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ABUSING DISCRETION: THE BATTLE FOR CHILDHOOD IN SCHOOLS

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ABSTRACT

For too many children the schoolhouse doors become a point of entry into the criminal justice system. Children of color are the most likely to suffer from this phenomenon. The presence of policing in schools is a key contributor to this "school-to-prison pipeline." This Note argues that broad, discretionary mandates for school resource officers (SROs) promote biased law enforcement that impacts Black girls in different and specific ways. I contend that SRO mandates can be effectively limited by strategically bolstering community organizing efforts with impact litigation.

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I. INTRODUCTION

In 2008, a young girl was arrested in Texas. Her crime? Resisting her exclusion from prom when her dress was deemed too revealing.[1] In 2010, a twelve-year-old girl was arrested, handcuffed, and detained at a New York City police department for hours.[2] Her crime? Writing "I love my friends Abby and Faith" on her desk with erasable marker.[3] In 2013, a sixteen-year-old diabetic child had her face slammed into a file cabinet and was arrested while leaving a classroom. Her crime? Falling asleep while reading during an in-school suspension.[4] In 2015, a sixteen-year-old girl was wrestled by a male police officer, flipped backwards out of her chair, and thrown across the classroom floor.[5] Her crime? Refusing to hand over her phone to her algebra teacher.[6] Stories such as these are remarkable but, evidently, not rare.

Over the past thirty years, school resource officers (SROs)—police officers charged with protecting school children—have become fixtures of the American educational landscape.[7] With their presence has come the criminalization of ordinary, youthful, behavior.[8] Stories abound of children arrested and even prosecuted for childish behavior in which most people engage at some point in their lives.

Schools are the focal point of many children's lives. Schools are where most children spend their days and they have profound, lifelong impacts on the lives and identities of children. The criminalization of normal, childhood behaviors in these high impact spaces hurts children of

1. MONIQUE W. MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS 3 (2016) [hereinafter MORRIS, PUSHOUT].

2. Farnel Maxime, *Zero-Tolerance Policies and the School to Prison Pipeline*, SHARED JUST. (Jan. 18, 2018), http://www.sharedjustice.org/domesticjustice/2017/12/21/zero-tolerance-policies-and-the-school-to-prison-pipeline.

3. *Id.*

4. MORRIS, PUSHOUT, *supra* note 2.

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

6. *Id.*

7. Maxime, *supra* note 3.

8. Ripley, *supra* note 6.

all races, gender expressions, sexualities, and disability statuses. Rather than turning to policing, children would be better served by limiting SRO mandates and minimizing interactions between SROs and children.

This Note contends that broad, discretionary SRO mandates create specific ramifications for girls of color, particularly Black girls. However, limiting discretion alone is not enough to address the damage done to Black girls' lives and education. Rather, this Note argues that SRO mandates must be limited and narrowed to address these disparate impacts. Using *Kenny v. Wilson*[9] as a case study, this Note examines how to synergistically employ community organizing and litigation to pressure political actors into narrowing SRO mandates.

II. THE DANGERS OF SCHOOL POLICING

A. *The School-to-Prison Pipeline*

SROs are often children's first point of contact in the criminal justice system.[10] This is a piece of a wider phenomenon often referred to as the "school-to-prison pipeline."

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9. Kenny v. Wilson, 885 F.3d 280, 285 (4th Cir. 2018).

10. MONIQUE W. MORRIS, AFRICAN AMERICAN POLICY FORUM, RACE, GENDER AND THE SCHOOL-TO-PRISON PIPELINE 7 (2012) [hereinafter MORRIS, RACE, GENDER AND THE SCHOOL-TO-PRISON PIPELINE]. Much of the research cited for this proposition comes from the landmark study conducted by Monique W. Morris in conjunction with Georgetown Law. This study was primarily conducted using the focus group method and the analysis brings in research and scholarly works from scholars as well as other data collecting organizations. The study states "SRO and other law enforcement participants (N=57) were asked to discuss their experiences working with girls of color, their general observations regarding interactions with girls of color, and to suggest policies and practices that could reduce contact between girls of color and the juvenile justice system. SRO participants were selected by national or local police agency leadership. All officers worked in public schools, from elementary to high school level; a small number of officers were stationed in nontraditional public schools. Participants who were girls of color (N=28) were selected by program directors who worked directly with them. These students had all interacted with SROs, and they were asked to discuss their experiences, their general observations regarding contact between girls of color and law enforcement, and to suggest ways—in and out of school—that contact with the juvenile justice system could be reduced. Researchers also conducted one town hall, a roundtable, seven in-depth individual interviews with SROs, and six other interviews with key stakeholders who worked in the jurisdictions in which the focus groups were located. Qualitative data was primarily collected from focus groups and individual interviews. Focus groups and interviews were conducted in urban communities in Alabama, Florida, and Georgia. Telephonic and in-person interviews were conducted with law enforcement and education stakeholders from urban and suburban districts in Alabama, California, Missouri and Washington, DC. One town hall meeting was conducted in Florida." MONIQUE W. MORRIS, REBECCA EPSTEIN

> School-to-prison pipeline refers to the collection of policies, practices, conditions, and a prevailing consciousness that facilitate both the criminalization within educational environments and the processes by which this criminalization results in the incarceration of youth and young adults.[11]

While the quality of instruction, design of the curriculum, and students' relationships to the school can affect the school-to-prison pipeline, the most direct route to prison for children is from in-school arrests.[12] Studies have found that one in ten children in the delinquency system were referred by schools (and this may be an underestimate).[13] Even after controlling for demographics, neighborhood crime rates, and other factors, a compilation of surveys and data from 2,650 schools found that students who attend schools with police officers are more likely to be reported to law enforcement for low level offenses.[14] Actions that may qualify for a scolding in the principal's office can filter a child into the juvenile justice system merely because the event happened in the presence of an SRO.[15] Not only can the misfortune of an officer's presence, rather than a school administrator's, divert children into the criminal justice system, officers' involvement can escalate the dynamic to the point of statutory disorderly conduct. This escalation will often ultimately result in a referral to the court system.[16] Engagement with the court system can have profound impacts on children even without a conviction. While the numbers may differ by jurisdiction, students who are arrested at school are three times more likely to be pushed out[17] of school than their classmates.[18] The im-

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& AISHATU YUSEF, CTR. ON POVERTY & INEQ.: GEO. L., BE HER RESOURCE 7, 16–17 (2018), https://njdc.info/wp-content/uploads/2017/09/Be-Her-Resource-A-Toolkit-About-School-Resource-Officers-and-Girls-of-Color.pdf [hereinafter MORRIS ET AL., BE HER RESOURCE].

11. MORRIS, RACE, GENDER AND THE SCHOOL-TO-PRISON PIPELINE, *supra* note 11, at 2.

12. *Id.*

13. Michael P. Krezmien et al., *Juvenile Court Referrals and the Public Schools: Nature and Extent of the Practicein Five States*, 26 J. CONTEMP. CRIM. JUST. 273, 287 (2010).

14. Jason P. Nance, *Students, Police and the School to Prison Pipeline*, 93 WASH. U. L. REV. 919, 976 (2016); Ripley, *supra* note 6.

15. MORRIS ET AL., BE HER RESOURCE, *supra* note 11, at 12; Amanda Merkwae, *Schooling the Police*, 21 MICH. J. RACE & L. 147, 149–50 (2015).

