554 So.2d 1153, 1158 (Fla. 1989), *rev’d* 501 U.S. 429 (1991). “Our Nation, we are told, is engaged in a ‘war on drugs.’ No one disputes that it is the job of law-enforcement officials to devise effective weapons for fighting this war. But the effectiveness of a law-enforcement technique is not proof of its constitutionality.” *Id.* at 440 (Marshall, J. dissenting).

corpus. Seduced by the militaristic rhetoric, the Court's words and deeds reveal a certain relish in imposing discipline on children who appeal to them for protection under the law.

The irony is that, in the judicial process, the enemy necessarily becomes specific and identifiable. No longer is the enemy an elusive drug trafficker or some unidentifiable "them," but instead a particular juvenile antagonist against the weight of the governmental entity waging the War. Thus, the Supreme Court's arc of suspending the rule of law under the exigencies of this War first engaged a fourteen-year-old girl in *New Jersey v. T.L.O.*¹³⁰ until that arc reached its inevitable nadir with the strip-search of a thirteen-year-old girl in *Safford Unified School District v. Redding*.¹³¹ Worse yet, the Court's skirmishes against the enemy started in 1985, before the Executive and the Legislature were fully engaged in making schools into battlegrounds. But for the Court's willingness to suspend the rule of law so early in the War, school officials may not have felt so emboldened to voluntarily enlist.

It all started with a search-and-seizure case involving a violation of school rules. In 1980, a high school teacher in Piscataway, New Jersey, discovered two freshman girls smoking in the restroom.¹³² When confronted by a school administrator, one girl confessed; T.L.O. did not.¹³³ Upon her denial that she had violated the school rule, the administrator took T.L.O. into his office and requested that she open her purse, whereupon the administrator found cigarettes as well as marijuana and paraphernalia related to both using and dealing—rolling papers, a pipe, plastic bags, and a list of students who owed money.¹³⁴ The administrator turned T.L.O. over to the police, and the State brought juvenile charges against her.¹³⁵ The case pivoted on the legality of the warrantless search of T.L.O.'s purse insofar as its contents served as the underlying evidence of delinquency. The Court's decision emphatically imposed the restrictions of the Fourth and Fourteenth Amendments on school districts for student searches: "In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, and not merely

130. *N.J. v. T.L.O.*, 469 U.S. 325 (1985).

131. *Safford Unified School District #1 v. Redding*, 129 S. Ct. 2633 (2009). In *Safford*, a school administrator authorized the warrantless strip search of a thirteen-year-old female student to search for prescription-strength ibuprofen and over-the-counter naproxen, both banned from school grounds by school board policy unless the student had permission. *Id.* at 2638.

132. *T.L.O.*, 469 U.S. at 328.

133. *Id.*

134. *Id.*

135. *Id.* at 328–29.

as surrogates for the parents.”¹³⁶ However, the flexibility of a school’s relationship with its students and the swiftness of the need to act in disciplinary circumstances allowed for warrantless searches of students under certain circumstances.¹³⁷

The Court framed a school official’s prerogative to search as an “effective method[] to deal with breaches of public order.”¹³⁸ However, the Court also framed the school official’s prerogative as being part and parcel of school discipline, that the prerogative relates to the “close supervision of schoolchildren.”¹³⁹ In so framing that prerogative, the Court made clear that the Fourth Amendment’s prohibition against unreasonable searches meant respecting the privacy interests of students, or their legitimate expectations of privacy,¹⁴⁰ so the Court formulated a test for allowing a student’s warrantless search depending upon the circumstances surrounding the search.¹⁴¹ That test entails a two-step analysis of reasonability: First, the search has to be justified at its inception and depends upon whether the school official had “reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.”¹⁴² Second, the scope of the search is constitutionally acceptable “when the measures adopted [were] reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”¹⁴³

The *T.L.O.* case was triggered by the school administrator’s suspicion that the girl had broken a school rule and then evolved into a controlled substance issue for a juvenile delinquency proceeding when the police were called. Thus, the Court’s analysis went beyond the necessity of giving school officials the right to proceed for purposes of school rules and discipline. Instead, the Court gave school officials the right to search on suspicion of *breaking the law*, especially drug laws, and thereby deputized school officials to search out student law-breakers while sparing them “the necessity of schooling themselves in the niceties of probable cause and permit[ting] them to regulate their conduct according to the dictates of reason and common sense.”¹⁴⁴ Whether intended or not, the Court conflated law enforcement with school discipline and gave school officials an extra-institutional capacity to become law enforcement officers while

136. *Id.* at 336–37.

137. *Id.* at 340.

138. *Id.* at 337.

139. *Id.* at 339.

140. *Id.* at 338.

141. *Id.* at 341.

142. *Id.* at 342.

143. *Id.*

144. *Id.* at 343.

simultaneously lowering students' constitutional protections, especially in cases involving drugs. By the time the student drug testing cases reached the Court, the pump was already primed to allow school officials to exercise that huge extension of extra-institutional authority.

In the meantime, the War on Drugs—particularly as President George H.W. Bush ratcheted up the war rhetoric—was becoming a near-obsession in some corners of the federal government. Hardly surprising, then, was the Supreme Court's employment of similar nearly hysteric rhetoric. For instance, when the Custom Service's employee drug-testing program was challenged by the employees' union, the Court majority relied on hortatory language in its favor:

The Customs Service is our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population. We have adverted before to "the veritable national crisis in law enforcement caused by smuggling of illicit narcotics." . . . This national interest in self-protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics.¹⁴⁵

The Court had not far to travel to rely on these exigencies of war to suspend children's civil rights in service to those exigencies.

The genesis of the Vernonia community's and school's decision to mandate urinalysis on its student-athletes was its "drug problem."¹⁴⁶ Discipline problems in the schools were attributed both to drug use and to a systemic acceptance of the drug culture among students, especially the athletes. All evidence pointed to the school district's attempting to solve the problem itself; there is no mention of referring students to the police or

145. Nat'l Treas. Employees Union v. Von Raab, 489 U.S. 656, 668, 670 (1990). Justice Scalia, dissenting in *Von Raab*, described these invocations of national disaster as insufficient to support the employee drug testing in the Customs Service. *Id.* at 682. Similar "reasoning" was used to uphold highway sobriety checkpoints in *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990). In the face of evidence in the record that such checkpoints are ineffective, the majority relied on similarly purple prose as the *Von Raab* court:

No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical. . . . "The increasing slaughter on our highways . . . now reaches the astounding figures only heard of on the battlefield."

