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Worshipping at the Altar of Progress: Cognitive Enhancing Drugs in Legal Education

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Worshiping at the Altar of Progress: Cognitive Enhancing Drugs in Legal Education

Cover Page Footnote

I would like to sincerely thank all those who have helped make this Comment what it is and fueled passion and fervor in the writing: Honorary Michael J. Newman for his kind and guiding mentorship; Dr. Martine Lamy for providing direct medical insight and understanding to the effects of Adderall and Ritalin; Dean Paul McGreal, my faculty adviser, who pushed me further in my topic while reminding me of the practicalities; Michael J. Jurek who helped me explore new issues and improve my writing, and of course, my loving family and husband who never once complained about all the hours spent cooped up in the office researching and writing.

WORSHIPING AT THE ALTAR OF PROGRESS: COGNITIVE ENHANCING DRUGS IN LEGAL EDUCATION

*Tessie Smith*¹

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¹ Candidate for Juris Doctorate at University of Dayton School of Law, May 2015 (expected). Bachelor of Arts University of Nebraska at Omaha. I would like to sincerely thank all those who have helped make this Comment what it is and fueled passion and fervor in the writing: Honorary Michael J. Newman for his kind and guiding mentorship; Dr. Martine Lamy for providing direct medical insight and understanding to the effects of Adderall and Ritalin; Dean Paul McGreal, my faculty adviser, who pushed me further in my topic while reminding me of the practicalities; Michael J. Jurek who helped me explore new issues and improve my writing, and of course, my loving family and husband who never once complained about all the hours spent cooped up in the office researching and writing.

I. INTRODUCTION

“We worship at the altar of progress, and to the demigod of choice, . . . [b]oth are very strong undercurrents in the culture and the way this is likely to be framed is: ‘Look, we want smart people to be as productive as possible to make everybody’s lives better. We want people performing at the max, and if that means using these medicines, then great, then we should be free to choose what we want as long as we’re not harming someone.’” – Anjan Chatterjee MD²

When Dr. Anjan Chatterjee, professor of neurology, made this statement, he boldly defended the use of drugs to enhance cognition.³ Several years prior, he predicted sweeping impacts from cognitive enhancing drugs like Adderall and Ritalin; he believed in their use and in the possibility that their benefits could resuscitate failings in all areas of academia.⁴ He labeled the use of cognitive enhancers as “cosmetic neurology”⁵ and compared their uplifting, self-improving affects to that of cosmetic surgery—which was also once scorned by the public.⁶ As promising as that sounds, there are side effects that must be considered, questions that must be asked. Can abusing cognitive enhancers give unfair advantage in academics or in the workplace? Can they in fact be harmful to users and to others?

Society demands a certain level of achievement of each and every individual from a very young age and a deep desire for approval takes hold of the human psyche.⁷ This desire for approval on its own is powerful enough to drive and shape an individual to push for lofty achievement and six-figure success; success becomes an addiction.⁸ As a result, it is not uncommon for people to go to extreme measures to achieve their goals and end ahead of the rest; extreme measures to cheat the system. In our ever competitive world, some have even said, “[i]f you’re not cheating, you’re not trying” hard enough.⁹ And people will cheat by any means possible,

² Benedict Carey, *Brain Enhancement Is Wrong, Right?*, N.Y. TIMES (Mar. 9 2008), <http://www.nytimes.com/2008/03/09/weekinreview/09carey.html?pagewanted=all>.

³ *Id.* Although there are many types of cognition and therefore many cognitive enhancing drugs, this Comment focuses specifically on the popular cognitive enhancing drugs Adderall and Ritalin, which are used to increase concentration and focus. See discussion *infra* Part II.

⁴ See Anjan Chatterjee, MD, *Cosmetic Neurology: The Controversy Over Enhancing Movement, Mentation, and Mood*, 63 NEUROLOGY 968, 968–70 (2004).

⁵ *Id.* at 968.

⁶ Anjan Chatterjee, *Cosmetic Neurology and Cosmetic Surgery: Parallels, Predictions, and Challenges*, 16 CAMBRIDGE QUARTERLY OF HEALTHCARE ETHICS 129, 129 (2007).

⁷ C.M. Rubin, *The Global Search for Education: On Success*, HUFFINGTON POST (Nov. 15, 2011), http://www.huffingtonpost.com/c-m-rubin/the-global-search-for-edu_18_b_1091683.html.

⁸ *Id.*

⁹ Dr. Chris Stankovich, *Are You Really Trying to Win if You're Not Trying to Cheat?*, THE SPORTS DOCTOR (Aug. 28, 2012), <http://blog.drstankovich.com/are-you-really-trying-to-win-if-youre-not-trying->

even subjecting themselves to illegal practices and sometimes drugs.¹⁰ Consider, for example, the story of Eldo Kim, an average twenty-year-old Harvard undergraduate, who in 2013 sent false bomb threats to his school in hope of avoiding finals for which he was unprepared.¹¹ Think of Caroline D., a fifty-two-year-old mother, who allegedly posed as her nineteen-year-old daughter and sat for an English exam.¹²

In specific professions, performance-enhancing drugs have become the preferred method of cheating.¹³ In sports, for example, the use of steroids, stimulants, and growth hormones has a very extensive history and has been documented and debated for decades.¹⁴ Now, the abuse of cognitive enhancing drugs that help students get ahead are quickly gaining popularity and the implications are slowly being realized.¹⁵ Similar to the competitive world of sports, students in the academic arena are collapsing under the debilitating competitive pressures and feeling like they too can no longer refuse these drugs.¹⁶ In no level of education is there the amount of competitive pressure placed on students as you can find on students in law schools.¹⁷

As this Comment will show, using cognitive enhancing drugs, such as Adderall and Ritalin, impacts competition in legal education the same way steroid usage influences the outcome of a race or game. That is to say, stimulant abuse yields unfair competitive advantage, which can cause harm

to-cheat/; *see also* Kim D. Kirkland, *Academic Honesty: Is What Students Believe Different from What They Do?* (Aug. 2009) (unpublished Ph.D. dissertation, Bowling Green State University) (on file with Ohio's Academic Library Consortium) (explaining that many students hold the belief that "if you are not cheating, you lose your competitive edge, and . . . cheating is [not] . . . a serious matter because everyone does it.").

¹⁰ Erin Bowen, *The Adderall Edge*, THE MIAMI STUDENT (Sept. 24, 2008), <http://miamistudent.net/?p=109952>; Victor Dorff, *Cheating – It's Not Just for Kids*, HUFFINGTON POST (May 15, 2013), http://www.huffingtonpost.com/victor-dorff/cheating-its-not-just-for_b_3264532.html (discussing the internalized pressure in educational systems and the resulting cheating); Milton J. Valencia & Eric Moskowitz, *Harvard student arraigned in bomb hoax*, THE BOSTON GLOBE (Dec. 18, 2013), <http://www.bostonglobe.com/metro/2013/12/18/harvard-student-ordered-stay-away-from-campus-after-federal-court-appearance/15cFyLVNMrtT4yB50hPEyH/story.html> (explaining how the pressure of high grades on one undergraduate student at Harvard caused him to send anonymous bomb threats in hopes of his finals being canceled).

¹¹ Valencia & Moskowitz, *supra* note 10. For his actions, Eldo Kim is now facing 5 years in prison and a \$250,000 fine. *Id.*

¹² Sarah Gates, *French Mother Allegedly Takes Exam For Daughter, Poses As 19-Year-Old*, HUFFINGTON POST (June 20, 2013), http://www.huffingtonpost.com/2013/06/20/french-mother-takes-exam-for-daughter-baccalaureate_n_3472723.html.

¹³ *See* Alex Kingsbury, *Performance Enhancing Drugs: Not Just Baseball*, U.S. NEWS & WORLD REPORT (Jan. 29, 2008), <http://www.usnews.com/news/national/articles/2008/01/29/performance-enhancing-drugs-not-just-baseball> (explaining that due to the stressful demands on classical musicians, many resort to the use of performance enhancing drugs).

¹⁴ *How we got here: A timeline of performance-enhancing drugs in sports*, SPORTS ILLUSTRATED (Mar. 11, 2008), <http://www.si.com/more-sports/2008/03/11/steroid-timeline>.

¹⁵ Carey, *supra* note 2.

¹⁶ Maxwell J. Mehlman, *Cognition-Enhancing Drugs*, 82 THE MILBANK QUARTERLY 483, 488 (2004).

¹⁷ *See* discussion *infra* Part II.B.

to both the user and others.¹⁸ Although stimulant abuse represents a problem at nearly every level of education, the effects and consequences for students in law schools are especially troubling.¹⁹ In addition to their fiercely competitive environments, law schools are institutions that hold high values, and follow specific ethical codes, restrictions, and professional oaths that set law students and graduates apart from the general public.²⁰ Therefore, failing to address this problem undermines the integrity of the entire legal profession.²¹

This Comment reveals how and why using performance enhancers to cheat the system is a persistent and timeless problem by discussing the most common cognitive enhancers, Adderall and Ritalin. Section II specifically explores the effects cognitive enhancing drugs have on their users, and exposes the ease of access, both in obtaining a prescription and buying it on the black market. Section II also details the dangers these drugs pose to non-prescription users.

Additionally, Section II addresses the prevalence of cheating with cognitive enhancing drugs in education, how law schools are environments of particular concern, and how right now, the “perfect storm” is brewing for abuse within legal education. Section II discusses the impact of off-script scholastic steroid use. It describes how the legal profession suffers both in and out of law schools by detailing the history and tradition of high ethical standards and professionalism every lawyer promises to follow. Finally, Section II focuses on the vehement competition in the legal education system and how both the system and current legal job market drives students to cheat.

Section III suggests and analyzes potential solutions to calm this storm through law schools and the American Bar Association (“ABA”), who have the power to stop this form of cheating. This Section specifically examines the honor code system in place within law schools and significant Fourth Amendment litigation regarding various drug screening programs, which have been implemented in the United States. This Comment closely examines suspicionless drug screening programs that have been held

¹⁸ See Gardiner Harris, *Warning Urged on Stimulants like Ritalin*, N.Y. TIMES (Feb. 10, 2006), http://www.nytimes.com/2006/02/10/health/policy/10drug.html?_r=0; Mehlman, *supra* note 16, at 488 (explaining the indirect harm on others); W. Alexander Morton & Gwendolyn G. Stockton, *Methylphenidate Abuse and Psychiatric Side Effects*, 2 PRIMARY CARE COMPANION J. CLINICAL PSYCHIATRY 159, 161–62 (2000) (explaining the toxicity and side effects of Ritalin); Alan Schwartz, *Drowned in a Stream of Prescriptions*, N.Y. TIMES (Feb. 2, 2013), <http://www.nytimes.com/2013/02/03/us/concerns-about-adhd-practices-and-amphetamine-addiction.html>.

¹⁹ Ann P. Fenton & John M. Wunderlich, *Mental Doping: The Untold Story of Modern Law School Exams*, STUDENT LAWYER 17, 17 (2010).

²⁰ Kelline R. Linton, Comment, *Scholastic Steroids: Is Generation Rx Cognitively Cheating?*, 39 PEPP. L. REV. 989, 992 (2012); Linda A. McGuire & Julie Phye, *The Hidden Curriculum in Medical and Law Schools: A Role for Student Affairs Professionals*, 115 NEW DIRECTIONS STUDENT SERVICES 59, 63 (2006); see generally MODEL RULES OF PROF'L CONDUCT (2013).

²¹ Fenton & Wunderlich, *supra* note 19, at 18.

Constitutional and discusses similar formats that could be initiated by the ABA. Regardless of the resulting solution, the purpose of this Comment is to initiate contemplative discussion of this important issue.

II. BACKGROUND

A. Adderall & Ritalin

1. The ADHD Epidemic

Adderall and Ritalin are drugs regularly prescribed for patients diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”).²² Although there are specific sub-types of ADHD, the main symptoms associated with ADHD are difficulty maintaining focus, paying attention to the tasks at hand, hyperactivity, and, especially in adults, impulsivity.²³ These are the symptoms which Adderall, Ritalin, and similar drugs like Concerta, were created to abate.²⁴ Although different in their chemical makeup,²⁵ Adderall and Ritalin both act as stimulants, releasing chemicals in the brain that create a balance within the prefrontal cortex.²⁶ As a result, these drugs increase ability to maintain focus and concentration and “can provide dramatic benefits in individual cases, [by] permitting students to improve [cognitive] performance.”²⁷ Adderall specifically is known to increase focus and decrease hyperactivity and impulsiveness in individuals with ADHD.²⁸ Similarly, Ritalin is known for improving “attention, concentration, spatial working memory, and planning.”²⁹ Both of these cognitive enhancing drugs facilitate efficiency and productivity in study habits and provide students with the self-control they usually lack.³⁰ These drugs work in the same manner for both individuals with and without

²² U.S. FOOD & DRUG ADMINISTRATION, NDA 11-522/S-040, ADDERALL (CII) NEW DRUG APPLICATION 3, 15 (2007), http://www.accessdata.fda.gov/drugsatfda_docs/label/2007/011522s040lbl.pdf; Harris, *supra* note 18.