16. MORRIS ET AL., BE HER RESOURCE, *supra* note 11, at 12.

17. The term "pushout" is used deliberately in the place of "dropout." The term "dropout' implies an affirmative decision on the part of students. "Pushout" more accurately represents the dynamics discussed here. Instances in which often institutional forces push students out of the school system. *See generally* MORRIS, PUSHOUT, *supra* note 2.

18. Robin L. Dahlberg, AM. CIV. LIBERTIES UNION MASS., ARRESTED FUTURES: THE CRIMINALIZATION OF SCHOOL DISCIPLINE IN MASSACHUSETTS' THREE LARGEST SCHOOL DISTRICTS 34 (2012).

pact is even more severe on children who must appear in court—these children are four times more likely to be pushed out of school than their peers.[19] Children who are pushed out of school are eight times more likely to end up in the criminal justice system.[20]

The effect of interacting with the juvenile justice system has long-lasting implications well beyond a student's immediate education. For example, these interactions can negatively impact children's long-term health and employment opportunities.[21] In a Dear Colleague letter[22] meant to highlight the racial disparity in school law enforcement practices, the Department of Justice found:

> [A] correlation between exclusionary discipline policies and practices and an array of serious educational, economic, and social problems, including school avoidance and diminished educational engagement; decreased academic achievement; increased behavior problems; increased likelihood of dropping out; substance abuse; and involvement with juvenile justice systems.[23]

Education is a key tool for escaping poverty.[24] Thus, when students are pushed out of school through criminalization of their behavior, they are deprived of a major means of disrupting the cycle of poverty.[25] This can have generational impacts. Childhood incarceration increases the rate of recidivism as an adult by around 23%.[26] In turn, the next generation of children is more likely to be involved in the judicial system because of their *mother's* incarceration.[27]

B. *Disproportionate Impacts of the School-To-Prison Pipeline*

Criminalization of childhood behavior is damaging to all children, but the effects are not felt evenly across demographics. While Black chil-

19. *Id.*; Ripley, *supra* note 6.

20. Dahlberg, *supra* note 19.

21. *Cf.* U.S. DEP'T JUST. & U.S. DEP'T EDUC. JOINT DEAR COLLEAGUE LETTER (2014), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html.

22. Dear Colleague letters can be issued to provide guidance to institutional actors in order to help them fulfill their constitutional and federal obligations.

23. U.S. DEP'T JUST. & U.S. DEP'T EDUC. JOINT DEAR COLLEAGUE LETTER, *supra* note 22.

24. MORRIS, PUSHOUT, *supra* note 2, at 31.

25. *See id.* at 21.

26. *See, e.g.*, Anna Aizer & Joseph Doyle, *Juvenile Confinement, Human Capital, and Future Crime: Evidence from Randomly Assigned Judges*, Q. J. ECON. 130, 134 (2015).

27. MORRIS, PUSHOUT, *supra* note 2, at 11.

dren under the age of eighteen comprise 14% of the population,[28] they comprise 35.3% of delinquency cases.[29] White children are slightly underrepresented in the system—they make up 50% of children under eighteen[30] and comprise only 42.9% of juvenile adjudications.[31] These statistics represent all delinquency cases and not just those specifically arising out of school arrests. However, a study in New York City, one of the country's largest school systems, shows that in the 2017-18 school year, 89.9% of juvenile reports in public schools were issued against Black or Latinx students.[32] Meanwhile, Black and Latinx students comprised only 66.5% of the New York City public school population.[33] This disparity appears to be a nationwide problem. Data collection around these issues is sporadic, but according to an analysis of 2013-14 school year data there are racial disparities in forty-three of fifty states and, in most states, Black students suffer from at least 10% more arrests.[34]

These disparities cannot be explained away by behavioral differences.[35] For example, in South Carolina, Black students are four times more likely to face criminal charges for "disturbing school."[36] Even after controlling for variables such as family income, students' academic performance, and past disciplinary incidents, being Black was a reliable predictor for why children were disciplined for subjective violations.[37]

Monique W. Morris's work addresses some of the dynamics that lead to these racial disparities. She argues that Black children are "subject to discriminatory practices informed by stereotype-driven fear."[38] Additionally, because of power dynamics influenced by race, Black children

28. *Racial and Ethnic Composition of the Child Population*, CHILD TRENDS (Dec. 13, 2018), https://www.childtrends.org/indicators/racial-and-ethnic-composition-of-the-child-population.

29. M. Sickmund, A. Sladky & W. Kang, *Easy Access to Juvenile Court Statistics: 1985-2019*, OFF. OF JUV. JUST. & DELINQ. PREVENTION (2021), https://www.ojjdp.gov/ojstatbb/ezajcs/asp/display.asp.

30. *Racial and Ethnic Composition of the Child Population*, *supra* note 29.

31. Sickmund et al., *supra* note 30.

32. N.Y.CIV. LIBERTIES UNION, STUDENT SAFETY ACT REPORTING: 2017-2018 SCHOOL YEAR 4, https://www.nyclu.org/sites/default/files/ssa_sy_17-18_factsheet_nyclu.pdf.

33. *Id.* at 1.

34. Sarah Hinger, *Racial Disparities in Student Arrests Is an Epidemic Affecting Children Nationwide,* ACLU (Feb. 3, 2017), https://www.aclu.org/blog/racial-justice/race-and-inequality-education/racial-disparities-student-arrests-epidemic.

35. U.S. DEP'T JUST. & U.S. DEP'T EDUC. JOINT DEAR COLLEAGUE LETTER, *supra* note 22.

36. Ripley, *supra* note 6.

37.*Id.*

38. MORRIS, RACE, GENDER AND THE SCHOOL-TO-PRISON PIPELINE, *supra* note 11, at 6.

may be more likely to consent to SRO searches, comply with orders, or admit wrongdoing.[39]

When looking at both race and gender expression, research often focuses on boys of color as they are the group most overrepresented in interactions with SROs and the juvenile justice system.[40] However, a closer look at how other groups, such as Black girls, are affected by school policing highlights the damage done across all demographics of children.

Black girls are impacted by an intersection of multiple, historically oppressed identities—being Black and feminine presenting. They may also identify as LGBTQ or as a person living with a disability, as well as any number of other intersections of identity.[41] Our society is profoundly shaped by race and gender. The stereotypes that accompany a racialized, gendered society feed the biases (both implicit and explicit) of school administrators and SROs.[42] Black girls tend to suffer from stereotypes around the way they dress, the way they speak, and their emotional reactions in the classroom.[43] These stereotypes impact the ways in which school administrators and SROs react to Black girls.

Negative biases against Black girls result from a culture that favors a "White middle-class definition of femininity."[44] Morris argues that the impact of these expectations around femininity and behavior plays out when looking at the offenses for which Black girls are disproportionately punished.[45] Offenses like dress code violations or disorderly conduct are discretionary and leave more room for stereotypes and biases to affect SRO decision making.[46] Anecdotally, there is no shortage of stories about Black girls facing disciplinary issues from wearing hair extensions while White girls face no penalties for dying their hair.[47] Conversely, for offenses

39. Merkwae, *supra* note 16, at 171.

40. *See e.g.* MORRIS, RACE, GENDER AND THE SCHOOL-TO-PRISON PIPELINE, *supra* note 11, at 6.

