

12-1-2019

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Recommended Citation

Rachel Smith, *“Disturbing Schools” Laws: Disturbing Due Process with Unconstitutionally Vague Limits on Student Behavior*, 28 J. L. & Pol’y 356 ().

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol28/iss1/8>

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“DISTURBING SCHOOLS” LAWS: DISTURBING DUE PROCESS WITH UNCONSTITUTIONALLY VAGUE LIMITS ON STUDENT BEHAVIOR

*Rachel Smith**

“The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. . . . That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”¹

INTRODUCTION

For over a century, the United States Supreme Court has held, in sum and substance, that students do not “shed their constitutional rights . . . at the schoolhouse gate.”² In practice, however, while not shed entirely, many of those rights have been increasingly limited. In 2016, footage of a South Carolina high school student being hurled across her classroom went viral.³ She and Niya Kenny, the girl who filmed the incident, were arrested pursuant to South Carolina’s “Disturbing Schools” Law,⁴ which subjects students to

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¹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

³ Evie Blad, *She Recorded Her Classmate’s Arrest, Then Got Arrested, Too*, ED WEEK (Jan. 24, 2017), <https://www.edweek.org/ew/articles/2017/01/25/she-recorded-her-classmates-arrest-then-got.html>.

⁴ (A) It shall be unlawful: (1) for any person wilfully or unnecessarily (a) to interfere with or to disturb in any way or in any place the students or teachers of any school or college in this State, (b) to loiter about such school or college premises or (c) to act in an obnoxious manner thereon.

criminal charges for behaving in a distracting or obnoxious manner on campus—behavior which can easily be conceptualized as typical teenage behavior.⁵ After finding this incident to be just one among hundreds, the ACLU agreed to file suit on behalf of 19-year-old Kenny and several other plaintiffs,⁶ arguing that the statute was unconstitutional.⁷ The suit, *Kenny v. Wilson*, was dismissed for lack of standing in the United States District Court for the District of South Carolina, but the Fourth Circuit Court of Appeals reversed in March 2018.⁸ The court found that the law endangered freedom of expression and due process and remanded for further proceedings on those two grounds.⁹ In May of 2018, following the Fourth Circuit's decision in *Kenny* and related incidents, South Carolina amended its Disturbing Schools Law to apply exclusively to non-students,¹⁰ therefore protecting students from arrest by law enforcement as a means of disciplining on-campus behavior. The amended law targets the behavior of visitors on school property (including, for example, non-student spectators attending on-campus sporting events).¹¹

S.C. CODE ANN. § 16-17-420(A) (2019).

⁵ Amanda Ripley, *How America Outlawed Adolescence*, THE ATLANTIC (Nov. 2016), <https://www.theatlantic.com/magazine/archive/2016/11/how-america-outlawed-adolescence/501149/>.

⁶ Taurean NeSmith, 21, an African-American student at Benedict College in Columbia, was arrested because he criticized a police officer for racial profiling during the stop of a fellow student. S.P., 15, a white student with behavioral and emotional disabilities at Travelers Rest High School in Greenville, was charged with a crime after failing to comply with instructions to leave the school library and cursing at a student who was making fun of her.

Kenny v. Wilson, ACLU, <https://www.aclu.org/cases/kenny-v-wilson> (last updated Mar. 16, 2017).

⁷ *Id.*

⁸ *Kenny v. Wilson*, No. 2:16-cv-2794 (CWH), 2017 WL 4070961, at *8 (D.S.C. Feb. 28, 2017) *rev'd*, 885 F.3d 280.

⁹ *Kenny v. Wilson*, 885 F.3d 280, 288–89, 291 (4th Cir. 2018).

¹⁰ Audrey Biesk, *Disturbing Schools Law Amended After Decades of Being 'Unconstitutionally Vague'*, WMBF NEWS, <https://www.wmbfnews.com/story/38876154/disturbing-schools-law-amended-after-decades-of-being-unconstitutionally-vague/> (Aug. 13, 2018, 11:27 PM).

¹¹ *Id.*

Disturbing Schools Laws¹² that target students are not contained to South Carolina's past, however. Around the same time as the *Kenny* decision, police arrested a seventh-grader in New Mexico for repeatedly fake burping in class; his arrest came pursuant to a state statute prohibiting disruptive behavior in schools.¹³ The child's mother initiated *A.M. v. Holmes*, a civil rights action against the police officer and school officials involved, alleging unlawful arrest and excessive use of force in violation of the Fourth Amendment after her son was taken to a juvenile detention center.¹⁴ The district court awarded all defendants qualified immunity, and the Tenth Circuit affirmed.¹⁵ The appellate opinion came with a scathing dissent from then-Circuit Court Judge Neil Gorsuch.¹⁶ Despite that hopeful dissent, the Supreme Court denied certiorari, and the thirteen-year-old boy was left without recourse.¹⁷

Neither the Disturbing School Laws nor the disproportionality with which they affect students of color are unique to South Carolina

¹² At least 22 states and dozens of cities and towns currently outlaw school disturbances in one way or another. South Dakota prohibits "boisterous" behavior at school, while Arkansas bans "annoying conduct." Florida makes it a crime to "interfere with the lawful administration or functions of any educational institution"—or to "advise" another student to do so. In Maine, merely interrupting a teacher by speaking loudly is a civil offense, punishable by up to a \$500 fine.

Ripley, *supra* note 5.

¹³ *Id.*

¹⁴ *A.M. ex rel. v. F.M. Holmes*, 830 F.3d 1123, 1132 (10th Cir. 2016).

¹⁵ *Id.* at 1169.

¹⁶ If a seventh grader starts trading fake burps for laughs in gym class, what's a teacher to do? Order extra laps? Detention? A trip to the principal's office? Maybe. But then again, maybe that's too old school. Maybe today you call a police officer. And maybe today the officer decides that, instead of just escorting the now compliant thirteen year old to the principal's office, an arrest would be a better idea. So out come the handcuffs and off goes the child to juvenile detention. My colleagues suggest the law permits exactly this option and they offer ninety-four pages explaining why they think that's so. Respectfully, I remain unpersuaded.

Id. at 1170 (Gorsuch, J., dissenting).

¹⁷ *A.M. ex rel. F.M. v. Acosta*, 137 S. Ct. 2151, 2151 (2017).

or New Mexico. But, using *Kenny* as a model, students may find they have both standing and due process protection to challenge Disturbing Schools Laws across the country due to the vague nature of these laws and opportunities for arbitrary enforcement that result from the same.¹⁸

Part I of this Note will focus on the history of zero-tolerance policies including Disturbing Schools Laws and relevant existing state statutes that restrict and target on-campus disturbances. Part II will analyze current case law, particularly the opposing outcomes from the Fourth and Tenth Circuits, as well as the Fourth Circuit's concerns with due process. Part III of this Note will examine the current consequences of these laws and the disparate impact they have on students of color—often funneling black and brown children into the criminal justice system for noncriminal behavior at a higher percentage than white children.¹⁹ Finally, Part IV will discuss why the Fourth Circuit in *Kenny* was correct in recognizing the students' standing to bring due process and First Amendment claims, and how South Carolina's new Disturbing Schools Law can serve as an example for civil rights groups looking to challenge similar instances of de facto discrimination across the country.²⁰

¹⁸ Students of color are more likely to be viewed as acting criminally. The Department of Education reports that nationwide, Black students are more than twice as likely as white classmates to be referred to law enforcement. These disparities in school arrests for minor infractions like “disorder” and “disturbance” are consistent with research suggesting that bias is more likely to play a role in categories of discipline that are harder to define objectively, such as “disrespect.”

ACLU, BULLIES IN BLUE: THE ORIGINS AND CONSEQUENCES OF SCHOOL POLICING 22 (2017), https://www.aclu.org/sites/default/files/field_document/aclu_bullies_in_blue_4_11_17_final.pdf.

¹⁹ U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, 2015–2016 CIVIL RIGHTS DATA COLLECTION SCHOOL CLIMATE AND SAFETY 3 (2018), <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>.

²⁰ *Legal English: “De Facto/De Jure”*, WASH. U. ST. LOUIS SCH. LAW (Dec. 28, 2012), <https://onlinelaw.wustl.edu/blog/legal-english-de-factode-jure/> (“De facto means a state of affairs that is true in fact, but that is not officially sanctioned. In contrast, de jure means a state of affairs that is in accordance with law (i.e. that is officially sanctioned).”).

I. HISTORY OF ZERO-TOLERANCE AND DISTURBING SCHOOLS LAWS

Over the past seventy years, broad zero-tolerance policies²¹ have morphed from providing harsh, exacting punishment for public crimes outside the “schoolhouse gate”—drug-dealing, drug-use, possession of weapons, and more—to policies designed to give school officials vast authority to punish students for any number of behaviors even on school premises. Teenagers have been charged “more than 10,000 times a year” under Disturbing Schools Laws on the books in at least twenty-two states across the country.²² This section will explore the evolution of Disturbing Schools Laws as a product of broader zero-tolerance policies. In particular, it will examine how biases and racially framed origins of such policies have caused students of color and students with disabilities to bear the brunt of their largely arbitrary enforcement.

