Volume 107
Issue 2 *Dickinson Law Review - Volume 107, 2002-2003*

10-1-2002

Safeguarding Schools: Drug-Free School Zone Acts in the Legal Arena

Ryan J. Fleming

Safeguarding Schools: Drug-Free School Zone Acts in the Legal Arena

Ryan J. Fleming*

I. Introduction

In October of 1998, David Drummond sat on his bed as police, in possession of a search warrant, climbed Drummond's fire escape and entered his apartment.[1] The police quickly placed Drummond in custody and searched his apartment, finding Ziploc packets and clear bags of cocaine, empty Ziploc bags, and $280 in cash, on or near Drummond, all within plain view.[2] Drummond's apartment was located only 587 feet from the St. Rose of Lima School.[3] Drummond was convicted of possession of a controlled substance with intent to deliver, and sentenced to two- to four-years imprisonment.[4]

At first glance, Drummond's conviction and sentencing appear as unremarkable as any of the hundreds of daily arrests for drug violations. One facet of Drummond's incarceration, however, places Drummond's conviction in a developing legal arena; Drummond received a heightened sentence under Pennsylvania's drug free school zone act.[5] The act imposes a minimum sentence of two- to four-years total confinement for any delivery of or possession with intent to deliver a controlled substance within 1000 feet of a public, private, or parochial school, college or university.[6] Although Drummond was in his apartment, which was inaccessible to children, the statute ensured that he would receive a harsher penalty because of the threat that his wares posed.

---

* J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, 2003; B.A., The University of Maryland at College Park, 1998. The author would like to thank Diana A. Clancy and his family for their love and support throughout the writing of this comment.

1. *See* Commonwealth v. Drummond, 2001 PA Super. 122, ¶ 3, 775 A.2d 849, 851 (2001).
2. *See id.*
3. *See id.* ¶ 3 n.5, 775 A.2d at 851 n.5.
4. *See id.* ¶ 3, 775 A.2d at 851.
5. *See id*; *see also* 18 PA. CONS. STAT. § 6317 (2001).
6. *See* 18 PA. CONS. STAT. § 6317(A).

Drummond appealed his conviction on the grounds that the court erred in applying the act.[7] His appeal was one of the latest attacks on what has become a much-challenged legislative entity: the drug-free school zone act. The typical school zone act is based loosely on the federal drug-free school zone act.[8] The federal statute ("Federal Act") doubles the minimum punishment for distribution of, possession with intent to distribute, or manufacture of controlled substances if the offense is committed within 1000 feet of a school or other area likely to be frequented by children.[9]

Offenders have subjected school zone acts to a variety of legal challenges.[10] However, courts have unanimously rejected these challenges, upholding the validity of the challenged acts. This comment will examine the ceaseless strength of school zone acts, the challenges that have been levied against them, and why the acts are so important. It will also identify why courts should continue to uphold the acts, and why state legislatures should push for even stricter penalties for offenders caught selling drugs in school zones.

II. Background

A. The Necessity of School Zone Acts

To the dismay of teachers, parents, and law enforcement officials, narcotics have become a fixture of American society. The government has responded accordingly; federal drug control spending rose from roughly $1.5 billion in 1981 to $17.9 billion in 1999 according to a recent study by the Schneider Institute of Health Policy.[11] Drug use among young adults continues to rise despite the increasing

7. *See Drummond*, 2001 PA Super. ¶ 5, 775 A.2d at 852; *see also* text accompanying notes 45-62 (including detailed discussion of *Drummond*).

8. *See* 21 U.S.C. § 860 (2001) (originally codified at 21 U.S.C. § 845a (1985)). Although states do not always specifically name the drug-free school zone acts as such, hereinafter they shall be referred to as school zone acts.

9. *See* 21 U.S.C. § 860(a); *see also* 21 U.S.C. § 841(b) (outlining penalties for various drug-related offenses).

10. *See* State v. Swafford, 890 P.2d 368 (Kan. Ct. App. 1995) (rejecting school zone act challenge based on argument that prosecution must show that defendant was aware that sale occurred within 1000 feet of a school); Commonwealth v. Taylor, 596 N.E.2d 333 (Mass. 1992) (rejecting challenge based on argument that statute was void for vagueness); Dawson v. State, 619 A.2d 111 (Md. 1993) (rejecting challenge based on argument that no children were in school zone at time of drug sale); *Drummond*, 2001 PA Super. 122, 775 A.2d 849 (rejecting challenge based on argument that children had no access to the defendant's apartment).

11. *See* CONSTANCE HORGAN ET AL., SUBSTANCE ABUSE: THE NATION'S NUMBER ONE HEALTH PROBLEM 85 (Jane J. Stein ed., 2001).

expenditures.[12] Weekly and monthly use of marijuana by all persons over twelve years of age rose from 4.9 million and 8.2 million, respectively, in 1992 to 6.8 million and 10.5 million, respectively, in 1998.[13] The number of high school students reporting having used marijuana or cocaine rose from 31.3% and 5.9%, respectively, in 1991, to 47.2% and 9.5%, respectively, in 1999.[14] Additionally, while the total crime index for offenders under the age of eighteen dropped by 20.5% from 1990 to 1999, the number of drug abuse violations among the same group increased by a startling 132.2% over the same time period.[15] Although levels of drug use among youths have declined from their peaks in the mid-1990s, they remain above levels of the early-1990s.[16] Studies show that significant changes in drug awareness take place between the ages of twelve and thirteen;[17] accordingly, it is imperative that regulations be enacted to eliminate children's access to drugs. The first place to start is in schools.