41. Monique Morris explains intersectionality: "Each identity intersects with the other to generate a more complex worldview than the one that would exist if any of us were ever truly able to walk through life with a singular identity." MORRIS, PUSHOUT, *supra* note 2, at 24.

42. MORRIS, RACE, GENDER AND THE SCHOOL-TO-PRISON PIPELINE, *supra* note 11, at 6.

43. *Id.;* FRANCINE T. SHERMAN & ANNIE BALCK, GENDER INJUSTICE 16, 23 (2015), https://njdc.info/wp-content/uploads/2015/09/Gender-Injustice-System-Level-Juvenile-Justice-Reforms-for-Girls.pdf.

44. MORRIS, RACE, GENDER AND THE SCHOOL-TO-PRISON PIPELINE, *supra* note 11, at 5; *see also* SHERMAN & BALCK, *supra* note 44, at 22–23.

45. MORRIS ET AL., BE HER RESOURCE, *supra* note 11, at 13.

46. *Id.;* MORRIS, RACE, GENDER AND THE SCHOOL-TO-PRISON PIPELINE, *supra* note 11, at 5.

47. MORRIS ET AL., BE HER RESOURCE, *supra* note 11, at 13.

that can be determined more objectively, Black and White students are charged at almost equal rates.[48]

C. *Disturbing-School Statutes*

While dress code issues may seem like a school disciplinary issue rather than a cause for involving law enforcement, many states use SROs to enforce these types of school policies via vague, disturbing-school statutes.[49] These statutes are used to criminalize a broad range of adolescent behaviors that administrators and SROs feel disrupt the educational environment—behaviors such as speaking back to teachers or violating dress codes.[50] SROs are given discretion to determine whether conduct is in violation of a school disciplinary rule or in violation of a statute.[51] Broad mandates via these disturbing-school statutes throw open the door to criminalizing a wide array of childhood behavior in schools. One approach to minimizing the negative impacts of school policing is to attack vague disturbing-school statutes. Restricting the reach of these statutes can, in turn, limit what SROs can criminalize within the schoolhouse walls.

What follows is a case study of *Kenny v. Wilson*, an effort which successfully limited SRO mandates by narrowing the South Carolina Disturbing-School statute. This Note will analyze the strategy behind this instructive case. As part of this analysis, the Note will argue for the strategic value in combining litigation with organizing efforts to limit school policing and, in turn, diminish negative outcomes for children.

III. CHALLENGING DISTURBING-SCHOOL STATUTES: A CASE STUDY OF *KENNY V. WILSON*

Stakeholders looking to challenge broad, disturbing-school statutes can turn to *Kenny v. Wilson* as an example for how advocates can effectively limit SRO mandates. The interplay of political organizing and litigation created a successful legislative outcome in the fight against school policing in South Carolina. Due to pressure brought by interim litigation wins and ground organizing, South Carolinian legislators changed the language of the South Carolina Disturbing-School statute in a manner that protected school children from prosecution.

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48. *Id.*

49. Ripley, *supra* note 6.

50. *See id.*

51. JOANNE MCDANIEL, N.C. STATE DEP'T OF JUV. JUST. & DELINQ. PREVENTION, SCHOOL RESOURCE OFFICERS AND SCHOOL ADMINISTRATORS: "TALKING AND WALKING" TOGETHER TO MAKE SAFER SCHOOLS 5 (June 2002).

A. *Pre-Litigation Organizing Efforts*

The efforts in South Carolina began well before the *Kenny* litigation due to constituents and political organizers who were long aware of issues around school policing.[52] In the years preceding the *Kenny v. Wilson* litigation, around 1,200 kids were charged per year under the state Disturbing-School statute.[53] The statute read:

> (A) It shall be unlawful: (1) for any person willfully 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.[54]

Violation of the statute was punishable by a fine of not more than $1,000 or ninety days imprisonment.[55] The statute was long wielded to criminalize "cursing, refusing to follow directions, or getting in a physical altercation that [did not] result in any injuries . . .[and] simply expressing concerns about police conduct."[56]

South Carolinians, particularly Black South Carolinians, saw first-hand how school policing impacted their children. Groups such as Every-BlackGirl and the Carolina Youth Action Project (formerly Girls Rock)[57]

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52. Telephone Interview with Vivian Anderson, Founder, EveryBlackGirl (Apr. 7, 2021).

53. Ripley, *supra* note 6.

54. S.C. CODE ANN. § 16-17-420(A) (2010).

55. S.C. CODE ANN. § 16-17-420(B) (2010).

56. *Kenny*, 885 F.3d at 286. A South Carolina Attorney General's Opinion determined that the statute could be applied to the "[u]se of foul or offensive language toward a principal, teacher, or police officer," or the "[u]se of obscene or profane language near a 'schoolhouse.'" Opinion No. 94-25, 1994 S.C. Op. Att'y Gen. 25, 1994 WL199757, at *1–2. (Apr. 11, 1994).

57. The South Carolina Youth Action Project mission states "Safer Schools Without SROs is a campaign to remove police officers from schools and redirect their funding to invest in student and teacher supports such as mental health counselors, student concern specialists, school psychologists, guidance counselors, crisis intervention specialists, and student/parent advocates who are extensively trained in restorative practices, trauma-informed care, and anti- oppressive youth work. . . . We demand the removal of all SROs in Charleston County schools and in every public school across South Carolina. We demand each school release all information related to school-based arrests and SRO involvement in matters of student discipline. We demand all SRO-related funding be re-directed to student and teacher supports such as mental health counselors, student concern specialists, school psychologists, guidance counselors, crisis intervention specialists, and student/parent advocates who are extensively trained in restorative practices, trauma-informed care, and anti-oppressive youth work." *Campaign Work*, CAROLINA YOUTH ACTION PROJECT, https://www.scyouthaction.org/campaign-work (last visited Aug. 11, 2021).

were interested in addressing how school policing policies resulted in the "adultification"[58] of Black girls.[59] Because of their deep understanding of community issues, organizers were the ones to develop the original vision for attacking overcriminalization in South Carolina schools.

Recognizing the harm done by broad SRO mandates, organizers like Vivian Anderson—a key player in the South Carolina movement—decided that challenging the South Carolina Disturbing-School statute was the most effective way to limit SRO mandates.[60] Organizers saw that South Carolina already had laws to prevent real dangers like drugs and guns from entering their schools.[61] Anderson believed the Disturbing-School law "was superfluous and intended for kids specifically. Those charged were kids and mostly Black and Brown kids."[62]

In an effort to get the law off the books, Anderson and other community organizers spent years speaking out at public hearings, circulating petitions, and working directly with affected girls.[63] Then, in 2015, a cell phone video filmed by Niya Kenny brought the abuse at the hands of SROs to national attention.

Niya Kenny was thrust into the internet limelight after recording her classmate at Spring Valley High School in Columbia, South Carolina being assaulted by a school resource officer.[64] Her Black, female classmate was flipped over a desk and dragged across the room.[65] When Niya spoke up against the officer's behavior, Niya herself was handcuffed in front of her schoolmates, transported in a police car, and detained in an adult detention center for multiple hours.[66] Niya was traumatized by the experience and dropped out of high school.[67] Political organizers were well aware of trajectories like Niya's and spent decades trying to change the nature of school policing. However, with Niya's recording, the public was effectively captivated, and serious political change was set in motion.