Id. at 449, 451. The Court eventually determined that a 1.6% arrest rate was sufficient empirical evidence to deem the program effective. *Id.* at 455. Arrest rates, however, were not the state's interest; curbing drunk driving was. *Id.* at 449. The state had presented no evidence of the latter. See also *Delaware v. Prouse*, 440 U.S. 648 (1979) (state failed to show any significant contribution to highway safety by having license and registration checkpoints).

146. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 648–49 (1995).

the juvenile authorities. Instead, the community apparently tasked the school district with fixing the “problem.”¹⁴⁷ The school district chose warrantless drug testing on all its athletes as the solution to that problem.¹⁴⁸ A seventh-grade student who wanted to try out for football challenged the school district’s policy.¹⁴⁹ He lost.¹⁵⁰

The Court did not treat these searches as being procedures arising from suspicions of violating either a school rule or the law, but instead as “custodial and tutelary.”¹⁵¹ These were searches “undertaken for prophylactic and distinctly *nonpunitive* purposes (protecting student athletes from injury, and deterring drug use in the student population).”¹⁵² Indeed, the test results were to be kept in-house without referral to law enforcement; however, a punitive aspect did exist: students who tested positive were suspended from athletic participation.¹⁵³ In any event, these “custodial and tutelary” searches were part and parcel of the War on Drugs: “Deterring drug use by our Nation’s schoolchildren is at least as important as enhancing efficient enforcement of the Nation’s laws against the importation of drugs.”¹⁵⁴ The weakest citizens were entitled to protection from that War because “the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction.”¹⁵⁵ Because these searches were for “protection” only, school officials no longer needed even a reasonable suspicion of drug use at all. To rule otherwise, according to the Court, would add “to the ever-expanding diversionary duties of schoolteachers the new function of

147. *Id.* The evidence was undisputed that the local high school was experiencing a serious discipline problem attributable to a combination of drugs and alcohol with their glamorization by student-athletes lionized by a community with limited entertainment options. *Acton v. Vernonia School Dist. 47J*, 796 F. Supp. 1354, 1356 (D. Ore. 1992). “The coincidence of an almost three-fold increase in classroom disruptions and disciplinary reports along with the staff’s direct observations of students using drugs or glamorizing drug and alcohol use led the administration to the inescapable conclusion that the rebellion was being fueled by alcohol and drug abuse as well as the student[s]’ misperceptions about the drug culture.” *Id.* at 1357. Although the administration had considered mass expulsion, the opinions reveal no evidence that law enforcement was engaged. Urinalysis was considered a “less drastic alternative” to other disciplinary measures. *Id.* at 1358.

148. *Id.* The empirical evidence shows that student drug-testing is an ineffective method for curbing drug use and, in some cases, may increase student drug use. *See generally* Susan Stuart, *When the Cure is Worse than the Disease: Student Random Drug Testing & Its Empirical Failure*, 44 VAL. U. L. REV. 1055 (2010).

149. *Vernonia School Dist. 47J*, 515 U.S. at 651.

150. *Id.*

151. *Id.* at 656.

152. *Id.* at 658 n.2 (emphasis in original).

153. *Id.* at 651.

154. *Id.* at 661.

155. *Id.* at 662.

spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation.”¹⁵⁶ Insofar as the Vernonia community agreed with the school district’s policy,¹⁵⁷ the local citizens were complicit in reducing their children’s civil rights in exchange for outsourcing an essentially law enforcement function to the schools.¹⁵⁸

Then the Court was faced with a challenge to a urinalysis policy in a school district without a distinguishable drug problem but in which all students who engaged in extracurricular activities—not just athletes—were subject to random drug-testing.¹⁵⁹ The Court no longer needed to posit any other justification for these tests than the special needs of the school environment,¹⁶⁰ but the Court characterized those “special needs” in a way that suggests it was supporting the school district’s War effort. Indeed, the Court’s analysis of the state interest sufficient to justify the intrusion on the students’ Fourth Amendment privacy interests was significantly juxtaposed in the context of the War: “The drug abuse problem among our Nation’s youth has hardly abated since *Vernonia* was decided in 1995. In fact, evidence suggests that it has only grown worse. . . . Indeed, the nationwide drug epidemic makes the war against drugs a pressing concern in every school.”¹⁶¹

Perhaps nowhere did Court so completely embrace its mission in the War on Drugs and face such a formidable juvenile enemy as in *Morse v. Frederick*.¹⁶² In that case, a principal disciplined a high school student who erected a banner that read “BONG HiTS 4 JESUS” while television crews followed the Olympic Torch Relay through Juneau, Alaska.¹⁶³ In the face of the student’s challenge under the First Amendment, the Court carved out

156. *Id.* at 664.

157. *Id.* at 665.

158. A follow-up to assess the Vernonia school policy’s success yielded only vague statements that drug use seemed to decrease and discipline seemed to improve. Ryoko Yamaguchi, Lloyd D. Johnston, & Patrick M. O’Malley, Youth, Educ. & Soc’y, *YES Occasional Papers No. 2: Drug Testing in Schools: Policies, Practices, and Association with Student Drug Use 1* (2003) [hereinafter Yamaguchi *Yes*].

159. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 826 (2002).

160. *Id.* at 829.

161. *Id.* at 834. This theme played out similarly in Justice Thomas’s dissent in *Safford Unified School District #1*, where he quoted this passage in *Earls* as the rule of law, rather than merely a piece of “evidence.” *Safford Unified School District #1 v. Redding*, 129 S. Ct. 2633, 2657 (2009). Thomas thereby converted a piece of evidence into a legal presumption of the state’s interest, virtually eliminating the state’s burden of proof and preordaining the loss of students’ constitutional rights.

