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GANG-SPECIFIC POLICIES AND REGULATIONS IN THE K-12 EDUCATIONAL CONTEXT

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I. BACKGROUND

A. STATE OF THE RESEARCH

This paper is a modest step toward resolving a sorely under-researched question: How to counter the troublesome effects of youth gangs in the K-12 school setting?

Despite relatively recent attempts to think of the problem in more holistic terms, the prevailing approach for over two decades has been characterized by suppression-minded tactics.¹ Schools, perhaps unsurprisingly, have tended to view gang matters as the charge of law enforcement.² Hence, much scholarly comment has focused on how police can collaborate with schools to ensure security in the learning environment.³ At the other end of the spectrum, advocates of prevention and intervention strategies have helped to direct the academic community's attention toward the effectiveness of such

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1. Malcolm Klein, *The American Street Gang: Its Nature, Prevalence, and Control* 169 (Oxford University Press 1995); James Diego Vigil, *Streets and Schools: How Educators Can Help Chicano Marginalized Gang Youth*, 69 Harv. Ed. Rev. 270, 277 n.3 (1999).

2. Klein, *supra* n. 1, at 169.

3. E.g. Irving Spergel, *Youth Gang Activity and the Chicago Public Schools* 268 (Oxford University Press 1985); Kenneth S. Trump, ch. 4 *Gangs and School Safety*, in *Schools, Violence, and Society* 45 (Allan M. Hoffman ed., Praeger 1996).

approaches.⁴ But lost in the shuffle has been the less glitzy aspect of gang suppression—the policies, rules, and regulations that school boards and legislators have enacted specifically in order to confront the gang problem.

Are we handling this part of the suppression equation in the right way? Although my personal orientation is toward multifaceted, community-wide solutions, I believe that this comparatively narrow question retains utmost importance while gang-targeted policies stay in effect (and still are being effected). The purpose of this paper is to take a first rough cut at determining what those policies are, whether they are needed, and what about them, if anything, should be changed.

B. CONTEXT

In 1975, criminologist Walter B. Miller wrote in a government report:

[The] substantial overlap between the ages of required school attendance and the ages of customary gang membership, along with the fact that about half of arrested gang-members are school-aged, would lead one to expect that whenever one finds serious gang problems, one would also find serious gang problems in the schools.⁵

Noting the paucity of literature on the subject, Miller surmised that perhaps this had not been the case in the past. But if his current assessment was right, times were changing. The disruptive effects of gangs were fast becoming a major issue in schools across the country. It was his hope that new research and fresh critical approaches would flourish as analysts came to realize the severity and scope of the problem.

He was right on the first count. Although nationwide data on gangs in schools has been late in the coming, the available statistics make the point. In 1989, 15.3% of 10,449 youths interviewed across the nation reported gang presence in their schools.⁶ Six years later,

4. E.g. Gary D. Gottfredson & Denise C. Gottfredson, *Gang Problems and Gang Programs in a National Sample of Schools* (June. 13, 2001) (unpublished manuscript, on file with the Office of juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice); Finn-Aage Esbensen, *The National Evaluation of the Gang Resistance Education and Training (G.R.E.A.T.) Program, in The Modern Gang Reader* (Jody Miller et al. eds., Roxbury Publishing Co. 2001); Vigil, *supra* n. 1.

5. Walter B. Miller, U.S. Dept. of Justice, *Violence by Youth Gangs and Youth Groups as a Crime Problem in Major American Cities* 45 (1975).

6. U.S. Department of Justice, *Students' Reports of School Crime: 1989 to 1995* <<http://www.ojp.usdoj.gov/bjs/pub/pdt/srcs.pdf>> (accessed March 13, 2003).

follow-up interviews with 9,954 students revealed 28.4% of respondents answering in the affirmative.⁷

The exacerbation of the general gang situation throughout the country allows for some data extrapolation as well. In the 1970's, when Miller made the above observation, nineteen states asserted some kind of gang problem; eight of these states reported to have five or more affected cities.⁸ In 1998, all fifty states could make both claims.⁹ If the educational realm somehow reflects the larger picture, one can probably posit substantial developments in the gangs-in-schools problem over the last twenty years.

Regarding Miller's second point, the research community has failed to respond as vigorously as he would have liked. The findings of the few studies that have surfaced only beg the question why. According to a national survey, 54% of students who told of gang presence in their school claimed to suffer from some type of victimization, as opposed to 46% of students who reported no gang incidence.¹⁰ Another nationwide study states that both male and female gang members are twice as likely to have been physically assaulted, compared to non-gang youths in their respective gender groups.¹¹ Male members are four times as likely, and females nine times as likely, to have been threatened with a knife or gun.¹² Finally, studies have associated gangs with easier access to drugs¹³ as well as higher drop-out and truancy rates, both on the part of gang members¹⁴ and intimidated students.¹⁵

C. THE PROJECT

With this informational backdrop in mind, I proceed to undertake two related endeavors.

The first portion of this paper describes how certain key decision-makers have acted to isolate gangs as a qualitatively distinct entity that merits targeted suppression. The decision-makers whom I focus on are first, members of the judiciary, and second, policymakers whose regulations become the subject of litigation. In effect, my task

7. *Id.*

8. Walter B. Miller, U.S. Dept. of Justice, *The Growth of Youth Gang Problems in the United States: 1970-1998*, ix (2001).

9. *Id.*

10. James C. Howell & James P. Lynch, U.S. Dept. of Justice, *Youth Gangs in Schools* 5 (2000).

11. Gottfredson & Gottfredson, *supra* n. 4, at 114.

12. *Id.*

13. *E.g.* Howell & Lynch, *supra* n. 10, at 4; Ray Hutchison & Charles Kyle, *Hispanic Street Gangs in Chicago's Public Schools*, in *Gangs: The Origins and Impact of Contemporary Youth Gangs in the United States* 121-122 (1993).

14. *E.g.* John Hagedorn, *People and Folks: Gangs, Crime and the Underclass in a Rustbelt City* 116 (Lake View Press 1988).

15. *E.g.* Hutchison & Kyle, *supra* n. 13, at 124.

translates into a comprehensive survey of judicial caselaw addressing gang suppression in schools. The intent is to provide a snapshot of how influential actors around the country are thinking about the problem; at the same time, I seek to outline the legal restrictions that policymakers face. I objectively analyze how these decision-makers rationalize their actions. When necessary, I provide plausible reconstructions and articulate unstated assumptions.

The second part of this work outlines my own policy arguments. I draw from social science sources to show why official measures that single out gang members are potentially damaging and civically misguided. In the concluding section, I propose a new attitudinal orientation that I believe should guide future efforts to confront the gangs-in-schools dilemma. This shift lays the foundation for a conceptual approach that places prime emphasis on creatively recasting the interdictory elements of suppression within the framework of prevention and suppression.

II. JUDICIAL CASELAW

A. INTRODUCTION

The caselaw on gangs in the school setting bears three distinct characteristics. First, virtually all litigation occurs in federal courts. Second, the number of decisions is extremely limited; this chapter covers all federal opinions that, as of this writing, settle in their respective jurisdictions some aspect of the school-gang relationship. Third, suppression—or, more accurately, students' resistance to it—is the subject of virtually all cases that deal with gangs in the educational context.

The following decisions come from appellate and district courts spread throughout the country. The general disposition of the judiciary is in favor of school discretion as long as the contested policies can reasonably be taken to apply to a clearly-identifiable class of individuals or actions.

B. FIRST AMENDMENT CLAIMS

Courts have long held that schools may regulate student dress and appearance without violating First Amendment guarantees of expression.¹⁶ School districts throughout the country have seen dress codes of varying levels of specificity and restrictiveness pass constitutional muster. Not coincidentally, however, debate has sparked afresh with the real and perceived spread of gang activity nationwide.

16. *E.g. Pugsley v. Sellmeyer*, 158 Ark. 247, 247-252 (1923) (holding that schools may pass regulations which mandate student uniforms and proscribe certain forms of immodest dress).

Most of today's administrators consider the gang problem serious enough to have it figure into the spirit, if not the wording, of dress regulations.¹⁷ But litigants protest that schools, in their zeal to respond to public cries for safety, define "gang" clothing in a way that impermissibly reaches legitimate forms of expression.¹⁸

Several main ideas are central to the expression-based approach to gang suppression. First is the school's desire to eliminate the attraction of gangs for students who might be susceptible to it. Under this theory, taking away the symbols and dress mannerisms—the marketing vehicles of the gang—decreases the temptation to join. Next, administrators wish to provide a sense of security for members of the school community. Displays of gang membership can be threatening, and there is comfort in the message that the school will not stand for it. Last is the need to prevent gang rivalries from developing into actual confrontations. As long as expressions of affiliation remain muted, the idea goes, gang members are less likely to pick a fight, if only because they are less likely to know with whom to pick it.

As these reasons show, school officials believe that the messages contained in visual manifestations of the gang problem are causally linked with the potential outbreak of violence. If, as one researcher observes, "gang dress and graffiti have become the side doors to gang membership"¹⁹ and its practices, the aim here clearly is to batten down the hatches.