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58. "Adultification" refers to the phenomenon of adults perceiving Black children as being older than they actually are. Janice Gassam Asare, *How The Adultification Bias Contributes to Black Trauma*, FORBES (Apr. 22, 2021), https://www.forbes.com/sites/janicegassam/2021/04/22/how-the-adultification-bias-contributes-to-black-trauma/?sh=2a8eead2b08e.

59. Telephone Interview with Vivian Anderson, Founder, EveryBlackGirl (Apr. 7, 2021).

60. *Id*.

61. *Id*.

62. *Id*.

63. *Id*.

64. *Kenny v. Wilson*, ACLU, https://www.aclu.org/cases/kenny-v-wilson (last updated Mar. 8, 2021) [hereinafter *Kenny v. Wilson*, ACLU].

65. *Id*.

66. Erik Eckholm, *South Carolina Law on Disrupting School Faces Legal Challenge*, N.Y. TIMES (Aug. 11, 2016), https://www.nytimes.com/2016/08/12/us/south-carolina-schools.html.

67. *Kenny*, 885 F.3d at 285.

B. *Organizing Efforts Meet Litigation Efforts*

The national outrage garnered from the footage gave community activists an opening.[68] Luckily, prior organizing efforts already created a foundation for the community to understand the basic issues around school policing as well as a common vision for what organizers hoped to accomplish.[69] Organizers determined that the best means of actualizing this vision was through litigation.[70] Recognizing the opportunity created by Niya's video, political organizers reached out to the ACLU of South Carolina to challenge the overbroad Disturbing-School statute that made Niya's arrest possible.

The lines of communication formed between organizers and litigators are critical to finding strategic plaintiffs.[71] In preparation for the *Kenny* litigation, the ACLU relied on organizers to help find instances of SRO misconduct as well as willing plaintiffs.[72] Organizers also supplied lawyers with statistics, expert witnesses, and other resources by tapping into their community networks.[73]

C. *The Plaintiffs*

Niya became the lead plaintiff in *Kenny v. Wilson*. Political organizers connected the ACLU with six additional named plaintiffs to challenge both the Disturbing-School statute as well as a Disorderly Conduct statute—both used to criminalize youthful behavior in schools.[74] The six

68. Telephone Interview with Vivian Anderson, Founder, EveryBlackGirl (Apr. 7, 2021).

69. *Id.*

70. *Id.*

71. Telephone Interview with Sarah Hinger, Senior Staff Attorney, ACLU Racial Justice Program (Apr. 7, 2021).

72. *Id.*; Telephone Interview with Vivian Anderson, Founder, EveryBlackGirl (Apr. 7, 2021).

73. Telephone Interview with Sarah Hinger, Senior Staff Attorney, ACLU (Apr. 7, 2021).

74. S.P. is another plaintiff. He is a White, high school student with conduct and mood disorders. He was charged under the South Carolina Disorderly Conduct statute. Taurean Nesmith, another plaintiff, was charged under this statute in addition to his charges under the Disturbing-School Statute. The plaintiffs also challenged this Disorderly Conduct Law which states "Any person who shall (a) be found on any highway or at any public place or public gathering in a grossly intoxicated condition or otherwise conducting himself in a disorderly or boisterous manner, (b) use obscene or profane language on any highway or at any public place or gathering or in hearing distance of any schoolhouse or church . . . shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars or be imprisoned for not more than thirty days." This law was not amended in response to the grant of standing and the ACLU continues to litigate the vagueness of the statute. Given the ongoing litigation and the fact that the

other named plaintiffs included Taurean Nesmith, a Black man, who was arrested on his college campus after complaining that a police officer was racially profiling him.[75] D.S. is a Black, female high school student with a learning disability.[76] She was charged under the Disturbing-School Statute after she was the only person injured in a physical altercation at school.[77] K.B. is a Latina girl who was charged with disturbing school when, at thirteen, she complained in response to a teacher removing her from class for being tardy.[78] D.D. is a Black girl; she was charged with disturbing school after being removed from her middle school classroom for talking in class and continuing to talk with a classmate in the hallway afterwards.[79] Both K.B. and D.D. were placed on probation in response to the charges and put in an alternative schooling program that did not provide courses necessary for high school graduation.[80] Lastly, Girls Rock, a nonprofit mentorship program, joined as an additional named plaintiff.[81]

Litigators like the ACLU lawyers in the *Kenny* case ultimately have a duty to the plaintiffs. However, they are also cognizant that litigation is a tool for pushing forward a broader policy agenda.[82] With this understanding, in preparation for litigation, the ACLU lawyers wanted to ensure that the *Kenny* litigation would create substantive value for the broader mission of limiting school policing.[83] This tactic of forming strategic partnerships with organizers at the inception allows lawyers to identify how potential legal resolutions impact the lives of community members and, in turn, what will garner community support for litigation efforts.[84]

D. *The Lawsuit*

Community organizers made clear that they wanted to challenge the Disturbing-School statute. The *Kenny* plaintiffs' arrests[85] and detentions

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Disorderly Conduct Law is not specific to schools, the following discussion will focus on the Disturbing School Statute. S.C. CODE ANN. § 16-17-530 (2012).

75. *Kenny*, 885 F.3d at 285.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Telephone Interview with Sarah Hinger, Senior Staff Attorney, ACLU (Apr. 7, 2021).

83. *Id.*

84. *Id.*

85. Nesmith and D.S. were also arrested in accordance with the South Carolina Disorderly Conduct Law. *Kenny v. Wilson*, ACLU, *supra* note 65; *Kenny*, 885 F.3d at 275.

proceeded under South Carolina's vague "Disturbing-School" statute. The vagueness of the South Carolina statute presented an opportunity for a Fourteenth Amendment Due Process Clause challenge. The Due Process Clause reads, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . "[86] Under Due Process jurisprudence, a statute is deemed unconstitutionally vague if it lacks "sufficiently specific limits on the enforcement discretion of the police 'to meet constitutional standards for definiteness and clarity.'"[87]

The vagueness of the statutory language gave discretion to SROs to weaponize or ignore the statute as they saw fit. The statutory language did not make clear what behavior was actually contemplated by state legislators.[88] In turn, the statute was used to criminalize "behavior that is indistinguishable from typical juvenile behavior, which schools address on a daily basis without resorting to the criminal justice system."[89]

Organizers also made clear to the ACLU that much of their fight was motivated by the racially discriminatory enforcement of the Disturbing-School statute.[90] Race was a critical element of the story organizers told their community members in order to garner broader support.[91] By showing community members the differences in how White students and students of color were treated by SROs, organizers demonstrated that Black students' negative interactions were avoidable.[92]

Given the importance of race in understanding the damage of vague SRO mandates, the ACLU attorneys did not shy away from acknowledging the centrality of race in their litigation.[93] The plaintiffs argued that the vagueness of the Disturbing-School statute permitted disproportionate discretionary enforcement against children of color in a manner that essentially criminalized "status rather than conduct."[94] These racial disparities were a key prong of the plaintiffs' argument. The first page of the complaint read: "While the Disturbing-School statute impacts hundreds

86. U.S. CONST. amend. XIV, § 1.

87. City of Chicago v. Morales, 527 U.S. 41, 64 (1999).

88. Telephone Interview with Sarah Hinger, Senior Staff Attorney, ACLU (Apr. 7, 2021).

89. *Kenny*, 885 F.3d at 286.