²³ *Attention Deficit Hyperactivity Disorder (ADHD)*, NATIONAL INSTITUTE OF MENTAL HEALTH, <http://www.nimh.nih.gov/health/topics/attention-deficit-hyperactivity-disorder-adhd/index.shtml> (last visited Mar. 31, 2015); Interview with Martine Lamy, MD, PhD, University of Cincinnati College of Medicine, in Cincinnati, Ohio (Mar. 8, 2014).

²⁴ Steve Sussman et al., *Misuse of “Study Drugs:” Prevalence, Consequences, and Implications for Policy*, 15 SUBSTANCE ABUSE TREATMENT, PREVENTION, AND POL’Y 1, 2 (2006).

²⁵ *Id.*

²⁶ Robert C. Spencer et al., *Psychostimulants Act within the Prefrontal Cortex to Improve Cognitive Function*, 72 BIOLOGICAL PSYCHIATRY 221, 221 (2012); Anne Harding, *Study uncovers how Ritalin works in the brain*, REUTERS (Jul. 3, 2008, 1:16 PM), <http://www.reuters.com/article/2008/07/03/us-study-ritalin-idUSPAT36215820080703>.

²⁷ Peter J. Whitehouse et al., *Enhancing Cognition in the Intellectually Intact*, THE HASTINGS CENTER REP. 14, 15 (May–June 1997).

²⁸ U.S. FOOD & DRUG ADMINISTRATION, *supra* note 22, at 15.

²⁹ Chatterjee, *supra* note 4, at 969.

³⁰ Anjan Chatterjee, *Drugs to Build a Better Brain*, 496 NATURE 431, 432 (2013).

ADHD.³¹

Although there are many alternative routes for the treatment of ADHD, physicians predominantly prescribe medication in their first attempt to treat patients, and cognitive enhancing drugs are prescribed more often than any other medication.³² A myriad of studies conducted over the past fifteen years have proven that prescriptions for ADHD medications are rising at an alarming pace.³³ One study, examining prescription rates between the years 2000–2005, showed an increase of nearly 12% in drug prescriptions for ADHD.³⁴ There has been a great amount of debate regarding whether the rapid rise of ADHD diagnoses in the U.S. is an accurate representation of the disorder.³⁵ Some doctors hypothesize that the general and subjective nature of the diagnostic tests may cause people to be improperly diagnosed with ADHD.³⁶ Others, looking to assorted studies in diagnosis rates of ADHD, surmise that it is merely a “fad diagnosis.”³⁷ Either way, it is indisputable that the swiftly increasing rates at which individuals are being diagnosed and prescribed Adderall and Ritalin have greatly increased the availability of these drugs available on the legal and black markets.³⁸ In fact, these drugs are so over-prescribed and in-demand there has been a persistent nationwide shortage.³⁹

2. The Black Market of Cognitive Enhancers

The significant number of prescriptions creates a large black market where many students are willing to sell portions of their stimulant

³¹ Interview with Martine Lamy, MD, PhD, *supra* note 23.

³² Margaret Austin et al., *ADHD: Attention Deficit Hyperactivity Disorder: Introduction to Attention Deficit Hyperactivity Disorder (ADHD)*, MENTALHELP.NET (Nov. 5, 2007), <https://www.mentalhelp.net/articles/adhd-treatment/>.

³³ Lon Castle et al., *Trends in Medication Treatment for ADHD*, 10 J. OF ATTENTION DISORDERS 335, 337–38 (2007); Mark Olfson et al., *National Trends in the Treatment of Attention Deficit Hyperactivity Disorder*, 160 AM. J. OF PSYCHIATRY 1071, 1074 (2003); Linda M. Robison et al., *National Trends in the Prevalence of Attention-Deficit/Hyperactivity Disorder and the Prescribing of Methylphenidate Among School-Age Children: 1990–1995*, 38 CLINICAL PEDIATRICS 209, 210 (1999).

³⁴ Castle et al., *supra* note 33, at 337, 340.

³⁵ Margaret Austin et al., *ADHD: Attention Deficit Disorder: Controversies Surrounding ADHD*, MENTALHELP.NET (NOV. 5, 2007), <https://www.mentalhelp.net/articles/controversies-surrounding-adhd/>.

³⁶ *Id.*

³⁷ *Id.* Many professionals in the industry believe that current diagnostic rates of ADHD are greatly distorted by an overarching difficulty in assessing symptoms of ADHD and the general criteria that are to be used in diagnostic tests. *Id.*

³⁸ Although students may very easily receive prescriptions for Adderall and other similar drugs, for the purposes of this Comment “drug abuse” will be defined as off-script illegal receipt and usage of prescription pills. This Comment will not, however, discuss abuse in the context of students receiving prescriptions through potentially deceitful means, such as lying during a diagnosis. It would not be proper, and likely not legal, for the ABA or any administrative body to make an investigative inquiry into a student’s manner of receiving a legal prescription when ADHD is in-fact a serious condition. *See generally Summary of the HIPAA Privacy Rule*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://www.hhs.gov/ocr/privacy/hipaa/administrative/privacyrule/index.html> (last visited Apr. 1, 2015).

³⁹ *See* Toni Clarke, *Adderall Shortage Shows Little Sign Of Easing As Demand Climbs*, HUFFINGTON POST (Jan. 1, 2012), http://www.huffingtonpost.com/2012/01/01/adderall-shortage-2012_n_1178445.html.

prescriptions, or sometimes even give it away to friends or study partners.⁴⁰ For students, illicitly obtaining Adderall or Ritalin is easier than any other drug; some students even go as far as rating it a “ten” on an ease of access scale.⁴¹ This statistic is not surprising when examined in light of a selling student’s incentives.⁴² Patients pay around \$0.50 per pill for Adderall or Ritalin, and in return, they can receive anywhere between \$3 and \$15 per pill when selling their prescription to others.⁴³ Once it is known that a student has a standing prescription for Adderall or Ritalin, purchase requests from other students begin rolling in.⁴⁴ According to one study, 54% of undergraduate students who had prescription medication for ADHD were pressed to sell, trade, or give away their prescriptions.⁴⁵

The medical community is aware of the abounding abuse and black market availability and is trying to restrict the availability to these drugs and standardize the diagnostic process.⁴⁶ The most recent version of the Diagnostic and Statistical Manual of Mental Disorders (“DSM”) was released in 2013 and more specifically defines symptoms to look for in individuals with ADHD.⁴⁷ Many physicians who suspect abuse take their time in making a diagnosis.⁴⁸ Dr. Lamy states that if the diagnosing physician uses neuropsychological tests, a diagnosis of ADHD would be difficult to obtain through false information or pretenses.⁴⁹ However, most physicians do not require them, and unfortunately, a diagnosis is otherwise reasonably easy to obtain by faking symptoms.⁵⁰

3. Danger Hidden in Plain Sight

It is important to remember that Adderall and Ritalin are in fact

⁴⁰ Sussman et al., *supra* note 24, at 3, 5; Stefanie Stolz, *Adderall Abuse: Regulating the Academic Steroid*, 41 J.L. & EDUC. 585, 586 (2012).

⁴¹ Bowen, *supra* note 10. On the students’ scale of one to ten, one was the hardest and ten was the easiest to gain access to Adderall. *Id.*

⁴² See Sarah Kramer, *Thanks to a Nationwide Adderall Shortage, an SMU Dealer Says, Profits are Up, Up, Up*, DALLAS OBSERVER (Mar. 27, 2012), http://blogs.dallasobserver.com/unfairpark/2012/03/thanks_to_a_nationwide_adderall.php; Sussman et al., *supra* note 24, at 1.

⁴³ Sussman et al., *supra* note 24, at 1.

⁴⁴ See *id.* at 3, 5; see also Kramer, *supra* note 42.

⁴⁵ Sussman et al., *supra* note 24, at 3.

⁴⁶ Interview with Martine Lamy, MD, PhD, *supra* note 23. Consider for example the implementation of the Ohio Automated Rx Reporting System (OARRS), a mandatory reporting system in Ohio that monitors filled prescriptions for each patient to make it easy to detect prescription abuse. See *Ohio Automated Rx Reporting System*, OHIO PMP.GOV, <https://www.ohiopmp.gov> (last visited Apr. 2, 2015).

⁴⁷ Interview with Martine Lamy, MD, PhD, *supra* note 23; see also *Highlights of Changes from DSM-IV-TR to DSM-5*, AM. PSYCHIATRIC ASS’N 1, 2 (2013), <http://www.dsm5.org/Documents/changes%20from%20dsm-iv-tr%20to%20dsm-5.pdf>; see generally AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

⁴⁸ Interview with Martine Lamy, MD, PhD, *supra* note 23.

⁴⁹ *Id.*

⁵⁰ *Id.* Neuropsychological tests can be very expensive and time consuming; therefore, many physicians will not require them for a diagnosis of ADHD unless they specifically believe there is potential for abuse by the patient. *Id.*; see also Bowen, *supra* note 10 (explaining how easy it is for a student to receive a prescription for Adderall).

legal drugs.⁵¹ Because of their legal status, people often assume that these cognitive enhancers are “safe” for use, with or without an actual diagnosis.⁵² However, the truth is Adderall and Ritalin can be dangerous and have been designated as Schedule II drugs by the federal government’s Drug Enforcement Administration (“DEA”).⁵³ Schedule II drugs are the second most dangerous category for any drug, carrying a high probability for abuse and the potential to lead to severe psychological or physical dependence.⁵⁴ Examples of drugs categorized as Schedule II include Cocaine, Methamphetamine, Methadone, and Oxycodone.⁵⁵ Above and beyond all else, abuse of and addiction to cognitive enhancing drugs can prove deadly: in 2011, the severe psychological dependence on Adderall by Richard Fee, a medical student, led to violent delusional episodes and his eventual suicide.⁵⁶

Knowing Adderall and Ritalin’s advantages alone, it is easy to understand the drugs’ allure, especially for students in higher education. Consider the stimulants’ effect on the human brain and combine it with ease of access, and it is clear why prescription abuse of these performance enhancing drugs began and why it continues to get worse. However, it must be repeated, ADHD is a serious condition, and for those with the disorder, cognitive enhancers like Adderall and Ritalin may be necessary to enable a student to subsist in a competitive learning environment. But when students with normal concentration levels take the drugs for their cognitive enhancing effect, there is a great potential that the student with a genuine ADHD diagnosis will be shoved back, suppressed, and altogether left behind.⁵⁷ Once Adderall and other similar drugs are used by one student, “it

⁵¹ *Adderall and Adderall XR (amphetamines) Information*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm111441.htm> (last visited Apr. 2, 2015).

⁵² *Nonmedical Use of Prescription Stimulants: What College Administrators, Parents, and Students Need to Know*, CTR. ON YOUNG ADULT HEALTH AND DEV. 1, 3, http://www.pharmacy.ca.gov/consumers/college_nonmedical_rx_drugs.pdf.