B. The Federal Statute

The Federal Act was originally introduced in 1970[18] in a far different form than it appears today. Currently the statute states that any person who distributes, possesses with intent to distribute, or manufactures a controlled substance within 1000 feet of a school, college, or playground, or within 100 feet of a youth center, swimming pool, or video arcade, is subject to twice the maximum punishment for those crimes outside of a school zone, and at least twice any term of supervised release.[19] The language of the Federal Act was not significantly strengthened until amendment in 1986.[20] That amendment added language to the Federal Act that expanded its coverage from elementary and secondary schools to include vocational schools,

12. *See generally id.*

13. *See id.* at 35.

14. *See* NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., YOUTH RISK BEHAVIOR SURVEY: 1999 (2000), *available at* http://www.cdc.gov/nccdphp//dash/yrbs /trend.htm.

15. *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: 2000, at 361 tbl. 4.6 (2001), *available at* http://www.albany.edu/sourcebook/1995/pdf/t46.pdf.

16. *See* HORGAN ET AL., *supra* note 11, at 14.

17. *See id.* at 28 ("Thirteen-year-olds are three times as likely to know how to obtain marijuana or to know someone who uses illicit drugs than are 12-year-olds.").

18. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 419, 84 Stat. 4566, 4595-96 (codified as amended at 21 U.S.C. § 860 (2001)).

19. *See* 21 U.S.C. § 860(a) (2001).

20. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1004(a), 1104, 1105(c), 1841(b), 1866(b)-(c), 100 Stat. 3207-6, 3207-11, 3207, 3207-52, 3207-55.

colleges, junior colleges, and universities.[21] Additionally, a 1988 amendment added language expanding the Federal Act to include areas within 100 feet of playgrounds, youth centers, swimming pools, and video arcades.[22] These amendments broadened the reach of the statute and evinced Congress's intent to criminalize drug activities not only in schools, but also in other areas where children are likely to be present.

The Federal Act functions as a sentence enhancer.[23] The statute enhances the penalties for violations of 21 U.S.C. § 841.[24] Subsection (b) of section 841 imposes a minimum sentence of ten years for the manufacture of, distribution of, or possession with intent to manufacture or distribute marijuana, cocaine, heroin, or other drugs in large quantities.[25] That subsection also allows for a maximum fine not to exceed the greater of that authorized by title 18 of the United States Code or $4,000,000.[26] For second offenses, the Federal Act imposes a minimum sentence of twenty years or a maximum fine of $8,000,000.[27] The subsection imposes a minimum sentence of five years, or a fine of $2,000,000, for the possession of lesser amounts of the listed drugs.[28] For second offenses involving those smaller quantities, the statute imposes a minimum sentence of ten years or a fine of $4,000,000.[29] By doubling these delineated penalties, the Federal Act ensures harsher penalties for individuals who commit their crimes within areas proximate to schools.

C. *The State Statutes*

Congress's creation of legislation to enhance existing drug penalties increased federal efforts to eradicate the drug trade from the lives of its most vulnerable targets. States soon followed. The basic language of state school zone acts is typically modeled on the Federal Act. State school zone acts usually impose some form of increased penalty for

21. *See id.*

22. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 6452(b)(1), 6457-6458, 102 Stat. 4371, 4373.

23. Regardless of the seeming simplicity of the statute as nothing more than a sentence enhancer, some courts have found that the statute actually created a separate range of crimes. *See, e.g.*, United States v. Chandler, 125 F.3d 892 (5th Cir. 1997).

24. *See* 21 U.S.C. § 841(b) (2001).

25. *See id.* § 841(b)(1)(A)(i)-(vii) (imposing minimum ten-year penalty for possession of one kilogram of heroin, five kilograms of cocaine, 100 grams of PCP, ten grams of LSD, 1000 kilograms of marijuana, etc.).

26. *See id.*

27. *See id.*

28. *See id.* § 841(b)(1)(B) (imposing minimum five-year penalty for possession of 100 grams of heroin, 500 grams of cocaine, ten grams of PCP, one gram of LSD, 100 grams of marijuana, etc.).

29. *See id.*

possession or distribution of drugs within 1000 feet of a school or a few hundred feet of a playground, video arcade, or other area likely to attract children. Curiously, however, most of the state statutes impose penalties far milder than their federal counterpart.

The Pennsylvania school zone act contains language quite similar to that of the federal statute.[30] The statute provides a minimum sentence of two years and a maximum sentence of four years for delivery of or possession with intent to deliver any controlled substance if the prohibited action occurred within 1000 feet of a school, college, or university, within 250 feet of a recreation center or playground, or on a school bus.[31] Although the statute does provide for harsher penalties if the court finds that there was intent to deliver to an individual under the age of eighteen years,[32] the penalties imposed do not match those of the Federal Act.

Similarly, under Maryland's former school zone act, an individual who manufactures, distributes, or possesses with intent to distribute a controlled substance within 1000 feet of a school or school board or on a school vehicle faces a maximum penalty of twenty-years imprisonment or a maximum fine of $20,000 (or both) for a first offense, or a minimum sentence of five- to forty-years imprisonment or a $40,000 fine (or both) for a second offense.[33] It is important to note, however, that the Maryland statute includes language that addresses a particular challenge that has been brought in Maryland, as well as in states that have not enacted such clearly written statutes.[34] The Maryland statute specifically states that the penalty for distribution in a school zone is enhanced regardless of whether school was in session at the time of the crime, or whether the property was being used for activities other than for school purposes at the time.[35] Regardless of the specificity with which the act was written, however, the Maryland statute contains penalties that are weak in comparison with those of the Federal Act.