162. *Morse v. Frederick*, 551 U.S. 393 (2007).

163. *Id.* at 397.

an exception to students' freedom of speech for messages that advocate illegal drug use.¹⁶⁴ Regardless of whether or not this banner was a message that actually advocated illegal drug use rather than adolescent gibberish designed to attract the attention of television cameras, the Court apparently believed that this speech was disruptive and that it impermissibly interfered with the school's educational function.¹⁶⁵ To reach that conclusion, the Court extrapolated the content of the speech as the disruption and impermissible interference, rather than the manner and location of the speech. The Court was offended by the drug-related nature of the speech rather than by any actual impact it had on the educational function. By making that leap, the Court stood shoulder-to-shoulder with other drug warriors to assist school officials who were mandated to engage in certain combat tactics by the government in the War on Drugs:

The problem remains serious today. . . . Congress has declared that part of a school's job is educating students about the dangers of illegal drug use. It has provided billions of dollars to support state and local drug-prevention programs . . . and required that schools receiving federal funds under the Safe and Drug-Free Schools and Communities Act of 1994 certify that their drug-prevention programs "convey a clear and consistent message that . . . the illegal use of drugs [is] wrong and harmful." . . . Thousands of school boards throughout the country—including JDHS—have adopted policies aimed at effectuating this message. . . . Those school boards know that peer pressure is perhaps "the single most important factor leading schoolchildren to take drugs," and that students are more likely to use drugs when the norms in school appear to tolerate such behavior. . . . Student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, thus poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse.¹⁶⁶

The Court delivered quite a blow to student civil rights with that decision, choosing to suspend the Constitution in service to the War on Drugs. No one had told the Justices that these combat tactics have no measurable success.¹⁶⁷ But at least the Court had early identified a specific enemy in the War on Drugs, and a formidable enemy it has proved to be.

164. *Id.* at 403.

165. *Id.* at 401, 405, 408.

166. *Id.* at 407–08 (citations omitted).

167. The U.S. "government has spent \$33 Billion in marketing 'Just Say No'-style messages to America's youth and other prevention programs. High school students report the same rates of illegal drug use as they did in 1970, and the Centers for Disease Control and Prevention says drug overdoses have 'risen steadily' since the early 1970s to more than 20,000" in 2009. Martha

IV. THE OUTSIDERS¹⁶⁸

The insidious problem with a war on an intangible or abstract concept is identifying the enemy.¹⁶⁹ As the War on Drugs progressed from the Nixon presidency to today, identifying a specific enemy on whom to declare War proved rather elusive, especially if the public were to be engaged in combat with an enemy that threatened the nation. A nation cannot engage with plants and pharmaceuticals. In concretizing that abstraction, the enemy was caricatured in different ways, depending upon the political or social framing of the War. But even from the outset, the War was caricatured as an “us-versus-them” phenomenon. The targets may change, but the cause remained the same: The nation was being threatened by “them.” The problem with that framing is that students are both “us” and “them.”

Otherness pervaded early drug control efforts in the U.S., usually due to racism.¹⁷⁰ Thus, early government anti-drug efforts stigmatized drug use by playing on racial characteristics and stereotypes: opium use was negatively associated with the Chinese¹⁷¹ while cocaine¹⁷² and marijuana use was negatively associated with African-Americans and Mexicans,¹⁷³ implying that “real” Americans were being threatened by outsiders. Thus, prohibiting opium use was but one of several weapons to marginalize Chinese immigrants in the late nineteenth and early twentieth centuries as

Mendoza, *U.S. Drug War Has Met None of Its Goals*, MSNBC.COM, http://www.msnbc.msn.com/id/37134751/ns/us_news-security/ (last updated May 13, 2010).

168. S.E. HINTON, *THE OUTSIDERS* (Viking 2007). S.E. Hinton’s best-selling and award-winning young adult novel focused on the violent conflict between the Socials and the Greasers, but particularly focused on the social alienation of the Greasers: “It was too vast a problem to be just a personal thing.” *Id.* at 187; *see also* Dale Peck, *‘The Outsiders’: 40 Years Later*, N.Y. TIMES, Sept. 23, 2007, <http://www.nytimes.com/2007/09/23/books/review/Peck-t.html>.
169. “Insofar as the war[] on . . . drugs [is] treated as [a war] on conditions, [it], like the wars on cancer and (in general) poverty must, of course, be seen as wholly metaphorical, for one cannot, of course, declare a literal war on a condition.” Jeremy Elkins, *The Model of War*, 38 POL. THEORY 214, 227 (2010); “Anything waged against a shapeless, intangible noun can never truly be won.” Suddath, *supra* note 77.
170. MORONE, *supra* note 14, at 464–65.
171. GLASSNER, *supra* note 24, at 135.
172. “In 1914, The New York Times reported that cocaine caused blacks to commit ‘violent crimes,’ and that it made them resistant to police bullets.” Mendoza, *supra* note 167; MORONE, *supra* note 14, at 465.
173. ERNEST L. ABEL, *MARIJUANA: THE FIRST TWELVE THOUSAND YEARS 217–22* (1980), available at <http://www.druglibrary.org/Schaffer/hemp/history/first12000/12.htm>. The higher penalties for crack use than for powder cocaine use have also led to higher arrests rates of African-Americans, whose communities tend to favor crack. Gary Fields, *White House Czar Calls for End to ‘War on Drugs’*, WALL ST. J., May 14, 2009, at A3, available at <http://online.wsj.com/article/SB124224891527617397.html>.

they competed, quite successfully, with white Americans in the economy.¹⁷⁴ Jim Crow laws presaged attacks on African-Americans' cocaine use while the Great Depression saw an increasingly hysterical connection between marijuana use and Mexicans.¹⁷⁵ Any number of social, cultural, nativistic, or perhaps tribal impulses could be to blame although the actual source is likely as simple as the founding Puritan notion that we can only define ourselves as U.S. citizens by contrasting ourselves with those who we are not.¹⁷⁶ But the approach to attributing drug abuse, and therefore bad behavior, to "others" runs long and deep. President Nixon mined those impulses when he launched the War on Drugs.

