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## The School-to-Prison Pipeline's Legal Architecture: Lessons from the Spring Valley Incident and Its Aftermath

Joshua Gupta-Kagan  
*Columbia Law School*, [jgupta-kagan@law.columbia.edu](mailto:jgupta-kagan@law.columbia.edu)

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# THE SCHOOL-TO-PRISON PIPELINE’S LEGAL ARCHITECTURE: LESSONS FROM THE SPRING VALLEY INCIDENT AND ITS AFTERMATH

*Josh Gupta-Kagan\**

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\* Assistant Professor, University of South Carolina School of Law. The author would like to thank Heather Goergen for excellent research assistance.

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## INTRODUCTION

In October 2015, a Black teenager at Spring Valley High School in Columbia, South Carolina had her cell phone out in her math class.<sup>1</sup> Her teacher told her repeatedly to put it away. Repeatedly she refused. The teacher then called a school administrator, who similarly instructed her to put away her phone. The student continued to refuse. The administrator then called the school resource officer (“SRO”), the uniformed, armed deputy sheriff assigned to the school.<sup>2</sup> The SRO came and informed the student that she had to put away her cell phone.<sup>3</sup> When the student again refused, the officer arrested her for the crime of “disturbing schools.”<sup>4</sup> Other students in the classroom recorded the arrest on their cell phones.<sup>5</sup> The video footage captured the SRO pulling the teenager

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1. The incident described here is set forth in detail in Section I.A, *infra*.

2. A federal statute defines an SRO as a “career law enforcement officer . . . assigned by the employing police department or agency to work in collaboration with schools and community-based organizations . . . .” 34 U.S.C. § 10389(4) (2015). By a memorandum of agreement between the local school district and county sheriff’s department, the latter assigned deputy sheriffs to Spring Valley High School. *See infra* note 96.

3. *See infra* notes 45–57 and accompanying text (describing the events at Spring Valley High School in greater detail).

4. S.C. CODE ANN. § 16-17-420 (2010).

5. Several news stations published articles reporting on the incident that included footage of these recordings. *See Sarah Aarthun & Holly Yan, South*

out of her desk and appearing to throw her across the classroom floor. The officer also arrested a second student who encouraged her classmates to record the arrest and vocally objected to it. Students posted their videos, which soon went viral. The incident quickly joined a long list of other incidents involving questionable use of force by SROs. It also contributed to the larger debate about policing tactics, especially those tactics directed at Black individuals and communities.

The incident initially garnered national attention due to the SRO's use of excessive force. But the Spring Valley High School incident also illustrates how specific incidents of relatively minor school misbehavior lead to arrest and prosecution rather than school-based intervention.<sup>6</sup> This incident was a product of a series of choices: by educators who asked an SRO to become involved in a classroom management situation, and by the SRO who agreed to do so and who chose to make two arrests. These kinds of decisions are replicated in a range of cases which have been dubbed the school-to-prison pipeline.<sup>7</sup> The result—children charged with criminal or delinquent acts for school misbehavior—is strongly criticized for imposing an overly punitive and harmful law enforcement response on situations that would be better handled through school discipline.<sup>8</sup>

The decisions that lead to school-based arrests, like those at the center of the Spring Valley incident, do not happen in a vacuum. This Article will use that incident and South Carolina's broader experience to analyze the laws, policies, and legal practices that create the legal architecture of the school-to-prison pipeline—and also identify promising, but incomplete reforms that have taken root in South Carolina. Reforming individual elements of that architecture will help limit this problem, but the problem can only be completely

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*Carolina Student's Violent Arrest Caught on Video; Officer Under Investigation*, CNN (Oct. 27, 2015, 12:50 AM), <http://www.cnn.com/2015/10/26/us/south-carolina-spring-valley-high-school-student-video/index.html> [https://perma.cc/9VS7-2PGC]; Erik Ortiz & Craig Melvin, *South Carolina Deputy Ben Fields Fired After Body Slamming Student: Sheriff*, NBC NEWS (Oct. 28, 2015, 12:34 PM), <https://www.nbcnews.com/news/us-news/sheriff-announce-south-carolina-deputy-ben-fields-be-fired-sources-n452881> [https://perma.cc/UW3F-ZRB8].