An even shorter minimum penalty is assigned under the Massachusetts school zone act.[36] That statute, containing the same

30. *See* 18 PA. CONS. STAT. § 6317 (2001).

31. *See id.* § 6317(A).

32. *See id.*

33. *See* MD. ANN. CODE art. 27, § 286D (2001) (repealed 2002). Although Maryland's school zone act was recently repealed, its construction nonetheless serves as an excellent example of effective school zone legislation.

34. *See infra* text accompanying notes 73-87 (discussing Dawson v. State, 619 A.2d 111 (Md. 1993)); *see also* State v. Jenkins, 15 S.W.3d 914, 918 (Tenn. Crim. App. 1999) (rejecting defendant's challenge of his conviction on grounds that Tennessee legislature made no indication in writing Tennessee school zone act that the act should apply only during school hours).

35. *See* MD. ANN. CODE art. 27, § 286D(a)(i)-(ii) (repealed 2002).

36. *See* MASS GEN. LAWS ch. 94C, § 32J (2001).

geographic limitations as the Federal Act for distance from a school or playground, imposes a minimum sentence of two years in a correctional facility for a drug crime in a school zone.[37]

One of the most illogically written school zone acts is that of California.[38] The California statute states that, when the drug offense occurs within 1000 feet of an elementary, vocational, junior high, or high school, the offender shall receive an increased penalty of three, four, or five years (left to the court's discretion).[39] However, the statute requires that the crime occur during hours that the school is open for classes or school-related programs, or at any time when minors are using the facility, for the statute to apply.[40] In drafting its school zone act in such a fashion, the California legislature contravened the intent of at least one other state legislature, which enacted a school zone act that applies to the school zone regardless of whether children are present at the time of the crime.[41] California has stated instead that children must be present at the time that the transaction occurs; otherwise, the statute does not apply and no harsher penalty is meted out. Additionally, the state's requirement of a discretionary decision by the court to impose a minimum of three-years imprisonment falls short of the federal standard.

Not all states impose such watered-down versions of the Federal Act. Texas's school zone act, for example, imposes increased grades of offenses, from third- or second-degree felonies to first-degree felonies, for drug offenses committed within 1000 feet of a school, or 300 feet of a youth center, swimming pool, or video arcade.[42] The Texas statute increases the minimum confinement by five years, and doubles the maximum fine for non-school zone drug violations.[43] Although Texas does impose a penalty for school zone violations that is somewhat stricter than those of other states, it is still weaker than the Federal Act.

The fact that states have enacted school zone acts is reassuring when considering the increase in drug use by youths in recent years. It is troubling, however, that most state statutes do not impose penalties as severe as those of the Federal Act. In light of the increased drug use by children, a legislative initiative aimed at curbing such use by limiting

37. *See id.*
38. *See* CAL. HEALTH & SAFETY CODE § 11353.6 (Deering 2001).
39. *See id.* § 11353.6(b).
40. *See id.*
41. *See* Dawson v. State, 619 A.2d 111, 117 (Md. 1993) ("The General Assembly established the 'drug-free zones' as a prophylactic device aimed at protecting children on or near school property . . . the application of [the statute] to all transactions within the 1,000 foot perimeter, *regardless of the presence of children*, is substantially related to this goal.") (emphasis added).
42. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.134 (Vernon 2000).
43. *See id.* § 481.134(c).

trafficking and its resulting negative effects on children should fully be utilized. But a statute with no teeth, such as the California statute, which has no effect on drug dealers if their activities occur at night, cannot possibly serve as a deterrent. A valuable weapon in the drug war is lost if states do not enact effective school zone acts. More states must enact statutes modeled on Maryland's recently-repealed school zone act, which included specific language identifying the intent of the legislature to apply the statute to all situations on school grounds, regardless of the presence of children. Without clear, concise statutes, defendants will always be willing and able to challenge the language of school zone acts.

III. Analysis of Legal Challenges

Challenges to school zone acts have come in a variety of forms. While some challenges have shown creativity or potential for validity, the courts have inevitably dismissed all challenges. This section will analyze a number of legal challenges to school zone acts and courts' responses.

The introduction of this comment introduced a recent Pennsylvania case, *Commonwealth v. Drummond*.[44] In *Drummond*, the police entered Drummond's apartment pursuant to a search warrant and placed him in custody before discovering several baggies containing cocaine and $280 in cash, all within the vicinity of where Drummond had been sitting when police entered the apartment.[45] Drummond's apartment was located 587 feet from the St. Rose of Lima School.[46] Drummond was convicted of possession of a controlled substance with intent to distribute[47] and sentenced to two- to four-years imprisonment under the Pennsylvania school zone act.[48]

Drummond challenged his conviction, claiming that the trial court erred by sentencing him pursuant to Pennsylvania's school zone act.[49] Specifically, Drummond challenged the court's application of the school zone act to him because his residence was not open to the general public, particularly children, despite the location of his apartment and its proximity to a school.[50]

When the Pennsylvania Superior Court decided *Drummond*, it also decided a companion case, *Commonwealth v. Hinds*.[51] In *Hinds*, police

44. 2001 PA Super. 122, 775 A.2d 849 (2001).
45. *See id.* ¶ 3, 775 A.2d at 851.
46. *See id.* ¶ 3 n.5, 775 A.2d at 851 n.5.
47. *See id.* ¶ 3, 775 A.2d at 851 (citing 18 PA. CONS. STAT. § 6317 (2001)).
48. *See id.* ¶ 3, 775 A.2d at 851.
49. *See id.* ¶ 5, 775 A.2d at 852.
50. *See id.* ¶ 14, 775 A.2d at 855.
51. 2001 PA Super. 121, 775 A.2d 859 (2001).