⁵³ *Drug Scheduling*, UNITED STATES DRUG ENFORCEMENT ADMIN., <http://www.justice.gov/dea/druginfo/ds.shtml> (last visited Apr. 2, 2015). Out of the five categories or schedules of drugs, Schedule I drugs are the most dangerous, have no acceptable medical use, and have a high potential for abuse and dependence. *Id.*

⁵⁴ *Id.* The Drug Enforcement Administration classifies drugs, substances, and certain chemicals used to make drugs into five schedules. *Id.* The substance is placed into a specific category depending upon its acceptable use, its likelihood for abuse, and its potential for dependency. *Id.* Schedule I represents the most harmful category, and Schedule V represents the least harmful. *Id.* Schedule I lists drugs with “no currently accepted medical use and a high potential for abuse . . . [and] with potentially severe psychological or physical dependence.” *Id.* While under Schedule V are drugs with a “lower potential for abuse than Schedule IV.” *Id.*

⁵⁵ *Id.*

⁵⁶ Schwartz, *supra* note 18. Dr. Lamy stressed concern that many psychotic disorders that a person may have, such as Bipolar disorder or Schizophrenia, most often do not develop until an individual is in his early twenties. Interview with Martine Lamy, MD, PhD *supra* note 23. Given this fact, students who take stimulants like Adderall and Ritalin without a prescription are putting themselves at a very high risk of the drug adversely affecting them and exacerbating any underlying disorders a student may have. *Id.* It is for this reason among others, that the abuse of these cognitive enhancing drugs is so dangerous. *Id.*

⁵⁷ See Fenton & Wunderlich, *supra* note 19, at 17.

is [no longer] needed to simply ‘level the playing field,’ but with the intent to gain an advantage through ‘cognitive enhancement.’”⁵⁸

B. Abuse of Cognitive Enhancing Drugs in Law Schools

While no studies exist that empirically measure stimulant abuse in law schools, anecdotes are plentiful from current and graduated law students who knew of peers or personally admitted to abusing the drug while in law school.⁵⁹ Similar to the use of performance enhancing drugs in major league baseball where “everyone knew” it was happening,⁶⁰ so, too, do students and administrators know that cognitive enhancing drugs are used by law students to effectively cheat. At the 2014 Annual Meeting of the Association of American Law Schools there was even a special breakout session led by Dr. Victor Schwartz of The Jed Foundation discussing the “critical issue” of abuse of cognitive enhancers specifically in law schools.⁶¹

Taking a look into other areas of higher education, there is clearly a trend in abuse of Adderall and Ritalin.⁶² In a study taken of 119 representative United States undergraduate colleges, approximately 13.1% of surveyed students self-reported past off-script abuse of cognitive enhancing drugs.⁶³ The rates went as high as 25% of all students surveyed at specific colleges.⁶⁴ Approximately 6.9% of the students reported “lifetime” abuse of cognitive enhancers.⁶⁵ A similar report by the Partnership for a Drug Free Kids found that around 2.7 million young Americans have used Adderall or Ritalin without a prescription.⁶⁶ Finally, another study focusing upon student use of cognitive enhancing drugs without a prescription and concluded that the majority of students engaging in this

⁵⁸ *Id.*

⁵⁹ *Id.* at 18. It has been surmised that higher educational institutions have not been studied in regard to stimulant abuse because these students tend to be “driven” students, and are not perceived by the public to be stimulant abusers. Nicholas W. Schieffelin, Note, *Maintaining Educational and Athletic Integrity: How will Schools Combat Performance-Enhancing Drug Use?*, 40 SUFFOLK U. L. REV. 959, 972 (2007).

⁶⁰ See generally HOWARD BRYANT, *JUICING THE GAME: DRUGS, POWER AND THE FIGHT FOR THE SOUL OF MAJOR LEAGUE BASEBALL* (2006).

⁶¹ See The Association of American Law Schools, *Annual Meeting 2014, Looking Forward, Legal Education in the 21st Century Final Program*, 97, available at <http://aals.org/am2014/Program2014.pdf>.

⁶² Sean Esteban McCabe et al., *Non-Medical Use of Prescription Stimulants Among US College Students: Prevalence and Correlates from a National Survey*, SOC’Y FOR THE STUDY OF ADDICTION 96, 97–98 (2005).

⁶³ *Id.* at 96–98. It must be kept in mind that in any case of self-reporting, actual percentages may in fact be higher than reported depending upon the activity being surveyed; studies have shown that the more illegal the activity, the less likely people, especially young adults, are to report. Nancy D. Brener, et al., *Assessment of Factors Affecting the Validity of Self-Reported Health-Risk Behavior Among Adolescents: Evidence From the Scientific Literature*, 33 J. OF ADOLESCENT HEALTH 436, 438–39 (2003).

⁶⁴ McCabe et al., *supra* note 62, at 99.

⁶⁵ *Id.* at 98, 102.

⁶⁶ Cassie Goldberg, *National Study: Teen Misuse and Abuse of Prescription Drugs Up 33 Percent since 2008, Stimulants Contributing to Sustained Rx Epidemic*, THE P’SHIP FOR DRUG FREE KIDS (Apr. 22, 2013), <http://www.drugfree.org/newsroom/national-study-teen-misuse-and-abuse-of-prescription-drugs-up-33-percent-since-2008-stimulants-contributing-to-sustained-rx-epidemic/>.

behavior do so with the primary focus of enhancing their performance and academic ability.⁶⁷ The study collected very little evidence indicating that students abuse cognitive enhancers for non-academic purposes.⁶⁸ Knowing the high rates of abuse in these areas of education, it would be completely illogical to say students are not using cognitive enhancing drugs in law schools.

1. Law School Values

While abuse of cognitive enhancing drugs represents a serious issue at nearly every level of education,⁶⁹ within the context and confines of law school and the legal profession, stimulant abuse creates a significant and notable issue.⁷⁰ It has been said that “[w]hat is ethical is what develops moral virtues in ourselves and our communities.”⁷¹ Within the *legal* community, moral virtues have developed over hundreds of years and play a significant role within the profession.⁷² In the preface to the ABA Model Code of Professional Responsibility, it is stated:

‘[t]he grounds for [a] lawyer’s [ethical] obligations are to be found in the nature of his calling[;] [t]he lawyer who seeks a clear understanding of his duties will be led to reflect on the special services his profession renders to society and the services it might render if its full capacities were realized. When the lawyer fully understands the nature of his office, he will then discern what restraints are necessary to keep that office wholesome and effective.’⁷³

Considering obligations within the legal profession and community, abuse of Adderall and Ritalin within law schools is in direct opposition to the “foundational principles of fairness and justice.”⁷⁴

Entering into the legal profession is not a task to be taken lightly. Before many law students even begin their education, they are required to take an oath of professionalism, promising to uphold the high ideals of the legal profession while recognizing the privileges and responsibilities the

⁶⁷ David L. Rabiner et al., *Motives and Perceived Consequences of Nonmedical ADHD Medication Use by College Students: Are Students Treating Themselves for Attention Problems?*, 13 J. OF ATTENTION DISORDERS 259, 263–64 (2009).

⁶⁸ *Id.* at 264.

⁶⁹ CTR. ON YOUNG ADULT HEALTH AND DEV., *supra* note 52 at 1–2.

⁷⁰ See generally Fenton & Wunderlich, *supra* note 19.

⁷¹ Manuel Velasquez et al., *Ethical Perspectives*, SANTA CLARA UNIVERSITY, <http://www.scu.edu/ethics/practicing/decision/virtue.html> (last visited Apr. 4, 2015).

⁷² See generally Lorie M. Graham, *Aristotle’s Ethics and the Virtuous Lawyer: Part One of a Study on Legal Ethics and Clinical Legal Education*, 20 J. LEGAL PROF. 5 (1995–1996); Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1385–92 (2004).

⁷³ AM. BAR ASS’N, COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS, 227 n.7 (2013) (quoting *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1159 (1958)).

⁷⁴ See generally Fenton & Wunderlich, *supra* note 19, at 17.

profession bestows upon them.⁷⁵ Students often pledge in these oaths that they understand and will abide by their respective school's honor code.⁷⁶ Honor codes are distinct and separate from school codes of conduct and substance abuse manuals; they are written and enforced by a specially-elected board within the school⁷⁷ and are intended to prevent academic dishonesty while maintaining the integrity and high ethical standards held by the legal profession.⁷⁸ While in school, a student risks heavy sanctions, including potential expulsion, upon breaking the honor code.⁷⁹ Some law school honor codes have general provisions regarding prohibition of any illegal activities.⁸⁰ Other law school honor codes clearly state that non-prescription drug use is a direct violation of the code.⁸¹ However, at this time, no law school honor codes contain explicit prohibitions on abuse of Adderall or Ritalin; some law schools have considered adding provisions to this effect, but have stopped short.⁸²

Another problem with this deceptive conduct is that it violates the ABA's Model Rules of Professional Conduct ("Model Rules").⁸³ Model Rule 8.4 prohibits a lawyer from engaging in any misconduct; this includes committing a crime that reflects dishonesty or engaging in dishonest conduct or misrepresentation.⁸⁴ Similarly, Model Rule 8.1 prohibits knowingly making "false statements of material fact" on any bar

⁷⁵ See, e.g., *Oath of Professionalism*, UNIV. OF DAYTON SCH. OF LAW, http://www.udayton.edu/law/students/professionalism_oath.php (last visited Apr. 4, 2015); see also *Oath of Professionalism*, UNIV. OF MEMPHIS, <http://www.memphis.edu/law/currentstudents/services/documents/oathofprofessionalism.docx> (last visited Apr. 4, 2015); see also *Professionalism Oaths for Incoming Classes*, WASHBURN UNIV. SCH. OF LAW, <http://washburnlaw.edu/students/honorcode/oaths.html> (last visited Apr. 4, 2015).

⁷⁶ See, e.g., UNIV. OF DAYTON SCH. OF LAW, *supra* note 75; see also UNIV. OF MEMPHIS, *supra* note 75; see also WASHBURN UNIV. SCH. OF LAW, *supra* note 75.

⁷⁷ See, e.g., *University of Dayton School of Law Honor Code*, UNIV. OF DAYTON SCH. OF LAW §1.02 (2012), http://www.udayton.edu/law/resources/documents/students/honor_code_2012.pdf.

⁷⁸ See, e.g., *Honor Code*, UNIV. OF SAN DIEGO SCH. OF LAW, <http://www.sandiego.edu/law/student-affairs/student-handbook/honor-code.php> (last updated July 15, 2013).

⁷⁹ See, e.g., *Student Handbook*, PEPPERDINE UNIV. SCH. OF LAW, 1, 50–51 (2011), <http://law.pepperdine.edu/strauss/content/student-handbook.pdf>; see also *Honor Code and Procedure for Law Students*, WASHBURN UNIV. SCH. OF LAW, <http://washburnlaw.edu/policies/honorcode.html#pt1> (last updated Sept. 15, 2008); see also UNIV. OF DAYTON SCH. OF LAW, *supra* note 77, at §5.06.

⁸⁰ See, e.g., WASHBURN UNIV. SCH. OF LAW, *supra* note 79.

⁸¹ PEPPERDINE UNIV. SCH. OF LAW, *supra* note 79, at 68.

⁸² See Taylor Bloom, *Viewpoint: Don't Alter Honor Codes to Include Abuse of Non-Prescription Drugs*, USA TODAY (Jan. 20, 2012), <http://college.usatoday.com/2012/01/20/opinion-dont-alter-honor-codes-to-include-abuse-of-non-prescription-drugs/> (alleging that several law schools, including Duke Law School and Wesleyan have taken the step to including a prohibition on Adderall and Ritalin in their respective honor codes); but see *The Honor Code*, WESLEYAN UNIV., <http://www.wesleyan.edu/studentaffairs/honorboard/honorcode.html> (last updated May 2010) (lacking a provision prohibiting Adderall); see *Rules & Policies Section Five*, DUKE UNIV. SCH. OF LAW, <https://law.duke.edu/about/community/rules/sec5/> (last visited Apr. 4, 2015) (lacking a provision prohibiting Adderall). At the time of writing this article, apart from the encouragement of the author, the Student Bar Association and Honor Council of the author's school began an initiative to amend its honor code to add in a provision against abuse of cognitive enhancing drugs, however it ultimately failed.

⁸³ See Fenton & Wunderlich, *supra* note 19, at 20.

⁸⁴ MODEL CODE OF PROF'L CONDUCT R. 8.4 (2013); see also Fenton & Wunderlich, *supra* note 19, at 20.

application.⁸⁵ If Model Rule 8.1 was strictly adhered to, students who abuse performance-enhancing drugs in law school risk failing the “Character and Fitness” portion of the bar exam and therefore, would not become practicing lawyers at all.⁸⁶

Finally, a study conducted at Rutgers University determined that students who cheat in their educational careers are likely to continue engaging in unethical behavior in their professional careers if not caught and reprimanded.⁸⁷ This fact alone compels further discussion of the issue as the legal profession is already fraught with drug and alcohol abuse.⁸⁸ As the leader in ethical standards within the legal profession⁸⁹ as well as within a majority of law schools,⁹⁰ the ABA has much more to gain by addressing this topic than any other organization. The ABA, therefore, must address this issue now to abate the problem and eradicate the cycle of drug abuse and unethical behavior within the legal profession.