Nixon's job was to persuade the country to cooperate in his efforts to fight drug abuse. His job was complicated by the fact that recreational drug use had gone mainstream. Young people discovered marijuana does not have the deleterious effects¹⁷⁷ that had so thoroughly terrified their parents: They would not die, become pregnant, or go insane.¹⁷⁸ An abstract message to the country that drug use had health consequences and a significant impact on crime, while true, did not have high marketing value. Nor did a message of morality: Such a message had not worked out so well during the Prohibition, and similar tactics have been a disaster for teen sexual activity. In addition, Nixon was in the midst of trying to end the Vietnam War as favorably as possible, especially in the face of the rising anti-war movement. So Nixon conjoined them.¹⁷⁹

President Nixon discovered that he could move the body politic to action if he associated this explosion in drug use with the anti-war protest movement. If Nixon could marginalize these users—many of whom were teenagers and could not vote yet—then he could recruit allies in the "silent majority" who remained afraid and abstinent. Nixon consciously linked the drug problem in the U.S. with Vietnam itself, indeed with the fate of the Nation: "When I look at the history of great civilizations in the past, many of them have gone down this road and they slip into basically the drug psychology, the drug society; it is terribly destructive of the character of

174. SZASZ, *supra* note 10, at 75–80.

175. MORONE, *supra* note 14, at 465–66.

176. MORONE, *supra* note 14 at 54, 55–59.

177. Musto, *supra* note 11.

178. *Reefer Madness* is perhaps the most easily derided of the religious prohibitionists' efforts to make children "Just Say No." The film was intended as a morality tale entitled *Tell Your Children*. While "addicted" to marijuana, the film's characters die, become sexually promiscuous, and go insane. Kevin Murphy & Dan Studney, *Reefer Madness History*, <http://web.archive.org/web/20060328163318/http://www.reefer-madness-movie.com/history.html>. Modern teenagers laughed and made the movie a cult hit.

179. Mendoza, *supra* note 167.

that nation.”¹⁸⁰ Blaming some of the problems in Vietnam itself on the drug-addled condition of the servicemen was also convenient.¹⁸¹ Nixon’s marginalization of GI heroin users alternatively framed the problem as a “drugs-as-disease metaphor,” the contagion of which threatened national security.¹⁸² He thereby constructed an identity of the “other” who was to blame for the U.S.’s drug problem as well as its foreign policy problems, an identity of an “other” that was un-American and could not be tolerated.¹⁸³ This “other” also fit well into Nixon’s stabbed-in-the-back narrative for the failures in Vietnam.¹⁸⁴ Perhaps just as significantly, it fit well into a quasi-religious assault on the legacy of the 1960s, during which minorities, women, the poor, and the elderly—“others”—won significant civil rights.¹⁸⁵

President Reagan, in particular, perpetuated Nixon’s “us-versus-them” paradigm of the War but made it a political as well as national security statement by tagging “them” as liberals and hippies out to destroy America. He was in the vanguard of those wanting to roll back civil rights success, so he blamed the era and reached back to blame the youth of the 1960s for perpetuating his own presidency’s drug problems in the 1980s:

We know there are a large number of individuals, primarily those who acquired their drug-use habits in the sixties and seventies, who persist in using illegal drugs. And this persistent demand for illegal drugs is met by sometimes seemingly limitless supply. But a surge in drug-related crimes,

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180. President Richard Nixon, Remarks at a White House Conference on Drug Abuse (Oct. 14, 1970), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=2719>.
181. JEREMY KUZMAROV, *THE MYTH OF THE ADDICTED ARMY: VIETNAM AND THE MODERN WAR ON DRUGS* 6 (2009). “The myth of the addicted army . . . helped to skew public memory of the Vietnam War by advancing the impression that pure and innocent American youth had been corrupted by illegal drugs—not by flawed policies, institutional failings, or cultural chauvinism, as most historians would conclude.” *Id.* President Nixon and Vice President Spiro Agnew similarly attempted to ascribe the failure in the Vietnam War on the insidious effect anti-war activists had on returning servicemen by spitting on them. That myth persists to this day, despite the absence of evidence that any such incidents occurred. JERRY LEMBCKE, *THE SPITTING IMAGE: MYTH, MEMORY AND THE LEGACY OF VIETNAM* 71-76 (1998); see also KUZMAROV, *supra*, at 7. Nixon and Agnew were marketing masters.
182. Daniel Weimer, *Drugs-as-a-Disease: Heroin, Metaphors, and Identity in Nixon’s Drug War*, 6 *JANUS HEAD* 260, 262 (2003), available at www.janushead.org/6-2/Wiemer.pdf.
183. *Id.* at 265. “Ensnared in a culture of fear, the public was falsely imbued with the impression that America’s social fabric was being torn apart at the seams by half-crazed and doped-up soldiers from whom nobody was safe.” Jeremy Kuzmarov, *From Counter-Insurgency to Narco-Insurgency: Vietnam and the International War on Drugs*, 20 *J. OF POL’Y HIST.* 344, 348 (2008).
184. Kevin Baker, *Stabbed in the Back! The Past and Future of a Right-Wing Myth*, *HARPER’S BAZAAR*, June 2006, www.harpers.org/archive/2006/06/0081080.
185. MORONE, *supra* note 14, at 445, 452. “The assault on the sixties has succeeded brilliantly. . . . [B]ut at its height, men and women stood up courageously for the American dream. . . . The movement’s victories—America’s democratic legacies—came at great sacrifice and with enormous courage.” *Id.* at 445.

deaths by overdose, births of drug-addicted and drug-impaired babies, and even the destabilization of national governments by traffickers should not be viewed as harbingers of defeat in our war on drugs. These events should instead strengthen our resolve to stop this insidious evil once and for all.¹⁸⁶

Reagan thereby characterized “us” as “America,” and exhorted that no less than our constitutional integrity demanded that the War on Drugs be a necessary war:

So, this is my message to you today: to hold the torch high, to stay in the battle. Too much is left to do. The battle is far from over. And all is yet to win or lose. But we stand with the founders of our nation in this ongoing struggle to protect our freedom. Thomas Jefferson reminded us that “Our peculiar security is in the possession of a written Constitution.” And he implored, “Let us not make it a blank paper by construction.” For as James Madison wrote, if “. . . the sense in which the Constitution was accepted and ratified by the Nation is not the guide to expounding it . . . there can be no security for a faithful exercise of its powers.” It was true then. It is true now. It will be true always.¹⁸⁷

President Reagan clearly had not gotten the message that drug use crosses political lines.¹⁸⁸

Thus, the early political bandwagon to drum up support for the War on Drugs was “us” (real Americans) against some vague “them,” typically political, racial or cultural outsiders.¹⁸⁹ For Nixon, the enemies were African-Americans, the political left, and hippies. For Reagan, the War focused on the racial underclass whereas President George H.W. Bush’s War took on a moralistic view that waged battle on those who were “more dependent, less fulfilled, lacking in ‘social currency,’ as well as those who do not accept the model of sober autonomy on which ‘our nation’s notion of liberty is rooted.’”¹⁹⁰ “Real” Americans were not only recruited to combat the enemies, they were to be protected from these enemies. Middle-class users were considered benign or even victims of the aggressor

186. Remarks to Media Executives at a White House Briefing on Drug Abuse, *supra* note 35. *See also* Remarks to the Federalist Society for Law and Public Policy Studies, *supra* note 128 (“The liberals have scoffed when I’ve said we’re winning the war on drugs.”).

187. Remarks to the Federalist Society for Law and Public Policy Studies, *supra* note 128.

188. *Politicians’ Children’s Encounters with Marijuana Prohibition*, NAT’L ORG. FOR REFORM OF MARIJUANA LAWS (July 6, 2000), http://norml.org/pdf_files/NORML_politicians_childrens_arrests.pdf; *Tokin’ Politics*, NAT’L ORG. FOR REFORM OF MARIJUANA LAWS, http://norml.org/index.cfm?Group_ID=3461 (last visited Sept. 29, 2011).

189. Elkins, *supra* note 166, at 224.

190. *Id.* at 226.

outsiders.¹⁹¹ Thus, Nancy Reagan's Just Say No clubs were especially designed to target white, middle-class children.¹⁹²

The patriotic fervor in waging the War of Drugs received a huge boost after the attacks of September 11. Regardless of whether terrorist groups have been funded solely by illegal drug trafficking¹⁹³ or perhaps even partially financed by U.S. drug policy itself,¹⁹⁴ the connection became the official government meme because of the attacks on the World Trade Center. The DEA called it Narco-Terrorism.¹⁹⁵ Indeed, the DEA Administrator, Asa Hutchinson, described September 11 as a great marketing tool in the War on Drugs:

This is a great opportunity for us to focus our country on the extraordinary connection between drugs and terrorism. When President Bush asked me to head up the DEA about 3 months ago, after I was confirmed, I did not anticipate that the events of September 11, of course, would even occur, but how it would significantly change the viewpoint of America and the attitude of our country toward drugs and how it would shape America's view of our nation's fight against drugs.¹⁹⁶

Perhaps more insidious, however, was the political coupling of adolescent drug use in the U.S. to terrorism:

Now we potentially are going to see, much like I had mentioned, if a student does illegal activity and illegal smoking as a teenager at school,

191. *Id.* at 226. At the height of the War, one drug warrior suggested that recreational drug users should be shot as traitors. *Id.* at 227.

192. *Frontline Chronology*, *supra* note 18.

193. Sheldon Richman, *The Drug War and Terrorism*, FREEDOM DAILY (Jan. 2002), www.fff.org/freedom/fd0201d.asp.

It has long been known that violent groups in Latin America have made money by protecting coca farmers from government agents, both American and indigenous. It should come as no surprise to learn that the same happens in Central Asia and the Middle East. It is certainly no surprise to the American authorities. They paid the Taliban in Afghanistan millions of dollars before September 11 to stem the growing of poppies for heroin. The Taliban is reported to have obliged, but the lost heroin is reported to have been made up by the Northern Alliance, the U.S. government's new allies.

Id. See also Kevin B. Zeese, *Drug Terror Link Shows Sloppy Thinking of Drug War Advocates*, NARCO-TERROR.ORG, www.narcoterror.org/kzoped0202.htm (last updated July 16, 2009).

194. Richman, *supra* note 193.

195. Steven W. Casteel, Assistant for Intelligence, U.S. Dep't. of Just., Drug Enforcement Admin., Testimony to the Senate Committee on the Judiciary Concerning Narco-Terrorism (May 20, 2003), available at <http://www.justice.gov/dea/pubs/cngrtest/ct052003.html>.

196. Asa Hutchinson, Administrator, Drug Enforcement Agency, Remarks During a National Symposium on Narco-Terrorism Entitled Target America: Traffickers, Terrorists & Your Kids (Dec. 4, 2001), available at http://www.targetamerica.org/downloads/symposium_transcript.pdf.

that he is likely to do illegal alcohol, and if he starts to do that, he's going to be exposed to other illegal activities. Our big concern in this area is we're going to see the interconnectedness of international terrorist organizations.¹⁹⁷

The implications of this coupling are rather horrifying, that our children are terrorists if they abuse drugs.

In absorbing this militaristic marketing strategy, schools are not entirely to blame. At the very least, qualifying for federal and state funds to deal with the problems required them to do so. More culpably, school officials could consider themselves part of a greater national security event, especially with the support of the Supreme Court cases; simplistic legal principles espoused by the Court are easier to apply than to reconsider them in the context of education theory and policy.¹⁹⁸ But schools should have known better than to make students the enemy. The educational dynamic between educators and adolescents is *always* “us-versus-them.” Teens always view themselves as the “others.” They pride themselves on that identification as a rite of passage to adulthood. When schools began actively targeting their students as the enemy in the War on Drugs, they militarized the conflict unnecessarily. The irony is that, after all is said and done, schools have nothing positive to show for that characterization: no significant reduction in drug use in the schools, no trust between school administrators and their charges, and no civil rights for students.