²¹ Farnel Maxime, *Zero-Tolerance Policies and the School to Prison Pipeline*, SHARED JUST. (Jan. 18, 2018), <http://www.sharedjustice.org/domestic-justice/2017/12/21/zero-tolerance-policies-and-the-school-to-prison-pipeline> (“Zero-tolerance policies require school officials to give students a specific, consistent, and harsh punishment, usually suspension or expulsion, when certain rules are broken. The punishment applies regardless of the circumstances, the reasons for the behavior (such as self-defense), or the student’s history of disciplinary problems.”).

²² Ripley, *supra* note 5.

Over the years, judges around the country have landed on various definitions of disturbance. In Georgia, a court concluded, a fight qualifies as disturbing school if it attracts student spectators. But a Maryland court found that attracting an audience does not create a disturbance unless normal school activities are delayed or canceled. In Alabama, a court found that a student had disturbed school because his principal had had to meet with him to discuss his behavior; an appeals court overturned the ruling on the grounds that talking with students was part of a principal’s job.

Id.

A. *Introduction of School Policing: Cultural Moments, Authority, and Disparate Impacts on Minority Students*

To say that curbing disorderly on-campus behavior was the singular motivation for today's zero-tolerance policies is to suggest that American public schools exist in a vacuum, unaffected by the behavior of adults outside "the schoolhouse gates."²³ In fact, several distinct factors converged in the early 1990s to birth a policy that, to this day, can put a child in handcuffs for fake burping in class.²⁴ One such factor was racist motivation to police racial minority students, a motivation with lasting cultural effects.²⁵ While zero-tolerance policies were originally intended to protect students from outside adults, they began to be used against students inside schools in the Civil Rights Era. The convergence of zero-tolerance policies and civil rights struggles created a tense environment in which the line between normal teenage behavior and criminality began to blur. As a result, behavior that once would have resulted in a "slap on the wrist," an afternoon detention, or, at worst, a brief suspension, can now land a student in handcuffs.²⁶

Los Angeles serves as a case study. As the Los Angeles schools became increasingly integrated due to the efforts of civil rights leaders in the late 1940s, the Los Angeles Police Department ("LAPD") formed a unit specifically dedicated to school behavioral policing.²⁷ The LAPD formed this unit in 1948 to maintain order

²³ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years."); see Maxime, *supra* note 21 (noting that in-school zero-tolerance policies grew out of "broken-windows policing" and the War on Drugs zero-tolerance policies in the 1980s).

²⁴ Rachael Revesz, *Court Defends Arrest of 13-Year-Old-Boy for Burping During Class*, INDEP. (July 31, 2016, 17:25), <https://www.independent.co.uk/news/world/americas/burping-court-upholds-defends-arrest-13-year-old-boy-student-new-mexico-a7165296.html>.

²⁵ See generally Maxime, *supra* note 21 (suggesting that studies show a correlation between the disproportionate impact of zero-tolerance policies on students of color and the school to prison pipeline).

²⁶ *A.M. ex rel. F.M. v. Holmes*, 830 F.3d 1123, 1132 (10th Cir. 2016).

²⁷ See ACLU, *supra* note 18, at 3.

and quell violence in newly-integrated schools and communities.²⁸ From there, police presence in schools only continued to grow as white Americans complained that “a lack of discipline among Black children would bring disorder to white schools.”²⁹ In 1957, policymakers in New York City formed a special juvenile justice committee that proposed stationing police in every public school;³⁰ in practice, however, “the [police] efforts were directed almost exclusively at poor Black and Latino neighborhoods.”³¹ Ten years later, the President’s Commission on Law Enforcement and Administration identified reducing juvenile delinquency and youth crime, particularly in communities of color, as the greatest challenge facing the criminal justice system, prompting legislators and law enforcement officials to consider methods for targeting youth in low-income, minority communities.³² Citing “roving bands of Negro youth” and “continual youth warfare,” the committee prompted Congress to pass the Omnibus Crime Control and Safe Streets Act of 1968³³ (the “Act”), which provided federal funding for programs geared toward preventing youth crime in America’s largest cities³⁴ and established the Law Enforcement Assistance Administration (“LEAA”).³⁵ This legislation would lay the

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* (“Representatives of the New York City Police Department (NYPD) depicted Black and Latino students in low-income neighborhoods as ‘dangerous delinquents’ and ‘undesirables’ capable of ‘corroding school morale.’”).

³² See generally PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967), <https://www.ncjrs.gov/pdffiles1/nij/42.pdf> (The report discusses, at length, that crime is concentrated in “the slums” of large cities, which blacks and other minority groups disproportionately inhabit).

³³ See Omnibus Crime Control and Safe Streets Act of 1968, 34 U.S.C. § 10101 (2017); ACLU, *supra* note 18, at 4.

³⁴ See ACLU, *supra* note 18, at 5.

³⁵ [The Law Enforcement Assistance Administration was e]stablished June 19, 1968, to develop new techniques and systems to strengthen law enforcement and criminal justice. The Institute made grants to public agencies, colleges and universities, and private organizations; and conducted studies and research in corrections, criminology, police science, public

groundwork for zero-tolerance policies and Disturbing Schools Laws that would eventually change the way students were disciplined, funneling black and brown students into the criminal justice system for school-based offenses.³⁶

In Kansas City, Missouri, a program funded by the LEAA “allowed teachers and school administrators to classify students as young as nine years old as ‘pre-delinquent,’” putting them at risk of police contact for even the smallest transgressions.³⁷ In the 1970s, the Chicago Police Department went beyond patrolling the city’s South Side and began sending plainclothes officers onto public school campuses.³⁸

The introduction of policing in the classroom reflected larger cultural and political shifts following the Civil Rights Movement and Vietnam War.³⁹ Years of protests, riots, and general civil unrest

administration, and law. By 1974, the Institute also served as a national and international clearinghouse for the exchange of criminal justice information. With passage of the Justice System Improvement Act on December 27, 1979, its functions were absorbed by the National Institute of Justice.

Records of the Law Enforcement Assistance Administration, NAT’L ARCHIVES, <https://www.archives.gov/research/guide-fed-records/groups/423.html> (last updated Aug. 15, 2016).

³⁶ [S]tudents all over the country face disciplinary procedures that deliver harsh predetermined punishments, rather than focusing on restorative practices. Ultimately, this disproportionate way of looking at school discipline plays a major role in perpetuating the school to prison pipeline. The “school to prison pipeline” refers to a national trend in which school policies and practices are directly and indirectly pushing students out of school and on a pathway to prison. Often zero-tolerance policies in schools funnel students into this pipeline.

Maxime, *supra* note 21.

³⁷ ACLU, *supra* note 18, at 5 (“Some school districts lacked any definition of pre-delinquency. Others defined pre-delinquency by reference to behaviors—‘short attention spans . . . [and] quick temper[s]’—recognized today as likely associated with learning or cognitive disabilities.” (citation omitted)).

³⁸ *Id.*

³⁹ See Terence McArdle, *The ‘Law and Order’ Campaign That Won Richard Nixon the White House 50 Years Ago*, WASH. POST (Nov. 5, 2018), https://www.washingtonpost.com/history/2018/11/05/law-order-campaign-that-won-richard-nixon-white-house-years-ago/?utm_term=.abde5489a239 (quoting Professor Julia Azari on the 1968 Presidential Race and Richard Nixon’s law-and-

had policymakers, including President Richard Nixon, calling for a return to “law and order.”⁴⁰ President Nixon publicly declared a “War on Drugs,” describing drug abuse as “public enemy number one.”⁴¹ President Reagan expanded on Nixon’s work in the 1980s, and in a twenty-year period, the country saw the incarcerated population of non-violent drug offenders climb from 50,000 to 400,000.⁴² Reagan’s stance on drug policy was met by Congress’s 1986 passage of the Anti-Drug Abuse Act, establishing mandatory minimum sentences for certain drug offenses.⁴³ The “law and order” movement quickly found its way into the classroom. In 1975, Congress passed the Juvenile Justice and Delinquency Prevention Act,⁴⁴ granting law enforcement full authority under federal law “to engage with youth based on assumptions of future behavior” during a time when rates of school-based violence were wildly exaggerated.⁴⁵

School Resource Officers became fixtures in schools. Part Q of Title I of the Act, as amended, defines a School Resource Officer (“SRO”) as a “career law enforcement officer, with sworn authority, deployed in community oriented policing, and assigned by the employing police department or agency to work in collaboration with school and community-based organizations.”⁴⁶ In 1967, Baltimore City Public Schools added over twenty full-time officers to its schools; Washington D.C. officers—armed and unarmed—

order message, “There was some pushback against the Great Society and civil rights but also the Vietnam War. . . . It was a referendum on 8 years of a Democrat presidency and a very close race.”).

⁴⁰ *Id.*

⁴¹ *The War on Drugs*, HISTORY, <https://www.history.com/topics/crime/the-war-on-drugs> (last updated June 7, 2019).

⁴² *A Brief History of the Drug War*, DRUG POL’Y ALLIANCE, <http://www.drugpolicy.org/issues/brief-history-drug-war> (last visited Sept. 27, 2019).

⁴³ *The War on Drugs*, *supra* note 41.

⁴⁴ Juvenile Justice and Delinquency Prevention Act, 34 U.S.C. § 11101 (2019) (original version at 42 U.S.C.A § 5601 (1974)).

⁴⁵ ACLU, *supra* note 18, at 5–6.