2. The Current Legal Market: Heavy Debt and Bleak Job Prospects

Abuse of cognitive enhancing drugs also creates a special concern in law schools due to the highly competitive nature found in the legal profession, job market, and law school environment.⁹¹ “Cognitive enhancers . . . provide an advantage to their users in many situations, including in virtually any competition for scarce resources.”⁹² Law schools are fraught with competition and scarce resources; “[a]s . . . educational institution[s], [law schools] admit[] highly ambitious students, pit[] them against each other with little attempt to level the financial playing field, and release[] them into a market that can’t absorb them.”⁹³

In the current job-market conditions, a student’s high grades in law school and maintenance of a competitive class rank are imperative.⁹⁴ However, most law schools require strict, mandatory grading curves, thereby allowing only a small percentage of the class to receive “A”

⁸⁵ MODEL CODE OF PROF’L CONDUCT R. 8.1 (2013).

⁸⁶ See *id.*; Fenton & Wunderlich, *supra* note 19, at 20.

⁸⁷ Fenton & Wunderlich, *supra* note 19, at 20.

⁸⁸ See generally Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?*, 31 CREIGHTON L. REV. 265, 266 (1997).

⁸⁹ *The Center for Professional Responsibility*, AM. BAR ASS’N, http://www.americanbar.org/groups/professional_responsibility/about_us.html (last visited Apr. 4, 2015) (“[T]he Center provide[s] national leadership in developing and interpreting standards . . . in legal and judicial ethics, professional regulation, [and] professionalism . . .”).

⁹⁰ See discussion *infra* Part III.B.

⁹¹ See generally Fenton & Wunderlich, *supra* note 19.

⁹² Whitehouse et al., *supra* note 27, at 21.

⁹³ Maya Itah, *Why do so many people hate law school?*, FORTUNE.COM (Feb. 24, 2014), http://management.fortune.cnn.com/2014/02/24/law-school-haters/?iid=HP_LN.

⁹⁴ Lateral Link, *25 Things All Young Lawyers Should Know In Order To Not Screw Up Their Legal Careers*, ABOVE THE LAW (Feb. 20, 2014), <http://abovethelaw.com/2014/02/25-things-all-young-lawyers-should-know-in-order-to-not-screw-up-their-legal-careers/>.

grades.⁹⁵ Furthering the appeal of the cognitive enhancing drugs for students is the fact that law school homework is comprised of “hours upon hours of dense and complex reading.”⁹⁶ However, the biggest factor that sets law schools apart from other educational institutions, including medical schools, is the fact that, in law schools, a student’s grade in a given course is often dependent upon a single final exam.⁹⁷ These finals account for a majority, if not 100%, of a student’s course grade, so a student’s ability to study for and master one exam can change his or her future path.⁹⁸

A student’s academic performance and class rank become even more serious when examined in light of the current legal market where jobs are difficult to find and a student’s high performance and grades are the keys that open the doors to quality externships, jobs, and legal experiences.⁹⁹ Law students must apply themselves actively and thoroughly, and maintain their grades vigilantly, or they give up their dreams of securing legal work.¹⁰⁰ During law school, many prestigious firms hiring students as summer clerks require applicants reach a certain percentile of their class, or have Moot Court or Law Review/Journal experience.¹⁰¹ However, in many law schools, superior grades are prerequisites to gaining these sought-after advancements and positions.¹⁰²

Once out of law school, the prospects do not get any better. Just ask a third-year law student what kind of law he wants to practice and he will almost certainly reply, “Any! I just want a job!” That is because recent and upcoming law graduates face “the grimmest job market in decades.”¹⁰³ Each year law schools publish their post-graduate employment data, but the data is not always the most honest view.¹⁰⁴ In 2013, analysis performed by the law reform group Law School Transparency found that barely half of 2012 law school graduates in the United States were employed in full-time,

⁹⁵ Shawn P. O’Conner, *Law Admissions Lowdown: 3 Pointers for Success in Law School*, U.S. NEWS & WORLD REPORT (Feb. 27, 2012), <http://www.usnews.com/education/blogs/law-admissions-lowdown/2012/02/27/3-pointers-for-success-in-law-school>.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *See id.*

¹⁰⁰ Lateral Link, *supra* note 94.

¹⁰¹ O’Conner, *supra* note 95; Fenton & Wunderlich, *supra* note 19, at 18.

¹⁰² *Id.*

¹⁰³ David Segal, *Is Law School a Losing Game?*, N.Y. TIMES (Jan. 8, 2011), <http://www.nytimes.com/2011/01/09/business/09law.html>.

¹⁰⁴ *See* Mark Hansen, *Job market for would-be lawyers is even bleaker than it looks, analysis says*, A.B.A. J. (Apr. 1, 2013), http://www.abajournal.com/news/article/job_market_for_would-be_lawyers_is_bleaker_than_it_looks_analysis_says/; Erin Fuchs, *I Consider Law School A Waste of My Life And An Extraordinary Waste Of Money*, BUSINESS INSIDER (Dec. 14, 2013), <http://www.businessinsider.com/is-law-school-worth-the-money-2013-12#ixzz2tGqsFgYW> (explaining one law graduate’s perspective on the legal market and how he believed his school misled him and others with the statistics they provided); Segal, *supra* note 103. Some law schools purposefully hire their own graduates to provide higher employment statistics. *Id.* at 3.

long-term lawyer jobs nine months after their graduation.¹⁰⁵ Of the 2012 graduating law students, nearly 30% were either underemployed or completely unemployed.¹⁰⁶ Each year these numbers appear to be dropping.¹⁰⁷ Legal jobs are disappearing; according to a 2011 Northwestern Law study, around 15,000 large firm attorney and legal-staff positions were terminated.¹⁰⁸ There is no longer a guaranteed legal career after legal education, even if the student graduates from a Top 20 law school.¹⁰⁹ Ask school officials for honest prospects regarding a well-paying legal career upon graduation and they will say, ““We never promised that, and don’t promise it [W]e promise . . . a really good legal education that can serve you well for the rest of your life.””¹¹⁰ In summary, as one article published by the ABA stated, “it’s no wonder, considering law firm layoffs, start-date deferrals, and hiring freezes that law students ‘would welcome any advantage in their quests to get the grades that will get them the job’”¹¹¹

The dismal legal job market inflicts further pressures on students because of the amount of debt they owe after they graduate. Statistics gathered in 2012 indicated that the average debt of law graduates in the U.S. was \$100,584.¹¹² The average debt from private law schools was nearly \$125,000.¹¹³ The highest *average* at any school was a whopping \$153,145.¹¹⁴ Additionally, the cost of attending these institutions is only rising.¹¹⁵

Given the grading curve in law school, “Adderall-induced A grades [consequentially] limit the top-ranked spots available for those free of cognitive enhancement.”¹¹⁶ All the above-described factors exacerbate and contribute to an environment that clearly demands nothing short of superior performance from its students.¹¹⁷ In this context, abuse of cognitive

¹⁰⁵ See Hansen, *supra* note 104.

¹⁰⁶ *Id.* It should be noted that “underemployed” does not indicate that the graduate is employed in any type of legal career; he may be waiting tables just to survive. See *id.*

¹⁰⁷ *Id.*

¹⁰⁸ Segal, *supra* note 103.

¹⁰⁹ Fuchs, *supra* note 104.

¹¹⁰ Itah, *supra* note 93.

¹¹¹ Fenton & Wunderlich, *supra* note 19, at 18.

¹¹² Paul Caron, *Law School Rankings by Debt Load Per Graduating Student*, U.S. NEWS & WORLD REPORT (Mar. 23, 2012), http://taxprof.typepad.com/taxprof_blog/2012/03/law-schools-rankings.html.

¹¹³ Debra Cassens Weiss, *Average Debt of Private Law School Grads is \$125K; It’s Highest at These Five Schools*, A.B.A. J. (Mar. 28, 2012), http://www.abajournal.com/news/article/average_debt_load_of_private_law_grads_is_125k_these_five_schools_lead_to_m/.

¹¹⁴ *Id.*

¹¹⁵ See Elie Mystal, *Law School Math: Tuition Goes Up While Student Expenses Magically Remain Flat*, ABOVE THE LAW (Oct. 10, 2013), <http://abovethelaw.com/2013/10/law-school-math-tuition-goes-up-while-student-expenses-magically-remain-flat/>; Staci Zaretsky, *In The Future, Law School Tuition Will Be Absolutely Terrifying*, ABOVE THE LAW (Oct. 15, 2013), <http://abovethelaw.com/2013/10/in-the-future-law-school-tuition-will-be-absolutely-terrifying/#more-277743>.

¹¹⁶ See Fenton & Wunderlich, *supra* note 19, at 18.

¹¹⁷ See *id.*

enhancers by some students coerces others to do the same, indirectly pressuring them to resort to stimulant use merely to keep pace.¹¹⁸ Stimulant abuse by students not only gives those abusing it an unfair advantage, it negates accommodations provided to students with actual diagnoses who *need* Adderall or Ritalin to keep their heads above water.¹¹⁹ As stated in a paper by several leading neurologists and bioethics scholars, “[t]o the extent that [cognitive enhancers] actually confer a competitive advantage, their use by some people will result in pressure on nonusers to become users, or else to accept what amounts to a handicap in the social competition.”¹²⁰

3. Cognitive Enhancing Drugs: Impacting Law Schools Grades

But does stimulant abuse really “confer a competitive advantage” within law schools?¹²¹ Reports vary on whether Adderall and Ritalin actually enhance a student’s grades.¹²² A large majority of these studies, like most of the literature on Adderall and Ritalin abuse, look at undergraduate students, but do not divulge findings within graduate level institutions.¹²³ As evidenced above, differences exist in content of schoolwork, type of testing, and grading systems, notwithstanding the vast and varied learning environments among undergraduate institutions and law schools.¹²⁴ In an undergraduate institution, students often use cognitive enhancers to abate effects of procrastination, to hurriedly finish papers, or to study for exams that are the next day.¹²⁵ These circumstances differ *significantly* from law schools.

A law student’s grade in any given course is often 100% dependent upon one final exam covering *all* of the material presented throughout the

¹¹⁸ Chatterjee, *supra* note 4, at 971; Fenton & Wunderlich, *supra* note 19, at 18; *see also* Bowen, *supra* note 10.

¹¹⁹ Fenton & Wunderlich, *supra* note 19, at 18.

¹²⁰ Whitehouse et al., *supra* note 27, at 20.

¹²¹ *Id.*

¹²² *See* Simon M. Outram, *The Use of Methylphenidate Among Students: The Future of Enhancement?*, 36 J. OF MED. ETHICS, 198, 198 (2010) (stating that psychostimulant use “improve[s] the performance of the healthy.”); *see generally* William J. Barbaresi et al., *Modifiers of Long-Term School Outcomes for Children with Attention Deficit/Hyperactivity Disorder: Does Treatment with Stimulant Medication Make a Difference? Results from a Population-Based Study*, J. DEV. BEHAV. PEDIATR. (Aug. 28 2007), www.ncbi.nlm.nih.gov/pubmed/17700079 (finding benefits of stimulant use in long term performance); *but see* Janet Currie et al., *Do Stimulant Medications Improve Educational and Behavior Outcomes for Children with ADHD?* (Nat’l Bureau of Econ. Research, Working Paper No. 19105, 2013) (explaining findings that there was little evidence of improvement in students’ grades). Regardless of the implications on grades, it should be remembered that drugs do not have the same impact on all individuals; a cognitive enhancer may help one person and not the other. Melhman, *supra* note 16, at 499. So, the question should not be did it work, but why did the student take the drug.

¹²³ *See supra* notes 62–68.

¹²⁴ *See supra* discussion Part II.B.2.