V. LORD OF THE FLIES¹⁹⁹

The War on Drugs' marketing strategy through militarized rhetoric worked. All branches of government sold the emotional message by incessant repetition, and the public—with little self-reflection—bought the militarization of the message as the means to an end: If we treat this effort as a War, then the drug problem will disappear. We did not stop to consider that the abstract would have to be made real, that we would be declaring war on their children as among “others,” including terrorists.

197. Former Congressman Mark Souder, Remarks During a National Symposium on Narco-Terrorism Entitled Target America: Traffickers, Terrorists & Your Kids (Dec. 4, 2001), available at http://www.targetamerica.org/downloads/symposium_transcript.pdf.

198. See, e.g., Robert G. Fraser, *Student Discipline from the Perspective of the School Attorney*, 34 NEW ENG. L. REV. 573 (1999–2000).

199. WILLIAM GOLDING, LORD OF THE FLIES (A Perigee Book 2003). Another influential novel that is often taught in high school classes, *Lord of the Flies* is set in war-time when a group of British school-boys is stranded on an island. It is, ultimately, about democracy and dictatorship. *Id.* at ix (Introduction by E.M. Forster). Golding himself describes the following theme: “The moral is that the shape of a society must depend on the ethical nature of the individual and not on any political system however apparently logical or respectable.” *Id.* at 290.

Hence, the marketing strategy shifted from the metaphorical to the literal and sustained the War on Drugs for forty years. It persuaded Congress and state legislatures to disgorge billions of dollars for worthless campaigns and useless armament. It persuaded courts to curtail the rights of students because we were at war. And, oh so tragically, that war first targeted our servicemen in Vietnam, many of whom are still struggling today under the stigma of being failures as warriors in a very real war, with very real bodies and very real trauma.

After forty years, perhaps facts and common sense have won out: the Obama Presidency is trying to address the nation's drug problems through prevention and treatment. The National Drug Control Strategy 2010 is focusing on small steps to change the War into a public health issue.²⁰⁰ But where one War ends, another War is sure to follow: War abhors a vacuum.²⁰¹ And that axiom leads to the current conundrum.

The rhetorical excesses of the War on Drugs are continuing, but now we are increasingly comfortable with the metaphorical becoming literal. The militarized rhetoric that pundits and politicians are using includes the same explicit words and images used during the War on Drugs, and they are whipping up a frenzy using the same paradigm: This health and social problem is a war of "us-versus-them." Presidents Nixon, Reagan, and H.W. Bush were wildly successful at marketing the War on Drugs as an "us-against-them" proposition, neglecting to mention, of course, that "us" had the same drug problems as "them."²⁰² But the point of that rhetoric in the War on Drugs was to market a product and recruit soldiers. The War may have been misbegotten, but it started with a legitimate enemy, drug abuse. At the outset, "us-versus-them" militarized rhetoric was the pathos, but it was not the logos. By mid-war, however, the federal government had used the powerful engine of our rule of law to identify children as the enemy. Today, the militarized rhetoric has skipped the abstraction and individualized the enemy—each other—without a moral reason in sight for doing so.

200. THE WHITE HOUSE, NAT'L DRUG CONTROL STRATEGY 2010 (May 2010), *available at* http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/ndcs2010_0.pdf.

Furthermore, the new proposal for ESEA's reauthorization still includes drug-free schools provisions but emphasizes safe, successful and healthy students rather than law enforcement. U.S. DEP'T. OF EDUC., A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT (2010), *available at* <http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf>.

201. HEDGES, *supra* note 8, at 14.

202. *See, e.g.*, Jay P. Greene & Greg Forster, *Sex, Drugs, and Delinquency in Urban and Suburban Public Schools* (Manhattan Inst. Educ., Working Paper, 2004), *available at* http://www.manhattan-institute.org/html/ewp_04.htm.

The United States has a long history of manipulating “otherness” as a way of creating unity, especially of the ruling majority. “The goal of such . . . rhetoric is to invoke pity for one’s own. The goal is to show the community that what they hold sacred is under threat. The enemy, we are told, seeks to destroy religious and cultural life, the very identity of the group or state.”²⁰³ Similarly did Hannah Arendt explain of totalitarianism: “The principle of the movement is whoever is not included is excluded, whoever is not with me is against me, so the world loses all the nuances and pluralistic aspects that have become too confusing for the masses.”²⁰⁴ So, today, “us” is engaged in a war with “them.”

This “civil” war has been denominated the Culture War. It is a war being “fought to defeat one’s cultural enemies.”²⁰⁵ Although pundits and politicians may insist that this characterization of the social dispute is a mere abstraction for which war as metaphor is acceptably employed, a Culture War seeks the destruction of its opponents. This is war for war’s sake: “[C]ulture war rhetoric is aimed not at offering an effective proof for the benefit of the opposition, but in destroying the opposition. Because proof is not its aim or its concern, culture war rhetoric has no allegiance to the truth.”²⁰⁶ This battle is no longer a war on an abstraction because pundits and politicians have learned, through the War on Drugs experience, that the audience will accept, condone, and encourage the metamorphosis of a metaphorical war on an abstraction to a literal one that harms our “real” enemies. If we would do this to children, we can certainly do it to adults.

The politicians’ and pundits’ response to such criticism is that the Culture War rhetoric has not actually crossed the line: “We did not mean that; the listener must have misunderstood; or the listener was mentally unstable.” But the listener did not misunderstand; the listener believed because he or she was immune to the subtleties that the politicians and pundits assert after the fact. If politicians’ rhetoric is militaristic, the natural impulse in the United States is to take up arms. Past rhetorical excesses have made the listener unable to discern that current rhetoric does not mean exactly what the politicians and pundits say: Today’s language of war no longer carries an implied message not to act. No longer does a metaphorical filter to the direct words of battle exist, and America’s past experience in the War on Drugs has inured people from reflecting on the morality of those words.

203. HEDGES, *supra* note 8, at 15.

204. HEDGES, *supra* note 8, at 15.

205. Kyle R. Cupp, *Culture War Rhetoric*, VOX NOVA (Feb. 14, 2011), <http://voxnova.com/2011/02/14/culture-war-rhetoric/>.