⁴⁶ *See* Omnibus Crime Control and Safe Streets Act of 1968, 34 U.S.C. §10389 (2017).

added elementary schools to their regular beats.⁴⁷ By 1972, forty states had some form of policing within their schools.⁴⁸

B. Broken Windows and Increased Harshness in School Policing

The addition of law enforcement officers to the classroom was later met with the development of an overly-harsh preventative method of policing, best characterized by crime prevention strategies in New York.⁴⁹ In 1993, New York City Mayor Rudolph Giuliani and his Police Chief Richard Bratton implemented a new approach to law enforcement called “broken-windows” policing.⁵⁰ It was the brainchild of Harvard social scientist James Q. Wilson and his colleague George Kelling.⁵¹ The “broken windows” model functions as follows:

[A]t the community level, disorder and crime are usually inextricably linked, in a kind of developmental sequence. Social psychologists and police officers tend to agree that if a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken. This is as true in nice neighborhoods as in rundown ones. Window-breaking does not necessarily occur on a large scale because some areas are inhabited by determined window-breakers whereas others are populated by window-lovers; rather, one unrepaired broken

⁴⁷ ACLU, *supra* note 18.

⁴⁸ *Id.*

⁴⁹ *Id.* at 7.

⁵⁰ Chris Benderev et al., *How a Theory of Crime and Policing Was Born, and Went Terribly Wrong*, NPR (Nov. 1, 2016), <https://www.npr.org/2016/11/01/500104506/broken-windows-policing-and-the-origins-of-stop-and-frisk-and-how-it-went-wrong>.

⁵¹ James Crotty, *A Broken Windows Approach to Education Reform*, FORBES (Aug. 30, 2013), <https://www.forbes.com/sites/jamesmarshallcrotty/2013/08/30/a-broken-windows-approach-to-education-reform/#620abbab4274>.

window is a signal that no one cares, and so breaking more windows costs nothing.⁵²

Law enforcement sought to prevent serious crimes by curbing lesser ones.⁵³ It was with this theory in mind that school districts and states began implementing policies that over-reacted to minor violations in the hopes of preventing more serious ones in the future.⁵⁴

The government's strict approach to criminal justice began to overlap with education policy⁵⁵ in 1990 with Congress' passage of the Gun-Free School Zone Act, a piece of legislation which would lay the framework for harsh disciplinary rules on school grounds:

Each State receiving Federal funds under any subchapter of this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than 1 year a student who is determined to have brought a firearm to a school, or to have possessed a firearm at a school, under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of a local educational agency to modify such expulsion requirement for a student on a case-by-case basis if such modification is in writing.⁵⁶

Schools used this strong language as "a model for a broadly punitive approach to youth behavior in schools."⁵⁷ The combination of broad discretion and the increased presence of SROs gave school administrators wide latitude to punish schoolyard behaviors as

⁵² George L. Kelling & James Q. Wilson, *Broken Windows*, THE ATLANTIC (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>.

⁵³ See, e.g., Maxime, *supra* note 21 ("For instance, the police would stop and arrest people for panhandling, disorderly conduct, and public drinking in order to prevent and decrease the number of rapes, robberies, and murders.").

⁵⁴ *Id.*

⁵⁵ *Id.* ("Zero-tolerance policies were written into school handbooks in the 1990s, created originally to be a deterrent for bringing weapons into schools. . . . With this theory in mind, school districts and states began cracking down on minor violations to prevent serious crimes from occurring in the future.").

⁵⁶ Gun-free requirements, 20 U.S.C. § 7961(b)(1) (2018).

⁵⁷ ACLU, *supra* note 18.

criminal offenses.⁵⁸ As a result, things like insubordination, cutting in line, and possessing over-the-counter medication like Aspirin⁵⁹ could result in suspension or expulsion at best, and criminal charges at worst, with black and brown children catching the brunt of the punishment.⁶⁰

In 1994, the federal government formed the Office of Community Oriented Policing Services (“COPS”) through the Violent Crime Control and Law Enforcement Act and allocated \$9 billion to increasing police presence in public schools and their surrounding communities.⁶¹ SROs⁶² became commonplace,

⁵⁸ Ripley, *supra* note 5.

⁵⁹ Each state and school system var[ies] in their approach and language surrounding zero-tolerance policies, but the common punishments of suspension and expulsion from school come from the following offenses: bringing any weapon to school, including seemingly innocent items like butter knives and toy swords, having any alcohol or drugs on campus, including tobacco and over-the-counter medications like Aspirin or Midol, fighting, including minor scuffles, threatening other students or teachers, or saying anything that could be perceived as a threat, insubordination, which could include talking back to a teacher or swearing in the principal’s office, and any behavior considered disruptive, such as cutting in a lunch line.

Maxime, *supra* note 21.

⁶⁰ When it came to clear-cut offenses, like using a weapon, African American students were no more likely than other students to get in trouble in Texas. But they were far more likely to be disciplined for *subjective* violations like disrupting class. Even after controlling for more than 80 variables, including family income, students’ academic performance, and past disciplinary incidents, the report found that race was a reliable predictor of which kids got disciplined.

Ripley, *supra* note 5.

⁶¹ ACLU, *supra* note 18, at 8.

⁶² In the Safe and Drug Free Schools and Communities Act, the federal government defined an SRO as: [A] career law enforcement officer, with sworn authority, deployed in community-oriented policing, and assigned by the employing police department or agency to work in collaboration with school and community-based organizations to—(A) educate students in crime and illegal drug use prevention and safety; (B) develop or expand community justice initiatives for students;

particularly in public schools serving predominantly low-income and minority students.⁶³ SROs were intended to add an element of safety to the school environment while also acting as community liaisons.⁶⁴ They were not, however, supposed to usurp the role of school disciplinarian—day-to-day discipline was to remain in the hands of teachers, staff, and school administrators.⁶⁵ In fact, in order to receive funding through the COPS program, applicant schools were required to submit a memorandum of understanding which clearly indicated that “SROs will not be responsible for requests to resolve routine discipline problems involving students.”⁶⁶ Thus, while they had the power to arrest students for disruptive behavior, they were also in a position to befriend, mentor, and support students.⁶⁷ With zero-tolerance policies in place, however, it proved difficult for SROs to embrace this latter, critical role, as school administrators relied on SROs to do their disciplinary work for them.⁶⁸

Lisa Thureau, Founder and Director of Strategies for Youth, and Johanna Wald, Director of Strategic Planning for the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School, poignantly articulated the ultimate ongoing positional conflict:

and (C) train students in conflict resolution, restorative justice, and crime and illegal drug use awareness.

Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147, 157 (2015) (citing 20 U.S.C. § 7161(11) (2018)).

⁶³ *Id.*

⁶⁴ See *About NASRO*, NAT’L ASS’N SCH. RESOURCE OFFICERS, <https://nasro.org/about/> (last visited Sept. 27, 2019).

⁶⁵ Community Oriented Policing Services, *Supporting Safe Schools*, U.S. DEP’T JUSTICE, <https://cops.usdoj.gov/supportingsafeschools> (last visited Sept. 27, 2019) (“Beyond law enforcement, [School Resource Officers (“SROs”)] also serve as educators, emergency managers, and informal counselors. While an SRO’s primary responsibility is law enforcement, whenever possible, SROs should strive to employ non-punitive techniques when interacting with students. Arrests should be used only as a last resort under specified circumstances.”).

⁶⁶ U.S. DEP’T OF JUSTICE, MEMORANDUM OF UNDERSTANDING FACT SHEET 2 (2017), https://cops.usdoj.gov/pdf/2017AwardDocs/chp/MOU_Fact_Sheet.pdf.

⁶⁷ See *About NASRO*, *supra* note 64.

⁶⁸ See ACLU, *supra* note 18, at 7–8.

Administrators perform the duties of law enforcement, but retain the power of a school administrator. SROs may act like teachers and counselors, but they have the power and authority of law enforcement agents.⁶⁹

The ambiguities in disciplinary roles, combined with the vague behavioral guidelines established by Disturbing Schools Laws, place students in a precarious position and provide immense discretion to the school administrators and SROs who work in tandem to enforce them.

II. DISRUPTIVELY VAGUE OR VAGUELY DISRUPTIVE?

One of the prevailing standards in substantive criminal law is that statutes defining punishable offenses must be specific enough to provide notice to the public of what behavior is prohibited and limited to prevent arbitrary or discriminatory enforcement.⁷⁰ Statutes that are deemed impermissibly vague are void on constitutional grounds as a violation of due process. Disturbing Schools Laws are impermissibly vague and thus unconstitutional.

A. *The Vagueness Doctrine in Criminal Law*

The Supreme Court held in *City of Chicago v. Morales* that a law cannot be so vague that a person of ordinary intelligence is unable to understand what is innocent conduct and what is illegal.⁷¹ In *Morales*, the Court held that an Illinois law was an unconstitutional violation of due process because it was “unconstitutionally vague.”⁷² In 1992, the Chicago City Council

⁶⁹ Lisa H. Thureau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. SCH. L. REV. 977, 985 (2009/2010).

⁷⁰ See *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

⁷¹ *Id.* at 56.