executed a search warrant of Hinds's apartment and discovered 5.97 grams of crack cocaine, four Ziploc packets of marijuana, drug paraphernalia and two guns.[52] The jury convicted Hinds and the court sentenced him under the Pennsylvania school zone act to an aggregate of five- to ten-years imprisonment, including the mandatory sentence imposed by section 7508 of the Pennsylvania school zone act,[53] but did not apply section 6317.[54] The Commonwealth appealed the issue of whether the trial court erred in failing to adopt the mandatory two-year sentence of the Pennsylvania school zone act.[55]

In both cases the court dismissed the argument that the school zone act did not apply because no minor was involved in the actual offense with which the defendants were charged.[56] The court relied on the reasoning of *Commonwealth v. Campbell*,[57] which held that, in enacting section 6317, the Pennsylvania legislature intended to protect children from the evils of drug use not only on school grounds or buses, but also in other areas where children were likely to be present, such as playgrounds or recreation centers.[58] The court found that section 6317 was intended to protect children from harms attendant to the drug trade and that such harms are present when an individual intending to sell drugs merely resides within 1000 feet of a school, regardless of whether the drugs are accessible to children.[59] The court stated that finding otherwise would emasculate the meaning of a "drug-free school zone."[60] In both cases, the court found that application of section 6317 was proper.[61]

Similarly, in another decision strengthening school zone acts against attack from criminals, the Kansas Court of Appeals found that a drug dealer may be punished under a school zone act even if he is not aware of his location within a school zone.[62] In *State v. Swafford*,[63] Swafford

52. *See id.* ¶ 2, 775 A.2d at 860.

53. *See* 18 PA. CONS. STAT. § 7508 (2001).

54. *See Hinds*, 2001 PA Super. ¶ 3, 775 A.2d at 860; *see also supra* text accompanying notes 30-32 (discussing 18 PA. CONS. STAT. § 6317).

55. *See Hinds*, 2001 PA Super. ¶ 4, 775 A.2d at 860; *see also* 18 PA. CONS. STAT. § 6317.

56. *See* Commonwealth v. Drummond, 2001 PA Super. 122, ¶ 15, 775 A.2d at 857 (2001); *Hinds*, 2001 PA Super. ¶ 7, 775 A.2d at 861.

57. 2001 PA Super. 251, 758 A.2d 1231 (2000).

58. *See Drummond*, 2001 PA Super. ¶ 15, 775 A.2d at 856; *Hinds*, 2001 PA Super. ¶ 7, 775 A.2d at 862.

59. *See Drummond*, 2001 PA Super. ¶ 15, 775 A.2d at 857; *Hinds*, 2001 PA Super. ¶ 7, 775 A.2d at 863.

60. *See Drummond*, 2001 PA Super. ¶ 15, 775 A.2d at 857; *Hinds*, 2001 PA Super. ¶ 7, 775 A.2d at 863.

61. *See Drummond*, 2001 PA Super. ¶ 19, 775 A.2d at 858; *Hinds*, 2001 PA Super. ¶ 9, 775 A.2d at 863.

62. *See* State v. Swafford, 890 P.2d 368 (Kan. Ct. App. 1995).

was convicted under the Kansas school zone act of selling rock cocaine to a police informant whose apartment was within 1000 feet of a school.[64]

Swafford challenged his conviction on the ground that knowledge that the sale occurred within 1000 feet of a school is an essential element of the crime.[65] The court examined the language of the statute and concluded that the Kansas legislature did not intend for the school zone act to require the defendant to know that he was within 1000 feet of a school in order to be effective.[66] The court found that the purpose of the school zone act was to protect children from drug use and the negative situations that accompany it.[67] The court reasoned that children would be exposed to these negative influences when individuals deal drugs near schools regardless of whether the dealers are aware of their proximity to the schools.[68] Additionally, the court found that requiring proof of a defendant's knowledge of his presence within a school zone at the time of the sale would place an arduous burden on police and prosecutors and would contravene the clear purpose of the statute.[69] The court affirmed the conviction.[70]

The decisions of the courts in *Drummond*, *Hinds*, and *Swafford* present an important element for creating an effective school zone act. In all three cases, the courts looked to the intent of the legislature, as expressed through the language of the school zone acts, to determine the effectiveness of the acts. If future courts scrutinize the language of the acts, the clarity of the school zone acts as enacted by state legislatures will determine the effectiveness of the acts in safeguarding children from the dangers of drug use. In addition to delineating clearly acts that are effective regardless of children's access to the place of sale or defendants' knowledge that they were in a drug zone at the time of the sale, legislatures must signal (and courts must recognize) the importance of making school zone acts effective twenty-four hours a day. By illuminating this component of the Pennsylvania statute, the court in *Drummond* and *Hinds* illustrated a legislative intent not simply to keep drugs away from children, but to keep all dangers attendant to drugs away from children.[71] Similarly, the court in *Swafford* recognized the

63. *Id.*
64. *See id.* at 371 (citing KAN. STAT. ANN. § 65-4161(d) (2000)).
65. *See id.*
66. *See id.* at 371-72.
67. *See id.* at 372.
68. *See id.*
69. *See id.*
70. *See id.* at 374.
71. *See* Commonwealth v. Drummond, 2001 PA Super. 122, ¶ 15, 775 A.2d 849, 857 (2001); Commonwealth v. Hinds, 2001 PA Super. 121, ¶ 7, 775 A.2d 859, 863

negative influence of these dangers on children, and indicated that a dealer's knowledge is irrelevant to such influence.[72]

Although dealers clearly can no longer challenge their convictions under a school zone act because of their lack of knowledge that they were in a drug-free school zone at the time of the offense, offenders are left with a potential loophole if school zone acts do not provide for round-the-clock effectiveness. Fortunately, courts have recognized the legislative intent of removing the threats of the drug trade from schools at all hours, but challenges to the time of arrest have arisen.