206. *Id.*

The War on Drugs, among other “just” wars of public policy, has deafened citizens to the ethical uses of war as metaphor: “In debating social policy through the language of war, we often forget the moral reality of war.”²⁰⁷ One of those moral realities is that a war requires justification. “[A] moral presumption against war [exists] because of the important individual and social duty not to kill others.”²⁰⁸ But when exhorted into war, today’s civilian can no longer discern the distinction between a metaphorical war in which he might engage and a literal war for which should not. Nor do today’s civilians understand the “formalities” of war. They do not understand that “[o]rganized killing . . . [is] done best by a disciplined, professional army.”²⁰⁹ Today’s civilians have not incorporated the moral imperative that the just warrior is to “[e]nter reluctantly, fight fairly, and restore the peace as soon as possible.”²¹⁰ Instead, a Culture War imbues the warrior with a “dangerous mentality of crusade or holy war . . . that right makes might of any kind acceptable[,] . . . neglect[ing] such constraints as right intention, discrimination, and proportionality, which protect the humanity of all parties in war.”²¹¹ The oh-so-successful marketing tactics that Nixon started, that Reagan energized, and that the Bushes sent into the stratosphere to support a Forty-Years War are now employed with little or no self-reflection, and certainly no justification nor ethical consideration.²¹²

Because of that lack of self-reflection on the use of war rhetoric in the Culture War, we trivialize both actual war and the source of that War: the debate about America's national identity.²¹³ War rhetoric does not engage the debate; it inhibits the debate. “The metaphor of warfare highlights the conflict involved in argument, but it hides the cooperation and collaboration, involving shared rules, that are also indispensable to argument.”²¹⁴ This fact holds especially true if either side of the “debate” has no proof to establish the rightness of its position. Instead, the militarized rhetoric simply solidifies and magnifies the pathos but not the logos, because no logos exists.

Instead of civilized debate, we simply have militarized rhetoric that is not designed to inform but to inflame, because “us” must out-recruit “them” to prevail. “Us” must recruit members because “us” wants “to grow

207. Childress, *supra* note 3, at 181.

208. *Id.* at 182.

209. HEDGES, *supra* note 8, at 9.

210. Childress, *supra* note 3, at 183.

211. *Id.* at 181.

212. *Id.* at 193.

213. *Id.* at 193–94.

214. *Id.* at 184.

indefinitely and what it needs for this is more and more people.”²¹⁵ Inflammatory, militarized rhetoric is particularly useful in recruiting because anger is an important attribute in the taking of sides:

One of the most striking traits of the inner life of a crowd is the feeling of being persecuted, a peculiar angry sensitiveness and irritability directed against those it has once and forever nominated as enemies. These can behave in any manner, harsh or conciliatory, cold or sympathetic, severe or mild—whatever they do will be interpreted as springing from an unshakable malevolence, a premeditated intention to destroy the crowd, openly or by stealth.²¹⁶

Worse, the crowd destroys civil society; it loves destruction for the sake of its growth and even for its *raison d’etre*:

The destructiveness of the crowd is often mentioned as its most conspicuous quality The crowd particularly likes destroying houses and objects: breakable objects like window panes, mirrors, pictures and crockery; and people tend to think that it is the fragility of these objects which stimulates the destructiveness of the crowd.²¹⁷

When war, and not just destruction, is its organizing principle, the crowd can erupt into actual war:

War is an astonishing business. People decide that they are threatened with physical destruction and proclaim the fact publicly to the whole world. They say ‘I can be killed’, and secretly add ‘because I myself want to kill this or that man.’ . . . Even if in fact the aggressor, each side will always attempt to prove that it is threatened.²¹⁸

Sadly, metaphorical war is successful in the United States because “[w]ar makes the world understandable, a black and white tableau of them and us. It suspends thought, especially self-critical thought. All bow before the supreme effort. We are one.”²¹⁹ In addition to a modern identity that accepts war because we are no longer sensitive to its images, we become desensitized to its moral problems. War becomes trivial rather than

215. ELIAS CANETTI, *CROWDS AND POWER*, 20 (Carol Stewart trans., The Noonday Press 1984).

216. *Id.* at 22. “In order to understand this feeling of hostility and persecution it is necessary to start from the basic fact that the crowd, once formed, wants to grow rapidly. It is difficult to exaggerate the power and determination with which it spreads.” *Id.* at 23.

217. *Id.* at 19.

218. *Id.* at 71–72.

219. HEDGES, *supra* note 8, at 10.

exceptional.²²⁰ “Once we sign on for war’s crusade, once we see ourselves on the side of the angels, once we embrace a theological or ideological belief system that defines itself as the embodiment of goodness and light, it is only a matter of how we will carry out murder.”²²¹ As the fable of *The Lord of the Flies* implies, man may be ineluctably drawn to savagery because he “loves adventure, excitement, foraging in groups, . . . and he loves shedding blood.”²²² With our failure to confront the moral problems of the Culture War and allowing it to become literal, we are no longer the moral force that can restrain those naturally inclined to violence.²²³

One of the most tragic consequences of the government’s assault on children in the War on Drugs is what it has done to the institution that might otherwise teach the moral lessons about war. When schools became the battleground, Congress and the Court used the rule of law to turn schools from institutions that should teach students about their role in democracy to institutions that teach students to be passive observers in the loss of their constitutional rights. Marketing messages are hard to rid oneself of, like those little tunes or advertising jingles—earworms—that we just cannot seem to get out of our heads. We remember those and embrace them without otherwise thinking about their factual basis. Marketing messages also require a commitment to the message: That commitment was wholly embraced in schools with certain regional, religious, and authoritarian attitudes, not unlike those that have enlisted in the Culture War. Thus, certain school districts have wholly favored this war effort over the educational fate of their students, and they have communicated to their students that schools are not to be trusted but that their greatest asset is to be feared. Long-term, schoolchildren hear the message that principles of democracy do not apply to them, a message communicated by the institution that has long been entrusted with teaching those principles. The past three or four generations of schoolchildren have heard the following message from schools: your rights as citizens are not nearly as important as our war efforts. Militarized rhetoric transformed a war against an abstraction into a war against actual children and the very survival of America’s rule of law in time of war. Nearly as bad are those students who have accepted their substandard status. After all, they are warriors. And

220. Childress, *supra* note 3, at 195.

221. HEDGES, *supra* note 8, at 9.

222. GOLDING, *supra* note 199, at ix.

223. See, e.g., HEDGES, *supra* note 8, at 84, 87.

“These militias [in Bosnia and Kosovo], without the discipline or military code of the professional soldier, were frightening. They were populated with criminals, misfits, and children who drive around with car trunks full of weapons they did not know how to use. They killed and tortured according to whims and moods.” *Id.* at 105.