6. The focus of this Article is on direct examples of the school-to-prison pipeline—incidents at school that trigger arrests and/or charges. Indirect examples, in which some combination of severe school discipline, poor education, and excluding children from regular schools creates criminogenic circumstances, are outside the scope of this Article.

7. For a history and critique of the school-to-prison pipeline metaphor, see generally Ken McGrew, *The Dangers of Pipeline Thinking: How the School-to-Prison Pipeline Metaphor Squeezes Out Complexity*, 66 EDUC. THEORY 341 (2016).

8. *E.g.*, *infra* notes 40–42.

solved by reforming all elements. The legal architecture involves several interlocking legal elements that together cause school discipline issues to become law enforcement issues.

First, the Spring Valley incident illustrates how criminal law broadly encompasses many incidents at schools that would be better handled as school discipline matters than as juvenile delinquency matters. It is a crime in South Carolina to disturb a school “in any way.”<sup>9</sup> This statute was used to charge both girls in the Spring Valley incident—and more than 1300 other South Carolina children that same year, making it the second most frequent delinquency charge in the state that year.<sup>10</sup> The racial disparities for this charge are tremendous, even when compared to the already large disparities in the juvenile justice system as a whole.<sup>11</sup> Although South Carolina’s criminal law is particularly broad—perhaps the broadest in the nation—other states are not far behind.<sup>12</sup>

Second, the Spring Valley incident reveals how legal instruments direct SROs’ involvement in situations that school officials should handle on their own. SROs are usually uniformed, armed officers employed by local police departments and assigned to schools.<sup>13</sup> There has been a significant national focus on encouraging school districts to enter into memoranda of agreement with law enforcement agencies to establish shared understandings between schools and law enforcement agencies regarding SROs’ roles, and to limit those roles.<sup>14</sup> The Spring Valley school district had a memorandum of agreement with the local sheriff’s department that both placed SROs at middle and high schools in the district and required school officials to refer any criminal action to those SROs.<sup>15</sup> Consistent with the memorandum of agreement, the Spring Valley High School administrator called in an SRO to assist with a disobedient but non-violent student. The Spring Valley experience thus demonstrates the importance of creating such memoranda of agreement with provisions to prevent school discipline matters from becoming matters for law enforcement.

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9. S.C. CODE ANN. § 16-17-420(A)(1)(a) (2010).

10. See *infra* note 121 and accompanying text.

11. See *infra* notes 158–62 and accompanying text.

12. See *infra* Section II.A.1.

13. A federal statute defines an SRO as a “career law enforcement officer . . . assigned by the employing police department or agency to work in collaboration with schools and community-based organizations . . .” 34 U.S.C. § 10389(4) (2015).

14. See *infra* note 190 and accompanying text.

15. See *infra* notes 204–06 and accompanying text.

The Spring Valley experience also demonstrates the need for statutory reform. In addition to the requirements under the memorandum of agreement, a South Carolina statute requires schools to refer certain other behavior—such as some schoolyard fights—to law enforcement.<sup>16</sup> That state statute requiring reporting was enacted at the height of tough-on-crime reforms of a generation ago.<sup>17</sup> This statute serves to transform school disciplinary incidents into law enforcement incidents unnecessarily. Like other legislation of that era, it is now ripe for reform.

Third, South Carolina illustrates a problem with the structure of diversion programs.<sup>18</sup> Diversion programs are often excellent alternatives to prosecuting children, but they are too often operated by law enforcement, thus requiring law enforcement involvement.<sup>19</sup> Moreover, frequently used programs require a child to first be charged so that law enforcement or prosecutors can admit them to the program.<sup>20</sup> In contrast, many schools do not operate their own diversion programs.<sup>21</sup> This can lead school officials and police officers to charge children criminally with a goal of directing them to a law enforcement-operated diversion program.<sup>22</sup> Such actions can sometimes lead to prosecution and conviction contrary to the intent of the school officials or police officers initiating that process.<sup>23</sup> More broadly, locating diversion programs within law enforcement agencies rather than schools requires law enforcement involvement in incidents that school officials could handle on their own. Thus, accessing those programs requires transforming school discipline matters into law enforcement matters. Developing more diversion programs operated by schools would avoid this unnecessary involvement with law enforcement.

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16. S.C. CODE ANN. § 59-24-60 (1994).