⁷² *Id.* at 51, 56 (“Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.” (citation omitted)).

enacted the “Gang Congregation Ordinance, which prohibit[ed] ‘criminal street gang members’ from ‘loitering’ with one another or with other persons in any in any public place.”⁷³ The city ordinance made loitering (as defined by the statute) a criminal offense punishable by “a fine of up to \$500, imprisonment for not more than six months, and a requirement to perform up to 120 hours of community service.”⁷⁴ Under the ordinance, guilt was predicated on all four of the following:

First, the police officer must reasonably believe that at least one of the two or more persons present in a “public place” is a “criminal street gang member.” Second, the persons must be “loitering,” which the ordinance defines as “remaining in any one place with no apparent purpose.” Third, the officer must then order “all” of the persons to disperse and remove themselves “from the area.” Fourth, a person must disobey the officer’s order. If any person, whether a gang member or not, disobeys the officer’s order, that person is guilty of violating the ordinance.⁷⁵

In 1998, *Morales* came before the United States Supreme Court after the Illinois Supreme Court upheld a ruling that the ordinance was violative of the Due Process Clause of the Fourteenth Amendment.⁷⁶ Finding for *Morales*, the Court upheld the Illinois Supreme Court’s ruling that the ordinance was violative of due process by virtue of being unconstitutionally vague.⁷⁷ The Court used the two-prong test for unconstitutional vagueness established in *Kolender v. Lawson*, a 1983 case regarding the language of criminal law statutes.⁷⁸ Under that test, a criminal law may fail for either of two independent

⁷³ *Id.* at 45–46.

⁷⁴ *Id.* at 47.

⁷⁵ *Id.*

⁷⁶ *Id.* at 46.

⁷⁷ *Id.* at 47; *City of Chicago v. Morales*, 687 N.E.2d 53, 59, 64 (Ill. 1997) (holding that “the gang loitering ordinance violates due process of law in that it is impermissibly vague on its face and an arbitrary restriction on personal liberties. . . . The freedom to engage in such harmless activities is an aspect of the personal liberties protected by the due process clause.”).

⁷⁸ *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

reasons: (1) a criminal law may fail to provide notice of what conduct it prohibits, or (2) it may authorize or encourage arbitrary and discriminatory enforcement.⁷⁹ In *Morales*, the Court found that the Chicago ordinance failed under both prongs of the test.⁸⁰

Discussing the statute's articulation of conduct, the Court stated that, while the term "loiter" may have a broader public meaning, the vague definition of "loitering" in the statute was fatal to its constitutionality because it failed to provide adequate notice about what behavior was permitted and what was prohibited:

[T]he term "loiter" may have a common and accepted meaning, . . . but the ordinance's definition of that term—"to remain in any one place with no apparent purpose"—does not. It is difficult to imagine how any Chicagoan standing in a public place with a group of people would know if he or she had an "apparent purpose."⁸¹

This vagueness about what loitering is covered and what is not dooms the ordinance.⁸² The city argued that adequate notice was provided because an individual would not be subject to punishment unless he or she failed to comply with "an officer's order to disperse."⁸³ The Court emphasized that the notice requirement exists to allow a citizen to "conform his or her conduct to the law" and further noted that, if the loitering itself only becomes a violation following an order to disperse, "the dispersal order itself is an unjustified impairment of liberty."⁸⁴ Citing *Coates v. Cincinnati*, the Court found that the "ordinance [was] therefore vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.'"⁸⁵

Turning to the second prong, the Court agreed with the Illinois Supreme Court that the statute "provide[d] absolute discretion to

⁷⁹ *Morales*, 527 U.S. at 56 (citing *Kolender*, 461 U.S. at 357).

⁸⁰ *See id.* at 56–63.

⁸¹ *Id.* at 56–57.

⁸² *Id.* at 57.

⁸³ *Id.* at 58.

⁸⁴ *Id.*

⁸⁵ *Id.* at 60 (citing *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971)).

police officers to decide what activities constitute loitering.”⁸⁶ The Court also noted that “[t]he ‘no apparent purpose’ standard” for deciding whether or not a dispersal order should be issued was “inherently subjective” and completely at the discretion of the officer on the street:

Presumably an officer would have discretion to treat some purposes—perhaps a purpose to engage in idle conversation or simply to enjoy a cool breeze on a warm evening—as too frivolous to be apparent if he suspected a different ulterior motive. Moreover, an officer conscious of the city council’s reasons for enacting the ordinance might well ignore its text and issue a dispersal order, even though an illicit purpose is actually apparent.⁸⁷

While acknowledging that the police were conscious of the potential for arbitrary enforcement and that Chicago faced a unique challenge in that there *were* gang members who did, in fact, create a hostile environment by loitering, the Court ruled on the side of personal liberties and held that the statute was impermissibly vague.⁸⁸

B. *What Rights Beyond the Schoolhouse Gates?*

Tinker v. Des Moines has long been the standard for the breadth of authority granted to school officials.⁸⁹ In 1965, several students from Des Moines, Iowa planned to wear black armbands at school during the holiday season to protest the war in Vietnam.⁹⁰ When the principals of several schools in the community became aware of these plans, they “adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused[,] he would be suspended until he returned without the armband.”⁹¹ Petitioner John Tinker wore an armband to school and was sent

⁸⁶ *Id.* at 61 (citations omitted).

⁸⁷ *Id.* at 62.

⁸⁸ *Id.* at 63–64.

⁸⁹ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

⁹⁰ *Id.*

⁹¹ *Id.*

home.⁹² Tinker filed suit in United States District Court for Southern District of Iowa, Central Division, seeking an injunction against the school and damages.⁹³ He alleged that the school had violated the students' freedom of expression under the First Amendment.⁹⁴ The District Court dismissed the complaint, as did the Eighth Circuit on appeal, finding the behavior was disruptive enough to warrant disciplinary action.⁹⁵

The United States Supreme Court granted certiorari and found that "the wearing of armbands in the circumstances of [the] case was entirely divorced from actually or potentially disruptive conduct by those participating" and was "closely akin to 'pure speech,'"⁹⁶ which remains uncontestedly protected under the First Amendment.⁹⁷ Citing *West Virginia State Board of Education v. Barnette*, the Court affirmed that "[t]he Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures—the Board of Education is not excepted."⁹⁸ The Court noted, however, that school officials must be able to create and maintain a safe controlled environment, and, as such, conceded the authority to "prescribe and control conduct in schools" that the

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *See id.* at 504–05.

⁹⁵ *Id.*

⁹⁶ *See id.* at 505 (distinguishing "pure speech," defined as "entirely divorced from actually or potentially disruptive conduct by those participating in it," from symbolic speech, exemplified by the wearing of armbands in protest of the Vietnam War).

⁹⁷ *Id.* at 506–07.

⁹⁸ The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Id. at 507 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

government may not necessarily have over the average adult citizen.⁹⁹ Addressing the District Court's conclusion, the Court stated that "undifferentiated fear or apprehension of a disturbance is not enough to overcome the right to freedom of expression. . . . [O]ur [C]onstitution says we must take this risk."¹⁰⁰ Thus, the Court held that barring a material disruption of the work or invasion upon another student's rights, a school does not have the right to limit its students' expressions.¹⁰¹

Most often, conflict surrounding the relationship between a school's authority over its students and students' fundamental rights arises in the context of search or seizure of a student's possessions on school property.¹⁰² The concept of due process as it relates to disciplinary behavior, however, has remained relatively untouched, giving broad deference and authority to school officials to conduct campus life in a manner they see fit.¹⁰³ Historically, the Supreme Court has found that students are not protected from searches by school administrators in the same way that average citizens are protected under the Fourth Amendment.¹⁰⁴ In *New Jersey v. T.L.O.*,

⁹⁹ On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. . . . Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

Tinker, 393 U.S. at 507.

¹⁰⁰ *Id.* at 508.

¹⁰¹ *Id.* at 514.

¹⁰² See, e.g., *Goss v. Lopez*, 419 U.S. 565, 581 (2004) (establishing due process within the school disciplinary process); *New Jersey v. T.L.O.*, 469 U.S. 325, 348–50 (1985) (covering Fourth Amendment boundaries); *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (rejecting claim that use of corporal punishment in schools was a violation of the Eighth Amendment).

¹⁰³ See *T.L.O.*, 469 U.S. at 339 (1985) ("Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds.").

¹⁰⁴ See *id.* at 337 (The reasonableness of a search and seizure depends on "the context in which the search takes place. . . . On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.").

the Supreme Court articulated boundaries surrounding the power of school officials acting in an investigatory capacity.¹⁰⁵ In *T.L.O.*, a New Jersey high school teacher discovered two freshmen smoking cigarettes in the school bathroom.¹⁰⁶ The teacher sent the students to the assistant principal, who then searched the respondent's bag, in which he found cigarettes, rolling papers, marijuana, and cash.¹⁰⁷ At trial, the respondent sought to suppress the evidence seized from her bag, arguing that the search was unlawful.¹⁰⁸ The Court found that the "underlying command of the Fourth Amendment is always that searches and seizures be reasonable" and that what is reasonable "depends on the context within which a search takes place."¹⁰⁹ There must be a balance, taking into consideration the privacy interests of a student and the "school officials'"¹¹⁰ need to maintain discipline by recognizing qualitative differences between the Constitutional remedies to which students and adults are entitled.¹¹¹ The Court, finding for the State, held that school safety, as a matter of public interest, outweighed the countervailing interest of student privacy.¹¹² Justice White remained convinced that "[t]his standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained

¹⁰⁵ *Id.* at 334.