War is hell.²²⁴ Equally as bad is the prospect that, by internalizing metaphorical war as a legitimate mechanism for discourse and for resolving disputes, children are actually learning to perpetuate war. Jack, Piggy, and Ralph were just children, but they had to form their own society: one represented democracy; the other anarchy.²²⁵ In the absence of any other guidance, a pig's head on a stick makes as much sense as a totem of civilization for children as what occurred to them in the War on Drugs.

Last, the War on Drugs taught Americans that even metaphorical militarization will adversely affect the rule of law. As is becoming increasingly apparent, legislatures all over the country are passing laws to align with the rhetoric, laws that will affect "them" and not "us." Hence, Arizona feels free to pass a statute that allows law enforcement to stop and ask for documentation of citizenship or alien status.²²⁶ Oklahoma is passing laws forbidding the consideration of Sharia law in any judicial decision.²²⁷ Other states—Wisconsin, Ohio, and Indiana—have considered legislation to bar collective bargaining rights to either public or private employee unions on the grounds that unions represent "them," not "us": "[T]he most powerful special interest in America today are the government unions. . . . Some of the money is siphoned into political union dues, goes back into politics and elects people who will vote for more and more and more."²²⁸ But the militarized rhetoric of "us" empowers listeners to accept the credo that disagreement begets violence, thus prompting one citizen to argue that any legitimate protests that this legislation might spark among "them" should be greeted with "live ammunition."²²⁹

224. "My school is considering drug tests Certainly, we value our freedom. But if there's one thing we've learned . . . , it is that our freedom has a price. If that means drug testing, so be it. It's a price I'm willing to pay." Student Drug-Testing Coalition, *Student Drug-Testing Programs: An Overview and Resource Guide* 33 (2008).

225. GOLDING, *supra* note 199, at 292–93.

226. Support Our Law Enforcement and Safe Neighborhood Act, S. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

227. State Question No. 755, OKLA. STATE QUESTIONS FOR GENERAL ELECTION 1, 7 (Nov. 2, 2010), http://www.ok.gov/elections/documents/sq_gen10.pdf; *Awad v. Zirriax*, 754 F. Supp. 2d 1298 (W. D. Okla. 2010) (preliminary injunction against implementation of State Question No. 755).

228. Gov. Mitch Daniels (R-IN), Remarks on The Diane Rehm Show Concerning State Budgets and Public Unions (Feb. 23, 2011), *available at* <http://thedianerehmshow.org/shows/2011-02-21/state-budgets-and-public-unions/transcript>.

229. *Deputy AG Under Review After "Live Ammunition" Tweet*, THEINDYCHANNEL.COM (Feb. 23, 2011), <http://www.theindychannel.com/news/26966614/detail.html>.

V. CAT'S CRADLE²³⁰

Politicians and pundits have become immune to the ethics of war rhetoric. The rhetoric itself is violent, and it breeds violence. The forty years of the War on Drugs has demonstrated the success of militarized rhetoric to move this nation to action. It does not suggest the success of the war itself, but it demonstrated the power of the marketing tool. It allows pundits and politicians to avoid responsibility by saying: "Everybody does it." The War on Drugs has damaged the American culture and it has damaged its democratic genius, the rule of law. But ultimately, it has made acceptable the idea of being at war with each other.

As the parable of the War on Drugs has taught the people of this nation, we will target specific enemies in the cause of an abstraction when impelled by metaphorical militarized rhetoric. Those enemies will not be protected by our rule of law. As these abstractions become less connected to facts and pragmatism, metaphorical rhetoric acquires the tenor of actual call to arms. The subtleties of the distinctions—even if those distinctions exist—are lost on the crowd that no longer recognizes the moral implications of war. Left to its own devices to preserve itself, the crowd will select enemies at random, targeting anybody who is not "us" to preserve itself. Gabrielle Giffords was specifically targeted in this Culture War. One can hardly argue that her shooting was coincidence or that mental instability is an intervening cause. Today's pundits and politicians no longer have the moral sense to even see the connection. Maybe that blindness is the most horrifying result of the numbness we suffer from the forty-year drumbeat of the War on Drugs: "Regardless of how you try to explain to people it's a 'war on drugs' or a 'war on a product,' people see a war as a war on them. . . . We're not at war with people in this country."²³¹

During its ill-conceived and badly implemented forty-year life, the War on Drugs has made victims of Americans' self-respect, their sense of democracy, and their children. As originally marketed, this War would rid the nation's schools of drugs and drug users, thereby helping schools get back to what they are designed to do—educate children. No one doubts or could credibly argue that drug use and schools do not mix. The problems with the War on Drugs were early apparent, making its longevity somewhat

230. "Perhaps, when we remember wars, we should take off our clothes and paint ourselves blue and go on all fours all day long and grunt like pigs. That would surely be more appropriate than noble oratory and shows of flags and well-oiled guns." KURT VONNEGUT, CAT'S CRADLE 254 (Dial Press Trade Paperback 1991). Long popular with young adults, *Cat's Cradle* is among Kurt Vonnegut's well-known anti-war novels.

231. Fields, *supra* note 173, at A3.

of a mystery. However, our ability to embrace war as the solution to a social policy and to ignore the moral ambiguities caused by such solution arose from the casual way in which we accept militarized rhetoric as the appropriate frame for the problem. In so accepting that pathos, we allowed our government to actually engage an enemy who could not fight back and to turn their safe haven into a war zone. If we allow our own children to be targeted, what stops people from declaring war on Members of Congress?