¹²⁵ *See, e.g.*, Taylor Brundage, *Procrastination medication: UB students use Adderall to cope with college stress*, THE SPECTRUM UNIV. OF BUFFALO (Apr. 28, 2013), <http://www.ubspectrum.com/article/2013/04/procrastination-medication>; Rebecca Stern, “Smart” drugs that aren’t so smart, YALE DAILY NEWS (Sept. 20, 2011), <http://yaledailynews.com/blog/2011/09/20/stern-smart-drugs-that-arent-so-smart/>.

course of the semester.¹²⁶ These exams are then administered under strict time restraints.¹²⁷ Law students will often study most of their waking hours within the days preceding final exams.¹²⁸ According to Dr. Lamy, Adderall and Ritalin are “really great” for the purpose of studying; the effect lasts four to eight hours and permits the student to remain entirely focused.¹²⁹ For students that normally demonstrate poor study habits, these drugs can be extraordinarily useful, helping the student remain concentrated on the task at hand.¹³⁰ While many students turn to coffee or energy drinks throughout study periods, Adderall and Ritalin provide a greater advantage because they do not have the negative side effects common to caffeine.¹³¹ Large amounts of caffeine cause jitters and affect the body in ways that can detract the user’s attention; Adderall and Ritalin simply do not affect the body in that way.¹³² When it comes to the actual exam, Adderall and Ritalin work just long enough to allow sustained concentration throughout the testing period.¹³³ Dr. Lamy states that under these circumstances, a law student *would* likely achieve a higher final exam score and ultimately, a higher grade, taking Adderall or Ritalin than without.¹³⁴

III. ANALYSIS OF POTENTIAL SOLUTIONS

A. Solutions in Law Schools

While individual law schools have important interests in stopping the abuse of cognitive enhancing drugs, this problem proves a tricky one to completely resolve. Drug testing students to determine whether or not they are taking the drugs is cost prohibitive,¹³⁵ and otherwise unmanageable for the reasons discussed below.¹³⁶ Law schools should instead focus on the

¹²⁶ O’Conner, *supra* note 95.

¹²⁷ William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975, 980–96 (2004).

¹²⁸ See Randall Ryder, *Law School Finals: Taking Your First Exams*, LAWYERIST (Nov. 21, 2011), <http://lawyerist.com/law-school-finals-taking-exams/> (suggesting that to study for law school exams, students should completely clear their schedule in the weeks prior to them).

¹²⁹ Interview with Martine Lamy, MD, PhD, *supra* note 23.

¹³⁰ *Id.*

¹³¹ *Id.* Adderall and Ritalin affect a person’s ability to concentrate and generally work in the same way as other stimulants, such as caffeine. *Id.*

¹³² *Id.* For instance, a student who drinks six cups of coffee may end up detracting further from his concentration due to frequent bathroom breaks. *Id.*

¹³³ *Id.*

¹³⁴ *Id.* In making this statement, Dr. Lamy further stated that there are many other circumstances that come into play while testing, and drugs like Adderall and Ritalin do not help in a student’s ability to recall facts. *Id.* However, taking into consideration the ability of the drugs to enhance concentration, a student taking the drugs is likely to do better on a timed test, where focus is often very important, than a student not taking the drugs. *Id.*

¹³⁵ See *Drug Testing of Public Assistance Recipients as a Condition of Eligibility*, AM. CIVIL LIBERTIES UNION (Apr. 8, 2008), <https://www.aclu.org/drug-law-reform/drug-testing-public-assistance-recipients-condition-eligibility> (stating that the costs for drug tests alone are around \$42 per person, not including other factors).

¹³⁶ See discussion *infra* Part III.D.

possibilities of deterring the behavior. Right now, without any disciplinary procedures in place, students face little risk of being caught and can attain very high rewards of better grades and class rank, better chances at Law Review and Moot Court, and better job prospects upon graduation. Why wouldn't a student cheat?

The best solution for individual law schools is to add a provision to the school's honor code that explicitly outlaws the abuse of cognitive enhancers. As previously discussed, honor codes, unlike the student codes of conduct and substance abuse manuals, focus specifically on issues that are deemed violations of academic integrity, such as cheating.¹³⁷ While abuse of cognitive enhancers does represent a potential substance abuse issue, students who take cognitive enhancing drugs without a prescription do so more for cheating than recreational drug purposes.¹³⁸

The biggest issue with adding a provision to a school's honor code is enforcement. Some argue that besides "he said/she said" evidence, proof that a student obtained Adderall or Ritalin illegally would be near impossible to gather for a law school's honor council. Similarly, even though one study indicated that students' main reason for abusing cognitive enhancers is improving academic performance,¹³⁹ apart from asking the alleged offender directly, motive would be hard for the honor council to verify with absolute certainty. Finally, without drug testing the alleged offender, it would be very difficult to confirm that the student took the drug at all. Without knowing the student's motive or proof that abuse took place, it would be impossible to enforce and punish an alleged offender.

It is for this very reason that many law schools may turn away from the decision to add such a provision; opponents argue that to add such a provision would merely make a "symbolic statement" or stand.¹⁴⁰ However, the enforcement argument should be thrown aside for several reasons. First, many laws are difficult to enforce and enforcement cannot be achieved overnight. Second, enforcement can occur through reporting. Finally, this argument underestimates the effective nature and overall purpose of school honor codes.

Enforcement should never be the first concern in an issue like this. If it were, then many provisions and laws would never be enacted in the first place. Consider, for example, one of the most serious and recognized forms of cheating, plagiarism.¹⁴¹ Even after the advent of internet plagiarizing websites and software which allow a teacher to copy and paste their

¹³⁷ See *supra* note 77 and accompanying text.

¹³⁸ Rabiner et al., *supra* note 67, at 268.

¹³⁹ Rabiner et al., *supra* note 67, at 264.

¹⁴⁰ Bloom, *supra* note 82.

¹⁴¹ Margaret Price, *Beyond "Gotcha!": Situating Plagiarism in Policy and Pedagogy*, 54 COL. COMPOSITION AND COMMUN 88, 90 (2002).

student's paper into a search engine and receive plagiarism results, it is extremely difficult to catch a student's plagiarism.¹⁴² A teacher must painstakingly examine each paragraph and each sentence for cohesion in writing style, and even these efforts do not work to catch a student who plagiarized his *entire* paper or perhaps bought it offline.¹⁴³ Further, without the Internet and websites like turnitin.com, there is the added difficulty of finding out what source the student copied from.¹⁴⁴ Finally, as with abuse of cognitive enhancers, once a student is caught copying, it is near impossible to discover his or her motives without directly asking; how do you know that a student did not mean to cite the source or simply did not understand how to cite appropriately?¹⁴⁵

Enforcement does not happen overnight. Look at any sports program where drugs have been banned and one will see that it takes a long time to effectively enforce and manage the provisions.¹⁴⁶ The first step in any of these arenas is recognizing there is a problem and then attempting to address the problem. When the issue is shoved aside, it is because of a willingness to ignore the problem, not because of a fear of or inability to enforce it.¹⁴⁷ Enforcement is not the concern right now when there have been fifty hearings and no proven violations.

Next, enforcement is possible through reporting. Honor codes often carry an affirmative duty for students to report any known violations committed by peers.¹⁴⁸ If a student fails to report his peer for a known honor code violation, and it is discovered, he too is subject to punishment under the honor code.¹⁴⁹ Although there is the possibility of false reporting, honor codes should require the reporting student to allege specific acts and facts,¹⁵⁰ similar to the requirements of a civil pleading.¹⁵¹ The honor code

¹⁴² See *Plagiarism Detection & Prevention: A Guide for Faculty*, DELTA STATE UNIV., <http://www.deltastate.edu/academics/libraries/collection-development-resources/plagiarism-detection-prevention-a-guide-for-faculty/> (last visited Apr. 5, 2015).

¹⁴³ *Id.*

¹⁴⁴ See Tyra Twomey, *What's the Deal with Turnitin?*, in *PEDAGOGY, NOT POLICING: POSITIVE APPROACHES TO ACADEMIC INTEGRITY AT THE UNIVERSITY* 149, 149–50 (Tyra Twomey et al. eds., 2009), available at <http://www.syr.edu/gradschool/pdf/resourcebooksvideos/AIBook/AITwomey.pdf>.

¹⁴⁵ Price, *supra* note 141 at 102–04. Intent can sometimes present an even bigger issue when it comes to plagiarizing than other forms of cheating; some school policies on plagiarism insist that the policy is violated regardless of intent if there is even the slightest amount of plagiarism. *Id.* at 102.

¹⁴⁶ See, e.g., *Drug Policy coverage: Event Timeline*, MAJOR LEAGUE BASEBALL, http://mlb.mlb.com/mlb/news/drug_policy.jsp?content=timeline (last visited Apr. 5, 2015).

¹⁴⁷ See, e.g., Brian Curtis, *The Steroid Hunt*, GRANTLAND (Jan. 8, 2014) <http://grantland.com/features/mlb-hall-fame-voting-steroid-era/>. Steroid usage, although common and obvious among players, was not properly addressed until 2003 with the introduction of the Joint Drug Prevention and Treatment Program. *Id.*; MAJOR LEAGUE BASEBALL, *supra* note 146.

¹⁴⁸ See, e.g., PEPPERDINE UNIV. SCH. OF LAW, *supra* note 79, at 3.02; UNIV. OF DAYTON SCH. OF LAW, *supra* note 77, at § 1.04.

¹⁴⁹ See, e.g., PEPPERDINE UNIV. SCH. OF LAW *supra* note 79, at 3.02; UNIV. OF DAYTON SCH. OF LAW, *supra* note 77, at § 4.01.

¹⁵⁰ See, e.g., UNIV. OF DAYTON SCH. OF LAW, *supra* note 77, at § 1.04.

¹⁵¹ Fed. R. Civ. P. 8.

should also prohibit false or misleading reporting.¹⁵² These provisions would ensure valid reporting of concerns, violations or incidents backed by substantial proof from reporting students.

Finally, the enforcement argument undermines the effective nature of honor codes. A myriad of sources indicate that honor codes are not effective simply because of the ability to enforce their provisions, but they work by ensuring students understand the standards and by “embedd[ing] [students] in a culture of integrity.”¹⁵³ Within honor code schools, students are shrouded in a community that places a higher expectation of accountability on them for themselves and others; they are expected to hold themselves to a higher standard, even without enforcement.¹⁵⁴ Furthermore, honor codes “have long-term effects on behavior” and follow students into their professional lives.¹⁵⁵ However, to guarantee an honor code is effective, the school must establish rules that are both (1) valued and (2) understood.¹⁵⁶

As the preface to the ABA Model Code of Professional Responsibility states, “[e]thical [c]onsiderations are aspirational in character and represent the objectives toward which every member of the profession should strive.”¹⁵⁷ Any school or organization may have an extremely well written code of ethics or honor code, but if it does nothing to create an ethical and cultural community of integrity where its “aspirations” are understood and valued, the code will fail.¹⁵⁸ As mentioned in Section II, many law schools take specific measures to ensure students read and understand the honor code, and recognize the integrity and honor of the profession they are entering.¹⁵⁹ There are further steps that may be taken to make any honor code more effective, but in the end, enforcement is not the

¹⁵² See, e.g., *Student Conduct & Honor Code*, UNIV. OF FLA. DIV. OF STUDENT AFFAIRS <https://www.dso.ufl.edu/scsr/process/student-conduct-honor-code/> (last visited Apr. 5, 2015).

¹⁵³ Donald L. McCabe et al., *Cheating in Academic Institutions: A Decade of Research*, 11 ETHICS & BEHAVIOR 219, 224–26 (2001); see also Donald L. McCabe & Linda Klebe Trevino, *Academic Dishonesty: Honor Codes and Other Contextual Influences*, 64 JOURNAL OF HIGHER EDUCATION 522, 526 (1993); see also David Callahan, *Why Honor Codes Reduce Student Cheating*, HUFFINGTON POST (Dec. 14, 2010), http://www.huffingtonpost.com/david-callahan/why-honor-codes-reduce-st_b_795898.html; see also Perry Nagin, *Can We Trust School Honor Codes to Prevent Cheating?*, POLICY.MIC (Dec. 24, 2011), <http://www.policymic.com/articles/3013/can-we-trust-school-honor-codes-to-prevent-cheating>.

¹⁵⁴ McCabe & Trevino, *supra* note 153, at 525–26.

¹⁵⁵ See McCabe et al., *supra* note 153, at 225 (discussing study findings that participating professionals whom attended colleges with honor codes acted with the least dishonest behavior in the workplace).

¹⁵⁶ *Id.* at 224–26.

¹⁵⁷ AM. BAR ASS’N, *supra* note 73, at 226.

¹⁵⁸ See McCabe et al., *supra* note 153, at 224–26; see also *Corporate Ethics: Right Makes Might*, BLOOMBERG BUSINESSWEEK (Apr. 10, 2002), <http://www.businessweek.com/stories/2002-04-10/corporate-ethics-right-makes-might> (explaining that although Enron had a valid and well written code of ethics, it ultimately failed by being nothing more than “window dressings” because the organization failed to put their values into action).