In *Dawson v. State*,[73] undercover officers approached Dawson at 9:30 p.m. within 1000 feet of Halls Cross Elementary School and inquired about purchasing cocaine.[74] Dawson sold the officers a small packet of cocaine for $25 and stated that he was routinely in that area and that the officers should look for him again if they needed more cocaine.[75] Dawson was arrested and convicted of unlawful distribution of a controlled dangerous substance and unlawful distribution of a controlled dangerous substance within 1000 feet of a school,[76] a violation falling under Maryland's school zone act.[77]

Dawson appealed his conviction, arguing that application of the Maryland school zone act violated the Due Process Clause of the United States Constitution and the Maryland Declaration of Rights.[78] He argued that there was no "real and substantial" relationship between the Maryland legislature's objective of protecting schoolchildren and the school zone act's imposition of liability regardless of the presence of children at the time of the crime.[79] Dawson argued that the legislative purpose of protecting children was not served by applying the statute at times when children were not present.[80]

The *Dawson* court found that it was not the Maryland legislature's intent to stop only the use of drugs by school-age children, but also to limit children's exposure to the violent crime and demoralizing environment that are an inevitable consequence of the drug trade.[81] The court dismissed Dawson's argument that the school zone act was too broad and found that the act was intended as a prophylactic measure to

(2001).

72. *See* 890 P.2d at 372.
73. 619 A.2d 111 (Md. 1993).
74. *See id.* at 113.
75. *See id.*
76. *See id.* at 114.
77. *See* MD. ANN. CODE art. 27, § 286D (2001) (repealed 2002).
78. *See Dawson*, 619 A.2d at 114.
79. *Id.* at 115.
80. *See id.*
81. *See id.*

halt drug activity and its attendant evils in even those areas that, although labeled as "school areas," are not frequented by students solely during school hours.[82] The court recognized that the Maryland legislature did not intend merely to regulate the business hours of those trading in drugs, but to eliminate those individuals from schools altogether.[83] The easiest way to do so was to make dealers aware that dealing drugs in school areas will result in penalties drastically outweighing any possible benefits to the dealers, regardless of the hour.[84] The court found the Maryland school zone act to be rationally related to the goal of protecting schoolchildren, noting that due process does not "require that the means chosen [by the legislature] to deal with a problem score a notable success in every application of the statute."[85] Finally, the court noted that in its research every court reviewing school zone acts had found them to be constitutional.[86]

The decision in *Dawson* is illustrative of how legislatures and courts should strive to create and interpret school zone acts. Although it is important that the Maryland Court of Appeals recognized the significance of applying the Maryland school zone act around the clock, regardless of the presence of children, the Maryland legislature took an important initial step when it enacted the school zone act. The legislature included the language that states that the act shall apply regardless of whether school is in session at the time of the offense, or whether the school property is being used for school purposes at the time of the offense.[87] That language cuts down the amount of judicial guesswork necessitated by less-clear statutes.

Some courts, however, are willing to take a clearly written statute and infer a legislative intent, even in the absence of specific words in the legislation to support their interpretation. In *Morse v. State*,[88] Morse was found guilty of dealing cocaine within 1000 feet of a school under the Indiana school zone act; the statute had no language pertaining to whether the school was open at the time of arrest.[89] Morse challenged the statute as unconstitutional because it did not require children to be present at the time of the crime.[90] The court dismissed Morse's challenge, stating that it could easily presume that the legislature

82. *See id.* at 116.
83. *See id.* at 116-17.
84. *See id.*
85. *See id.* at 117 (quoting United States v. Agilar, 779 F.2d 123, 125 (2d Cir. 1985)).
86. *See id.* at 118.
87. *See* MD. ANN. CODE art. 27, § 286D(a)(1)(i)-(ii) (2001).
88. 593 N.E.2d 194 (Ind. 1992).
89. *See id.* at 195; *see also* IND. CODE § 35-48-4-2(b)(2)(B)(i) (2002).
90. *See Morse*, 593 N.E.2d at 197.

recognized that school premises are not occupied solely during school hours, but are also gathering places for children outside of school hours.[91] The *Morse* court concluded by noting that the legislature was justified in that presumption as well as in its intention not to require proof of the presence of children for conviction under the statute.[92]

Some comfort may be taken in the *Morse* court's extrapolation of a legislative intent to strike down an offender's challenge of a school zone act as unconstitutional. The decision in *Morse*, however, is no guarantee that other courts will not abide strictly by the language of the school zone act, choosing to uphold a similar challenge if language pertaining to time is not present in the statute.