17. 1994 S.C. Acts 299.

18. *See infra* Section II.C. A diversion program is designed to help the child understand his or her error, to prevent its recurrence, and to prevent a prosecution of that child—that is, to divert the child from the juvenile justice system. Some diversion decisions are made after a charge is referred to juvenile courts, and others (typically involving programs operated outside of law enforcement) are made before any charge, thus eliminating the need for a charge.

19. *See infra* Section II.C.

20. *See* GEORGE W. APPENZELLER ET AL., AN EVALUATION OF THE SOUTH CAROLINA JUVENILE ARBITRATION PROGRAM 12 (2011), [http://www.swsolutionsinc.com/Library/Reports/2011\\_SCDJJ\\_ArbitrationProgram.pdf](http://www.swsolutionsinc.com/Library/Reports/2011_SCDJJ_ArbitrationProgram.pdf) [<https://perma.cc/ZN4X-5PPT>] (describing a commonly used diversion program in South Carolina as one for children “charged with committing” certain offenses).

21. *See infra* Section II.C.

22. *See id.*

23. *See id.*

Fourth, the Spring Valley incident reveals concerns about the exercise of prosecutorial discretion in deciding whether to prosecute, dismiss, or divert school-based charges. In our juvenile justice system, such decisions should consider both the state's ability to prove a child guilty of a crime *and* whether prosecuting a child for that crime is necessary to protect the public or to rehabilitate the child.<sup>24</sup> Contrary to the latter principle, the local elected prosecutor in the Spring Valley incident left charges pending against the two girls for months before dismissing them.<sup>25</sup> The prosecutor wrote that he did not believe the publicity around the event would permit him to have a fair trial.<sup>26</sup> The elected prosecutor did not state any consideration of whether prosecution would serve the juvenile justice system's rehabilitative purposes,<sup>27</sup> illustrating a more widespread problem of how authorities exercise prosecutorial discretion without adequately considering whether rehabilitating a particular child requires prosecuting him or her.<sup>28</sup>

This Article will also address post-Spring Valley reform efforts in South Carolina. These reform efforts are significant, but incomplete. There are both local and statewide reforms that seek to limit arrests and charges for school misbehavior, and these reforms have had some success. In Richland County (where the Spring Valley incident occurred), reforms have reduced arrests by sheriff's department

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24. This historic rehabilitative purpose has been stated for decades. *See, e.g.*, Wallace Waalkes, *Juvenile Court Intake—A Unique and Valuable Tool*, 10 CRIME & DELINQ. 117 (1964) (quoted in WILLIAM SHERIDAN, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, CHILDREN'S BUREAU, STANDARDS FOR JUVENILE AND FAMILY COURTS 53 (1966)).

25. *See infra* notes 72–79 and accompanying text.

26. Letter from Dan Johnson, Solicitor, Fifth Judicial Circuit to Captain John Bishop, South Carolina Law Enforcement Division (Sept. 2, 2016), regarding South Carolina Law Enforcement Division Investigative File No. 32-15-0130, at 11 [hereinafter Solicitor Investigation Summary], <http://www.scsolicitor5.org/Portals/2/SLED%20Investigative%20Flie%20No%20%2032-15-0130%20-%20Spring%20Valley%20Matter.pdf> [<https://perma.cc/9NLJ-9HEX>].

27. *See, e.g.*, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE JUSTICE SYSTEM STRUCTURE & PROCESS: ORGANIZATION AND ADMINISTRATION OF DELINQUENCY SERVICES (2013), [http://www.ojjdp.gov/ojstatbb/structure\\_process/qa04205.asp?qaDate=2012](http://www.ojjdp.gov/ojstatbb/structure_process/qa04205.asp?qaDate=2012) [<https://perma.cc/F28C-JVSG>] (analyzing juvenile justice purposes clauses in state statutes and finding the vast majority of states endorse rehabilitative goals). South Carolina's statute endorses rehabilitative goals. S.C. CODE ANN. § 63-19-350(7) (2008).

28. Josh Gupta-Kagan, *Rethinking Family Court Prosecutors: Elected and Agency Prosecutors and Prosecutorial Discretion in Juvenile Delinquency and Child Protection Cases*, 85 U. CHI. L. REV. (forthcoming 2018).