¹⁰⁶ *Id.* at 328.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 329.

¹⁰⁹ *Id.* at 336–37 ("If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students.").

¹¹⁰ *Id.* at 350 (Powell, J., and O'Connor, J., concurring) (describing school officials as those tasked with "the education and training of young people").

¹¹¹ *Id.* at 349.

¹¹² We join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law.

Id. at 341 (majority opinion).

intrusions upon the privacy of schoolchildren.”¹¹³ Despite the Court’s emphasis on the privacy interests of students, in practice, this standard has given school officials broad authority to encroach further upon the students’ privacy interests.

III. DISTURBING SCHOOLS LAWS IN PRACTICE

The content and enforcement of Disturbing Schools Laws vary from state to state and even city to city, but most share a striking lack of specificity in terms of what behaviors can be punished and to what extent.¹¹⁴ For example, Arkansas prohibits “annoying conduct” without any definition of “annoying.”¹¹⁵ Florida makes it a crime to “interfere with the lawful administration or functions of any educational institution” without specifying what behaviors constitute interference worthy of prosecution.¹¹⁶ South Dakota prohibits “boisterous” behavior—without defining what constitutes criminally “boisterous” behavior—while interrupting a teacher in Maine is a civil offense punishable by up to a \$500 fine.¹¹⁷

¹¹³ By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.

Id. at 342–43.

¹¹⁴ Ripley, *supra* note 5.

¹¹⁵ *Id.*; ARK. CODE. ANN § 6-21-606 (West 2019) (The statute does not define “boisterous” or annoying behavior though it relies on such language for determining guilt. “Any persons who shall, by any boisterous or other conduct, disturb or annoy any public or private school in this state . . . shall be guilty of a violation and upon conviction shall be fined in any sum not exceeding one hundred dollars (\$100), payable into the general school fund of the county.”).

¹¹⁶ Ripley, *supra* note 5; *see also* FLA. STAT. ANN. § 877.13 (West 2019) (The Florida statute does not define “disruption,” “disturbance,” or “interference,” giving broad discretion to school officials and law enforcement to decide what behavior is punishable as a “misdemeanor of the second degree.”).

¹¹⁷ Ripley, *supra* note 5; *see also* S.D. CODIFIED LAWS § 13-32-6 (2019) (South Dakota also uses the term “boisterous” without definition in its “Disturbance of school as a misdemeanor” statute.).

From June 2010 to May 2018, South Carolina had a Disturbing Schools Law that made it a misdemeanor to:

wilfully or unnecessarily . . . interfere with or to disturb in any way or in any place the students or teachers of any school or college in this State . . . , loiter about such school or college premises[,] or . . . to act in an obnoxious manner thereon.¹¹⁸

The statute did not, however, articulate or define what it meant to “disturb” or what it meant to take certain actions in an “obnoxious manner.”¹¹⁹ New Mexico currently has a similarly ambiguous law that makes it a misdemeanor to “interfere with the educational process of any public or private school by committing, threatening to commit or inciting others to commit any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of a public or private school.”¹²⁰ The legislature made no effort to articulate or define the kinds of disruptive conduct punishable as a criminal offense, leaving students with language so vague that they may not be able to articulate disruptive behavior that will result in simple scholastic discipline or distinguish between such behavior and that which is impermissible to the point of being criminally punishable.

IV. TESTING DISTURBING SCHOOLS LAWS AGAINST *MORALES*

In the past five years, lawmakers have begun to push back against the schools, officers, and state statutes that allow innocuous pre-teen or teenage behavior to place students in handcuffs.¹²¹ *Kenny v. Wilson* was a landmark decision in this area, and its influence was amplified by the great deal of public attention it garnered.¹²² As mentioned, in *Kenny*, a group of former South Carolina high school students filed suit against the school district, alleging that South Carolina’s Disturbing Schools Law¹²³ was

¹¹⁸ S.C. CODE ANN. § 16-17-420(A) (2019).

¹¹⁹ *Id.*

¹²⁰ N. M. STAT. ANN. § 30-20-13(D) (West 2019).

¹²¹ Ripley, *supra* note 5.

¹²² *See id.*

¹²³ § 16-17-420.

unconstitutionally vague.¹²⁴ The suit arose after a video circulated of a South Carolina high school student who refused to put her phone away being yanked from her desk and dragged across the floor by an SRO.¹²⁵ Niya Kenny, the student who filmed the incident, was arrested and booked under the South Carolina Disturbing Schools Law.¹²⁶

The student plaintiffs' complaint put forth a due process argument, contending that the law was unconstitutionally vague, thus violating the plaintiffs' due process rights under the Fourteenth Amendment because the law "fail[ed] to provide sufficient notice of prohibited conduct and encourage[d] arbitrary and discriminatory enforcement."¹²⁷ The district court dismissed the case for a lack of standing, reasoning that the "the plaintiffs' fear of future arrest and prosecution under the two statutes [did] not rise above speculation and thus [did] not constitute an injury in fact."¹²⁸

The Fourth Circuit revisited the complaint and reversed the lower court's decision, finding that the plaintiffs in *Kenny* had the standing to bring a suit.¹²⁹ The court used the test from *Spokeo, Inc. v. Robins*, which held that to establish Article III standing, a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."¹³⁰ To establish injury in fact, the plaintiff must show that said injury is "concrete and particularized" and "actual or imminent."¹³¹ In *Kenny*, the court found that a plaintiff may rely on future injury for purposes of standing, so long as that plaintiff can show that the "threatened injury is certainly impending or there is a substantial risk that the harm will occur."¹³² One way the Fourth Circuit has allowed

¹²⁴ *Kenny v. Wilson*, 885 F.3d 280, 284 (4th Cir. 2018).

¹²⁵ Ripley, *supra* note 5.

¹²⁶ *Kenny*, 885 F.3d at 285.

¹²⁷ *Id.* at 286.

¹²⁸ *Id.* at 284.

¹²⁹ *Id.*

¹³⁰ *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

¹³¹ *Id.* at 1548.

¹³² *Kenny*, 885 F.3d at 287 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)).

plaintiffs to show this is by showing that the defendant has not disavowed enforcement of the law in question.¹³³ The court found injury in fact because many of the plaintiffs had been punished under the Disturbing Schools Law, and it found that the threat of further punishment was imminent because the school district had not disavowed enforcement of the law.¹³⁴

Kenny resulted in a victory for students' rights, as the Fourth Circuit found the plaintiffs had standing and remanded for further proceedings, permitting the students to challenge the Disturbing Schools Law for violating their freedom of expression and due process.¹³⁵ Those claims have yet to be tried. Similarly, *A.M. v. Holmes* exemplifies another challenge to a Disturbing Schools Law, though the resulting Tenth Circuit opinion was characterized by a discussion and grant of qualified immunity that barred the plaintiff from bringing claims like those in *Kenny*.¹³⁶ However, both cases show a trend of challenging Disturbing Schools Laws, a trend which future challenges to similar statutes should premise on the vagueness test cited in *City of Chicago v. Morales*, wherein the Supreme Court required that criminal laws provide notice of the prohibited behavior so as not to encourage or enable arbitrary or discriminatory enforcement.

The version of the South Carolina Disturbing Schools statute at issue in *Kenny*, instituted in 1976 and amended in 2010, read:

(A) It shall be unlawful:

(1) For any person wilfully or unnecessarily (a) to interfere with or to disturb in any way or in any place the students or teachers of any school or college in this State, (b) to loiter about such school or college premises or (c) to act in an obnoxious manner thereon; or

(2) For any person to (a) enter upon any such school or college premises or (b) loiter around the premises, except on business, without the permission of the principal or president in charge.

¹³³ *Kenny*, 885 F.3d at 288.

¹³⁴ *Id.* at 289.

¹³⁵ *Id.* at 284.

¹³⁶ *A.M. ex rel. F.M. v. Holmes*, 830 F.3d 1123, 1129 (10th Cir. 2016).

(B) Any person violating any of the provisions of this section shall be guilty of a misdemeanor and, on conviction thereof, shall pay a fine of not more than one thousand dollars or be imprisoned in the county jail for not more than ninety days.¹³⁷

In deciding *Morales*, the Supreme Court of Illinois found that the use of the term “loitering” in the statute at issue “drew no distinction between innocent conduct and conduct calculated to cause harm.”¹³⁸ The United States Supreme Court agreed, noting that “freedom to loiter for innocent purposes” constituted part of the “liberty” which the Fourteenth Amendment’s Due Process Clause protects and recalled that it had previously identified the “‘right to remove from one place to another according to inclination’ as ‘an attribute of personal liberty’ protected under the Constitution.”¹³⁹

Holding the language of the South Carolina statute to the same standard as that used in *Morales*, it is clear that the Disturbing Schools statute, before its amendment, was “impermissibly vague on its face and [constituted] an arbitrary restriction on personal liberties.”¹⁴⁰ Part (A)(1)(a) of the statute made it illegal to “interfere with or to disturb in any way or in any place the students of . . . any school or college in th[e] [s]tate.”¹⁴¹ The language of this statute drew no distinction “between innocent conduct and conduct calculated to cause harm” and provided no definitions.¹⁴² With no distinction or definition of specific conduct that triggered the statute, a sneeze that interrupts the teacher’s train of thought, a student who needs to leave the room quickly due to illness or emergency, or another who absentmindedly checks her cell phone and giggles could *technically* “disturb in [some] way” the course of class and could result in a misdemeanor charge for the student under the statute.¹⁴³ Enforcement against every such “disturbance,” however, can easily become arbitrary and discriminatory.