90. Telephone Interview with Sarah Hinger, Senior Staff Attorney, ACLU (Apr. 7, 2021).

91. Telephone Interview with Vivian Anderson, Founder, EveryBlackGirl (Apr. 7, 2021).

92. *Id.*

93. Complaint at 1, Kenny v. Wilson, No. 2:16-CV-2794-MBS, 2020 WL 1515527 (D.S.C. Mar. 30, 2020).

94. *Morales*, 527 U.S. at 50; *Kenny*, 885 F.3d at 286.

of adolescents each year, some students in South Carolina feel the burdens of the law more than others. Statewide in 2014-2015, Black students were nearly four times as likely to be referred for charges of Disturbing Schools as were their white classmates."[95] This explicit use of race was a deliberate means of framing the litigation to support the efforts of the community members, the realities of life in effected communities, and the desired outcomes. It served as an acknowledgment of the overwhelmingly disproportionate effects of school policing on Black people and students of color.[96]

E. *Determining the Standard of the Plaintiffs*

With the needs of the community in mind and a legal strategy in place, the ACLU filed a complaint with the district court.[97] Initially, the district court dismissed the case, determining that the plaintiffs' fears of future arrest and prosecution were too speculative to support a lawsuit.[98] In doctrinal terms, the district court found that the plaintiffs lacked standing.[99] On appeal, the Court of Appeals for the Fourth Circuit overruled this determination, finding that multiple plaintiffs suffered from both an ongoing and future injury in fact, holding:[100]

> [At] least some of the named plaintiffs do not rely on conjecture or speculation, but rather, on the fact that they attend school where they were previously arrested and criminally charged under the two South Carolina statutes, and they don't know

95. Complaint at 1, Kenny v. Wilson, No. 2:16-CV-2794-MBS, 2020 WL 1515527 (D.S.C. Mar. 30, 2020).

96. Telephone Interview with Sarah Hinger, Senior Staff Attorney, ACLU (Apr. 7, 2021); Telephone Interview with Vivian Anderson, Founder, EveryBlackGirl (Apr. 7, 2021).

97. Complaint, Kenny v. Wilson, No. 2:16-CV-2794-MBS, 2020 WL 1515527 (D.S.C. Mar. 30, 2020).

98. Kenny v. Wilson, No. 2:16-CV-2794-MBS, 2020 WL 1515527 at 1 (D.S.C. Mar. 30, 2020); *Kenny*, 885 F.3d at 280.

99. Kenny v. Wilson, No. 2:16-CV-2794-MBS, 2020 WL 1515527 at 1 (D.S.C. Mar. 30, 2020).

100. The court's finding as to standing applied to S.P., D.S., and Nesmith. Because these claims were sufficient to establish standing, the court left the determination of Kenny's and Girls Rock's standing for the district court.

The same determinations around chilled conduct at school and fear of future prosecution in school no longer applied to Kenny given her pushout from school and did not apply to Girls Rock as it is an organization rather than a student. *Kenny*, 885 F.3d at 280.

> which of their actions at school will be interpreted to violate the statutes in the future.[101]

In explaining the decision, the court explicitly embraced the atmospherics of racial disparity laid out in the complaint filed by the ACLU.[102] The court specifically acknowledged the races of the plaintiffs (and their disability status), stating:

> Plaintiffs claim that the statutes are enforced in a discriminatory manner, leaving racialminorities and students with disabilities especially vulnerable. In 2014-2015 black students in South Carolina were nearly four times as likely to be charged under theDisturbing Schools Law compared to their white classmates. In Charleston County, a charge under the Disturbing Schools Law was the number one reason young people enteredthe juvenile justice system and black students were more than six times as likely to becharged for the offense compared to white students.Plaintiffs allege that such racial disparities in discipline cannot be explained by differences in behavior among students of different races.[103]

The Court of Appeals for the Fourth Circuit's grant of standing, as well as the emphasis on the discriminatory impact on children of color, was a major win for both the litigation and organizing efforts in South Carolina. The acknowledgement of race in the standing determination shows at least one circuit's recognition that race creates a dynamic where children of color are more susceptible to suffering future injury in the face of vague Disturbing-School statutes.

Because of the plaintiffs' appellate standing victory, the state would now need to dedicate resources to fighting the claims on the merits in further litigation. Rather than do so, State Representative Mia S. McLeod proposed major amendments to the language of the Disturbing-School statute.[104] The new statute insulated students from adjudication, reading: "It is unlawful for a person *who is not a student* to willfully interfere with, disrupt, or disturb the normal operations of a school or college in this State. . ."[105] This was a victory for the South Carolina movement. By eliminating school children from the scope of the statute, the state eradicated a major means of criminalizing childhood behavior. In school discipline matters, SROs would needto rely on more definitive

101. *Id.* at 281.
102. *Id.* at 289.
103. *Id.* at 286.
104. Eckholm, *supra* note 67.
105. S.C. CODE ANN. § 16-17-420(A) (2018) (emphasis added).

statutes (such as those criminalizing guns or drugs in schools) rather than the vague Disturbing-School statute. With SRO mandates limited in this manner, criminalization of misbehavior would be less susceptible to the discretion of individual officers.

Although the grant of standing and the change in statutory language was a victory, litigation efforts are ongoing and there remains a battle over the Disorderly Conduct statute.[106] The Disorderly Conduct statute applies more broadly in the community and is written to permit use outside of the schoolhouse walls. As such, South Carolina appears more willing to fight to uphold the statute.[107]With this statute still in place, there remains a loophole for SROs to penalize and criminalize children for misbehaving in school. Until the courts resolve the challenge to the Disorderly Conduct statute, the South Carolina movement cannot claim a complete legal victory.

However, given the success around the Disturbing-School statute, cases like *Kenny* that challenge these statutes for vagueness can serve as important models for protecting children from the effects of school policing. A look at how the *Kenny* strategy fits into a broader, established framework for leveraging litigation in policy movements is instructive in informing future challenges to SRO mandates. Two landmark analyses of the interplay between political organizing and litigation are Stuart Scheingold's *The Politics of Rights* and Michael McCann's *Rights at Work*.[108] These works highlight the broader theory underpinning the strategy and the success behind the *Kenny* efforts.

IV. WIELDING ORGANIZING AND LITIGATION AS WEAPONS IN POLITICAL MOVEMENTS

A. *The Value of Collective Legal Consciousness and the Myth of Rights*

When interviewing people involved in both the *Kenny* litigation and broader activism around school policing, a strategic picture emerged of a symbiotic relationship between litigators and community activists. Beyond the successful legislative outcome in South Carolina, *Kenny* serves as a valuable model for challenging state laws that broaden SRO

106. Telephone Interview with Sarah Hinger, Senior Staff Attorney, ACLU (Apr. 7, 2021).

107. *Id.*; Telephone Interview withVivian Anderson, Founder, EveryBlackGirl (Apr. 7, 2021).