SROs by more than fifty percent, and statewide, changes in practice have cut disturbing schools charges in half.<sup>29</sup>

The South Carolina Senate has passed a bill dramatically narrowing the scope of the disturbing schools offense.<sup>30</sup> The bill's fate will depend on South Carolina House of Representatives action when it reconvenes in 2018. Passing this bill would represent significant progress, but only partial reform. An original analysis of South Carolina data shows that limiting disturbing schools prosecutions has historically led to authorities using other charges instead.<sup>31</sup> If the pending bill is enacted, it will likely screen out some of the more extreme fact patterns, but will not stop the larger flow of children through the school-to-prison pipeline. Recent declines in disturbing schools charges have occurred without any enacted disturbing schools statutory reforms—showing that powerful levers of change exist beyond such legislation.

This Article will also analyze efforts to improve the legal limits on SROs' activities in schools. The county in which the Spring Valley incident took place has made some significant progress, especially through a voluntary agreement between the county sheriff's department and the U.S. Department of Justice ("DOJ").<sup>32</sup> This agreement identifies a range of minor crimes as school discipline matters in which SROs should not be involved.<sup>33</sup> Less promising efforts to revise the memoranda of agreement between the sheriff's department and local school districts show an ongoing need for stronger provisions to distinguish law enforcement from school discipline.<sup>34</sup> The revised memoranda encourage but do not require officers to decline to charge children for minor incidents.<sup>35</sup> Yet, the revised memoranda continue to require school officials to report to SROs any incident that amounts to a crime.<sup>36</sup> This is in tension with the provisions of the voluntary agreement, and leaves SROs with the discretion of what to do next. Thus, the revised memoranda seek to change the culture of SRO involvement in school discipline, but fail to change the legal elements that permit it.

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29. *See infra* notes 298, and 325–26 and accompanying text.

30. *See infra* note 262 and accompanying text.

31. *See infra* Section III.A.2.

32. *See infra* Section III.B.1.a.

33. *See infra* notes 336–37 and accompanying text.

34. *See infra* Section III.B.1.b.

35. *See infra* note 342 and accompanying text.

36. *See infra* note 345 and accompanying text.



One statewide reform has made significant progress on limiting the role of SROs. A 2017 South Carolina Department of Education regulation limits when school officials can refer minor incidents to law enforcement.<sup>37</sup> Such referrals are only lawful when an incident poses an immediate safety risk or the student has engaged in at least three such incidents in that school year.<sup>38</sup> It also requires that districts and law enforcement agencies incorporate such limits in their memoranda of agreement.<sup>39</sup> This regulatory change holds the greatest promise for statewide reforms for limiting the pipeline. But the regulation alone is not enough because it leaves important implementation questions to local school districts.

Reforms to other pillars of the school-to-prison pipeline's legal architecture remain relatively untouched. The South Carolina statute requiring schools to report many incidents to law enforcement has not been changed. Public schools have not developed a wide set of diversion programs. No formal steps have been taken to affect the exercise of delinquency charging discretion.

This Article does not address several key issues related to the school-to-prison pipeline, including points that other scholars have already established. First, it does not rehash the description of the school-to-prison pipeline or trace its history.<sup>40</sup> Second, this Article takes as a given that there is a significant difference between law enforcement and school discipline; common school misbehavior like disobedience and fights should not trigger arrests or juvenile delinquency charges absent relatively severe factors like serious injuries, weapon possession, or drug distribution. Third, United States schools, family courts, and juvenile justice systems have too often failed to prevent school misbehavior from forming the basis of juvenile delinquency charges. The school-to-prison pipeline contributes to this failure and it requires reform. Other scholars have established these points in detail.<sup>41</sup> Fourth, this Article does not

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37. See *infra* note 356.

38. See *infra* note 357–58.

39. See *infra* note 362.

40. For an illustrative summary of the pipeline and its history and growth, see Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 929–45 (2016) [hereinafter Nance, *Students, Police, and the School-to-Prison Pipeline*]; Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 324–31 (2016) [hereinafter Nance, *Tools for Change*].