1. "Sufficient communicative elements"

Courts consider school dress policies within the multi-tiered framework of First Amendment jurisprudence. In order to determine whether expression protections apply in the first place (and hence, whether schools even need to justify contested provisions), the judiciary must ask whether student dress has "sufficient communicative elements," was there an "intent to convey a particularized message," and was "the likelihood...great that the message would be understood by those who viewed it?"²⁰

In *Oleson v. Board of Educ. of School Dist. No. 228*,²¹ a student challenged a school board rule barring males from wearing earrings.²² This provision was a specific enumeration of a general policy forbidding all gang activities.²³ As it so happened, the earring in

17. *Long v. Board of Educ. of Jefferson County, Kentucky*, 121 F. Supp. 2d 621, 622-23 (2000).

18. *Id.* at 622.

19. Klein, *supra* n. 1, at 169.

20. *Spence v. Washington*, 418 U.S. 405, 409-411 (1974).

21. 676 F. Supp. 820 (N.D. Ill. 1987).

22. *Id.* at 820-821.

23. *Id.*

dispute was indeed favored by gang members at the time.²⁴ After receiving several suspensions for violating the rule, the student sought relief on First Amendment grounds, claiming that the school board prevented him from broadcasting a message of “individuality.”²⁵ However, the Illinois district court was quick to cite a federal appeals decision declaring messages of “individuality” to be beyond the scope of First Amendment protection.²⁶ Even if this message was constitutionally worthy, the district court added, the school’s desire to ensure student safety provided a rational basis for curtailing gang activities.²⁷

The communicative elements issue would reemerge almost a decade later in *Bivens v. Albuquerque Public Schools*.²⁸ The challenger here was suspended on numerous occasions for flouting a dress code that forbade sagging pants, a style of dress that the school associated with gangs.²⁹ The New Mexico district court granted, and the Tenth Circuit affirmed, summary judgment for the school district.³⁰ Sagging did not merit First Amendment safeguards, because the school had provided ample showing that the intention behind the expression was by no means clear.³¹ Evidence indicated that sagging reasonably could be associated with a variety of messages, including gang affiliation, fashion preferences, and hip hop cultural expression.³² As in *Oleson*, this court found that in any case, the regulation served commendable pedagogical goals—here, improving the climate and learning environment of the school.³³

Despite what these two opinions say on paper, I believe that they are not really concerned about whether any intended message exists, much less what that message is or how viewers would receive it. Rather, the real story lies in the courts’ unstated emphasis on the *possibility* that other students may construe conduct to be gang-related. Both judges maintain that the students would lose anyway, communicative elements notwithstanding, because the state’s desire to preserve a safe learning environment would warrant infringements on facially legitimate speech. Gangs, and messages supporting them, somehow pose a danger to the learning environment. These dangers are great—so great, in fact, that schools can justifiably ban any speech that spectators *might* understand to be gang-affirming. The greater the

24. *Id.* at 821.

25. *Id.* at 822.

26. *Id.* at 822; see *Fowler v. Board of Educ. of Lincoln County, Kentucky*, 819 F.2d 657, 662-663 (6th Cir. 1987).

27. *Id.* at 823.

28. 899 F. Supp. 556 (D.N.M. 1995), *aff’d*, 131 F.3d 151 (10th Cir. 1997).

29. *Bivens*, 899 F. Supp. at 558.

30. *Id.* at 564.

31. *Id.* at 561.

32. *Id.*

33. *Id.*

risk to the pedagogical function, the more restrictive the prophylactic measures can be.

These decisions on the preliminary step of First Amendment analysis set an unmistakable tone: Responses to gangs in schools requires broad discretion on the part of officials, not just because gangs pose particularly troublesome threats, but also because the school environment merits particularly distinctive protections.

2. The *O'Brien* standard

Once courts have determined that student conduct has “sufficient communicative elements” to reach First Amendment territory, the question becomes, what standard governs state regulation of student speech? Very recent decisions have embraced the Supreme Court’s ruling in *United States v. O’Brien*,³⁴ which held that when conduct involves both speech and non-speech elements, the state’s interest in regulating the latter may justify incidental incursions on the former.³⁵ The four-part test, to be satisfied in full, sets the following requirements:

- The state policy must fall within the constitutional power of the government.
- The state policy must further an important or substantial government interest.
- The interest must be unrelated to the suppression of student expression.
- The incidental restrictions on First Amendment conduct must be no more than necessary to facilitate that interest.³⁶

The Fifth Circuit in *Littlefield v. Forney Independent School Dist.*³⁷ adopted this standard in deciding the constitutionality of a general ban on gang clothing.³⁸ This regulation, adopted pursuant to Texas Education Code § 11.162, allowed for mandatory dress requirements if the school board believed such measures “would improve the learning environment at the school.”³⁹ Failure to comply could result in expulsion. The Fifth Circuit held that there was no First

34. 391 U.S. 367, 377 (1968).

35. *Id.* at 376.

36. *Id.*

37. 268 F.3d 275 (5th Cir. 2001)

38. *Id.* at 286.

39. Tex. Educ. Code Ann. § 11.162 (1996). According to the district, the dress policy’s rationale was “to increase student safety by reducing gang and drug related activity as well as the likelihood of students bringing weapons to school undetected and by allowing teachers to more readily distinguish Forney students from outsiders.”

Amendment violation under any of O'Brien's four prongs.⁴⁰ The district was fully authorized to implement the policy under state law; a substantial government interest lay in improving the educational process; the board had no specific intention of suppressing speech; and the restrictions applied only during school hours, during which time there were ample alternatives for communication.⁴¹

A Kentucky district court likewise decided for the school in *Long v. Board of Educ. of Jefferson County, Kentucky*⁴² Here, a school council adopted a dress code in order to address a gang problem, promote student safety, prevent violence due to disputes over attire, and facilitate the identification of non-students.⁴³ Violations were punishable by a range of disciplinary actions, including suspension. In choosing to adopt the *O'Brien* standard, the court explicitly rejected the standard outlined in *Tinker v. Des Moines Independent Community School Dist.*, to be described below.⁴⁴ The court affirmed the council's policy on all four prongs, underscoring the school's interest in creating an appropriate and peaceful learning environment (prong two), as well as the school's obvious intention to target gang violence, as opposed to innocent group affiliation (prong four).⁴⁵

Explicit in *Long* is how the nature of the government's interest (prong two) is a factor in determining how far the school can go in suppressing speech (prong four).⁴⁶ The court finds an important and substantial interest in maintaining an appropriate learning environment: "[T]he very notion of education implies the need to control the atmosphere in which learning occurs."⁴⁷ Notably, the court proceeds to assert, "The unique characteristics of the school, therefore, allow school officials greater leeway to regulate expression in schools."⁴⁸ For the *Long* court, context plays a significant role in determining when speech can and cannot be suppressed.⁴⁹ In the educational arena, where maintaining a proper environment is a crucial concern, greater degrees of speech restriction are warranted.⁵⁰

40. *Littlefield*, 268 F.3d at 286.

41. *Id.* at 286-287.

42. 121 F. Supp. 2d 621 (W.D. Ky. 2000).

43. *Id.* at 623.

44. 393 U.S. 503, 507 (1969). In the *Long* court's point of view, the *Tinker* standard applies to purely symbolic speech and is irrelevant for purposes of regulating general dress: "*Tinker* expressly distinguished an armband symbolizing protest of the Vietnam War from regulations that relate to 'the length of skirts or the type of clothing' worn by students." 121 F. Supp. 2d at 624.

45. *Long*, 121 F. Supp. 2d at 626.

46. *Id.* at 625.

47. *Id.* at 626.

48. *Id.* at 626.

49. *Id.* at 625.

50. *Id.* at 627.

The Fifth Circuit in *Littlefield* does not articulate this connection as directly, but the opinion exhibits the same consideration. In the spirit of deference, the court leaves decisions about the educational process in the hands of experts.⁵¹ The court also relieves districts of the need to show evidence for why the specific goals of a uniform policy (here, improving student performance, fostering self-esteem, and improving attendance, among other things) are not already at satisfactory levels.⁵² It seems that as long as a policy can reasonably be taken to enhance the pedagogical function, the judiciary will refrain from striking down restrictions on expression. In short, the particular nature of the state interest here makes for laxer standards of speech suppression.

3. The *Tinker* standard

Courts have also analyzed First Amendment challenges involving dress codes under a different, more student-friendly standard. In the famed *Tinker* case, students wore armbands to school in protest of America's actions in the Vietnam War. The high court ruled that when student conduct is "closely akin to pure speech," as was the display of armbands, the proper test is to ask whether the questioned speech would "materially and substantially" interfere with the educational process.⁵³ The *O'Brien* framework, in contrast, applies not to "pure speech," but to conduct incorporating both speech and non-speech elements.

The choice between the *Tinker* and *O'Brien* standards seems quite straightforward in *Chalifoux v. New Caney Independent School Dist.*,⁵⁴ in which students displayed rosary beads in supposed violation of an anti-gang dress code.⁵⁵ The school district police had found that one gang used rosaries as symbols of affiliation. However, the Texas district court determined as a factual matter that the youths were not gang members, that they were never approached by gang members because of their rosaries, and that the beads had never disrupted school activities. Likening the display of rosaries to pure speech, the court held that the district failed to meet the *Tinker* requirement of material and substantial interference with the school function.⁵⁶ The religious undertones of this case, combined with the judge's convictions about

51. 268 F.3d at 287.

52. *Id.* at 286.

53. *Tinker*, 393 U.S. at 509.

54. 976 F. Supp. 659 (S.D. Tex. 1997).

55. *Id.* at 663.