It would seem that a far more secure approach for a state legislature to take is to follow the lead of Massachusetts, whose school zone act states that any person who delivers dangerous substances within 1000 feet of a school, "whether or not in session," may be sentenced to a mandatory minimum sentence of two years.[93] The clarity of that statute allowed the Appeals Court of Massachusetts, in *Commonwealth v. Hernandez*,[94] to dispense expeditiously with Hernandez's challenge of the statute.[95] Hernandez challenged the statute on the grounds that the area where he was arrested did not meet the definition of a "school" because school was not in session at the time of his arrest, and, thus, the statute did not apply.[96] The court relied on the clarity of the statute to hold that, because the statute states that school does not have to be in session at the time of the incident, Hernandez's claim was groundless.[97]

Lack of clarity in statutes may also allow offenders to challenge school zone acts as overly vague. In *Commonwealth v. Taylor*[98] the Supreme Court of Massachusetts heard a challenge of the state's school zone act on the ground of unconstitutional vagueness. In *Taylor*, a police officer observed Taylor engaged in what the officer believed to be a drug sale in a subway station approximately 125 feet from Don Bosco High School.[99] The officer apprehended and arrested Taylor and found fourteen packets of marijuana and $221 in cash.[100] Taylor was convicted of possession of marijuana with intent to distribute and possession of

91. *See id.*
92. *See id.*
93. MASS. GEN. LAWS ch. 94C, § 32J (2001).
94. 680 N.E.2d 111 (Mass. App. Ct. 1997).
95. *See id.* at 116.
96. *See id.*
97. *See id.*
98. 596 N.E.2d 333 (Mass. 1992).
99. *See id.* at 334.
100. *See id.*

marijuana with intent to distribute within 1000 feet of a school,[101] the latter charge falling under the Massachusetts school zone act.[102]

Taylor challenged his conviction on the ground that the Massachusetts school zone act violated his rights under the Due Process Clause of the United States Constitution because the provision was too vague and overbroad to be properly enforced.[103] Specifically, Taylor argued that the act did not sufficiently define the specific acts prohibited.[104] The court found that the Massachusetts school zone act was not unconstitutionally vague.[105] The court stated that the act satisfied the requirements of the "void for vagueness" test in that a person of average intelligence could understand that it prohibits possession of drugs with intent to distribute within 1000 feet of a school and that it instructs police on what is criminal, deterring arbitrary enforcement.[106]

In a creative claim, Taylor also argued that the act was overbroad because there was no area within the City of Boston that was not also within 1000 feet of a school zone.[107] Taylor claimed that the increased proximity to schools in Boston created a discriminatory statute because anyone in Boston charged with possession with intent to distribute would be charged under the school zone statute, while dealers outside of Boston would not be similarly charged.[108] The court dismissed the possibility that inner-city drug dealers might constitute a "suspect class" worthy of protection, part of the test for equal protection violations.[109] The court noted that other courts have routinely found[110] that an individual's increased proximity to a school, regardless of the reason, does not make him different from other citizens and, therefore, entitled to different treatment.[111]

---

101. *See id.*

102. *See* MASS. GEN. LAWS ch. 94C, § 32J (2001).

103. *See Taylor*, 596 N.E.2d at 336.

104. *See id.*

105. *See id.* The court stated that the "void for vagueness" doctrine holds that a statute must define the offense with sufficient clarity that ordinary people can understand what is prohibited and in such a manner that it does not encourage arbitrary enforcement. *Id.* (quoting Commonwealth v. Williams, 479 N.E.2d 687, 688 (Mass. 1985)).

106. *See id.*

107. *See id.*

108. *See id.* The court treated Taylor's claim as a contention that the statute violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.*; *see* U.S. CONST. amend. XIV, § 1 ("[N]or [shall any state] deny to any person within its jurisdiction the equal protection of the laws.").

109. *See Taylor*, 596 N.E.2d at 336 n.8.

110. *See* United States v. Pitts, 908 F.2d 458, 460 (9th Cir. 1990); United States v. Agilar, 779 F.2d 123, 126 (2d Cir. 1985); Harrison v. State, 560 So. 2d 1124, 1128 (Ala. Crim. App. 1989).

111. *See Taylor*, 596 N.E.2d at 337. The court also rejected Taylor's argument on the

The challenge that Taylor brought is important for two reasons. First, it illustrates judicial unwillingness to accept equal protection challenges to school zone acts because of the lack of a class of individuals suffering disparate treatment. By eliminating the possibility of offenders claiming that they received treatment in one jurisdiction that was different from treatment of similar offenders in another jurisdiction, courts have signaled that the goal of the statutes, protection of children, is adequately advanced by acts establishing school zones and punishing equally those offenders within such zones.[112]

Second, Taylor's challenge is a good example of the creative lengths to which offenders and their attorneys will go to challenge sentence-enhancing school zone acts. Taylor stretched the protections of the Constitution to limits that the court was unwilling to accept by claiming that he received treatment disparate from what a dealer would have received in another city. The court in *Taylor* recognized the extraordinary value of school zone acts and made clear that they would have upheld Taylor's conviction even if he had been correct in his claim that there was no area in Boston that was not within 1000 feet of a school.[113] It is imperative that courts continue to recognize the value of school zone acts in the face of challenges brought by offenders and their attorneys.

Finally, while this comment has focused thus far on challenges to state school zone acts, challenges to the Federal Act are common as well. One case, *United States v. Cross*,[114] involved a number of the above-mentioned challenges applied to 21 U.S.C. § 845 (the precursor to the modern Federal Act).[115] In that case, Cross was found guilty of seven counts of distribution of cocaine, five of which occurred within 1000 feet of a school, in violation of 21 U.S.C. § 845a.[116]

Cross appealed his conviction under the Federal Act on the ground that section 845a violated the Equal Protection Clause because it lacked a rational relation to Congress's purpose and was, therefore, both over- and under-inclusive.[117] Cross argued that, as written, section 845a did not apply to drug deals in non-school areas even though the danger was no

---

ground that there was no evidence that there was no location within the City of Boston that was not also within 1000 feet of a school. *See id.* at 336.