41. *E.g.*, Nance, *Students, Police, and the School-to-Prison Pipeline*, *supra* note 40, at 929–45; Nance, *Tools for Change*, *supra* note 40, at 324–31; Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 864 (2012). See generally Barbara Fedders, *The Anti-Pipeline Collaborative*, 51 WAKE FOREST L. REV. 565 (2016).

address non-legal reforms described by other scholars, which can establish “more pedagogically sound methods to address school violence” than arresting students.<sup>42</sup> These include improved training and supervision of SROs, classroom management training of teachers, school innovations to improve school-wide discipline, and the development of a variety of school-based diversion programs—crucially important topics, but beyond the scope of this Article. Fifth, this Article does not address searches and surveillance of students at school and how such actions (and related Fourth Amendment doctrines) may further the school-to-prison pipeline.<sup>43</sup> Finally, this Article does not address how punitive school discipline and academic challenges at school can lead to delinquency and adult crime—an important component of the school-to-prison pipeline. Rather, this Article focuses on incidents at school that lead directly to arrests or charges, and the purely legal reforms necessary to dismantle that portion of the school-to-prison pipeline’s architecture.

Part I will describe the Spring Valley incident in detail, including its immediate aftermath and legal reform efforts it inspired. In so doing, Part I will explain why this incident and South Carolina’s broader experience is worth focusing on. Part II identifies the elements of the pipeline’s legal architecture illustrated by the Spring Valley incident and South Carolina more broadly. Part III explores reform efforts in South Carolina and notes some significant but incomplete progress that has occurred. Part III argues that discrete reforms, while positive, will not be enough to stem the flow of cases through the pipeline or to keep recent progress from eroding; more comprehensive reform is required.

### **I. CASE STUDY: THE SPRING VALLEY INCIDENT AND THE SCHOOL-TO-PRISON PIPELINE IN SOUTH CAROLINA**

This Part will describe the Spring Valley incident itself—both its well-publicized facts and other details that are equally important to drawing lessons from the incident. This Part will also explain why this incident, and South Carolina’s experience more generally, deserve particular attention.

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42. Nance, *Students, Police, and the School-to-Prison Pipeline*, *supra* note 40, at 978.

43. *See generally, e.g.*, Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 EMORY L.J. 765 (2017); Josh Kagan, *Reappraising T.L.O.’s ‘Special Needs’ Doctrine in an Era of School-Law Enforcement Entanglement*, 33 J.L. & EDUC. 291 (2004); Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067 (2003).

### A. The October 26, 2015 Spring Valley High School Incident

The facts of what happened at Spring Valley High School on October 26, 2015 are well established.<sup>44</sup> A teenager, whose name is sealed, had her mobile phone out in her third period algebra I class.<sup>45</sup> Her teacher told her to put away her phone, and she did.<sup>46</sup> The teacher then assigned the class to do class work on a website.<sup>47</sup> He used a separate program to monitor what students were doing on their individual computers.<sup>48</sup> Through that program, he saw that the student had opened her email.<sup>49</sup> He used his remote access to close her email. She re-opened it and he re-closed it remotely three or four more times.<sup>50</sup>

The teacher walked up to the student and “noticed that she had her cell phone in her lap. He asked the student to give him her cell phone, at which point she refused and told [him] to ‘get out of her face.’”<sup>51</sup> He then wrote a discipline referral and asked the student to leave the class and she refused.<sup>52</sup> He repeated the instruction to leave and she repeatedly refused.<sup>53</sup> At this point, there was no suggestion that she was interfering with any other student’s work.<sup>54</sup>

The teacher contacted a high school administrator—the equivalent of an assistant principal in many schools. The administrator came to the classroom and asked the student several times to leave the classroom with him. “The student sat quietly and refused to comply

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44. The South Carolina State Law Enforcement Division and the FBI both investigated the incident, which was also the subject of significant media attention. Except as noted, the summary of facts relies on the official investigations as summarized by the elected solicitor based on law enforcement investigations. *See* Solicitor Investigation Summary, *supra* note 26. Other accounts abound. *E.g.*, ANDREA J. RITCHIE, *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR 72–73* (2017); Alan Blinder, *Ben Fields, South Carolina Deputy, Fired Over Student Arrest*, N.Y. TIMES (Oct. 28, 2015), <https://www.nytimes.com/2015/10/29/us/south-carolina-deputy-ben-fields-fired.html> [<https://nyti.ms/2iPRC9e>]; Amanda Ripley, *How America Outlawed Adolescence*, ATLANTIC MONTHLY (Nov. 2016), <https://www.theatlantic.com/magazine/archive/2016/11/how-america-outlawed-adolescence/501149/> [<https://perma.cc/PQX3-Y7WK>].