56. *Id.* at 666-667. The court added that the district would have failed to satisfy the *O'Brien* test as well. The ban on rosaries was not effective in reducing gang activity, so the incursions on speech were more than necessary to advance that interest (prong four). *Id.* at 667. The court's line of reasoning suggests a sliding scale approach to this portion of the *O'Brien* test—the more effective the policy, the greater the degree of permissible restrictions on speech.

the sincerity of the students' beliefs, no doubt reinforced the outcome of this decision.

Like armbands, rosary beads are highly symbolic in nature and resemble accessories more than garb. However, actual articles of clothing are harder to justify as pure speech in light of the *O'Brien* cases above. In *Jeglin v. San Jacinto Unified School Dist.*,⁵⁷ students were prohibited from wearing clothing with college or professional sports team insignias to school.⁵⁸ The regulations did not mention gangs expressly, but specific provisions—for instance, a ban on “colors”—suggested that gangs were a prime consideration.⁵⁹ (Indeed, the opinion evaluated the school policy solely as a response to gang activity.) The California district court applied the *Tinker* standard without overtly saying so, and without explaining why. In its view, the school district's elementary and junior high campuses exhibited insufficient evidence of actual or threatened disruption, although the high school did show enough of a gang presence and potential for disruption that the dress regulation was possibly justified.⁶⁰ The nature of this evidence was unclear in the opinion.

Jeglin is probably an anomaly. The *O'Brien* cases and their precedents have applied the four-part test to school regulations on the wearing of clothing proper, clearly indicating that such conduct falls outside the ambit of pure speech. And whether *Jeglin* even applied the *Tinker* standard correctly is debatable. In *Tinker*, the Supreme Court had understood the act of wearing armbands to be the disruptive conduct. *Jeglin*, by contrast, seems to conceive of gang activity in general, rather than the wearing of athletic clothing, as the source of disruption: “[School officials] have carried their burden of showing both a gang presence . . . and activity resulting in intimidation of students and faculty that could lead to disruption or disturbance of school activities.”⁶¹

This application of the *Tinker* standard is problematic, because it cuts against the grain of the original decision in two ways. First, instead of narrowing the disorderly conduct to a specific expressive

57. 827 F. Supp. 1459 (C.D. Cal. 1993).

58. *Id.* at 1459.

59. *Id.* at 1463-1464. One targeted group of “students engaged in any disruptive behavior” included “students engaged in negative activity, behavior, dress or display, which when evaluated collectively, could denote student group affiliation which threatens the safe and orderly school environment.” *Id.* at 1463.

60. *Id.* at 1461-1462. This possibility was enough for the court to uphold the high school dress code: “While it is by no means certain that the otherwise offending dress code will negate [gang] presence and possible disruption, we assume that in carrying out their duties defendants will recognize and from time to time review their encroachments on First Amendment rights of their student population and revise any restrictions to conform to the existing situation.” *Id.* at 1462.

61. *Id.* at 1462 (emphasis added).

act, *Jeglin* defines the proscribable conduct to encompass a range of activities. Consequently, *Jeglin* expands the realm of conduct within which the court can restrict student liberties. Second, the court seems to believe that the material and substantial interference standard applies to gang activity in general, but not to the particular act of wearing athletic clothing. Tellingly, the judge admitted that “it is by no means certain that the otherwise offending dress code will negate [gang] presence and possible disruption.”⁶² In other words, wearing athletic attire may not in itself cause material and substantial interference.

The intent of the *Tinker* test, though, was to get at activities that stand a good chance of disrupting the educational process.

B. “CHILLING EFFECT” DOCTRINES

In addition to the traditional type of First Amendment analysis described above, courts have implemented other tests designed to further protect expressive rights. The two doctrines pertinent to gangs—vagueness and overbreadth—are unified by a common rationale: Both are intended to prevent the “chilling effect” that occurs when individuals who have the right to speak fear to do so, due to the fact that the guiding statute is inappropriately or unclearly framed.

1. Vagueness

In order to overcome a charge of vagueness, a regulation must satisfy two conditions: First, the terms of the statute must exhibit “sufficient definiteness that ordinary people can understand what conduct is prohibited” and second, the law must be defined “in a manner that does not encourage arbitrary and discriminatory enforcement.”⁶³ Vagueness claims derive, in theory, from Fourteenth Amendment due process requirements; laws must be clearly articulated so that people have fair notice of what constitutes an infraction. But since “chilling effect” considerations are functionally really about free speech, many courts have opted to undertake this analysis under the umbrella of First Amendment jurisprudence.

The majority of the vagueness claims raised below entail, in some form or another, alleged uncertainty about what comprises a “gang.” The inconsistencies among these opinions reflect disagreement within and between communities of social scientists, law enforcement

62. *Id.*

63. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). This statement of the vagueness doctrine’s two-part framework parses out the motivations behind the original formulation, which held that prohibited conduct “must be so clearly expressed that the ordinary person can choose, in advance, what course it is lawful for him to pursue.” *Connally v. General Constr. Co.*, 269 U.S. 385, 393 (1926).

officials, and citizens about how to conceive of gangs.⁶⁴ Although courts are primarily concerned with the formal statutory context, problems arise when official policies adopt widely-disputed, common parlance notions of “gangs” without saying more.

*Stephenson v. Davenport Community School Dist.*⁶⁵ involved a rule stating that students who participated in “gang related activities such as display of ‘colors,’ symbols, signals, signs, etc.” would risk suspension and expulsion.⁶⁶ Although there was no evidence that the plaintiff was involved in a gang, she removed a tattoo in order to avoid the risk of violation. She filed suit after receiving a scar from the operation. The Eighth Circuit decided for the student, declaring both requirements of the vagueness test to be lacking. No federal case, the court pointed out, had ever upheld any gang-specific regulation challenged for vagueness that did not define “gang.” Furthermore, without adequate notice of what constituted a gang, administrators and school police enjoyed unfettered discretion in labeling activity as gang-related.

The court in *Chalifoux v. New Caney Independent School Dist.*, previously described in the First Amendment context, resolved a vagueness claim very much in line with *Stephenson*. There, the Texas district court contemplated a regulation that defined “gang-related apparel” simply as “[a]ny attire which identifies students as a group (gang-related).”⁶⁷ In the judge’s view, this self-referencing definition did not reveal much about the nature of forbidden conduct, nor did it distinguish gang clothing from group-identifying attire of legitimate extracurricular clubs. As for the arbitrariness issue, the court noted that the principal invariably rubberstamped the school police’s recommendations on clothing proscriptions. Thus, law enforcement exercised an unconstitutional level of discretion in setting school policy.

These decision contradict the most recent application of the vagueness doctrine to gang-specific school regulations. In *Fuller ex rel. v. Decatur Public School Board Of Educ. School Dist. 61*,⁶⁸ rival gang members engaged in a fight at a high school football game.⁶⁹ The

64. One particularly sticky issue has been whether criminality should be an essential defining component of gangs. Academics debate whether criminality best functions as an dependent or independent variable in studying “gang” activity. Others more politically-minded argue that to cast gang-members as necessarily delinquency-prone is to succumb to the interests of law enforcement. For a discussion of these and related concerns, see Klein, *supra* n. 1, at 23-29.

65. 110 F.3d 1303 (8th Cir. 1997).

66. *Id.* at 1305.

67. 976 F. Supp. 659, 664.

68. 251 F.3d 662 (7th Cir. 2001).

69. *Id.* at 664.

Seventh Circuit was faced with the following provision, which elaborated on a rule prohibiting all “gang-like activities”:

As used herein, the phrase ‘gang-like activity’ shall mean any conduct engaged in by a student 1) on behalf of any gang, 2) to perpetuate the existence of any gang, 3) to effect the common purpose and design of any gang and 4) or to represent a gang affiliation, loyalty or membership in any way while on school grounds or while attending a school function. These activities include recruiting students for membership in any gang and threatening or intimidating other students or employees to commit acts or omissions against his/her will in furtherance of the common purpose and design of any gang.⁷⁰

The school expelled the students based in part on this rule.

The court held that the provision was sufficiently clear. Instrumental in its holding was a recent Supreme Court decision that implicitly condoned police discretion in determining whether gang members were named parties to a civil injunction.⁷¹ According to the *Fuller* court, if police officers, in the context of the criminal law, could determine who might be a gang member, then school officials, in the context of school discipline, likewise should be able to determine what gang-like activity is. Here, the court was persuaded that administrators had good reason to believe that the fight’s instigators were gang members.

The final opinion on vagueness skirts the issue of how to define gangs, but it does possibly speak to the *Fuller* court’s purpose in departing from precedent. In *Bivens v. Albuquerque Public Schools*,⁷² outlined in the First Amendment decisions above, the New Mexico district court rejected the claim that the term “sagging” rendered the school’s regulation unconstitutionally vague.⁷³ “The need to maintain appropriate discipline in schools must favor more administrative discretion than might be permitted in other parts of our society,” the court said.⁷⁴ In its view, order is such an important objective in the educational context that schools may establish rules that might otherwise be deemed vague. As the court in *Fuller* might have

70. *Id.* at 666. The juxtaposed conjunctions between numbers 3) and 4) are an accurate rendition of the rule.

71. See *City of Chicago v. Morales*, 527 U.S. 41 (1999) (declaring an anti-gang injunction void for vagueness, but on grounds *not* involving definitions of “gang-like activity”).

72. 899 F. Supp. 556 (D.N.M. 1995)

73. *Id.* at 563.

74. *Id.*

expressed it, the harms entailed in a “chilling effect” are far outweighed by the need to prevent the disruption that gangs are likely to engender. In fact, suppressing this sort of speech may even be desirable in itself—better that students steer wide and clear of potentially gang-related conduct than for them to test the limits of clearly-pronounced rules.