112. *See id.* at 337.

113. *See supra* note 110 (outlining cases the court cited finding possibility of disparate treatment of dealers to be unpersuasive as basis for striking down school zone acts).

114. 900 F.2d 66 (6th Cir. 1990).

115. *See* 21 U.S.C. § 860 (2001).

116. *See Cross*, 900 F.2d at 67.

117. *See id.* at 68.

less prevalent.[118] Additionally, Cross claimed that the section unfairly applied to transactions that took place completely in private between adults if the transactions occurred within 1000 feet of a school.[119]

The court, citing *United States v. Holland*,[120] rejected the under-inclusiveness argument by finding that equal protection does not require that Congress legislate against every possible situation where drugs may be sold in the presence of children.[121] Rejecting the over-inclusiveness argument, the court found that the purpose of the statute is not simply to eliminate drugs from schools, but also to remove the dangerous circumstances surrounding the drug trade.[122] The court found that the statute promotes this ideal by punishing offenders caught dealing in private homes away from children, but within 1000 feet of a school.[123]

Cross then argued that section 845a violated due process by establishing an irrebuttable and irrational presumption of guilt in that the sale of drugs within 1000 feet of a school necessitates a punishment greater than punishments given for the same crimes outside of a school zone.[124] He alleged that such greater punishments were not appropriate where the defendant harbored no intent to sell to children.[125] The court rejected this argument and stated that the statute does not presume guilt but, rather, increases punishment where a particular set of facts is found to be present.[126] Therefore, there was no irrational presumption of guilt in violation of due process.[127]

Finally, Cross claimed that section 845a violated due process because it included no mens rea requirement that the defendant be aware that the drug transaction occurred within 1000 feet of a school.[128] Cross, who relied upon *Liparota v. United States*,[129] argued that when a statute's purpose is unclear it should be resolved in favor of leniency and that, because section 845a was unclear, in the interest of leniency, knowledge of the proximity of the drug transaction to a school must be regarded as an element of the crime that the prosecution must prove.[130]

The court rejected the argument that knowledge was an element to be proven by the prosecution on the ground that the purpose of the

118. *See id.*
119. *See id.*
120. 810 F.2d 1215 (D.C. Cir. 1987).
121. *See Cross*, 900 F.2d at 68.
122. *See id.*
123. *See id.*
124. *See id.*
125. *See id.*
126. *See id.*
127. *See id.*
128. *See id.*
129. 471 U.S. 419 (1985).
130. *See Cross*, 900 F.2d at 69.

statute is clear: deterrence of drug distribution around schools.[131] The court also agreed with the Second Circuit Court of Appeals in *United States v. Falu*,[132] which held that section 845a only applies to persons who have violated 21 U.S.C. § 841(a)(1), which contains a mens rea component requiring that the defendant knowingly or intentionally distributed a dangerous substance.[133] The court stated that applying the rule of leniency to offenders caught dealing in school zones would disrupt the clear intent of Congress that those individuals bear the burden of ascertaining proximity to schools.[134] Based on that finding, the court affirmed the conviction.[135]

The *Cross* decision illustrates a federal court's rejection of a number of challenges to the Federal Act. Like most state courts, the federal court chose to place the safety of children above the alleged violations of the defendant's rights. From the local courts to the federal courts, judicial action uniformly verifies the importance of school zone acts. Although the state acts may lack some of the force of the Federal Act, courts support school zone acts, and, consequently, challenges to them have become unlikely to succeed. The question left to be asked is why courts so overwhelmingly support school zone acts and how the judicial attitude toward the acts can be utilized to increase the severity and effectiveness of state school zone acts.

IV. Judicial Support for School Zone Acts

Regardless of the favorable stance that this comment takes toward school zone acts, there is arguably some merit to attacks on school zone acts as unconstitutional, at least as far as their regulation of drug sales within private homes. The government's heightened regulation of a private, purely adult-oriented, albeit illegal, activity, would appear to present a question of infringement on individual rights when that limitation is based upon the activity's influence on children. As at least one judge has found, the police power is finite, limited to the legislative objective enacted.[136] Enhancing sentences of dealers caught selling their wares in their homes, which happen to be within 1000 feet of a school, could be construed to lack a reasonable relationship with the legislative intent of removing drugs from schools.[137] Yet the courts have not failed

131. *See id.*
132. 776 F.2d 46 (2d Cir. 1985).
133. *See Cross*, 900 F.2d at 69.
134. *See id.*
135. *See id.* at 70.
136. *See* Commonwealth v. Hinds, 2001 PA Super. 121, ¶¶ 1-9, 775 A.2d 859, 863-67 (Johnson, J., dissenting).
137. *See id.* ¶ 1, 775 A.2d at 864 (Johnson, J., dissenting).

to condemn harshly attacks on school zone acts by defendants.

The reasons for judicial support of school zone acts are straightforward and have been laid out by the various opinions mentioned in this comment, as well as in many other cases involving challenges to school zone acts. First, judges generally place the protection of children above other interests and pursue this protection through the deterrent effect of school zone acts.[138] By interpreting the legislative intent of school zone acts to be the protection of children from the ravages of drugs and their attendant debilitating consequences, courts have indicated that decisions regarding school zone acts will be made in favor of the protection of children, not the rights of dealers.

Courts have, in fact, indicated that school zone acts, as written, are intended to place a higher burden on dealers than on prosecutors, police, and courts.[139] Individuals who choose to conduct their operations within school zones will be forced to evaluate their decision to do so, and, if they choose to continue operating in such fashion, those individuals—not the courts or the police—will face the consequences. Judges have signaled that prosecutors will not have to prove that the defendant knew that he was within a school zone,[140] making all the more foolish a dealer's decision to sell near a school.