108. STUART SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 5 (2004); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY AND THE POLITICS OF LEGAL MOBILIZATION (1994).

mandates nationwide. Lawyers have a tendency to consider litigation the end-all-be-all for social and policy changes.[109] A look at cases such as *Kenny* or other movements over time (such as the push for equal pay for women) shows that oftentimes, successful long-term policy outcomes are the result of a coordinated leveraging of both litigation and political organizing.[110] Under this model, Scheingold and McCann assert that rights and litigation ought to be used as *mobilization* for political organizing rather than a complete end-goal.[111]

The mobilizing element of these campaigns comes from what Scheingold deems a "legal consciousness" born of the "myth of rights."[112] By establishing a legal consciousness through the court system, movements are given a framework for how policy should be crafted and a narrative—a myth of rights—explaining why the community should engage with the issue.[113] Scheingold explains:

> This preoccupation with courts, rules, and litigation—with, in other words, the legal paradigm—stems from an elusive distinction between law and politics which is so much a part of myth of rights thinking. To the extent that this line of thought does tap cultural predispositions, the myth of rights, like other ideologies, elicits support, mobilizes energies, and coordinates the activities of its adherents. It has the power to conferlegitimacy, to "bind . . . both cognitively and affectively, providing a basis for discussion and action." The myth of rights furnishes explanations for the past, standards for evaluating the present, and programs for social action in the future.[114]

Litigation can establish the myth of rights—the concept that there are inherent and concrete rights which should gain recognition in the legal system—and organizers can push politics to be conducted in conformity with those rights.[115] Under this conception, law and legal outcomes can serve as a symbol in the narrative told by political organizers.[116] Scheingold argues that this symbolism and narrative can create a shared vision that is critical to organizing movements.[117] The litigation in *Kenny* es-

109. SCHEINGOLD, *supra* note 109 *passim*.

110. Telephone Interview with Vivian Anderson, Founder, EveryBlackGirl (Apr. 7, 2021); SCHEINGOLD, *supra* note 109 *passim*; MCCANN, *supra* note 109 *passim*.

111. SCHEINGOLD, *supra* note 109, at 213; MCCANN, *supra* note 109.

112. SCHEINGOLD, *supra* note 109, at 12.

113. *Id*.

114. *Id*. at 14.

115. *Id*. at 12, 132.

116. *Id*. at 12.

117. *Id*.

tablished a popular understanding that grants of authority to SROs should be limited and specific to avoid infringing on Due Process rights. In turn, this narrative framework was used by organizers to drum up community support and pressure legislatures to make policy changes.

Scheingold acknowledges that there are plenty of shortcomings to the premise of the myth of rights. For one, the buy-in to this myth is not evenly dispersed.[118] According to Scheingold, some populations, like minority groups, tend to be more skeptical of these rights given the historical withholding of the rights by powerbrokers.[119] As such, creating a cohesive, motivating narrative based on these rights can prove more challenging in certain communities.[120] For example, as a generalization, Scheingold asserts that the "Black community"[121] tends to have greater skepticism towards the myth of rights.[122] This is largely attributable to the reality that civil rights have been historically withheld from Black communities. However, in the case of school policing, it is Black community members whose children are often most affected by SRO presence. As such, the Black community members affected by school policing have the most to gain from buying into the myth of rights. This was the case in the *Kenny* efforts. Organizers had to convince Black community members of the rights for which they were fighting and the racial disparities at play in order to mobilize political support.[123]

Because the believability of a myth of rights can be community specific, the rhetorical battle is one best fought by organizers. This is because, according to Scheingold, "[l]egal symbols do not resonate evenly, or with uniform intensity, throughout the body politic."[124] Stakeholders with their finger on the pulse of the community and with an understanding of the local "language" are well positioned to know what rhetoric will be effective and what will demotivate the community. This was evident in the organizing efforts around the *Kenny* litigation. Race played an explicit role in the language of the litigation efforts. As such, organizers like Anderson were the ones to explain in resonant terms the legacy of slavery and how racism perpetuates throughout local schools.[125]

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118. *Id.* at 62.

119. *Id.*

120. *Id.*

121. This paints with a broad brush as there is no monolithic "Black community."

122. SCHEINGOLD, *supra* note 109, at 62.

123. Telephone Interview with Vivian Anderson, Founder, EveryBlackGirl (Apr. 7, 2021).

124. SCHEINGOLD, *supra* note 109, at 62.

125. Telephone Interview with Vivian Anderson, Founder, EveryBlackGirl (Apr. 7, 2021).

B. *Further Benefits of Litigation in Political Movements*

Scheingold argued that the myth of rights and a shared legal consciousness are useful in motivating communities to organize around political change.[126] Litigation is primarily a means of creating this consciousness and legitimizing the myth of rights. However, there are other potenpotential benefits that arise from litigation.

In *The Politics of Rights*, McCann argues that litigation is valuable not only in how it empowers the direct stakeholders but also in how it can mobilize more peripheral support.[127] This is critical because the long-term success of policy efforts often depends upon outside financial and organizational resources.[128] Luckily, the fact of a "legal consciousness" and an understanding of rights entitlement means that, even with mixed outcomes in the courts, people and resources can still be motivated to support the mission.[129]

While the *Kenny* litigation is ongoing, this dynamic is already evident in the peripheral support and attention brought to the movement. In addition to the state legislature reforming the Disturbing-School statute, a U.S. Department of Justice inquiry was initiated in 2016 to reassess how police interact with children for minor offenses.[130] The DOJ filed a statement of interest in the case and supported a finding of unconstitutional vagueness in the Disturbing-School statute.[131] Additionally, an advisory group was formed by the State Board of Education to approve a plan forlimiting officer involvement in matters that do not amount to serious crimes or threats to safety.[132] McCann argues that litigation drums up peripheral support, in part because it adds an air of legitimacy to the organizing efforts.[133] With court involvement, people believe there is an

126. SCHEINGOLD, *supra* note 109, at 12.

127. MCCANN, *supra* note 109, at 285.

128. *Id.*

129. *Id.*

130. Paul Bowers, *South Carolina's Vague 'Disturbing Schools' Law Faces Legal, Legislative and Enforcement Challenges*, POST & COURIER (Sept. 14, 2020), https://www.postandcourier.com/news/south-carolina-s-vague-disturbing-schools-law-faces-legal-legislative/article_134bf0d8-287a-11e8-acc6-ef7fa5566763.html.

131. The DOJ specifically noted the massive racial disparities in enforcement of the Disturbing School statute and even argued that "significant racial disparities in the enforcement of a criminal statute may indicate that the statute is unconstitutionally vague." Press Release, U.S. Dep't of Just., Department of Justice Files Statement of Interest in South Carolina Statewide School-to-Prison Pipeline Case (Nov. 29, 2016), https://www.justice.gov/opa/pr/department-justice-files-statement-interest-south-carolina-statewide-school-prison-pipeline.

132. Eckholm, *supra* note 67.

133. MCCANN, *supra* note 109, at 284–87.

institutional and legal basis for their fight. Hinger (an ACLU attorney) and Anderson (a community organizer) both acknowledged the value of litigation in raising the profile of issues around school policing for those not directly impacted.[134] Community members like Anderson long advocated for changes to the Disturbing-School law but the efforts were unsuccessful in creating sweeping changes.[135] Involvement from large organizations like the ACLU brought needed attention from powerbrokers. Anderson explained that the ACLU provided value in forcing policy makers to recognize "oh, it's a real case."[136]

More broadly, whether the outcome of a case is positive or not, Scheingold notes that court involvement gives other government actors a sense that this is no longer merely a private issue.[137] Anderson believes that the *Kenny* litigation efforts made powerbrokers see that SRO presence in schools was a real issue deserving of real attention.[138] Even before any definitive conclusion to the case, the legislature amended the law in recognition of the rights at issue.[139]

Additionally, the claims articulated and institutionalized via litigation can guide power-brokers in their reform efforts. In *Kenny*, one can imagine that the vagueness challenge brought by the ACLU, as well as the focus on children's ability to participate in school, informed how legislators approached reforming the statute. Given the emphasis on chilling *children's* school participation, an obvious means of reform was to simply remove children from the reach of the statute.