Even though the final cases do not square with the first two, all of them do share a certain analytical feature. Under a typical vagueness analysis, the notice and discretion components are supposed to operate separately; shortcomings in either one of them should suffice to uphold void-for-vagueness claims. Here, however, the courts seem to establish a robust causal link between the two. For example, the pro-student cases predicate requirements of clear notice on the need to prevent capricious judgments. The pro-school decisions, on the other hand, argue that notice obligations can be less demanding, because officials must have a relatively high baseline of discretion. In both instances, the direction of causation flows from discretion to notice; the “appropriate” level of notice is a function of how much discretion the courts believe administrators should have.

The notice-discretion connect raises the question of why cases on gangs in schools would share this particular gloss on the vagueness doctrine. I posit two related facts to explain this. On the one hand, compared to other contexts, schools are unique in that *both* discretion and rule-making play vital roles. Students must be able to refer to transparent guidelines, but authority figures need some flexibility to respond to unpredictable situations. On the other hand, the individuals who wield discretion are often the very ones who make the rules. The judiciary knows that administrators shape regulations with their own enforcement capacities in mind; the rules that officials create very much reflect the level of discretion that they wish to have. Courts are simply acknowledging these dynamics as they pass their own normative judgments on “appropriate” levels of discretion and, by extension, the “appropriate” form that notice should take.

2. Overbreadth

The doctrine of overbreadth prohibits government actions that impair a “substantial” amount of constitutionally protected rights, “judged in relation to the statute’s plainly legitimate sweep.”⁷⁵ This analysis is designed to prevent a chilling effect on the speech of third parties *not* party to the suit. Therefore, “[a]n overbreadth challenge is not appropriate if the First Amendment rights asserted by a party attacking a statute are essentially coterminous with the expressive rights of third parties.”⁷⁶

75. *Broadrick v. Okla.*, 413 U.S. 601, 615 (1973).

76. *U.S. v. Hicks*, 980 F.2d 963, 969 (5th Cir. 1992).

With respect to gangs in schools, this doctrine has been the focus of less litigation and, thus far, less controversy. In *Chalifoux*, the rosary beads decision upholding the vagueness challenge, the Texas court employed a formalistic rationale in refusing to find the school regulation overbroad. The court emphasized that the students had asserted the claim based on their own First Amendment rights, but that overbreadth involves only the rights of third parties. *Stephenson*, the other case upholding the student's vagueness claim, likewise rebuffed an overbreadth claim. A Supreme Court precedent declared the latter analysis inapplicable "if the statute being challenged has been amended or repealed,"⁷⁷ as was the situation here.

Given the dearth of cases, it is hard to tell if both courts dismissed these challenges as a matter of coincidence. How far federal courts are willing to take the overbreadth doctrine in cases involving gangs in schools remains to be seen.⁷⁸

C. FOURTEENTH AMENDMENT CLAIMS

In addition to the due process-based vagueness doctrine, students have advanced two other kinds of Fourteenth Amendment arguments to protest gang-targeted regulations. These claims have been tried in only two courts, both times unsuccessfully.

In *Hines v. Caston School Corp.*,⁷⁹ an Indiana state court decision, a student filed suit after receiving a suspension for wearing an earring.⁸⁰ The debated rule in *Hines* stated, "Students are not to wear jewelry or other attachments not consistent with community standards or that could pose a health or safety hazard to either the student himself or to other students in his presence."⁸¹ The court employed a rational basis test on state constitutional grounds, assuming a substantive due process interest in control over personal appearance. The school cited a number of reasons for the ban: the need to prevent an influx of gangs, discourage rebellion against community standards of dress, and create a positive school environment, *inter alia*. Although the court found no relation to gang prevention, it did have enough evidence of the other justifications to decide for the school.

The litigants in *Hines* also presented a Fourteenth Amendment equal protection argument. Preventing only males from wearing

77. *Mass. v. Oakes*, 491 U.S. 576, 583 (1989).

78. State courts have declared government regulations to be impermissibly overbroad in other gang-related contexts. See e.g. *In re Englebrecht*, 67 Cal. App. 4th 486 (1998) (striking down restrictions on the use of pagers in public places); *City of Harvard v. Gaut*, 227 Ill. App. 3d 1 (1996) (holding that a municipal law against wearing "known gang colors, emblems, or other insignia" impermissibly prohibits some forms of religious expression).

79. 651 N.E.2d 330 (Ind. App. 1995).

80. *Id.* at 333.

81. *Id.* at 332.

earrings, they claimed, was a gender-based classification subject to a higher standard of scrutiny. The court agreed that the government action had to pass the more stringent requirement of being substantially related to some legitimate objective.⁸² However, it nevertheless found both the goal (enforcement of community standards) and the enforcement approach (the school prohibited *all* students from wearing jewelry in a manner inconsistent with those standards) to pass constitutional muster.

Oleson v. Board of Educ. of School Dist. No. 228,⁸³ already described in the First Amendment context, also failed on the gender-based equal protection theory.⁸⁴ According to the Illinois court, the school board had the prerogative to take notice of the correlation between earrings worn by males and gang membership.⁸⁵ Furthermore, the purpose of the overall policy was to prohibit demonstrations of gang affiliation on the part of both gender groups.⁸⁶ Even though the litigated rule focused only on earrings worn by males, other provisions were in fact targeted at the unique ways that girls identified with gangs.⁸⁷

III. THE CURRENT APPROACH: A CRITICAL ASSESSMENT

A. INTRODUCTION

Despite their minor differences, the courts above agree on one point: Youth gangs pose such significant risks to educational goals that official policies can justifiably subject gang members to differential treatment. The purpose of this section is to show why there is good reason to believe that this approach, though intuitively appealing, is ineffective and most likely inimical.

I first attempt to provide a precise statement of exactly what the gangs-in-schools problem is. A proper formulation, I argue, should factor for the best interests of *all* key actors within the educational community—not the least of whom, though many policymakers have failed to acknowledge it, are gang youths themselves. Next, I outline the actions that school officials presently take, explaining how certain consequences contradict not only the teachings of social science, but also the school system's own proclamations about advancing its mission to educate. Finally, I explore the reasons that motivate the current approach. I suggest that shortcomings in these call for a

82. *Id.* at 335 (citing *S.V. v. Estate of Bellamy*, 579 N.E.2d 144, 146 (Ind. App. 1991)).

83. 676 F. Supp. 820 (N.D. Ill. 1987).

84. *Id.* at 823.

85. *Id.* at 821-822.

86. *Id.* at 823.

87. *Id.*

systematic re-evaluation of the school's proper role as a community institution vis-à-vis a subpopulation comprised of some of this nation's most troubled children.

B. FORMULATION OF THE PROBLEM

The best articulation of the school's challenge accounts for the interests of every involved party. The key question becomes, how to accommodate to the fullest extent possible these dynamic interests in the realm of regulatory parlance? Which individuals are members of the educational community? What can they reasonably ask for? And how does the presence of gangs in schools threaten those entitlements?

The most striking feature of the *status quo* mentality is the secondary status that it affords to suspected gang members. Suspensions and expulsions are well-worn measures for punishing gang-related activity, blessed with the support of courts and legislatures around the country. Somehow, the interests of gang youths in fully engaging with the school community has become lost amidst the clamor to protect the "victims" of disruption—those students and teachers who, if not serious about the education process, at least refrain from actively subverting it. But the fundamental problem, simply stated, is that gang members are vital members of the school community.

These students count among the unluckiest members of a subpopulation characterized by an incredible confluence of marginalizing factors. On an ecological level, gang members tend to come from disorganized neighborhoods marked by scarce resources⁸⁸ and few community outlets for recreation and socialization.⁸⁹ Gang members often have poor relational contacts, growing up in impoverished, distressed households⁹⁰ in which both parents work⁹¹ or the family is headed by a single mother.⁹² Deficits in adult contacts⁹³ are counterbalanced by increased association with delinquent peers.⁹⁴ Personal characteristics of gang members tend to include low self-concept, limited skills, and undeveloped social abilities.⁹⁵ And perhaps not coincidentally, researchers have underscored the disproportionate

88. Klein, *supra* n. 1, at 198-199; Irving Spergel, *The Youth Gang Problem* 60 (1995); Frederick Thrasher, *The Gang* 22-23 (1927); James Diego Vigil, *Barrio Gangs: Street Life and Identity in Southern California* 28 (1988).

89. Vigil, *supra* n. 88, at 43.

90. Terence P. Thornberry, *Risk Factors for Gang Membership*, in *The Modern Gang Reader* 40 (Jody Miller et al. eds., 2001).

91. Vigil, *supra* n. 88, at 27.

92. Miller, *supra* n. 5, at 114.

93. Thornberry, *supra* n. 90, at 38.

94. *Id.* at 40.

95. Klein, *supra* n. 1, at 80.

representation of minorities in gangs,⁹⁶ and the roles that discrimination and cultural conflict play in the formation of gangs.⁹⁷ I do not claim that gang members necessarily exhibit all these risk factors, or even that gang youths experience these characteristics to a greater degree than other children. But I am pointing out, consistent with the research, that neighborhoods where a good number of these factors come into play tend to be those areas where delinquent youth subcultures thrive.

By adopting harsh measures that shut gang members out of the educational community, policymakers persecute a significant portion of precisely those students who ought to be priority candidates for reach-out efforts. Officials have premised their campaign of exclusion on one of two erroneous perceptions of gang members. Both, curiously, are mutually exclusive.