45. Solicitor Investigation Summary, *supra* note 26, at 1.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *See id.*

with [the administrator's] directives or respond to him in any way.”<sup>55</sup> The administrator then called the SRO Benjamin Fields and explained the situation to that officer when he arrived.<sup>56</sup> The administrator gave the student a final warning, noting the “deputy is here” and asked her to leave a final time; she refused.<sup>57</sup>

The SRO asked the student to come with him several times and she continued to refuse. As the elected solicitor (the South Carolina term for elected local prosecutor,<sup>58</sup> equivalent to the district attorney in other jurisdictions) later summarized: “Fields subsequently informed the student that she was under arrest for disturbing schools and attempted to place her under arrest. While Fields was attempting to effectuate a lawful arrest, an altercation between himself and the student occurred.”<sup>59</sup> That “altercation” began when Fields used physical force to pull the non-compliant student out of her desk. One video showed the student resisting by “striking Deputy Fields in the face with her fist when his hand makes the initial contact with her arm.”<sup>60</sup> The video reveals only this single strike, which was not forceful enough to stop or delay the deputy’s actions or cause any reported injury. The deputy successfully pulled the student out of her desk, which tipped over and fell to the floor, leaving the student on the floor. He then “threw”<sup>61</sup> the student (as the local sheriff later put it) several feet away from the desk. In recordings widely publicized, one can hear the officer then say, “[p]ut your hands behind your back” as he completed the arrest of the student as classmates looked on.<sup>62</sup>

After the arrest, authorities took the student to a hospital. Doctors noted several injuries, including “a minor nondisplaced fracture at the distal radial physis [a wrist bone].”<sup>63</sup>

When the SRO first entered the class, another student, Niya Kenny,<sup>64</sup> encouraged students to record the incident and objected to

55. *Id.* at 2.

56. *Id.*

57. *Id.*

58. *See* S.C. CONST. art. V, § 24.

59. Solicitor Investigation Summary, *supra* note 26, at 2.

60. Staff Reports, *Richland Co. Sheriff Leon Lott's Statement on Firing of Deputy Ben Fields*, THE STATE (Oct. 28, 2015, 4:20 PM), <http://www.thestate.com/news/local/crime/article41712405.html> [<https://perma.cc/3B42-CWE5>].

61. *Id.* (“The one [action] that concerns me the most was the throwing of the student across the floor.”).

62. *See* Aarthun & Yan, *supra* note 5.

63. Solicitor Investigation Summary, *supra* note 26, at 9.

64. Kenny’s name was made public because she was charged as an adult. She also has spoken frequently about the incident to the media and is the lead plaintiff in the

how the SRO handled the situation. Several other students recorded the “altercation” on their mobile phones and circulated the recordings, which soon reached media outlets.<sup>65</sup> After the SRO arrested the first student, Kenny said, “[h]e turned around and he was like, ‘Oh, you have so much to say, you’re coming, too.’”<sup>66</sup> The SRO initially arrested Kenny for disorderly conduct but later submitted paperwork to charge her with disturbing schools.<sup>67</sup>

The SRO charged both the first student and Kenny with disturbing schools.<sup>68</sup>

### B. The Incident’s Aftermath

Thanks to the students who recorded the incident and posted those recordings on social media, the incident—or at least the final moments captured on video—quickly became well known.

Within two days, the Richland County sheriff fired Deputy Fields.<sup>69</sup> In doing so, the sheriff did not question whether the student with the mobile phone had committed a crime or whether Fields should have arrested her. Rather, he focused on the force used during the arrest, especially “the throwing of the student across the floor.”<sup>70</sup> The sheriff also requested an FBI investigation into the incident.<sup>71</sup>

Firing Fields did not have any immediate effect on the charges Fields filed against either child; both continued to face disturbing schools charges. By December, advocates delivered a petition to the office of the Richland County solicitor demanding that he drop the charges.<sup>72</sup> The solicitor responded with a public statement saying that

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class action challenging the use of the disturbing schools charge. *See* Complaint at 4, *Kenny v. Wilson*, No. 16 Civ. 2794 (D.S.C. filed Aug. 11, 2016) [hereinafter *Kenny v. Wilson* Complaint], [https://www.aclu.org/sites/default/files/field\\_document/kenny\\_v\\_wilson\\_complaint.pdf](https://www.aclu.org/sites/default/files/field_document/kenny_v_wilson_complaint.pdf) [<https://perma.cc/PU7K-WL3X>].