Importantly, Scheingold notes that lawyers also serve as a conduit in connecting organizers with those in power.[140] Access to the courts can be a means of accessing legislatures.[141] "Citizen initiatives in the courts can be used to bring important matters to legislative attention."[142] This dy-

134. Telephone Interview with Sarah Hinger, Senior Staff Attorney, ACLU (Apr. 7, 2021); Telephone Interview with Vivian Anderson, Founder, EveryBlackGirl (Apr. 7, 2021).

135. Telephone Interview with Sarah Hinger, Senior Staff Attorney, ACLU (Apr. 7, 2021); Telephone Interview with Vivian Anderson, Founder, EveryBlackGirl (Apr. 7, 2021).

136. Telephone Interview with Vivian Anderson, Founder, EveryBlackGirl (Apr. 7, 2021).

137. SCHEINGOLD, *supra* note 109, at 136.

138. Telephone Interview with Vivian Anderson, Founder, EveryBlackGirl (Apr. 7, 2021).

139. Sarah Hinger, *South Carolina Legislature Repeals Racist 'Disturbing School' Law for Students*, JUV. JUST. NETWORK (June 8, 2018), https://www.njjn.org/article/south-carolina-legislature-repeals-racist-disturbing-school-law-for- students.

140. SCHEINGOLD, *supra* note 109, at 134–36.

141. JOSEPH L. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION xviii (1970).

142. *Id.*

namic was clear in *Kenny*. The media attention brought from the ACLU litigation (as well as organizing efforts) put pressure on legislatures to reform the Disturbing-School statute prior to anycourt mandate to do so.[143]

In the *Kenny* litigation, the ACLU provided its own, specific advantages as a legal organization. The ACLU's name carries cachet and their well-funded organization brings with it resources that may be beyond the reach of grassroots organizers.[144] The sense of legitimacy and weightiness afforded by litigation brought by the ACLU brings public scrutiny to issues and media attention.[145] In the *Kenny* case, this scrutiny, prior to court determinations, meant enforcement of the Disturbing-School statute dropped precipitously and multiple bills were introduced to change the scope of the statute.[146] The same scrutiny led to the DOJ involvement in the case, the 2016 inquiry, and the State Board of Education advisory group.[147]

Applying Scheingold's and McCann's work to the *Kenny* efforts, a helpful model can be built to fight school policing in jurisdictions outside of South Carolina. Anderson is doing so by traveling to other states such as Florida to roll out the model she helped employ around the *Kenny* litigation.[148] That being said, this model is not without shortcomings and its general applicability remains open to debate.

V. POTENTIAL PITFALLS OF LITIGATION

A. *A Myth Lacking in Support*

Kenny makes evident that litigation, while useful, should be thought of as ancillary to broader political movements.[149] According to Scheingold, the key strategy misstep is in overweighting expectations around the impact of litigation.[150] The myth of rights, developed in the litigation process is, after all, a myth. The force of the concept only goes as

143. Bowers, *supra* note 131; Hinger, *South Carolina Legislature Repeals Racist 'Disturbing School' Law for Students*, *supra* note 140.

144. Telephone Interview with Sarah Hinger, Senior Staff Attorney, ACLU (Apr. 7, 2021).

145. Bowers, *supra* note 131.

146. *Id.*

147. *Id.*

148. Telephone Interview with Vivian Anderson, Founder, EveryBlackGirl (Apr. 7, 2021).

149. SCHEINGOLD, *supra* note 109, at 95; Telephone Interview with Vivian Anderson, Founder, EveryBlackGirl (Apr. 7, 2021).

150. SCHEINGOLD, *supra* note 109, at 96.

far as society is willing to buy into that concept. McCann warns that litigation in service of these rights can be limited in its utility.[151]

Additionally, Scheingold cautions that courts may be unresponsive to a particular conception of rights.[152] Even the most effective political organizing will not prevail over a legal determination that is in opposition to the myth of rights perpetuated through the organizing efforts. And those working for progress and change may come head-to-head with the reality that, in legal battles, "the dominant tendency is surely to enforce the status quo."[153] Even in the event of successful litigation, change from the courts tends to be slow. Advances are often small as the courts are designed to resist change.[154]

Therefore, courts can be important in legitimizing the rights at the center of a political fight, but should not be relied upon for implementing change.[155] The *Kenny* litigation efforts continue to crawl through the South Carolina courts while, in response to political pressure, the legislature has already amended the Disturbing-School statute.[156] In the words of McCann, "legal mobilization is usually but one among many constitutive and strategic dimensions of most social movements."[157] Too often, the "letter of the law" can be fulfilled without staying true to the "spirit of the law."[158] That is, according to Scheingold, because the scope and particularities of a judicial decision involving a statute or court order are often ambiguous.[159] While a case may look successful due to a change in the law, the impact on the ground may be more muted. As Alexis Karteron, a juvenile justice and civil rights attorney, noted, "if the police set their minds to arresting kids in school, will a change in law really prevent that?"[160] Organizers should be prepared for these dynamics and understand how they can continue efforts in a push for *material* changes that are felt in the lives of community members.

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151. MCCANN, *supra* note 109, at 86.

152. SCHEINGOLD, *supra* note 109, at 87.

153. *Id.* at 91.

154. *Id.* at 107.

155. *Id.* at 108.

156. Hinger, *South Carolina Legislature Repeals Racist 'Disturbing School' Law for Students*, *supra* note 140.

157. MCCANN, *supra* note 109, at 10–11.

158. Telephone Interview with Alexis Karteron, Director, Rutgers Constitutional Rights Clinic (Apr. 10, 2021); *see, e.g.*, Geraldine Doetzer, *Hard Labor: The Legal Implications of Shackling Female Inmates During Pregnancy and Childbirth*, 14 WM. & MARY J. WOMEN & L. 363, 391 (2008).

159. SCHEINGOLD, *supra* note 109, at 119.

160. Telephone Interview with Alexis Karteron, Director, Rutgers Constitutional Rights Clinic (Apr. 10, 2021).

B. *The Problem of Follow-Through and Misalignment*

Where legal efforts prove insufficient, organizing efforts can shift public opinion such that stakeholders choose to address school discipline in a way that reflects the community's attitudes. McCann notes that judges oftentimes avoid becoming too enmeshed in "equity policy administration," leaving it to organizers to pressure power holders to recognize the rights articulated by courts.[161] Legal values do not necessarily sway those in power, but persistent, organized efforts backed by court-recognized legal rights can prove persuasive.[162] Given this reality, beyond litigation, there must be a plan for implementing the rights recognized in the courts.[163]

Litigation and organizing efforts are not always perfectly aligned and this can create roadblocks for movements. A tension can inhere in using individual claims to fight for broader policy initiatives. While lawyers ultimately have a duty to their clients, ideal outcomes for plaintiffs may not totally align with large scale legislative or policy change. Because of this, communication between the legal team and organizers is critical.[164] All parties need to be clear on the vision throughout the process and understand where concessions can and should be made. There will presumably always be stakeholders who are not in complete agreement with the litigation/organizing attack plan.[165] However, if the legal team anticipates harm to the broader community due to potential legal outcomes, they should reconsider litigation.[166] This naturally requires up-front transparency from all stakeholders in order to better grasp the community impact of various outcomes.