The first view ascribes to these youths a strong sense of agency, justifying harsh punishments with the assumption that gang behavior is a manner of deliberate social maladjustment.⁹⁸ Social scientists agree, however, that unique conditioning factors endemic in many poor urban neighborhoods generate powerful acculturating milieus.⁹⁹ These normative influences, often inconsistent with mainstream values, sabotage the learning process for gang members. Clearly, the way to impress traditional norms upon these students is *not* to send them back to the same street setting that planted the seeds of deviant behavior.

The alternative perspective posits that the gang youth's tendency toward deviance is at least partially an innate, psychologically-based

96. Nat. Youth Gang Center, *1998 National Youth Gang Survey* 20 (reporting minority youths to comprise 86% of gang members).

97. Ko-Lin Chin, *Chinese Subculture and Criminality* 51 (1990); Vigil, *supra* n. 88, at 41-42.

98. Donald W. Kodluboy & Loren A. Evenrud, *School-Based Interventions: Best Practices and Critical Issues*, in *The Gang Intervention Handbook* 277 (Arnold P. Goldstein & C. Ronald Huff eds., 1993) (noting that school officials often overlook the possibility that gang-related behavior is a result of emotional disability).

99. See e.g. Richard A. Cloward & Lloyd E. Ohlin, *Delinquency and Opportunity: A Theory of Delinquent Gangs* (1960) (arguing that gangs offer illegitimate opportunities to compensate for traditional pathways to success, which are inaccessible to many gang youths); Albert K. Cohen, *Delinquent Boys: The Culture of the Gang* (1955) (proposing that delinquent subcultures emerge when inadequate socialization to middle class norm causes working class youths to aggregate and to resist those norms); Joan Moore, *Homeboys: Gangs, Drugs, and Prison in the Barrios of Los Angeles* 150 (1978) (observing that conventional and deviant norms are "inextricably mixed" in Los Angeles barrio communities); Walter B. Miller, *Lower Class Culture as a Generating Milieu of Gang Delinquency*, in *The J. of Soc. Issues* 5 (1958) (asserting that delinquent subcultures derive from ecological conditions rather than reactionary impulses to middle class norms).

phenomenon.¹⁰⁰ Advocates of this view therefore question to a certain extent the prospect of rehabilitation. On this point, the majority of academics have rallied around the notion that considerations of environment and ecology have much more explanatory power in describing gang involvement than theories that focus on the wayward tendencies of a few individuals.¹⁰¹

These official misperceptions take nothing away from the concerns of parties against whom gangs are usually believed to be antagonistically positioned. All students have the unequivocal right to be secure from threats, disruption, and undue influences. Studies have found disturbing correlations between gang membership and student perceptions that their schools are unsafe;¹⁰² some researchers believe that dangerous school environments increase gang membership, driving students to join for protection.¹⁰³ Without question, parents should be able to advocate for their child's safety and the quality of her educational experience. And school administrators must balance their duty to educate every student they feasibly can against the need to maintain a smoothly-operating learning environment—all the while paying heed to political concerns.

The task is set: How can we design policies that will strike the best balance between the seemingly contradictory interests of each these parties?

C. WHAT SCHOOLS DO NOW

The present institutional response to gangs may be characterized thus: Educators respond to a perceived problem by focusing on certain set of individuals in a manner that isolates them, as a matter of perception, attitudinal orientation, and practical consequence, from the

100. See e.g. Martín Sánchez Jankowski, *Islands in the Street: Gangs and American Urban Society* 22-23 (1991) (arguing that gangs tend to attract the most competitive individuals who exhibit characteristics of defiant individualism); Lewis Yablonsky, *Gangsters: Fifty Years of Madness, Drugs, and Death on the Streets of America* 101-102 (1997) (stating that many gang members have sociopathic personalities).

101. See e.g. Robert J. Bursik & Harold G. Grasmick, *Neighborhoods and Crime: The Dimensions of Effective Community Control* (1993) (underscoring the role of social disorganization in gang formation); Hagedorn, *supra* n. 14, at 29-30 (describing the effects of macroeconomic change on gang formation); Spergel, *supra* n. 88, at 70 (remarking that gangs formation correlates with the breakdown of community institutions); Vigil, *supra* n. 88, at 16-24 (explaining the importance of historical factors in contributing to economic and sociocultural marginality).

102. Gottfredson & Gottfredson, *supra* n. 4, at 70.

103. *Id.* at 71 (suggesting that an increased sense of safety in schools might reduce gang cohesion and participation); Howell & Lynch, *supra* n. 10, at 7 (positing that gang membership in schools may be a response to a threatening educational environment); see also Klein, *supra* n. 1, at 168-169 (noting that the school is probably the main location where potential members experience gang culture); Hutchison & Kyle, *supra* n. 13, at 125 (observing that the perception of threats encouraged students to carry weapons).

mainstream educational community. The regulatory segregation of gangs is based on the idea that their members are especially prone to disruptive behavior. As a prophylactic device, this specialized treatment operates in two ways. First, it renders illicit certain activities associated with these groups that otherwise would be permissible; and second, it subjects already punishable activities to harsher penalties if such acts are carried out in association with gang groups.

While research on the effects of anti-gang regulations in schools is virtually nonexistent, such policies are founded on the principles of “zero tolerance” discipline and exhibit the demonstrated failings of that philosophy. Moreover, I believe that the situational characteristics and group dynamics particular to gang members only serve to exacerbate these harmful consequences. In the end, the pedagogical function is subordinated to and harmed by the “get tough” mentality. And gang members, already shorthanded by various instances of disadvantage, are forced into a position of “extra-marginalization.”

1. The educational mission subordinated

Zero tolerance policies respond to infractions great and small with swift, invariable, and invariably harsh measures. They have the startling effect of undercutting the very educational function that they purport to further. The enforcement of regulations becomes more important than instruction¹⁰⁴—a state of affairs that is at once evident in and aggravated by the fact that many school administrators see law enforcement as the first line of defense.¹⁰⁵ Schools develop close relationships with the police, adopting the suppression-focused orientation that typifies law enforcement work. In Cleveland public schools, for example, the police have established a gang unit whose top priorities are enforcement and investigation.¹⁰⁶

Grossly sensational media portrayals of the gang problem define public perception¹⁰⁷ and, in large part, the reactions of education officials, members of the judiciary, and lawmakers. Key decision-makers face mounting pressures to clamp down on the problem, falling prey to a crackdown ethos that renders the anti-gang movement an end in itself. In the end, those in power cause zealous enforcement to

104. The Civil Rights Project, Harvard University, *Opportunities Suspended: Devastating Consequences of Zero Tolerance and School Discipline Policies 2* (2000) [hereinafter *Opportunities Suspended*] (“[Zero tolerance] employs a brutally strict disciplinary model that embraces harsh punishment over education.”). See also Pedro A. Noguera, *Preventing and Producing Violence: A Critical Analysis of Responses to School Violence*, 65 Harv. Ed. Rev. 189, 189 (Summer 1995) (“In many school districts, concerns about violence have even surpassed academic achievement.”).

105. Klein, *supra* n. 1, at 169; Noguera, *supra* n. 104, at 190.

106. Klein, *supra* n. 1, at 169.

107. Hagedorn, *supra* n. 14, at 23; Klein, *supra* n. 1, at 55-56; Spergel, *supra* n. 88, at vii; Miller, *supra* n. 5, at 56-66.

overshadow the primacy of the instructional role that they were trusted to protect.

2. The educational mission harmed: Gang group dynamics

The trivialization of pedagogy and its dire implications compound yet other effects harmful to the educational function. Zero tolerance may wreak deleterious effects in more direct ways. Concentrated attention on gangs may in fact render the school environment even *more* dangerous for the same reason that zero tolerance policies do so—students who perceive themselves victims of arbitrary treatment are likely to dismiss the legitimacy of authority figures. The effectiveness of any suppression effort is predicated in good part on perceptions of its justifiability, but the draconian measures of zero tolerance generate indignation and perceptions of unfairness.¹⁰⁸

These reactions translate into particularly harmful consequences when gangs are involved. Experts have underscored the unique group dynamics that drive gang members to capitalize on any occasion that may improve group solidarity.¹⁰⁹ Contrary to media depictions, most youth gangs are fairly unstructured entities with shifting membership and constantly-changing role patterns. Against this backdrop of flux, an originally tentative sense of cohesion grows stronger with the emergence of perceived threats against which the gang can collectively struggle. The oppressive actions of authority figures is, unsurprisingly, a key source of conflict.¹¹⁰

When schools portray the gang as a worthy target for discipline, they establish an “us-versus-them” atmosphere that serves to sustain the validity of the gang in the eyes of its members. Actions against the school become status-enhancers in the group psychology structure.¹¹¹ Instead of succumbing to the “chilling effect” of deterrence, gang members see incentives to indulge in actions that are yet bolder, yet more dangerous. Ironically, youths who were first exposed to gang life on the streets may find the educational setting to be a crucible for their deviant norms and values.¹¹² Students who have never experienced street culture may find themselves a captive audience to increasingly numerous, and increasingly intimidating, displays of gang presence.

108. See *Opportunities Suspended*, *supra* n. 104, at 10 (pointing out that adolescents are extremely sensitive to situations in which they believe individualized discipline would be more appropriate than generic enforcement).