65. *See, e.g.*, WIS Staff, *FBI to Lead Investigation of Violent Incident at Spring Valley High School*, WISTV.COM (Nov. 19, 2015, 3:41 PM), <http://www.wistv.com/story/30353999/video-shows-confrontation-between-spring-valley-student-and-school-resource-officer> [<https://perma.cc/9EE4-9753>] (posting three videos of the arrest).

66. Evie Blad, *She Recorded Her Classmate’s Arrest, Then Got Arrested, Too: Q&A with Former Student Niya Kenny*, EDUC. WK. (Jan. 24, 2017), <http://www.edweek.org/ew/articles/2017/01/25/sherecorded-her-classmates-arrest-then-got.html?print=1> [<https://perma.cc/TL76-DENU>].

67. *See* *Kenny v. Wilson* Complaint, *supra* note 64, ¶ 86.

68. *Id.*

69. *See* Staff Reports, *supra* note 60.

70. *Id.*

71. *See id.*

72. *See* WIS Staff, *Solicitor: No Involvement in Charges Against Spring Valley HS Teens Until FBI Investigation Over*, WISTV.COM (Dec. 16, 2015, 7:34 AM),

he would decide whether to prosecute the charges “based only on evidence and in accordance with the law” and that he would await results of the FBI investigation before making a final decision.<sup>73</sup> The solicitor’s statement made no reference as to whether prosecuting the girl who refused to put away cell phone<sup>74</sup> (or delaying a decision pending the FBI investigation) was in her best interest or served the juvenile court’s rehabilitative mission.

When the FBI concluded its investigation,<sup>75</sup> the solicitor announced that he would dismiss the charges against the two girls.<sup>76</sup> The solicitor wrote that he believed the first student “did disturb the school,” but the termination of the officer and “administrative action . . . taken against school personnel” made winning a conviction difficult.<sup>77</sup> The solicitor again engaged in no analysis of whether prosecuting the child served any rehabilitative purpose.<sup>78</sup> The solicitor concluded that he could not prove that Kenny was guilty of disturbing schools.<sup>79</sup>

Dismissing the charges was certainly a positive development for the two girls (as it would be for any defendant), and research, including studies of South Carolina juvenile cases, suggests that this dismissal may have reduced the likelihood of either girl engaging in any future crime.<sup>80</sup> Nonetheless, the dismissal could not erase harms caused by

<http://www.wistv.com/story/30763259/black-parents-association-wants-charges-against-teens-dropped> [<https://perma.cc/GVB2-9CYB>].

73. Statement of Dan Johnson, Fifth Judicial Circuit Solicitor (Dec. 16, 2015), <http://www.wistv.com/story/30773582/read-solicitor-johnsons-statement> [<https://perma.cc/U8YT-DYSW>]; see also WIS Staff, *supra* note 72 (describing advocates’ efforts and the solicitor’s response).

74. Kenny was seventeen years old at the time of the incident and, following South Carolina law limiting family court jurisdiction to children under seventeen, was charged as an adult. See S.C. CODE ANN. § 63-19-20(1) (2008).

75. Federal authorities announced they would not charge Deputy Fields with any civil rights violations. Cynthia Roldán, *Former School Officer Will Not Be Charged, Sues Sheriff, School District*, THE STATE (Jan. 13, 2016), <http://www.thestate.com/news/local/crime/article126379009.html> [<https://perma.cc/ULD4-W9M9>].