Once litigation commences, lawyers have a clear obligation to their clients. Therefore, conflicts must be identified at inception.[167] Additionally, a conversation about the shortcomings of litigation and where the legal system can assist with broader goals should happen early in the process.[168] For example, large civil rights actions can be hard to bring and

161. MCCANN, *supra* note 109, at 281.

162. SCHEINGOLD, *supra* note 109, at 131, 148.

163. *See* Doetzer, *supra* note 159, at 391–92.

164. Telephone Interview with Sarah Hinger, Senior Staff Attorney, ACLU (Apr. 7, 2021); Telephone Interview with Alexis Karteron, Director, Rutgers Constitutional Rights Clinic (Apr. 10, 2021).

165. Telephone Interview with Sarah Hinger, Senior Staff Attorney, ACLU (Apr. 7, 2021).

166. *Id.*

167. *Id.*

168. *Id.*; Telephone Interview with Alexis Karteron, Director, Rutgers Constitutional Rights Clinic (Apr. 10, 2021).

hard to win.[169] This is particularly so in the context of schools, as courts have a history of showing deference to pedagogical determinations by school personnel.[170]

> When addressing school disciplinary rules, courts have been less demanding of specificity than they have when assessing the constitutionality of other regulations, such as criminal statutes. As we have noted, because schools need the authority to control such a wide range of disruptive behavior, "school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions."[171]

These headwinds should be communicated to stakeholders when crafting a litigation strategy. Appropriate expectations help maintain commitment to the cause and prevent conflict borne of disappointment. As both Hinger and Anderson acknowledged, the litigation alone without community pressure would have been insufficient in catalyzing legislative change.[172] Thus keeping the community motivated with appropriate expectations is critical.

C. *Mobilizing the Opposition*

Another shortcoming of litigation is that legal outcomes can motivate some while antagonizing others. This can lead to unpredictable results in the community.[173] Few moments in history better illustrate this point than the post-*Brown* school desegregation era.[174] While *Brown* was seen as a historical legal victory, there continue to be concerted policy efforts to undermine the rights recognized in *Brown* and many school districts throughout the country remain functionally segregated.[175]

In the case of the South Carolina statute at issue in *Kenny*, the amendments to the statute proposed by Representative McCleod brought

169. Telephone Interview with Alexis Karteron, Director, Rutgers Constitutional Rights Clinic (Apr. 10, 2021).

170. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969).

171. *Fraser*, 478 U.S. at 686.

172. Telephone Interview with Vivian Anderson, Founder, EveryBlackGirl (Apr. 7, 2021); Telephone Interview with Sarah Hinger, Senior Staff Attorney, ACLU (Apr. 7, 2021).

173. SCHEINGOLD, *supra* note 109, at 147.

174. Sonya Ramsey, *The Troubled History of American Education after the Brown Decision*, AM. HISTORIAN, https://www.oah.org/tah/issues/2017/february/the-troubled-history-of-american-education-after-the-brown-decision/ (last visited May 25, 2022).

175. *Id.*

the ire of a prosecutor and a sheriff's group.[176] These stakeholders claimed that the law was necessary for disciplining children who refuse to comply with rules.[177] The opposition further claimed that the pre-*Kenny* statute allowed officers to charge for lesser offenses rather than leaving them only the option of more serious charges such as assault.[178] Even with bipartisan support, the bill temporarily stalled in response to this pushback.[179] One can envision scenarios in which the dissent drawn from more publicity would prove too much for reform efforts.

However, Scheingold argues that in the midst of opposition, the use of a legal framework can helpfully "divert attention from fundamental conflicts by focusing on established procedures."[180] Put otherwise, the myth of rights leaves community members with a sense that there is a true interpretation of the law and, regardless of policy differences, the lawyers just need to litigate until the truth is uncovered.[181] This dynamic was at play in *Kenny*. Attention was drawn from opposition groups in response to legislative efforts to rewrite the Disturbing-School statute. However, the court of appeals's granting of standing—a finding of "legal truth"—gave the legislature motivation to continue reform efforts in spite of dissenting voices.

D. *Lack of Opportunity*

When looking at school policing specifically, not all disturbing school statutes will afford the same opportunities as the one in *Kenny*. Many experts deemed the pre-*Kenny* South Carolina Disturbing-School statute to be one of the broadest and vaguest in the country.[182] As such, there may have been exceptional incentives for lawmakers to amend the statute in recognition of a higher likelihood that the courts would strike it down. States with statutes that afford problematic levels of discretion that are not quite so vague may decide to roll the dice and proceed with litigation.

Both litigation and organizing are far from perfect strategies for change. However, when used in combination, the two can be powerful tools. A concept of rights derived from legal battles can help mobilize and coalesce organizing efforts. Litigation and legal actors also bring with them resources and access to powerbrokers. Meanwhile, organizers have an

176. Eckholm, *supra* note 67.
177. *Id.*
178. *Id.*
179. *Id.*
180. SCHEINGOLD, *supra* note 109, at 52.
181. *Id.*
182. Eckholm, *supra* note 67.

understanding of community needs and of resonate political strategies. As with any imperfect tools, even when combined, a litigation and organizing effort can still suffer from pitfalls. Nonetheless, this strategy, as seen in *Kenny v. Wilson*, can be an effective one to consider when working to limit SRO mandates.

VI. CONCLUSION

In a world where childhood behavior is criminalized in schools, an instance of normal adolescent misbehavior can change the trajectory of a child's life. As a society, when we relegate the disciplinarian role to police officers, we miss an opportunity for children to learn from their mistakes under the trained hand of a teacher, a social worker, or a guidance counselor; we miss an opportunity for children to grow and learn without fear.

Additionally, school policing disproportionately impacts children of color and fosters a school-to- prison pipeline that aggravates racial disparities in the criminal justice system. The answer is not to eliminate bias in law enforcement through zero tolerance policies—these have historically proved to be disastrous.[183] The answer is to limit the bounds of school policing by clarifying and limiting vague statutes and decriminalizing behaviors that should never have been criminalized in the first place. The scope of duties delegated to SROs vary based on state law and individual school district policies or memorandums of understanding. There is no "one size fits all" means of challenging the presence of SROs across jurisdictions. However, *Kenny v. Wilson* can serve as an example of utilizing organizing and litigation tools to whittle away at school policing. While the legal strategies will change based on the SRO mandate in question and the desired outcome, a cross-jurisdictional framework for weaponizing political activism and litigation in the fight against school policing already exists.[184] Using these tools, stakeholders have the ability to interrupt the school-to-prison pipeline and protect vulnerable children—particularly children of color—from entering the vicious cycle of criminalization.

183. THE ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW "ZERO TOLERANCE" AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL TO PRISON PIPELINE 9–10 (Mar. 2010).

184. *See generally* MCCANN, *supra* note 109; SCHEINGOLD, *supra* note 109.