¹⁵⁹ See *supra* notes 75–81 and accompanying text.

definitive factor in curbing negative student behavior.¹⁶⁰

These schools must encourage and publicize clear values to make them understood.¹⁶¹ In amending the honor code, law schools must explicitly name all prohibited cognitive enhancers; it is not enough to simply state that use of drugs without a valid prescription is prohibited. According to Professor McCabe's findings, honor codes are effective because they state outright what is expected; students know precisely what behavior is acceptable and what is not.¹⁶² Leaving a provision in the "gray area" by using ambiguous language does not permit students to know what is right and what is wrong. Definitive terms facilitate responsibility and grant students the confidence to report concerns without speculating whether or not an incident breaches the code and thereby creates a greater duty to report such behavior. As it stands, a student cannot report an activity that is not considered cheating under the honor code, even if the student believes it is cheating. If the honor code is ambiguous, a student may turn a blind eye, feeling it is not necessary to report the witnessed event. Plainly listing prohibited drugs and activities mitigates confusion, gives the reporting student peace of mind in stepping forward, and provides solid, unbiased principles to stand on in reporting a violation. This is especially true if the honor code has a provision against false reporting and the student fears retribution.

The amended provision should forbid solicitation of cognitive enhancers. Criminal law charges defendants in their attempts to commit a crime.¹⁶³ The amendment should also oppose appropriation of cognitive enhancers from other students. Although the punishment sought for appropriation should be less than the punishment sought for actual use of the substance, the candid language that bans solicitation will motivate students to think twice and to practice greater accountability. The student who is asked for the drug is responsible for reporting it to the honor council.

The added provision might be similar to the following:

Students shall refrain from utilizing illegal or legal cognitive enhancing drugs without a valid prescription, to obtain any actual or presumed academic advantage. Cognitive enhancing drugs included for the meaning of this section include the following, along with any drugs of like effect: Amphetamines (Adderall, Dexedrine, Dextrostat, Dexedrine Spansule, and Vyvanse), Methylphenidates (Ritalin, Methylin, Metadate, Concerta, Quillivant, and

¹⁶⁰ See generally McCabe et al., *supra* note 153.

¹⁶¹ *Id.* at 225–26; see also *supra* text accompanying notes 71–73.

¹⁶² McCabe et al., *supra* note 153, at 226.

¹⁶³ MYRON MOSKOVITZ, *CASES AND PROBLEMS IN CRIMINAL LAW* 569 (6th ed. 2012).

Daytrana), Methamphetamines (Speed), Strattera, Intuniv, and Cocaine.

The ABA, who creates the Model Rules, could draft a suggested amendment for ABA accredited schools to add to their honor codes for further uniformity. If these provisions are added to a law school's honor code, cognitive enhancing drug abuse will decrease not only because offending students will be caught and disciplined, but also because rooted understanding of what is right and wrong, along with mandatory reporting will significantly increase risk for violation and act as an impartial deterrent.

B. Solutions From The American Bar Association

Exacting any change on a scale larger than a simple amendment to a law school's honor code requires more force than a law school acting on its own. The best organization to neutralize the widespread effects of cognitive enhancer abuse is the ABA. The ABA is a voluntary professional organization.¹⁶⁴ Some of their stated goals are to “improv[e] the legal profession, eliminat[e] bias and enhanc[e] diversity,”¹⁶⁵ and as mentioned in Section II, the ABA is the leading source and enforcer of ethics within the entire legal profession in the United States.¹⁶⁶

Although the United States Department of Education is the national agency responsible for the accreditation of schools providing the Juris Doctorate degree (“J.D.”), which graduating students receive, the ABA also provides accreditation of law schools.¹⁶⁷ Accreditation by the ABA is similar to institutional membership in the National Collegiate Athletic Association (“NCAA”); ABA accreditation is not required for law schools, but provides significant benefits.¹⁶⁸ The most common benefit assures students who graduate from an ABA accredited law program can sit for the bar exam in any jurisdiction in the United States.¹⁶⁹ In many states, this is an extra requirement; in order to take the bar, an individual's J.D. must come from an ABA accredited or ABA-approved law school.¹⁷⁰

The ABA accreditation process requires adherence to strict

¹⁶⁴ *About the American Bar Association*, AM. BAR ASS'N, http://americanbar.org/about_the_aba.html (last visited Apr. 5, 2015).

¹⁶⁵ *Id.*

¹⁶⁶ AM. BAR ASS'N, *supra* note 89 (“[The Center] provide[s] national leadership in developing and interpreting standards . . . in legal and judicial ethics, professional regulation, [and] professionalism . . .”).

¹⁶⁷ AM. BAR ASS'N, *supra* note 164.

¹⁶⁸ *Frequently Asked Questions*, AM. BAR ASS'N, http://www.americanbar.org/groups/legal_education/resources/frequently_asked_questions.html (last visited Apr. 5, 2015).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* Accreditation by the ABA requires many things, including approval by the ABA and compliance with its standards. *Id.* Many states now require ABA accredited degrees prior to bar admission because ABA standards have become the norm and guarantee that the student has received a quality education and will be further prepared for the responsibilities inherent in being a practicing attorney. *Id.*

guidelines in order to become “approved.”¹⁷¹ For example, since the 1970s the ABA has required accredited law schools to provide courses that teach students professional responsibility and the Model Rules.¹⁷² There are currently 205 J.D. law schools that have ABA-approved status.¹⁷³ The ABA is therefore the largest organization with both a say in professional ethics and a guiding-hand in law schools across the United States, making it the perfect organization to attempt to solve the abuse of performance-enhancing drugs in law schools.

The ABA already has in its Model Rules provisions that are seemingly against abuse of cognitive enhancers in law schools. Therefore, in addressing this problem the ABA must do more than merely adjust the rules. The most comprehensive and effective solution is to conduct suspicionless drug testing of law students in ABA accredited schools. However, whenever there are drug tests involved, there will be privacy concerns.

C. The Fourth Amendment

The main concern of any regulation or action that implicates a citizen’s privacy is the Fourth Amendment to the United States Constitution. The Fourth Amendment declares:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁷⁴

Taken literally, the Fourth Amendment protects a citizen against searches of his person or possessions.¹⁷⁵ However, in the past century, a greater understanding and a wider scope has been given to Fourth Amendment protections of the citizen’s “person” by stating that drug testing may represent an unconstitutional search.¹⁷⁶ Although the Fourth Amendment clearly states there must be probable cause for a state actor to carry out a search or seizure, the Supreme Court has held that searches

¹⁷¹ *Introduction to the 2014-2015 ABA Standards and Rules of Procedure for Approval of Law Schools*, AM. BAR ASS’N, http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_introduction.authcheckdam.pdf.

¹⁷² Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, 58 *LAW & CONTEMP. PROBS.* 139, 139 (1995); AM. BAR ASS’N, *STANDARDS FOR THE APPROVAL OF LAW SCHOOLS*, STD. 301.

¹⁷³ *ABA-Approved Law Schools*, AM. BAR ASS’N http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html (last visited Apr. 5, 2015).

¹⁷⁴ U.S. CONST. amend. IV.

¹⁷⁵ *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 613 (1989).

¹⁷⁶ See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664–65 (1995); *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665 (1989); *Skinner*, 489 U.S. at 617–18.

unsupported by probable cause may be constitutional ““when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.””¹⁷⁷

The following subsections examine drug testing jurisprudence in other levels of education to shed light on what exactly represents a constitutional search, what or who a state actor is, and what interests are strong enough to allow a reasonable intrusion of a citizen’s privacy.

1. Drug Screening and Privacy Issues in High Schools

Throughout the past few decades a trend emerged in which high schools across the country began implementing random drug screens of students.¹⁷⁸ A majority of the schools started out simply testing students participating in sports.¹⁷⁹ However, the practice quickly came to include other extracurricular activities like band, drama club, and academic competitions.¹⁸⁰ Many courts have examined Fourth Amendment disputes arising from these drug-screening programs.¹⁸¹ One general principle these cases articulate is that although public high schools, funded through the government, are “state actors,” high school students are minors; they have a limited privacy interest while the government, looking out for public welfare and health, has a greater interest to protect the nation’s youth from drugs and alcohol.¹⁸²

In 1985, the Supreme Court in *New Jersey v. T.L.O.* stated that when carrying out searches of students, public school officials acted as state actors, not as surrogates for the parents.¹⁸³ Therefore, every search was required to adhere to the Fourth Amendment.¹⁸⁴ The Court insisted that any search by the school, as a state actor, must be “reasonable under the circumstances” and further provided a two-part test.¹⁸⁵ The *T.L.O.* Court stated that a search is considered reasonable under the circumstances and therefore constitutional, when it is (1) “justified at its inception,” and (2) “reasonably related in scope to the circumstances which justified the

¹⁷⁷ *Acton*, 515 U.S. at 653 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

¹⁷⁸ M.H. Davis, *Facts & Statistics on Random Drug Testing of High School Students*, GLOBAL POST, <http://everydaylife.globalpost.com/statistics-random-drug-testing-high-school-students-8400.html> (last visited Apr. 5, 2015).

¹⁷⁹ *See id.*

¹⁸⁰ *See id.*

¹⁸¹ *See* Bd. of Educ. v. *Earls*, 536 U.S. 822, 825–27 (2002); *Acton*, 515 U.S. at 648; *New Jersey v. T.L.O.*, 469 U.S. 325, 327 (1985); *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1096 (Colo. 1998).

¹⁸² *See Earls*, 536 U.S. at 830–31; *Acton*, 515 U.S. at 656–57; *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring).

¹⁸³ *T.L.O.*, 469 U.S. at 336–37.

¹⁸⁴ *Id.* If the Court had held otherwise, school officials could be seen as acting as surrogate parents and would have immunity from the Fourth Amendment under the doctrine of *in loco parentis*. *Id.*

¹⁸⁵ *Id.* at 337, 341–42.

interference in the first place.”¹⁸⁶ The Court further stipulated that a search should be deemed permissible in scope when measures used are related to its objectives and not “excessively intrusive” in light of the searched individual’s age and sex and “nature of the infraction.”¹⁸⁷

Over a decade later the Court stated, “[T]he ultimate measure of the constitutionality of a governmental search is ‘reasonableness.’”¹⁸⁸ In *Vernonia School District v. Acton*, a public school district implemented a drug-screening program after an increase in drug use and drug related disciplinary problems at the school.¹⁸⁹ Examining a student’s challenge to the school program, the Court held that the drug screening was constitutional because (1) the school demonstrated a need for the drug test; (2) high school students had a diminished expectation of privacy; and (3) the school board had a narrowly defined and reasonable testing policy.¹⁹⁰ The Court reasoned that, similar to *T.L.O.*, in determining whether a specific testing program meets the reasonableness standard, the program must be judged by balancing the intrusion of the individual’s privacy interests with the governmental interests in conducting the test.¹⁹¹

In 2002, the Supreme Court expanded the acceptable scope of drug tests by allowing drug screening for the sole purpose of deterring drug usage among high school students.¹⁹² In *Board of Education v. Earls*, a public school system required that any student participating in extracurricular activities submit to random drug tests.¹⁹³ When a positive test result for drugs occurred, the results were kept confidential and did not result in legal or disciplinary action against the student, but instead it lead to parental notification and a recommendation for drug counseling.¹⁹⁴ In the Court’s determination of the testing program’s constitutionality, it stated that a showing of need was not required, but that *all* students give up some of their privacy rights when attending school.¹⁹⁵ Specifically, in its holding, the Court stated the Fourth Amendment has never imposed a strict requirement of suspicion, and in some instances, the government’s interest in discovering hidden problems or in preventing the development of problems may be compelling enough to allow searches without any individualized

¹⁸⁶ *Id.* at 341–42. This requirement of reasonableness, however, should not be seen as imposing a requirement of individualized suspicion for the search; the Court has also stated that “the Fourth Amendment imposes no irreducible requirement of . . . suspicion.” *Id.* at 342 n. 8.

¹⁸⁷ *Id.* at 342.

¹⁸⁸ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995).

¹⁸⁹ *Id.* at 648–50.

¹⁹⁰ *Id.* at 664–65.

¹⁹¹ *Id.* at 652–53.

¹⁹² *Bd. of Educ. v. Earls*, 536 U.S. 822, 836 (2002).

¹⁹³ *Id.* at 826.

¹⁹⁴ *Id.* at 833. The school’s program dictated that a student would have to receive multiple tests with positive results to necessitate a removal of the student from extracurriculars. *Id.* at 834.