109. Klein, *supra* n. 1, at 80-82; see Lewis Yablonsky, *The Violent Gang* 178, 191 (The Macmillan Company 1962).

110. Klein, *supra* n. 1, at 62; Vigil, *supra* n. 1, at 276.

111. Vigil, *supra* n. 1, at 276.

112. *Id.* at 274 (“Street bonding is reinforced by school bonding, thus affirming and solidifying a pattern of action and reaction that mixes street and school cues and rules . . .”).

3. The educational mission harmed: Profiling for violence

Perceptions of injustice are grounded on more than an internally-generated hypersensitivity. The school's singular treatment of gang members is a profile for violence that is conceptually ill-conceived and fraught with potential for abuse. In my view, gang-specific regulations are unlike any school disciplinary policy ever created in that they define a select group of individuals to be exclusive candidates for aggravated punishments—including denial of education—based on their unproven associations outside of school.

This proposition can be broken down into several parts.

First, like with any act of profiling, there are problems with treating youths differently because of their group affiliations instead of their individual characteristics. The big danger is that schools risk penalizing students who would not engage in those crimes ordinarily linked to gang members. The other side of the equation, of course, is that the more accurate a profile is, the more under-inclusive it tends to be. The breadth of the profiling criteria should be measured by the severity of the harms that the profile will prevent, balanced against the harms that it will create. Public attention has centered on the former. The problem is, hardly anyone has talked about the latter.

One major harm, again, is the possibility of increased gang solidarity and heightened tendencies toward aggression. Another involves the corruption of the kinds of lessons about fairness and just desserts that the school ought to impart. Students will learn that might makes right; that toughness and intolerance are philosophies to live by; that stereotypes are legitimate instruments of oppression; and that those in power can lock whomever they want to out of decision-making processes. The school is such a good enemy because its practices fit so cleanly into the same oppositional framework found on the streets. The travesty is not that gang members create these jimmied perceptions, but rather, that not so much jimmying needs to be done.

Another problem lies in the practice of basing exclusion on non-school-related affiliations. Unlike fraternities and sororities, which tend to be centered around the school, many gangs are neighborhood-rooted entities that pre-exist and outlive the educational experience.¹¹³ When mere membership triggers denial of instruction, schools effectively discriminate against certain individuals because of aspects of their identity that take shape in realms far removed from the educational experience. No doubt, particular expressions of that identity are unquestionably disruptive and justifiably punishable—but how are kids to shun deviant norms and values if prosocial institutions like the school push them back into the streets? A double injustice is at

113. *Id.*

play. Not only do officials discriminate against students for having school-unrelated associations that supposedly engender wayward tendencies; they also mete out punishments that push these kids back to the streets, where these associations become reinforced.

Finally, discussions about profiling are necessarily discussions about discretion in rule making and enforcement. The first stage of any anti-gang project is, quite simply, confusion. Definitional disputes between and among academics, law enforcement, and policymakers have been well-documented in the literature.¹¹⁴ Any number of school officials will likely approach the table with just as many different conceptions of a gang, and hence, just as many different notions of the appropriate enforcement strategy.

The problem of rule creation, once overcome, only makes way for difficulties at the rule application level. The intimacy of the school environment, I submit, makes it difficult for officials to apply policies in a dispassionate manner. Studies show that many teachers are quick to develop subjective biases toward “problem” students.¹¹⁵ Coupled with the pressures of the crackdown ethos, this attitudinal orientation could translate into over-applied and over-severe punishment for youths who raise the slightest suspicion of gang involvement. Students who simply associate with gang members come under strict surveillance; youths who never conceived of themselves as part of a gang may be “labeled” into actual membership.¹¹⁶ Even if the profile construction is itself valid, then, misapplications of it can easily fuel the oppositional tendencies of youth groups.

4. The extra-marginalization of gang youths

What I have mentioned thus far highlights the risk that gang-specific policies will compromise the educational function for everyone. I believe, moreover, that the current approach can have especially disastrous effects for gang members themselves. The various forms of marginalization that these youths experience are either directly or indirectly aggravated by the school’s imprimatur of

114. For a good discussion, see Spergel, *supra* n. 88, at 16-24. Recent observations on the changing nature of youth gangs may add new dimensions to the definitional task. See David Starbuck et al., U.S. Dep’t of Justice, *Hybrid and Other Modern Gangs* (2000) (explaining the evolution of traditional characteristics of youth gangs, such as homogeneous ethnicity, loyalty to a single gang, and use of colors as symbolic expression).

115. See e.g. Ron Nelson et al., *The Trouble with Profiling Youth At-Risk for Violence*, 28 NASP Communique 5, ¶ 8, at <<http://www.nasponline.org/publications/cq285profile.html>> (last accessed March 11, 2003).

116. See Klein, *supra* n. 1, at 46.

disapproval.¹¹⁷ Some of them are obvious—the correlation between disciplinary trouble and low scholastic achievement,¹¹⁸ the rejection of traditional opportunity structures after repeated failures,¹¹⁹ and the disproportionate impact of anti-gang regulations on minority youth. Here, I wish to highlight two ways in which the extra-marginalization of gang members may be quite worrisome.

Instruction-denying policies remove from the educational mainstream a segment of the youth population that already exhibits alarmingly low levels of school attendance. Despite the lack of nationwide statistics on gang dropout rates, regional studies provide some telling data. In one survey of ninety-nine gang members in St. Louis, only 60% of respondents attended school.¹²⁰ Another report on a youth services program estimated a 50-60% dropout rate among participating gang members. A study in Florida placed the figure at 80%. And one researcher's interviews with forty-seven gang founders in Milwaukee revealed that all of them had stopped attending school, most of them having been expelled for fighting.¹²¹

The troubling question is, what happens to gang members once they are ushered out the exit door? Students who are placed in alternative institutions often receive no guidance at all¹²²; twenty-four states do not even require alternative education assignments for suspended or expelled children.¹²³ For many of these youths, the only alternative to formal education is the streets, where they first adopted the antisocial behavior that put them at odds with the school in the first place. As one report on zero tolerance has observed, education-depriving policies destroy bonding opportunities with adults—for many gang members, already too scarce—and thereby undermine the formation of positive attitudes toward fairness and justice.¹²⁴

Finally, we should not ignore the exceptionally destructive effects that such severe punishments bear on gang members in special education programs. While no specific statistics are available, research has found gang membership to be correlated with low academic achievement, deficient social abilities, poor impulse control, and

117. Vigil's concept of "multiple marginality" posits a causal connection between gang formation and "stacked" conditions of disadvantage vis-à-vis mainstream society on the ecological, socioeconomic, cultural, and psychological levels. See Vigil, *supra* n. 88, at 9-12.

118. Gary D. Gottfredson & Denise C. Gottfredson, *Victimization in Schools* 191 (Plenum Press 1985).

119. See Cloward & Ohlin, *supra* n. 99 at 105; Cohen, *supra* n. 99 at 53-54.

120. Scott H. Decker & Barrick Van Winkle, *Life in the Gang: Family, Friends, and Violence* 189 (Cambridge U. Press 1996).

121. Hagedorn, *supra* n. 14, at 116.

122. See e.g. *Opportunities Suspended*, *supra* n. 104, at 12.

123. *Id.*

124. *Id.* at 10-11.

limited skills and interests—all of which have served as reasons for removing students from mainstream educational curricula.¹²⁵

D. WHY SCHOOLS DO WHAT THEY DO

The official mantra behind gang-specific policies is the need to preserve the “health and safety” of the school setting. However, practitioners are shortsighted in interpreting this rationale, applying it, and critically assessing the legitimacy of its scope.

1. The problem of interpretation

I have been contending that schools hold an inappropriately exclusionary understanding of the community to be protected. The need to preserve security has spurred a campaign to remove the elements of disruption—the gang members themselves. Zero tolerance principles have become the conceptual vehicles for effecting this practice. The shut-out philosophy, however, is justifiable only under one of two conditions: first, the students associated with the disruption can be taken to exist outside of the educational community that officials wish to preserve; and second, said students pose such great risks to instructional goals that the educational community would be better conceived to exclude them. As I have argued, neither of these conditions apply.

Troubled youths need positive influences, and the school is, by default, the optimal provider. For many gang members, the primary unit of social control—the family—suffers from weak relationships and extreme financial and emotional duress.¹²⁶ Schools are next in line as the formal institutional influence, followed by law enforcement.¹²⁷ Needless to say, the latter option is not the ideal one. As long as the school remains the last best hope for redirecting gang members, it is the vital obligation of educational policymakers to figure out how to keep these youths in the fold.

As for the notion that gangs necessarily wreak havoc on school operations, very little support for this media-driven perception appears in the academic literature. Two researchers assert that popular beliefs about gangs “taking over” schools are grossly exaggerated.¹²⁸ Other studies have revealed that not all gang members deride their education, and that even sporadic attendees have plans to earn their diploma

125. E.g. Richard L. Allington et al., *How Administrators Understand Learning Disabilities: A Qualitative Analysis*, Vol. 18 Remedial and Special Ed. (July 1, 1997).