¹³⁷ S.C. CODE ANN. § 16-17-420(A)–(B) (2019).

¹³⁸ *City of Chicago v. Morales*, 527 U.S. 41, 50–51 (1999) (citing *City of Chicago v. Morales*, 687 N.E.2d 53, 60–61 (Ill. 1997)).

¹³⁹ *Id.* at 53 (citing *Williams v. Fears*, 179 U.S. 270, 129 (1900)).

¹⁴⁰ *Id.* at 50 (citing *Morales*, 687 N.E.2d at 59).

¹⁴¹ § 16-17-420.

¹⁴² *Morales*, 527 U.S. at 50–51.

¹⁴³ § 16-17-420(1).

Like the Chicago ordinance at issue in *Morales*, Part (A)(1)(b) used the term “loiter” but drew no distinction between innocent conduct and that calculated to cause harm.¹⁴⁴ Indeed, much of what “elementary and secondary students (who are in many ways disorderly or boisterous by nature)” do in between classes and on school grounds during lunch and after school—such as standing around in the halls or gathering in groups—could likely be characterized as loitering for purposes of the statute.¹⁴⁵ In *Morales*, the Court found that “since the city [could not] conceivably have meant to criminalize each instance a citizen stands in public . . . the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of ‘loitering,’ but rather about what loitering is covered by the ordinance and what is not.”¹⁴⁶ What the South Carolina legislature had attempted to do with the Disturbing Schools Law was exactly what the Court forbids: “[t]he Constitution does not permit a legislature to ‘set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could rightfully be detained.’”¹⁴⁷

The South Carolina statute also did not define what “obnoxious” behavior looks like for the purposes Part (A)(1)(c).¹⁴⁸ Merriam-Webster defines “obnoxious” as “odiously or disgustingly objectionable; highly offensive,” but offers no additional guidance.¹⁴⁹ Whether in sight, sound, or behavior, what is obnoxious to one person may not be obnoxious to another. This is particularly true as applied to the behavior of teens or children as opposed to

¹⁴⁴ *Id.*; see also *Morales*, 527 U.S. at 61–62 (“That the ordinance does not apply to people who are moving—that is, to activity that would not constitute loitering under any possible definition of the term—does not even address the question of how much discretion the police enjoy in deciding which stationary persons to disperse under the ordinance.”).

¹⁴⁵ *Kenny v. Wilson*, 885 F.3d 280, 290 (4th Cir. 2018).

¹⁴⁶ *Morales*, 527 U.S. at 57.

¹⁴⁷ *Id.* at 60 (citing *United States v. Reese*, 92 U.S. 214, 221 (1876)).

¹⁴⁸ See S.C. CODE ANN. § 16-17-420 (2019) (lacking any definition of the word “obnoxious”).

¹⁴⁹ *Obnoxious*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/obnoxious> (last visited Sept. 27, 2019).

adults.¹⁵⁰ Indeed, the Fourth Circuit noted that elementary and secondary students are “in many ways disorderly and boisterous by nature,” and thus the vagueness of the Disturbing Schools Law had the potential to restrict students’ freedom of speech and expression, thus chilling student engagement.¹⁵¹

New Mexico’s current Disturbing Schools Law, at issue in *A.M.*, falls within the category of Crimes Against Public Peace and reads in pertinent part:

(D) No person shall willfully interfere with the educational process of any public or private school by committing, threatening to commit or inciting others to commit any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of a public or private school. . . . (F) Any person who violates any of the provisions of this section shall be deemed guilty of a petty misdemeanor.¹⁵²

In *A.M.*, the Tenth Circuit upheld a grant of qualified immunity to the SRO and school administrator defendants.¹⁵³ Qualified immunity is a defense that “protects governmental officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”¹⁵⁴ In a dispute over qualified immunity, the burden is on the plaintiff to show that there was a constitutional violation and that an “objectively reasonable officer could not have thought the force was constitutionally

¹⁵⁰ [T]hat is, adolescents are more likely to take greater risks and to reason less adequately about the consequences of their behavior. . . . There can be no doubt that many incidents that result in disciplinary infractions at the secondary level are due to poor judgement on the part of the adolescent involved.

AM. PSYCHOLOGICAL ASS’N ZERO-TOLERANCE TASK FORCE, ARE ZERO-TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? 855 (2008) <https://www.apa.org/pubs/info/reports/zero-tolerance.pdf>.

¹⁵¹ *Kenny v. Wilson*, 885 F.3d 280, 290 (4th Cir. 2018).

¹⁵² N. M. STAT. ANN. § 30-20-13(D), (F) (West 2019).

¹⁵³ *A.M. ex rel. F.M. v. Holmes*, 830 F.3d 1123, 1129 (10th Cir. 2016).

¹⁵⁴ *Id.* at 1134.

permissible.”¹⁵⁵ The court concluded that “there was no clearly established law indicating that A.M.’s minor status could negate Officer Acosta’s customary right to place an arrestee in handcuffs.”¹⁵⁶

Holding the New Mexico statute at issue in *A.M.* to the same standard for vagueness as that in *Morales*, the constitutionality of the statute comes into question, and with it, the protection of qualified immunity. Qualified immunity applies where the defendant acts in a manner that is constitutional or that he reasonably believes to be constitutional.¹⁵⁷ It follows that, if the statute encouraging the behavior is unconstitutional by virtue of being violative of due process rights, the SROs’ behavior is no longer subject to the protections of qualified immunity.¹⁵⁸ In affirming the finding of qualified immunity, the Tenth Circuit implicitly held that the New Mexico statute was not substantively unconstitutional, despite the clearly egregious use of force against a twelve-year-old for burping in class.¹⁵⁹ The plaintiff in *A.M.* was denied the opportunity to pursue First or Fourteenth Amendment claims, and the United States Supreme Court denied the plaintiff’s petition for certiorari.¹⁶⁰

¹⁵⁵ *Id.* at 1151.

¹⁵⁶ *Id.* at 1152.

¹⁵⁷ *See id.* at 1151.

¹⁵⁸ *Id.*

¹⁵⁹ Often enough the law can be “a ass—a idiot,” CHARLES DICKENS, *OLIVER TWIST* 520 (Dodd, Mead & Co. 1941) (1838)—and there is little we judges can do about it, for it is (or should be) emphatically our job to apply, not rewrite, the law enacted by the people’s representatives. Indeed, a judge who likes every result he reaches is very likely a bad judge, reaching for results he prefers rather than those the law compels. So it is I admire my colleagues today, for no doubt they reach a result they dislike but believe the law demands—and in that I see the best of our profession and much to admire. It’s only that, in this particular case, I don’t believe the law happens to be quite as much of a ass as they do. I respectfully dissent.

Id. at 1170 (Gorsuch, Cir. J., dissenting).

¹⁶⁰ *A.M. ex rel. v. Acosta*, 137 S. Ct. 2151, 2151 (2017).

The New Mexico statute, however, is as vague as—if not vaguer than—the one at issue in *Kenny*.¹⁶¹ Looking carefully at its language, the statute prohibits “any act” that might “disrupt, impair, [or] interfere with” the functions of a public or private school.¹⁶² The statute does not further define any of those terms, nor does it place a scienter requirement on the action.¹⁶³ As it stands, under the common use of “disrupt” or “interfere,” a hiccup, a cough, or a sneeze could *technically* and subjectively force a student to face criminal consequences. If a student suddenly became ill and fell to the ground, or bumped into another student’s desk, creating noise and commotion, he would certainly be guilty of causing disruption, albeit unintentionally. Enforcement of the statute is essentially arbitrary and vulnerable to a facial attack. As the Court noted in *Morales*, “[t]his is not an ordinance that ‘simply regulates business behavior and contains a scienter requirement’ but is in fact ‘a criminal law that contains no mens rea requirement.’”¹⁶⁴ The Court concluded that any such law would be vulnerable to a facial attack.¹⁶⁵ The breadth of the statute’s interpretation due to its ambiguity “allows the ordinance to reach a substantial amount of innocent conduct,” thus an inquiry into the “moment-to-moment judgement” of law enforcement officers is necessary.¹⁶⁶ The arrest

¹⁶¹ The American Civil Liberties Union filed a federal lawsuit challenging South Carolina’s “disturbing schools” law. The law allows students in school to be criminally charged for normal adolescent behaviors including loitering, cursing, or undefined “obnoxious” actions on school grounds. The ACLU is also challenging a similarly vague “disorderly conduct” law, which prohibits students from conducting themselves in a “disorderly or boisterous manner.” The statutes violate due process protections of the Constitution.

Kenny v. Wilson, *supra* note 6.

¹⁶² N. M. STAT. ANN. § 30-20-13(D) (West 2019) (emphasis added).

¹⁶³ See *generally id.* (failing to define or articulate what might constitute such behavior).