¹⁹⁵ *See id.* at 829–30.

suspicion.¹⁹⁶

2. Drug Testing of Undergraduate Students

While it appears state actors have a wide scope when implementing suspicionless drug screening in high schools, warrantless searches of college students are subject to more strict and traditional Fourth Amendment analysis.¹⁹⁷ College students are generally old enough to enlist in the military, drive vehicles, have careers, and vote. Therefore, it can no longer be said that university students, as adults, are entitled to less protection than other persons under the Fourth Amendment simply because they are students at a university.¹⁹⁸

In *University of Colorado ex rel. Regents of the University of Colorado v. Derdeyn*, for example, a state university implemented drug-testing program of student athletes, which was deemed unconstitutional by the Supreme Court of Colorado.¹⁹⁹ The court stated while non-voluntary, suspicionless drug testing by state actors “always intrudes on an individual’s Fourth Amendment privacy interests,” the level of the intrusion may vary depending upon the context of the situation and implementation of the drug testing.²⁰⁰ Gathering information from similar prior decisions, the court in *Derdeyn* arranged a list of five factors they used to determine the magnitude of privacy intrusions for a Fourth Amendment analysis.²⁰¹ (1) the place and manner of the drug test; (2) the nature of the activity or industry in which the individual participates and whether it is commonly regulated for safety;²⁰² (3) the “operational realities” of the individual’s workplace; (4) “whether the individual . . . [is] subject to frequent medical examinations,” regardless of the reason; and (5) the consequences of refusing to submit to the drug test.²⁰³ Considering these factors, the court held that when balanced, the governmental interest was not sufficiently compelling to outweigh the significant intrusion of the privacy on university athletes, and the program was therefore unconstitutional.²⁰⁴

¹⁹⁶ *Id.* at 829. The Court in *Earls* heavily emphasized the fact that there was a growing epidemic of students using drugs and that the Government’s interest in protecting and preventing further drug abuse by minors was sufficient enough to negate the need for suspicion in testing its students. *Id.* at 834–38.

¹⁹⁷ See, e.g., *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988).

¹⁹⁸ See, e.g., *Univ. of Colo. ex rel. Regents of the Univ. of Colo. v. Derdeyn*, 863 P.2d 929, 938 (Colo. 1993). Courts often explain that minors have less interest in their constitutionally protected rights because until they reach the age of majority, many aspects of their lives are controlled by their parents, and children are seen as not having the same decision-making skills as adults. Anne C. Dailey, *Children’s Constitutional Rights*, 95 MINN. L. REV. 2099, 2100–01 (2011).

¹⁹⁹ *Derdeyn*, 863 P.2d at 946.

²⁰⁰ *Id.* at 937.

²⁰¹ *Id.*

²⁰² *Id.* (citing *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 627 (1989)). This factor is looked at to show that the interest in testing the individual is not merely due to health and safety concerns of the individual himself, but of the health and safety within the industry. *Derdeyn*, 863 P.2d at 937.

²⁰³ *Derdeyn*, 863 P.2d at 937 (alteration in original).

²⁰⁴ *Id.* at 946.

3. Testing Conducted by the National Collegiate Athletic Association

Although universities themselves have a harder time implementing drug-screening programs, courts have held that the NCAA is not a state actor, and further, that the NCAA personally has an interest and ability to implement drug screening.²⁰⁵ The NCAA is a non-profit organization over a century old that acts to protect student athletes, mainly at the undergraduate level.²⁰⁶ Many of the nation's colleges voluntarily join the NCAA to help regulate their athletic programs and to participate in NCAA organized athletics.²⁰⁷

Roughly half of the NCAA members are public institutions that supply more than half of the NCAA's revenues.²⁰⁸ However, it has been held that state funding alone does not make an entity a state actor.²⁰⁹ In *Arlosoroff v. NCAA*, the United States Court of Appeals for the Fourth Circuit stated that, "[t]here is no precise formula to determine whether otherwise private conduct constitutes 'state action;' [a]fter 'sifting facts and weighing circumstances,' the inquiry in each case is whether the conduct is fairly attributable to the state."²¹⁰ The court reasoned that even though a private institution, like the NCAA, may be heavily regulated and subsidized by the state, it is not necessarily making state actions.²¹¹ Instead, the court suggested state action requires the organization's functions be ones "traditionally reserved to the state."²¹²

The Supreme Court supported the *Arlosoroff* holding in *NCAA v. Tarkanian*.²¹³ In *Tarkanian*, the Court stated the NCAA was not a "state actor" for the purposes of the Fourth Amendment.²¹⁴ The Court stated that the most important question in determining state action is whether "the conduct allegedly causing the deprivation of a federal right [can] be fairly attributable to the State."²¹⁵ The Court concluded that because the NCAA acts on its own and not through the state, its actions will likely be held constitutional.²¹⁶

In *Hill v. NCAA*, the California Supreme Court acknowledged that the NCAA's implemented system of drug-testing athletes was constitutional

²⁰⁵ See *NCAA v. Tarkanian*, 488 U.S. 179, 196 (1988).

²⁰⁶ *Health And Safety*, NCAA, <http://www.ncaa.org/health-and-safety> (last visited Apr. 5, 2015).

²⁰⁷ *Membership*, NCAA, <http://www.ncaa.org/about/who-we-are/membership> (last visited Apr. 5, 2015).

²⁰⁸ *Arlosoroff v. NCAA*, 746 F.2d 1019, 1021 (4th Cir. 1984).

²⁰⁹ See *id.*

²¹⁰ *Id.* (internal citations omitted).

²¹¹ *Id.* at 1022.

²¹² *Id.* at 1021. The Court also emphasized that participation of public institutions in the NCAA was voluntary. *Id.* at 1020.

²¹³ *NCAA v. Tarkanian*, 488 U.S. 179, 195-99 (1988).

²¹⁴ *Id.* at 196.

²¹⁵ *Id.* at 199 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)) (alteration in original).

²¹⁶ *Id.*

because the system was “reasonably calculated to further its legitimate interest.”²¹⁷ The court reasoned that the NCAA, as the sponsor and regulator of sporting events, had great interest not only in safeguarding the health and safety of student athletes, but also in protecting the integrity of athletic competition.²¹⁸ The court further provided that these interests outweighed the athlete’s expectation of privacy, and that the NCAA’s program was formulated in such a way that it did not disturb the legitimate privacy interest of the athletes.²¹⁹ Finally, the court held that the NCAA’s interests in stopping drug abuse extended not only to performance enhancing drugs that affect the player’s athletic abilities, but also to the use of all illegal and dangerous substances.²²⁰

In *Hill*, the court specifically cited four features of the NCAA’s drug testing program in its determination that student athletes’ interests were not offended:

(1) advance notice to athletes of testing procedures and written consent to testing; (2) random selection of athletes actually engaged in competition; (3) monitored collection of a sample of a selected athlete’s urine in order to avoid substitution or contamination; and (4) chain of custody, limited disclosure, and other procedures designed to safeguard the confidentiality of the testing process and its outcome.²²¹

Although *Hill* was decided nearly twenty years ago, the NCAA still continues to maintain a similar drug-testing program to ensure the safety and integrity of its competitions.²²² Under its drug-testing policy, the NCAA designated a list of drugs that are banned.²²³ The list sets out classes of drugs that the NCAA bans and further states that any substance chemically related to the specific classes are banned as well.²²⁴ However, the NCAA provides medical exceptions for athletes with documented medical histories showing a need for regular use of certain medications.²²⁵ When conducting a drug test, each sample is collected and processed by an independent

²¹⁷ *Hill v. NCAA*, 865 P.2d 633, 660 (Cal. 1994). It must be noted that *Hill* was concerned with privacy violations of the California Constitution and not the Fourth Amendment to the U.S. Constitution. *Id.* at 637. Nonetheless, *Hill* demonstrates important points that go hand-in-hand with the Fourth Amendment. See generally *id.*

²¹⁸ *Id.* at 661.

²¹⁹ *Id.* at 637.

²²⁰ *Id.* at 662–63.

²²¹ *Id.* at 637.

²²² *Drug Testing*, NCAA, <http://www.ncaa.org/drugtesting> (last visited Apr. 5, 2015).

²²³ *2014-15 NCAA Banned Drugs*, NCAA, <http://www.ncaa.org/health-and-safety/policy/2014-15-ncaa-banned-drugs> (last visited Apr. 5, 2015).

²²⁴ *Id.* Examples of banned classes of drugs are stimulants, anabolic agents, alcohol, and beta blockers, and street drugs. *Id.*

²²⁵ *NCAA Drug Policies: For Your Health & Safety*, NCAA 1, 1 (2013-2014), http://www.ncaa.org/sites/default/files/6.%20DRUG%20POLICIES_6%2018-13.pdf.

agency.²²⁶ The samples are thereafter collected and analyzed under “strict, published protocol[s].”²²⁷ Upon a finding of a positive drug test, the NCAA’s punishments are strict and automatic, resulting in a loss of eligibility of play.²²⁸ However, there are routes for the student athlete to appeal a finding of a positive drug test.²²⁹

D. Drug Screening to Stop the Abuse of Cognitive Enhancing Drugs

Implementing any kind of drug screening within law schools, whether by the law school itself or by the ABA, as suggested in this Comment, implicates potential privacy issues and must be balanced against the greater context of the system of legal education. The Fourth Amendment applies only to the federal and state governments, vis-à-vis application of the Fourteenth Amendment, and their agents.²³⁰ Therefore, the analysis of any solution may change according to which entity in the legal profession attempts to take action.

As alluded to previously in Section III, most law schools would be incapable of conducting such a program. All public law schools would be considered state actors in a Fourth Amendment analysis; they not only receive funding from the state, but, unlike the NCAA, public law schools, as agents of the state, would be viewed as “taking state actions” by conducting student drug screening.²³¹ As state actors, these schools would be subject to a strict Fourth Amendment analysis in the courts.²³² Conversely, a private law school would not be considered to be taking state action and the Fourth Amendment would not apply. However, a private law school could still run into the same state issues addressed in both and *Derdeyn*, having its interests outweighed by the intrusion of the student’s privacy.²³³ While law schools have the same interests as the ABA, a court would likely see, as in *Derdeyn*, the school itself has less of an interest than a national organization like the ABA, and the intrusion involved would outweigh the school’s individual

²²⁶ NCAA, *supra* note 222.

²²⁷ *Id.*

²²⁸ *Id.* Upon a second finding of a positive drug test the student either loses his second year of eligibility in the case of street drugs, or in the case of performance enhancing drugs, becomes permanently ineligible. *Id.*

²²⁹ *Id.*

²³⁰ *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985); *see also* *Hill v. NCAA*, 865 P.2d 633, 650 n.8 (Cal. 1994) (stating that “[l]ike other rights contained in or derived from provisions of the Bill of Rights, the federal constitutional right to privacy applies only against state action.”).

²³¹ *See* *NCAA v. Tarkanian*, 488 U.S. 179, 183 (1988) (explaining that the University, as a state-funded institution, conducts state actions); *see also* *Univ. of Colo. ex rel. Regents of the Univ. of Colo. v. Derdeyn*, 863 P.2d 929, 935–936 (Colo. 1993) (“The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches conducted by the government, even when the government acts as the administrator of an athletic program in a state school or university.”) (internal citation omitted); *see also* *New Jersey v. T.L.O.*, 469 U.S. 325, 333–37 (1985) (explaining that state actions include searches and seizures by public school officials who are acting as civil authorities).

²³² *See* *T.L.O.* at 336.

²³³ *See* *Derdeyn*, 863 P.2d at 949–50.

interests.²³⁴ These problems are in addition to the debilitating costs of conducting drug-testing programs.²³⁵ Therefore, schools should not attempt to establish a drug-screening program on their own.

The ABA is not considered a state actor; although it accredits and approves law schools, similar to the NCAA with its memberships, it does not take state action, but, instead, acts entirely on its own.²³⁶ Because the ABA is not a state actor, when acting on its own accord, the Fourth Amendment does not apply; thus, any searches and seizures conducted by the ABA would not violate the Fourth Amendment.²³⁷ However, the ABA would be wise to implement a program that conforms to Fourth Amendment standards, and avoids the kind of challenges the NCAA faced in the state courts. By modeling a system of testing from examples found in the Fourth Amendment jurisprudence discussed previously in Section III, the ABA could successfully implement a drug screening program within its accredited schools, which would discourage students from abusing cognitive enhancing drugs. The next subsections investigate specific interests the ABA has in testing law students, and how a program could be reasonably implemented in order to withstand Fourth Amendment scrutiny.