The clarity of the enacted statutes has eased the courts' interpretations of individual school zone acts. Courts have uniformly found school zone acts to be clearly opposed to dealers' attempts to defend themselves through claims of persecution.[141] The fact that some state statutes do not include elements providing for swifter and harsher punishment does not lessen this clarity of purpose.[142] This precision of construction simplifies courts' decisions to uphold school zone acts

138. *See* State v. Swafford, 890 P.2d 368, 372 (Kan. Ct. App. 1995); *see also* Dawson v. State, 619 A.2d 111, 117 (Md. 1993) (stating that Maryland school zone act is designed to "deter the seller and other illicit dealers from conducting their operations near school property in the future") (quoting United States v. Nieves, 608 F. Supp. 1147, 1149-50 (S.D.N.Y. 1985)); *Hinds*, 2001 PA Super. ¶ 6, 775 A.2d at 862.

139. *See Swafford*, 890 P.2d at 372 ("Congress evidently intended that dealers . . . bear the burden of ascertaining where schools are located and removing their operations from those areas or else face enhanced penalties.") (quoting United States v. Falu, 776 F.2d 46, 50 (2d Cir. 1985)); *see also* United States v. Cross, 900 F.2d 66, 69 (6th Cir. 1990).

140. *See Cross*, 900 F.2d at 69 (stating that defendant's knowledge of the proximity to school is not an element that must be proven by prosecution).

141. *See* Commonwealth v. Taylor, 596 N.E.2d 333, 336 (Mass. 1992) ("Courts which have considered the question have consistently found drug-free school zone provisions not to be unconstitutionally vague."); *see also Cross*, 900 F.2d at 69 (finding that the intent of Congress in enacting the Federal Act was clear in not requiring *mens rea* for successful prosecution of dealers within school zones).

142. *See supra* text accompanying notes 38-41 (discussing California school zone act).

against all challenges.

Clarity of construction has also allowed courts easily to determine that school zone acts are rationally related to legislatures' goal of protecting children from drugs.[143] Additionally, courts have found that fair application of school zone acts to all offenders eliminates the possibility of uneven application and, resultingly, of due process challenges.[144] Even and fair application of a clearly written statute, rationally related to the legislative purpose it was created to pursue, insulates school zone acts from attacks by defendants on due process, equal protection, and other grounds, and has led to unlimited support from the courts.[145]

The construct of school zone acts as sentence enhancers, which merely add to the punishment of individuals already determined to be guilty, also aids courts in deciding to support the acts. Criminals affected by school zone acts have been adjudicated guilty of one crime, distribution of controlled dangerous substances, when the school zone acts come into effect.[146] A judge should have little sympathy for a convicted drug dealer attempting to claim entitlement to relief from a clearly constructed sentence enhancer for the crime of which the dealer has previously been found guilty. For judges, it is simply a matter of applying a legislatively enacted mandate to an individual already determined to be guilty.

Finally, although it may seem to be an example of circular reasoning, the fact that so many courts have supported school zone acts indicates that future courts will support them as well.[147] It is hard to imagine that any future challenges to school zone acts will succeed in light of the lopsided judicial record that has developed on such challenges. Courts recognize the extraordinary role that the acts play in

143. *See Dawson*, 619 A.2d at 117 (finding that "the application of [Maryland's school zone act] to all transactions within the 1,000 foot perimeter [of schools], regardless of the presence of children, is substantially related to this goal [of protecting children on school property]"); *see also Cross*, 900 F.2d at 69; Morse v. State, 593 N.E.2d 194, 197 (Ind. 1992).

144. *See Taylor*, 596 N.E.2d at 337 ("[The Massachusetts school zone act] does not discriminate against any group; it furthers a legitimate State interest of protecting children and adolescents by establishing a drugfree [sic] school zone and treats those who would disobey the law within the zone equally.").

145. *See Dawson*, 619 A.2d at 118 ("We also note that our research has indicated that every court reviewing drug-free school zone statutes has found them to be constitutional.").

146. *See Cross*, 900 F.2d at 69 ("[The Federal Act] does not criminalize otherwise innocent activity, for the statute applies only to persons who have violated 21 U.S.C. § 841(a)(1)."); *see also Taylor*, 596 N.E.2d at 337 (rejecting defendant's attempt to have court recognize drug dealers as "suspect class" worthy of special protection).

147. *See supra* note 145.

the protection of children, and, therefore, future courts will continue to uphold the acts. Although it is unrealistic to expect convicted offenders to halt their attempts to circumvent the penalties assigned by school zone acts, it is quite realistic to expect that courts will continue to reject these attacks for as long as they may persist.

V. Conclusion

Drug-free school zone acts remain an effective tool to safeguard children from drugs. Although the plight of drug use among children continues unabated, with increased support of school zone acts, it may be possible to at least keep drugs out of schools. Removing drugs from schools could drastically reduce drug use in America by limiting children's exposure to drugs. By limiting children's introduction to narcotics, the drug use that has reached epidemic proportions could be stopped in its tracks. However, change cannot occur through judicial action alone. State legislatures must create school zone acts that are effective around the clock, regardless of the presence of children. Penalties must be increased to levels comparable to those of the Federal Act. School zone acts need real teeth in order to be the deterrent that they were created to be. While courts have shown their ceaseless support for school zone acts, the courts may only act within the parameters of the law. It is up to the state legislatures to give the courts the weapons to continue the fight.

***