¹⁶⁴ *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) (quoting *Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982) and citing *Colautti v. Franklin*, 439 U.S. 379, 395 (1979)).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 60.

of a seventh-grader for burping in class is precisely the reason police officers cannot and should not be left “absolute discretion.”¹⁶⁷

V. BEYOND STANDING

Kenny v. Wilson’s success lies not only in achieving standing and ensuring that affected students have their day in court, but in bringing to light two important substantive issues arising under Disturbing Schools Laws and to be tried on remand—namely that, across the board, these statutes tend to be unconstitutionally vague and are therefore necessarily prone to arbitrary enforcement. The Fourth Circuit made two important points in its analysis of the issue.¹⁶⁸ First, the court noted that a key element of the student plaintiffs’ complaint was that, in general, students of color and students with disabilities faced a disproportionate likelihood of being disciplined under the Disturbing Schools Laws.¹⁶⁹ In affirming the presence of a credible future threat, the court noted that for three of the plaintiffs—one disabled, one black, and one black and disabled—the “threat of enforcement [was] particularly credible.”¹⁷⁰

The plaintiffs in *Kenny* noted that “black students like Kenny are nearly four times as likely as their white peers to be charged with disturbing school” despite a lack of justifying behavioral differences.¹⁷¹ In fact, it is true on a national scale that while black students make up 15% of the public school population and students with disabilities represent 14%, they represent 31% and 28%, respectively, of all law enforcement referrals or school-related arrests.¹⁷² In 2008, the American Psychological Association

¹⁶⁷ *Id.* at 61.

¹⁶⁸ *Kenny v. Wilson*, 885 F.3d 280, 289 (4th Cir. 2018).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Ripley, *supra* note 5.

¹⁷² Referral to law enforcement is an action by which a student is reported to any law enforcement agency or official, including a school police unit, for an incident that occurs on school grounds, during school-related events, or while taking school transportation. School-related arrest refers to an arrest of a student for any activity conducted on school grounds, during

(“APA”) created a “Zero-Tolerance” task force to investigate whether such policies were effective in schools.¹⁷³ With respect to their impact on students of color, the task force found that “African American students may be disciplined more severely for less serious or more subjective reasons,” with contemporary research suggesting the disproportionate discipline “may be due to lack of teacher preparation in classroom management, lack of training in culturally competent practice, or racial stereotypes.”¹⁷⁴

A 2011 study of the Texas school system showed that nearly three in five students were suspended or expelled at some point within their middle school and high school years.¹⁷⁵ The study also found that African American students were “far more likely to be disciplined for *subjective* violations like disrupting class.”¹⁷⁶ This discrepancy is not unique to Texas, South Carolina, or any one state. In fact, in 2015, the federal government filed a Statement of Interest in a case involving an eight-year-old third-grader and a nine-year-old fourth-grader who were handcuffed by an SRO on multiple occasions for behavior related to their disabilities.¹⁷⁷ The government’s statement notes that minority students and those with disabilities suffer even greater emotional consequences as a result of such “coercive force.”¹⁷⁸ Often, the disabilities or behavioral manifestations that lead to the contact are exacerbated by the

off-campus school activities (including while taking school transportation), or due to a referral by any school official. All arrests are considered referrals to law enforcement. During the 2015–16 school year, over 290,600 students were referred to law enforcement agencies or arrested.

U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, *supra* note 19, at 3 (internal citation omitted).

¹⁷³ AM. PSYCHOLOGICAL ASS’N ZERO-TOLERANCE TASK FORCE, *supra* note 150.

¹⁷⁴ *Id.*

¹⁷⁵ Ripley, *supra* note 5.

¹⁷⁶ *Id.* (“Even after controlling for more than 80 variables, including family income, students’ academic performance, and past disciplinary incidents, the report found that race was a reliable predictor of which kids got disciplined.”).

¹⁷⁷ Statement of Interest of the United States at 1–2, *S.R. and L.G. v. Kenton Cty*, 302 F. Supp. 3d 821 (E.D. Ky. 2017) (No. 2:15-CV-143).

¹⁷⁸ *Id.* at 11.

interaction.¹⁷⁹ For example, in *S.R. and L.G. v. Kenton County*, an interaction between plaintiff L.G. and an SRO occurred because L.G. ran from the officer when she saw him, for fear of being handcuffed again.¹⁸⁰

According to data collected by the United States Department of Education's Office of Civil Rights for the 2013–2014 school year, although “[b]lack children make up 18% preschool enrollment,” they make up “48% of preschool children suspended more than once.”¹⁸¹ In urban centers like New York City, the contrast is even starker—though only “27% of city students are black, they accounted for about 47% of all suspensions last school year.”¹⁸² Students with disabilities are similarly overrepresented in the New York City Department of Education's suspension statistics.¹⁸³ Though they represented only 19% of public school enrollment, they represented about 39% of all suspensions.¹⁸⁴

In December 2010, New York City lawmakers passed the Student Safety Act which requires the Department of Education and New York Police Department to provide quarterly data on school safety issues, suspensions, expulsions, and arrests in schools.¹⁸⁵ Though suspensions have decreased over the past several years, recent data shows a continued reliance on handcuff usage for students exhibiting non-criminal behavior,¹⁸⁶ particularly for

¹⁷⁹ *Id.* at 12.

¹⁸⁰ *Id.* at 10.

¹⁸¹ U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: EARLY CHILDHOOD EDUCATION 1 (2014) <https://www2.ed.gov/about/offices/list/ocr/docs/crdoc-early-learning-snapshot.pdf>.

¹⁸² Christina Veiga, *New York City Schools Continue to Give Out Fewer Suspensions, Though Racial Disparities Persist*, CHALKBEAT (Oct. 30, 2017), <https://chalkbeat.org/posts/ny/2017/10/30/new-york-city-schools-continue-to-give-out-fewer-suspensions-though-racial-disparities-persist/>.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *The Student Safety Act*, N.Y. C.L. UNION, <https://www.nyclu.org/en/student-safety-act> (last visited Sept. 27, 2019).

¹⁸⁶ See N.Y. CIVIL LIBERTIES UNION, STUDENT SAFETY ACT REPORTING 2017–2018 SCHOOL YEAR 3, https://www.nyclu.org/sites/default/files/ssa_sy_17-18_factsheet_nyclu.pdf (last visited Sept. 27, 2019).

children experiencing emotional distress.¹⁸⁷ During the 2017–2018 school year, 92.5% of students handcuffed during a mental health crisis were Black or Latino.¹⁸⁸

During the *Kenny* district court proceedings, the Department of Justice submitted a Statement of Interest noting that the South Carolina statute (prior to its amendment) “raise[d] significant concerns, particularly in light of the allegations of arbitrary and discriminatory enforcement.”¹⁸⁹ The statement emphasized that “[t]he prohibition on vague statutes is rooted in the Due Process Clause and the ‘ordinary notions of fair play’ it embodies.”¹⁹⁰ It was also contended that the plaintiffs had provided sufficient evidence demonstrating that Disturbing Schools Laws were not being equitably enforced, noting that the Supreme Court has continually recognized that “where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standard-less sweep that allows policemen . . . to pursue their personal predilections.”¹⁹¹ Indeed, these notions of vagueness and arbitrary enforcement were at the center of the plaintiffs’ substantive due process argument in *Kenny*, particularly because the students involved were students of color and students with disabilities.

VI. WHAT *KENNY* MEANS FOR DISTURBING SCHOOLS LAWS

In an ideal world, the role of disciplinarian would remain with school officials who, theoretically, are trained to work with students, are familiar with the students in their school communities, and can distinguish between serious and dangerous behavior requiring law enforcement intervention on the one hand, and that indicative of teenage immaturity or disability on the other.¹⁹² The APA’s “Zero-

¹⁸⁷ *See id.* at 4.

¹⁸⁸ *Id.*

¹⁸⁹ Statement of Interest of the United States, *Kenny v. Wilson*, No. 2:16-cv-2793 (CWH), 2017 U.S. Dist. LEXIS 218160 (D.S.C. Feb. 28, 2017).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *See* AM. PSYCHOLOGICAL ASSOC. ZERO-TOLERANCE TASK FORCE, *supra* note 150, at 855 (“Findings from the field of developmental neuroscience indicate that if a particular structure of the brain is still immature, then the functions that it governs will also show immaturity.”).

Tolerance” task force found that, in general, zero-tolerance policies like South Carolina’s pre-amendment Disturbing Schools Law were counterproductive:

The goal of any effective disciplinary system must be to ensure a safe school climate while avoiding policies and practices that may reduce students’ opportunity to learn. Although the goals of zero-tolerance in terms of ensuring a safe and disciplined school climate must be supported, the implementation of zero-tolerance has created continuing controversy by threatening the opportunity to learn for too many students. Moreover, the Zero-Tolerance Task Force’s review of an extensive database on school discipline reveals that, despite the removal of large numbers of purported troublemakers, zero-tolerance policies have not provided evidence that such approaches can guarantee safe and productive school climates for other members of the student population. Clearly, an alternative course is necessary that can guarantee safe school environments without removing large numbers of students from the opportunity to learn.¹⁹³

But in a country that far too regularly experiences mass shootings in schools,¹⁹⁴ it is difficult to imagine a conversation about school safety that does not involve armed officers—despite an abundance of studies suggesting that there are alternative approaches that may prove more effective at reducing school violence, and that the presence of armed officers often contributes to a sense of hostility and anxiety in a school environment.¹⁹⁵ The “Dignity in Schools

¹⁹³ *Id.* at 857.