126. Joan Moore, *Going Down to the Barrio* 81 (1991); Vigil, *supra* n. 88, at 44-47.

127. Vigil, *supra* n. 88, at 63.

128. Decker & Van Winkle, *supra* n. 120, at 192 (remarking that “any public stereotype that trumpets ‘gang control’ of schools (or the total absence of a gang problem) is alarmist and unfounded”); *But see* Hutchison & Kyle, *supra* n. 13, at 115 (describing two Chicago public schools in which gangs had “control of individual schools and of specific areas within school buildings”).

eventually.¹²⁹ Another researcher observes that law enforcement officials mislead educators into adopting sensationalist views of the gang member as violent, drug-selling super-predator.¹³⁰

I cannot emphasize enough that gang-related threats are unfortunately very real. Victimization is an extremely serious matter that no responsible policymaker should trivialize. Neither, though, should those in power ignore the fact that the academic literature presents a much less distressing scenario than popular stories would have them believe. Moreover, exclusionary zero-tolerance policies are not only motivated by fear, but they themselves foster it. Teachers who are scared of their students tend to exploit official disciplinary channels in order to avoid having to deal with conflict personally.¹³¹ However, this practice prevents teachers from developing a habit of listening to students and challenging the very preconceptions that invoked fear in the first place.¹³²

The fact is, the exclusionary concept of the school community upon which the current approach is predicated is very much rooted in a systematic perpetuation of ignorance.

2. The problem of application

The second deficiency involves the way in which the health and safety goal bears out in practice. Officials assume that conceptual formulations of the problem must be communicated in actually implemented policies; if gangs spell trouble, then gangs must be announced to spell trouble. Although certain gang activities are antithetical to the school's well-being, policymakers should question their instinct to implement rules that publicize gangs to be "the problem." As I have already mentioned, gangs can strike back with their own self-serving P.R. mechanisms. Given the conflict-seeking nature of these groups, officials may better fulfill their goals by considering savvier approaches that are less outwardly confrontational.

129. James F. Short, Jr. & Fred L. Strodbeck, *Group Process and Gang Delinquency* (1965); Mercer L. Sullivan, "Getting Paid": *Youth Crime and Work in the Inner City* 35 (1989).

130. Klein, *supra* n. 1, at 170 ("It is worrisome to see the occasional gang picture portrayed as the typical gang picture. The ideology of the past twelve years has led to an institutionalized distortion of street gang realities. Who can blame school systems for creating gang units and panicking at the threat of gang members in their schools if they turn first to the street professionals—local police—. . .for what they assume to be informed advice?").

131. Pedro A. Noguera, *Preventing and Producing Violence: A Critical Analysis of Responses to School Violence*, 65 Harv. Ed. Rev. 189, 204 (Summer 1995).

132. *Id.*

3. The problem of scope

Finally, I believe the health and safety aim is far too restrictive, both in terms of situational and temporal scope. The emphasis of the prevailing approach lies on setting conditions to ensure the immediate functioning of educational operations within the limited environs of the school. However, by virtue of the fact that schools are the most crucial institutions of social control for many gang members, educators have additional responsibilities that extend well past these strictures.

For troubled students, the school's influence needs to extend beyond its own walls. Its day-to-day functioning, I have contended, are likely to be more secure with the realization that perceptions of the gang threat are inflated, and that overzealous suppression can have a boomerang effect. Ultimately, the best way to curtail the menacing aspects of gang culture is to ensure that the school itself does not inadvertently foster them, and to provide students with alternatives to the streets. I will explain in the next section that community reach-out efforts are vital in this regard, and that schools must be conscious of their place within this wider community in order to prepare youths to engage in it.

With respect to time restrictions, educators need to extend their thinking past not just the last bell of the school day, but also beyond the gang member's formal educational career. Exclusionary policies that result in the extra-marginalization of gang youths can have profound implications for society over broader periods of time. Street cultures will receive constant infusions of misdirected energy; gang crime will likely increase; general neighborhood conditions may deteriorate. Concerns about temporal limitations, then, circle back to the question of situational scope. The health and safety of the school is inextricably intertwined with that of the community at large.

IV. FUTURE DIRECTIONS

I begin this concluding chapter with a what I take to be a common-sense proposition: Schools will minimize the gang's negative influence and destructive effects by creating conditions that discourage antisocial gang behavior. By "discourage," I do not mean making the school less inviting for these youths and actively pushing them out. Educators have a duty to engage and reach out to gang youths, and hostile actions may backfire by fortifying group cohesion. And by "creating conditions," I do not mean grafting hastily-composed zero-tolerance measures onto the preexisting functional blueprint of the school. If gangs are symptomatic of deep-seated social-structural inadequacies, then educators have to think on the level of systemic reform—both with respect to their own operations, and with regard to the school's potential as an agent of community change.

My prescriptions tend toward the conceptual and the general, although I do include a case study to show one practical manifestation

of the kinds of ideas I propose. I take this approach realizing that first, practitioners have far more insight, expertise, and creativity than I, and second, that different circumstances make each school's gang problem unique.

A. CREATING AN ETHOS OF COLLECTIVE ADVANCEMENT

Creating conditions that discourage gang activity and promote education must start with transforming feelings of factional belonging into a sense of school-wide unity. Three factors will impact on this: the nature of the vision that educators wish to realize, the policies that they construct to implement it, and the procedures and attitudes associated with effecting those policies.

The vision, I have maintained, needs to extend past the immediate health and safety of the school premises, not least of all because these short-term concerns will be best addressed by refocusing on the larger picture. As a threat-posing entity, the gang is likely to have less bite if its internal bonds are weakened; without the cohesive gang's powerful peer influences, students will have less incentive to engage in delinquent behavior. Educators will avoid cohesion-building missteps by first, being aware of and avoiding exclusionary actions that strengthen those bonds, and second, by thinking broadly about creating new affiliations for alienated youth. Both undertakings springboard from the insight that gang-involved students are to be counted among the school community's own, and that the multifaceted problems which lead to gang presence within the school have roots extending far beyond it.

Educators, having articulated their mission, should next recognize that policies and regulatory attitudes simultaneously shape the other. Just as officials must embrace certain attitudes to establish good policies, they must adopt policies that will create and constantly refresh the appropriate mindsets. If officials seem charged by a desire to advance the best interests of *everyone* in the community, they will give gang members fewer opportunities to create conflict. On the flip side, punishments reserved solely for gang members are at once products and self-fueling promoters of an overzealous crackdown mentality. Such youths will view neither the regulations nor the people who enforce them to further their best interests. Without any reason to engage with the mainstream educational community, gang members will be extremely unlikely to renounce their affiliations with deviant groups.¹³³

133. Researchers concur that gangs take on norm-shaping and personal attachment roles that are normally associated with traditional affiliations. See e.g. : pergel, *supra* n. 88, at 152-153 (stating that according to theories of social disorganization, the ruptured bonds between youths, families, and community institutions result in role vacuums that are filled by gangs).

The idea is to create an *ethos* of collective advancement that permeates everything the school does and continually reminds students that the goal of education is *their* well-being. The fact that the present approach achieves exactly the opposite makes the challenge that much harder—but that much more urgent.

B. DO WHAT YOU SAY, SAY WHAT YOU DO

Creating this collective ethos requires action. School officials need to ask how they can provide better substitutes for *all* aspects of gang life that kids find appealing. Educators should conduct research about the powerful needs that drive individuals to join gangs, and then make sure that *all* facets of the school experience are tailored to create more compelling alternatives. While this may seem an instance of a small tail wagging a large dog, the kinds of personal needs that draw individuals to gangs affect a good many non-gang kids who grow up in the same neighborhoods.

The dynamics of inner-city life—the lack of resources, the absence of voice in the power structure, the spatial and social isolation—send signals to youths about their value and legitimacy in society at large.¹³⁴ Persistent violence creates cynicism about the future.¹³⁵ Social networks are impoverished and offer youths few role models and contacts to offer opportunity.¹³⁶ Gangs step in to provide youths with a sense of status and identity,¹³⁷ offering them a source of respect, reputation and power to offset a low conception of self.¹³⁸ Gangs also provide excitement and protection,¹³⁹ as well as a sense of brotherhood.¹⁴⁰ If the school fails to meet these various needs, then youths may see little reason *not* to join gangs. Knee-jerk suppression responses can err on the side of excess, but here, there is no such thing as too much prevention.

In addition to creating outlets that can compete with gangs, the second, oft-overlooked step is to let everyone *know* that the school considers the well-being of every student to be its top priority. If perceptions of conflict are important for the gang's survival, then the rules of politicking dictate that schools should wage an aggressive PR campaign of its own. Consistency of communication is just as important as its mode and content. For example, repeated personal

134. Milbrey W. McLaughlin, *Embedded Identities: Enabling Balance in Urban Contexts*, in *Identity and Inner-City Youth: Beyond Ethnicity and Gender* 43 (Shirley B. Heath & Milbrey W. McLaughlin eds., 1993).

135. *Id.* at 46.

136. *Id.* at 54.

137. Klein, *supra* n. 1, at 78-79; Spergel, *supra* n. 88, at 97; Vigil, *supra* n. 88, at 152-158; Yablonsky, *supra* n. 100, at 195.

138. Yablonsky, *supra* n. 100, at 195.

139. Klein, *supra* n. 1, at 78-79.

140. Vigil, *supra* n. 88, at 51.

attention, whatever its form, works to transform autocratic authority figures into teachers, and violence-prone thugs into students. With this “do what you say, say what you do” approach, students will be bombarded with positive signals that will, over time, feed into the collective ethos I described above.

C. THE LIMITS OF SUPPRESSION RESHAPED

Although this paper has concentrated on regulation and its faults as presently applied, my suggestions thus far reflect my belief that any reform strategy limited solely to suppression will fall short. By definition, suppression means interdiction, and naysaying goes only so far. On the other hand, I think that comprehensive approaches are inadequate, too, if suppression tactics remain conceptually and effectively disjointed from alternative measures. As long as gang members have a regulatory monster to battle, they will handily downplay the good intentions behind other, “softer” approaches.