1. Compelling Interests

It is clear from Fourth Amendment precedent that any testing program must be reasonable.²³⁸ However, to enable a finding of reasonableness there must be a balancing between the intrusion of the individual's right to privacy and the testing entity's interests in conducting the test.²³⁹ Therefore, explicit interests must be determined. As discussed in both Sections II & III of this Comment, the ABA has several compelling reasons for addressing the abuse of cognitive enhancers.

First and foremost, abusing cognitive enhancers is an illegal activity.²⁴⁰ As in the context of high schools, law schools also have an interest in keeping their students off illegal drugs—and illicitly-obtained, potentially dangerous legal drugs as well.²⁴¹ Deterring illegal activity of adult student athletes has also been found to be an important interest held by the NCAA in Fourth Amendment jurisprudence.²⁴² It is only logical that institutions providing students with a legal education have a great interest in

²³⁴ *Id.* at 934.

²³⁵ See AM. CIVIL LIBERTIES UNION, *supra* note 135 (stating that the costs for drug tests alone are around \$42 per person, not including other factors).

²³⁶ See, e.g., *Arlosoroff v. NCAA*, 746 F.2d 1019, 1021 (4th Cir. 1984).

²³⁷ See *supra* note 230 and accompanying text.

²³⁸ See discussion *supra* Part III.C.

²³⁹ See *supra* text accompanying note 191.

²⁴⁰ *Prescription Drugs Fast Facts*, NAT'L DRUG INTELLIGENCE CTR. (2003), <http://www.justice.gov/archive/ndic/pubs5/5140/5140p.pdf>.

²⁴¹ See *Bd. of Educ. v. Earls*, 536 U.S. 822, 838 (2002).

²⁴² See *Hill v. NCAA*, 865 P.2d 633, 662–63 (Cal. 1994).

ensuring that law school graduates are law-abiding citizens.

The ABA also has an interest in preventing cheating and maintaining integrity in its fiercely competitive system where grades are of the utmost importance.²⁴³ Stated in *Hill*, the NCAA is allowed to protect the integrity of its competitions by testing for use of performance enhancing drugs.²⁴⁴ Likewise, the ABA should be allowed to protect the integrity of the competitive process within legal education. However, there are some key differences in these interests. Specifically, competition is the core function of membership in the NCAA.²⁴⁵ Therefore, this interest may be greater in the NCAA as it protects against competitive advantages between players and teams. While the legal profession is inherently competitive, it is quite unlike a sports competition. A student's grades and performance in school affects his first job out of law school along with his ability to gain Moot Court or Law Review positions, but many other factors may affect his job prospects after that.

Similarly, the ABA has an interest in protecting the overarching integrity of the legal profession; Adderall and Ritalin abuse bloodies not only the standards of legal schools, but dishonors the legal profession as a whole.²⁴⁶ One of the direct goals of the ABA is to "improv[e] the legal profession,"²⁴⁷ and the ABA is a highly-respected frontrunner leading the way in professional ethics.²⁴⁸ Further, as discussed in Section II, willingness to abuse cognitive enhancers may be indicative of the character of those taking the drugs and may follow graduates into practice—in a profession that already has difficulties with substance abuse.²⁴⁹ That said, the ABA has great interest in protecting against corruption in the legal field by conducting drug tests of students.

Next, as Schedule II drugs, Adderall and Ritalin represent a potential health and safety issue for those abusing the drug. In *Hill*, the court found that the NCAA had great interest in protecting student athletes from health and safety issues that arise from use of dangerous and illegal substances.²⁵⁰ Adderall and Ritalin are Schedule II drugs and the DEA recognizes them as dangerous substances with high risk of abuse.²⁵¹ These drugs have already led to problems so large and encompassing at least one

²⁴³ See discussion *supra* Part II.B.2.

²⁴⁴ *Hill*, 865 P.2d at 661.

²⁴⁵ See *id.* at 660.

²⁴⁶ See discussion *supra* Part II.B.1.

²⁴⁷ AM. BAR ASS'N, *supra* note 164.

²⁴⁸ AM. BAR ASS'N, *supra* note 166 ("[The Center] provide[s] national leadership in developing and interpreting standards . . . in legal and judicial ethics, professional regulation, [and] professionalism . . .").

²⁴⁹ See *supra* notes 87–88 and accompanying text.

²⁵⁰ *Hill v. NCAA*, 865 P.2d 633, 661 (Cal. 1994).

²⁵¹ DRUG ENFORCEMENT ADMIN., *supra* note 53.

student lost his life.²⁵² Therefore, a court would find that the ABA has great interest in protecting its members from using potentially harmful drugs.

2. Implementing the Program in a Reasonable Manner

Given that there are numerous interests in regulating the usage of drugs within law schools, it must next be examined how to implement a “reasonable” program under a Fourth Amendment analysis. Reasonableness is judged by balancing the intrusion of the individual’s privacy interests with the interests in conducting the test.²⁵³ The Supreme Court stated that in order to have a “compelling interest” the actor’s interest must simply be “important enough to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy.”²⁵⁴

Any entity wishing to solve this problem by developing a drug-testing program, should first determine the level of privacy intrusion. The five factors outlined in *Derdeyn* provide a guiding framework in this determination.²⁵⁵ Regarding the second factor, law students, unlike athletes, are not subject to regular physical examinations as part of their profession. Similarly, considering the third factor, substance abuse is not heavily regulated in legal profession for safety reasons, unlike that of a pilot or corrections officer, for example.²⁵⁶ The fourth factor is dependent upon the individual being tested and is not applicable to this Comment’s analysis.

The remaining factors are dependent upon the proposed program itself, how the tests would be conducted, and the consequences of refusing to allow the drug test. This could potentially cause an issue for the level of intrusion. For the first *Derdeyn* factor, the ABA should implement procedures similar to the NCAA for reasonableness purposes. However, unlike students who participate in NCAA activities, law students are not subject to regular physical examinations; therefore, the testing procedure

²⁵² Schwartz, *supra* note 18.

²⁵³ See *supra* text accompanying note 191.

²⁵⁴ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995) (emphasis omitted).

²⁵⁵ *Univ. of Colo. ex rel. Regents of the Univ. of Colo. v. Derdeyn*, 863 P.2d 929, 937 (Colo. 1993). The factors are (1) the place and manner of the drug test; (2) the nature of the activity or industry in which the individual participates and whether it is commonly regulated for safety; (3) the “operational realities” of the individual’s workplace; (4) “whether the individual . . . [is] subject to frequent medical examinations,” regardless of the reason; and (5) the consequences of refusing to submit to the drug test. *Id.*

²⁵⁶ See, e.g., *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 664–66 (1989) (holding that a testing program of officers who handled drugs materials and firearms was constitutional); *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 634 (1989) (stating that railroad workers had a diminished expectation of privacy due to their employment); *Poole v. Stephens*, 688 F. Supp. 149, 155 (D.N.J. 1988) (holding that the state had a great interest in testing corrections officers).

should be more discrete, if possible.²⁵⁷

In regard to the fifth factor, the NCAA collects consent forms annually from its student athletes.²⁵⁸ The ABA should adopt this idea and require law schools to obtain student consent forms upon entrance into law school, along with the “Character and Fitness” paperwork each new student completes now. Such a consent form would alert students of the tests they may have to endure and remind them of the standards they must uphold while in law school. Voluntary consent to the drug test negates any Fourth Amendment intrusion and precludes a student from making a privacy intrusion argument.²⁵⁹ If a student refuses to sign the consent or submit to a drug test, similar to NCAA procedures,²⁶⁰ it should be treated as a first positive test under the suggested punishment framework provided below. If scrutinized by the courts, this consequence of refusing the test would not be considered overly extreme.²⁶¹

E. Punishments for Students Who Abuse Cognitive Enhancing Drugs

An important question arises when any solution is proposed: What would happen to an individual who submits a positive drug test or violates the new honor code provision? Any punishment must be calculated considering the interests in providing the solution. A severe punishment could impede progress because the offending student is reluctant to seek treatment for fear of being punished. On the other hand, if there is too lenient of a punishment, the problem may not subside at all.

One possible solution could require an asterisk to appear on the student’s transcript or official GPA. Similar to the sport of baseball, an asterisk appearing upon the student’s record would indicate “chemical assistance” with the use of cognitive enhancers.²⁶² Any future employer would see it and judge the individual’s performance accordingly. However, such a measure taken in the context of the legal profession could create too much of a stigma, potentially rendering the individual unemployable. Applying this measure would fail to reconfigure the true grade distribution. Students who avoid taking cognitive enhancers would retain the same GPA

²⁵⁷ See *NCAA Drug-Testing Program 2013-14*, NCAA 1, 8 (2013), <http://www.ncaa.org/sites/default/files/5.%20Drug%20Testing%20Program%20Book%202013-14.pdf> (explaining the procedure for collecting the urine sample through direct observation).

²⁵⁸ *Id.* at 5.

²⁵⁹ *Derdeyn*, 863 P.2d at 937 n.16. If, however, the consent would be found by a court to be non-voluntary, this would act as conclusive evidence that the program “intrudes on an individual’s . . . privacy interest.” *Id.*

²⁶⁰ NCAA, *supra* note 257, at 10.

²⁶¹ See, e.g., *Derdeyn*, 863 P.2d at 942, 949 (explaining that the university’s punishment of prohibiting athletic participation upon a student’s refusal to test was too severe of a punishment because of student’s potential loss of scholarship).

²⁶² Michael Wilbon, *Tarnished Records Deserve an Asterisk*, WASHINGTON POST (Dec. 4, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A33718-2004Dec3.html>.

and class rank as if there were no solution at all. It is a no-win solution that leaves the playing field uneven and boxes the un-aided student out of interviews and prestigious positions on Law Review or Moot Court. A solution of this nature essentially would not resolve the bigger issues.

On the other extreme, the ABA or law school could impose strict liability and punishment through expulsion. Although this creates a difficult problem because it allows no leeway for the student abusing drugs to seek treatment, some schools' codes would allow no choice but expulsion. As discussed in Section II, in some schools, using drugs illegally is considered a direct violation of the honor code.²⁶³ Similarly, other schools have explicit sections in their honor code prohibiting students from participating in any illegal activity.²⁶⁴ In these schools, there would be no other choice than to hold a student to strict liability, honor council hearings, and potential expulsion. However, this severe punishment should be avoided if possible.

The best solution exists in implementing a three-strike punishment program. Upon a finding of a first positive test or honor code violation, the student would be recommended to a drug-counseling program with a mandated follow-up testing date or a later honor council hearing similar to the solution adopted by the high school in *Board of Education v. Earls*.²⁶⁵ Although the high school in *Earls* was concerned with substance abuse in its testing and not academic dishonesty, Adderall and Ritalin are Schedule II drugs with a high likelihood of abuse and potential addiction and students should thus be granted the ability to seek treatment without fear of retribution.²⁶⁶ Requiring a follow up drug test before sanctioning a student negates the extreme measure of expulsion and provides the student a chance to seek help if necessary. Upon a finding of a second positive test, the student would attend a hearing for determination of punishment. Punishments might include loss of eligibility to participate in groups such as Moot Court or Law Review. Because expulsion is a drastically serious punishment, the ABA or law school should require a third positive drug test or honor code violation for Adderall or Ritalin before considering expulsion.

IV. CONCLUSION

Performance enhancing drugs like Adderall and Ritalin present a serious concern for the legal profession. If we ignore this problem and no solution is offered, the abuse will only escalate. With prescription rates multiplying and creating a fully-stocked black market, it is likely more students seeking success will break and give in to the competitive pressures caused by those already abusing the drugs. Stimulant abuse creates a

²⁶³ See *supra* notes 80-81 and accompanying text.

²⁶⁴ See *supra* notes 80-81 and accompanying text.

²⁶⁵ *Bd. of Educ. v. Earls*, 536 U.S. 822, 833-34 (2002).

²⁶⁶ DRUG ENFORCEMENT ADMIN., *supra* note 53.

significant issue regarding the integrity of the legal profession and unbiased competition in law schools. It also reflects on the health and safety of future attorneys.

Although law schools can take positive steps forward by adjusting attitudes toward this abuse and making amendments to law school honor codes, it is going to take a bold, unshakable player to make a forcible impact on stimulant abuse. The ABA needs to step forward and speak up, even if its role is merely to solicit and support studies focused on learning more about stimulant abuse in its schools.

Dr. Anjan Chatterjee is right; as Americans, we worship at the altar of progress in the attempt to be as smart and productive as possible. However, professional responsibility should never be forsaken in that pursuit.