¹⁹⁴ Michelle Lou & Christina Walker, *There Have Been 22 School Shootings in the US So Far This Year*, CNN (July 26, 2019, 9:39 AM), <https://www.cnn.com/2019/05/08/us/school-shootings-us-2019-trnd/index.html>.

¹⁹⁵ In the same way, research shows that subjecting students to daily interactions with armed guards, or the possibility that their teachers could have a concealed weapon tucked inside their waistband, may make students feel less safe. Such measures send the message that a student’s display of anxiety and

Campaign,” a coalition of organizations against increasing the number of police officers in schools, advocates ending the consistent presence of law enforcement and, instead, focus on training “school staff [] to ensure safe and positive school climates, such as community intervention workers, peacebuilders, behavior interventionists, transformative or restorative justice coordinators, school aides, counselors and other support staff, [on what they] can and do prevent and address safety concerns and conflicts.”¹⁹⁶

Although *Kenny* has yet to proceed further through the court system, in May 2018, the South Carolina legislature amended its Disturbing Schools statute to explicitly restrict the statute’s application to non-students only—albeit leaving room to punish suspended students as non-students.¹⁹⁷ While this change on its own was an immense victory for teenagers from South Carolina, the real victory lies in their having been granted standing by the Fourth Circuit to pursue their due process claims,¹⁹⁸ where, as seen in *A.M.*, challenges against SROs or school administrators run the risk of

agitation might be met with lethal force, rather than calming conversations.

Micere Keels, *The False Comfort of Securing Schools*, N.Y. TIMES (Sept. 6, 2018), <https://www.nytimes.com/2018/09/06/opinion/school-shootings-security-violence.html>.

¹⁹⁶ COUNSELORS NOT COPS, DIGNITY IN SCHOOLS CAMPAIGN 2, http://dignityinschools.org/wp-content/uploads/2017/10/DSC_Counselors_Not_Cops_Recommendations-1.pdf (last revised Oct. 2013).

¹⁹⁷ The annotated law provides as follows:

(A) It is unlawful for a person who is not a student to wilfully interfere with, disrupt, or disturb the normal operations of a school or college in this State by: . . . (4) being loud or boisterous on school or college grounds or property after instruction by school or college personnel to refrain from the conduct; (5) threatening physical harm to a student or a school or college employee while on school or college grounds or property . . . (B) For the purpose of this section, “person who is not a student” means a person who is not enrolled in, or who is suspended or expelled from, the school or college that the person interferes with, disrupts, or disturbs at the time the interference, disruption, or disturbance occurs.

S.C. CODE ANN. § 16-17-420(A)–(B) (2019).

¹⁹⁸ *Kenny v. Wilson*, 885 F.3d 280, 291 (4th Cir. 2018).

being dismissed under the shield of qualified immunity.¹⁹⁹ The *Kenny* plaintiffs set a new precedent for students pursuing changes to school discipline policies across the country.²⁰⁰ *Kenny* establishes a framework by which students of color and students with disabilities can challenge Disturbing Schools Laws as both facially unconstitutional and violative of substantive due process.²⁰¹

While changes will likely come through committed plaintiffs like Niya Kenny, there is work to be done on the other side of the Bench and in state legislatures. In 2011, Texas Supreme Court Chief Justice Wallace B. Jefferson spent a day in Juvenile Court at the invitation of one of his colleagues.²⁰² Chief Justice Jefferson, the first African American appointed to the state's Supreme Court, saw a broken system that was "funneling kids from schools to detention centers."²⁰³ The experience was disturbing enough to prompt him to call a meeting with state legislators to see what could be done; to his surprise, they were more than happy to participate in the change that made the Disturbing Schools Law more specific and directed towards disruptive behavior.²⁰⁴ The legislative changes took effect beginning September 1, 2013, the first day of the new school year.²⁰⁵ In the first year alone, "some 40,000 charges were *not* filed against

¹⁹⁹ A.M. *ex rel.* F.M. v. Holmes, 830 F.3d 1123, 1133 (10th Cir. 2016).

²⁰⁰ *See Kenny*, 885 F.3d at 291.

²⁰¹ *Id.*

²⁰² These are families in distress—very often uneducated parents trying to deal with troubled youth, many of whom have mental-health issues If it were my kid, I would be in that courtroom filing pleadings to dismiss. But many of the kids were from broken homes and very modest financial means.

Ripley, *supra* note 5 (Justice Jefferson, reflecting on his visit to juvenile court).

²⁰³ *Id.*

²⁰⁴ After his day in juvenile court, Jefferson met with Texas legislators to see what could be done. It turned out that many were as disgusted by the status quo as he was. They were tired of reading news stories about kids getting charged with disrupting class for spraying perfume or throwing paper airplanes. It was a waste of taxpayer dollars, not to mention embarrassing.

Id.

²⁰⁵ *Id.*

kids,” a roughly sixty-one percent decline in criminal charges.²⁰⁶ This is a striking example of how judicial discretion can be used to influence policy when the status quo is creating devastating circumstances.

Change can also start within the schoolhouse. For those who believe that zero-tolerance policies are the only thing standing between a teacher and the allegedly unruly teens roaming the halls of our nation’s public schools,²⁰⁷ it is worth noting that behavioral concerns need not only be addressed through law enforcement involvement. In three of the nation’s largest school districts—New York, Chicago, and Miami-Dade—the school districts staff more school police officers than social workers or counselors.²⁰⁸ According to Dennis Parker, Director of the ACLU’s Racial Justice Program, the discrepancy “reflects an approach to school discipline and school safety that is ultimately counterproductive.”²⁰⁹ Marc Schindler, head of the Justice Policy Institute, points out that “[w]hile there are conflicting studies about the effectiveness of police in schools, . . . research shows they bring plenty of

²⁰⁶ *Id.* (“And there was no evidence that school safety suffered as a result. The number of juvenile arrests for violent crimes, which had been declining before the reforms, continued to fall, as did the number of expulsions and other serious disciplinary actions in schools.”).

²⁰⁷ In April, a bill that would have eliminated the charge for students at their own school, like the one Texas had passed, came up for a subcommittee hearing in the South Carolina legislature. A solicitor and former teacher named Barry Barnette testified against the proposal. “There’s kids that will not obey the rules. And you’ve got to have discretion for that officer,” he said. “I wish it was a perfect world where the students were always well behaved and everything. It’s not that way.”

Id.

²⁰⁸ Jennifer Gerson Uffalussy, *There Are More Police Officers Than Counselors in These Major School Districts*, TEEN VOUGE (Apr. 4, 2016), <https://www.teenvogue.com/story/police-officers-schools-counselors> (“New York and Chicago both have about double the number of police officers on campus than school counselors.”).

²⁰⁹ *Id.* (“In fact, according to *The 74*, not one of the 10 largest school districts in the country even has the suggested student to counselor ratio as recommended by the American School Counselor Association.”).

unintended consequences for students.”²¹⁰ Scholar-activists Thureau and Wald suggest that “the access to SROs for consultation on whether an act is an arrestable offense increases the likelihood that school administrators will use such information for police functions.”²¹¹

Since it is doubtful that SROs will be removed from schools at any point in the near future, there is enough information to suggest that more training will provide officers with a better sense of how to handle teenagers, particularly those with special educational needs or behavioral issues that might manifest in disruptive behaviors.²¹² The National Association of School Resource Officers exists as a non-governing leadership body for SROs across the country.²¹³ In its “Statement on Police Involvement in School Discipline,” the Organization encouraged schools to complete a clear and concise memorandum of understanding, emphasizing that “SROs *must* [r]eceive [t]raining [r]egarding” students with special needs and discouraging the use of physical restraint in almost all situations.²¹⁴

In many ways, however, these are small fixes for a much larger problem. Until SROs’ responsibilities are clearly separated from

²¹⁰ Cheryl Corley, *Do Police Officers in Schools Really Make Them Safer?*, NPR (Mar. 8, 2018, 5:00 AM), <https://www.npr.org/2018/03/08/591753884/do-police-officers-in-schools-really-make-them-safer>.

²¹¹ Thureau & Wald, *supra* note 69, at 984.

²¹² Several training requirements were recommended, starting with knowledge of the school’s code of conduct so school officials and police are on the same page. The Justice Center administered the report in coordination with the Supportive School Discipline Initiative launched in 2011 by the U.S. Attorney General and the U.S. Secretary of Education. More than 100 advisers including policymakers, school administrators, teachers, behavioral-health experts, and police collaborated on the recommendations.

Mark Keierleber, *Why So Few School Cops Are Trained to Work With Kids*, THE ATLANTIC (Nov. 5, 2015), <https://www.theatlantic.com/education/archive/2015/11/why-do-most-school-cops-have-no-student-training-requirements/414286/>.

²¹³ See *About NASRO*, *supra* note 64.

²¹⁴ *NASRO Position Statement on Police Involvement in Student Discipline*, NAT’L ASS’N SCH. RESOURCE OFFICERS (Aug. 14, 2015), <https://nasro.org/news/press-releases/nasro-position-statement-police-involvement-student-discipline>.

those of disciplinary school administrators, and until American public schools can deliver the same quality of services and education to all students, no matter their zip-code, students of color, students from low-income communities, and students with disabilities will need people like Niya Kenny to keep their phones out and keep standing.