Somehow, the divisive, discouraging vocabulary of gang-specific suppression needs to reemerge in the form of enabling terms applicable to all. Naysaying must channel directly into efforts to instill in students some meaningful identification with their educational experience. In my belief, the crucial task is to explore how suppression can interact and intermingle with its more outwardly-inclusive intervention and prevention counterparts. The limits of suppression, I will argue, are greatly expanded when educators *contextualize* the regulatory endeavor within other approaches. The way to do this is to structure it to *feed into* them.

D. A CASE STUDY: LESSONS AND EXTRAPOLATIONS

One way these elements can come together is exemplified in the reforms of Webb Middle School in Austin, Texas. Although the locus of the school’s reforms centered around prevention, the types of structural changes that enabled these reforms open up possibilities for redirecting the thrust of school regulations. The strategies that these educators have employed, as I will elaborate, can and should tie directly into the suppression aspect of redirecting gang behavior.

Under the strong leadership of its principal, Webb Middle School galvanized the wider community to gather the support and resources to form about fifty student clubs.¹⁴¹ Each of these groups addressed a different interest, ranging from traditional activities like soccer and chess to more unusual pursuits such as yoga and Tejano dance. Club activities were integrated into the daily curriculum. Administrators reached out to parents and local businesses by asking them to help school staff in providing manpower and expertise; these contributions

141. Tina Juarez, *Where Homeboys Feel at Home in School*, 53 Educ. Leadership 30, 31 (Feb. 1996).

could take the form of organizing, tutoring, mentoring, or simply spending time with the children. Particularly instrumental was the active involvement of the students themselves in bringing this project to life.¹⁴² Because the students had direct say in brainstorming club activities, each individual was virtually guaranteed to find a club that would match his interests. The results of this program were pronounced.¹⁴³ Before implementation, truancy and dropout rates were on the wrong side of state-mandated benchmarks. One year into the program, these numbers were close to zero.

Here, I highlight the lessons that policymakers can take away from Webb Middle School's experience. In my view, each of the following tactics are necessary steps for realizing the broader conceptual goals described above.

1. Involving the community

Once school officials have accepted their role in responding to a community-based problem, they have to point their PR bullhorn out toward that very community, too. They need to communicate the school's willingness to reach out and cooperate with the public. And educators, as spokespeople with moral authority, must encourage others to go through the same soul-searching process that led them to realize their obligation to collaborate with others to implement change.

One might lament that volunteers would be hard to come by in depressed communities where gangs thrive. However, the public surely will surely remain on the sidelines if schools are too timid to dispel gang-related myths and advocate the truth that the school's problems *are* community problems. For many community members, in fact, the mere knowledge that outlets for volunteerism exist may be the only required catalyst for participation. At Webb, this was the case for a number of individuals who had wanted to get involved but were previously unsure how.¹⁴⁴

Community-wide participation is important, not just because logistical support comes with it, but also because it exposes youths to relational associations with adults that differ from what students are used to at school. Students begin to feel that the community is pushing an agenda that is centered around their own needs. If, like at Webb, this adult contact is structured into the school day, then such constructive associations may start to "infect" impressions of the school experience writ large. Webb's educators, realizing this connection, revamped the academic curriculum to make classes more resemble the activities-based club experience—a move that encouraged students to tie together the positive cues of the one with the other. The

142. *Id.*

143. *Id.* at 31-32.

144. *Id.* at 31.

upshot of community involvement is that students come to have more reason to view adults as people whom they should identify with, not oppose.

Suppression efforts can draw several benefits from a committed community.

- *Students can learn that the regulations enforced in school are motivated by the same norms and values that apply to society in general.* For example, the adults involved in Webb's clubs can explain how the values important to those activities—fair play, honesty, self-discipline, respect for others, and hard work—are important to the school's operations as well.
- *Community members have the chance to collaborate closely with school officials in determining how to handle disciplinary infractions.* Such measures may lie outside the standard arsenal of stern lectures and detentions. Creative, carefully thought-out measures that involve non-traditional authority figures and contexts may make a stronger impression on youths desensitized to standard procedures.
- *Finally, the increased presence of adults will naturally reduce violent behavior.* This effect, if carefully constructed, ideally will be the product of respect rather than intimidation.

2. Involving the students

By gathering direct input from those they serve, educators simultaneously discover what students need and communicate to them that their well-being is the school's driving motivation. Indeed, Webb's clubs would have flopped if students did not care to join; gangs could have viewed them as yet another school-sponsored imposition. Furthermore, one crucial advantage of student participation is the humanizing effect of conversation. (It is hard to be frightened of a would-be Tejano dancer.)

The potential implications for discipline are significant.

- *If students contribute to formal decision-making processes, they will perceive the outcomes as more legitimate.* Conceivably, student feedback can have a place in both rule creation and rule enforcement. Although the limits of feasibility are probably not too broad for the former, sufficiently meaningful participation will give students a personal stake in abiding by regulations over which they sense some ownership. As for rule enforcement, youths are also more likely to accede to punishments that are determined according to procedures that they themselves help to arrange.
- *The interdictory element of discipline can be reshaped in the form of input privileges.* The ability to offer feedback is all the

more valuable if contributed ideas bring about tangible results. One way to cast discipline from a more preventive angle, then, is to reward good behavior with official responses that empower students to really make a difference. For instance, in the context of Webb's group activities, youths who maintain commendable behavior records should be allowed to choose and direct club projects for a set period of time.

- *The same peer pressures that inspire much gang activity can become a prosocial influence.* Student involvement opens possibilities for imaginative and more effective forms of discipline. Perhaps Webb's club setting would be the proper context to impose penalties, even for violations that occur outside of club activities. Or maybe the best way to dispense punishment is before sunrise in front of a group of close friends, when *all* involved parties, including the offenders themselves, would wonder whether sleep deprivation was worth the guilty act.

3. Presenting opportunities to succeed

This advice is as much a warning not to push gang members away from school as it is a call to pull them toward it. Gang involvement holds more attraction for those youths who find little chance for success in mainstream society, either because of personal deficiencies or wider systemic biases.¹⁴⁵ Repeated failures in one setting will impel kids to seek other yardsticks for achievement. The group activities at Webb Middle School managed to chase out the specter of disappointment by placing exclusive emphasis on the opportunity to succeed.¹⁴⁶ Some students, once freed of this preoccupation with failure, found themselves developing a sense of self-confidence that carried over into the classroom. Accomplishment in one induced success in the other, prompting a very healthy cycle.

The way this bears on disciplinary practices is somewhat more subtle, but no less important.

- *Rule violations must be presented as learning experiences instead of failures.* Disciplinary measures should be statements about an individual's actions, not his self-worth. Rejection-oriented punishments like expulsions signal that students are irredeemable in the eyes of the educational community; gang-specific policies only communicate that gang members are more likely than not to be irredeemable. The alternative, I believe, is consistently to link punishments to constructive ends.

145. See *supra* text accompanying n. 117.

146. Juarez, *supra* n. 141, at 31.

- *Those who administer discipline become instrumental in communicating the presence of opportunities.* The link between suppression and construction is forged not only in creative deed, as I have been stressing, but also in spoken word. Educators should actually *tell* students that they must face consequences for choices they made, but that their redirection means a great deal to the community. Importantly, officials should not assume that students know why their action was wrong; the norms that rule the streets may be inconsistent with the kinds of rationales that undergird the mainstream ethic. As before, the school should work with parents and community members to think of the most effective manner and messenger for each unique case.

V. CONCLUSION

For a gang prevention initiative, perhaps the most stunning aspect of Webb Middle School's experiment is how much the trappings of gang life found their way into the formal school environment. The entire student body was broken down into dozens of "sets," each with their own respective leaders and even their own distinctive "colors," courtesy of local businesses that donated club uniforms. While subsequent reform endeavors need not be so visibly dramatic, the core of the Webb philosophy is undeniable. Gang members will see little reason to affiliate with the school if it fails to accomplish for them what the gang does; and the school, in turn, will most certainly fail if it ignores realities about gangs and dodges its responsibility to cope with them.

My criticisms and recommendations revolve around a simple idea—that to beat the gang problem, schools have to know the competition and themselves. The *status quo* approach fails on both ends. Exclusionary gang-isolating strategies pay short shrift to decades of research about gangs. They subordinate the educational mission that they purport to protect. They fail to acknowledge the doomed fate of overzealous zero-tolerance campaigns against conflict-seeking groups. They ignore the exacerbated injustices of profiling in schools. And their rationales are unacceptable, because they define the school's obligations to fall shy of saving the very kids whom educators, if anybody, *ought* to save.

With the right knowledge and attitude, schools can parlay the suppressive aspects of disciplinary regulation—perhaps the thorniest part of the pro-socializing project—into constructive messages and activities. In creating a sense of collective advancement, communication will be just as critical as action. Imagination, too, must assume as much importance as facts. The truth is that gang members, like anybody, need structure, rules, belonging, a sense of identity, and something to hope for. The fact is that deprivation impels them to turn

inward, against each other, and potentially against anyone else. Imagination kicks in once we realize that if a kid is able to explain, “In school, we are nothings; in a gang, we are somebodies,”¹⁴⁷ then he has it in him to really *become* a somebody—if only schools will do their part to show him the way.

147. Juarez, *supra* n. 141, at 30.