76. Solicitor Investigation Summary, *supra* note 26, at 11.

77. *Id.*

78. See *id.*

79. *Id.*

80. Prosecuting rather than dismissing first-time charges was found to increase the likelihood of recidivism, with particularly strong results for misdemeanor offenses like disturbing schools. The only exceptions found were for youth “who have [ ] been diagnosed with an aggression-related mental disorder,” who had similar levels of re-offending following a misdemeanor regardless of whether they were prosecuted. David E. Barrett & Antonis Katsiyannis, *The Clemson Juvenile Delinquency Project: Major Findings from a Multi-Agency Study*, 26 J. CHILD & FAM. STUD. 2050, 2051–52 (2017).

the arrests and charges. Multiple studies have identified that arrests and charges—even when ultimately dismissed—increase the odds that children will drop out of high school.<sup>81</sup> For instance, Gary Sweeten found that a “first-time arrest during high school nearly doubles the odds of high school dropout.”<sup>82</sup> Niya Kenny’s story illustrates this harm. After her arrest at school, Kenny did not return to Spring Valley, and instead enrolled in a GED program.<sup>83</sup> Later litigation brought on her behalf asserted that “due to the humiliation and anxiety she experienced, Ms. Kenny did not feel that she could return to Spring Valley High School.”<sup>84</sup> By her own account, the arrest triggered “the worst anxiety,” when police officers, or others who reminded her of the incident, came into the fast food restaurant where she worked.<sup>85</sup> Soon after the event, she stated: “I used to kind of, you know, just start crying. There were times my mom had to come pick me up from work because I just, I couldn’t deal with it.”<sup>86</sup> Because the first student was charged in family court and has not publicly spoken about the incident, the effect of the incident on her and the charges against her are not publicly known.

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81. Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 JUST. Q. 462, 463 (2006) (noting earlier research reaching this conclusion). Other studies reach similar conclusions. *See generally, e.g.*, Paul Hirschfield, *Another Way Out: The Impact of Juvenile Arrests on High School Dropout*, 82 SOC. EDUC. 368 (2009); Randi Hjalmarsson, *Criminal Justice Involvement and High School Completion*, 63 J. URB. ECON. 613 (2008); David S. Kirk & Robert J. Sampson, *Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood*, 86 SOC. EDUC. 36 (2010).

82. Sweeten, *supra* note 81, at 473. Sweeten found that cases requiring court appearances (as must occur when charges are not diverted or dismissed) “nearly quadruples the odds of dropout.” *Id.*

83. Scholars and education leaders have argued that “people with GEDs are, in fact, no better off than dropouts when it comes to their chances of getting a good job.” Claudio Sanchez, *In Today’s Economy, How Far Can a GED Take You?*, NPR (Feb. 18, 2012, 5:30 AM), <http://www.npr.org/2012/02/18/147015513/in-todays-economy-how-far-can-a-ged-take-you> [<https://perma.cc/6Z8T-BXSL>]; *see, e.g.*, James J. Heckman, John Eric Humphries & Nicholas S. Mader, *The GED* 423, 425 (Nat’l Bureau of Econ. Research, Working Paper No. 16064, 2010) (summarizing a body of research as showing that “GEDs are *not* equivalent to ordinary high school graduates” and that “[c]ontrolling for their greater scholastic ability, GEDs are equivalent to uncredentialed dropouts in terms of their labor market outcomes and their general performance in society.”).

84. Kenny v. Wilson Complaint, *supra* note 64, at 17.

85. Blad, *supra* note 66.

86. *Id.*

### C. Why Focus on Spring Valley and South Carolina?

The incident at Spring Valley High School could have occurred in any part of the country and, indeed, similar incidents have occurred elsewhere.<sup>87</sup> The Spring Valley incident “catalyzed a national conversation about the involvement of police officers in the administration of school discipline.”<sup>88</sup> The incident is worthy of analysis for that reason alone. Two additional reasons explain why this incident, and South Carolina more broadly, are worthy of a particular focus: the incident effectively illustrates the legal architecture of the school-to-prison pipeline; and reform efforts that followed the incident both illustrate the possibility of effective changes and allow for analysis of which reform efforts are most impactful.

#### 1. *Spring Valley and South Carolina Illustrate the Pipeline's Legal Architecture*

Multiple legal rules overlap to form the school-to-prison-pipeline's legal architecture. As Part II will explain in more detail, South Carolina cases and data illustrate the role of statutory, judicial, regulatory, and contract law in shaping incidents like the arrests at Spring Valley. A focus on statewide trends will capture how the pipeline operates in the aggregate, beyond any single incident.

Relatedly, multiple factors have rendered the school-to-prison pipeline particularly active in South Carolina. According to an *Education Week* analysis of 2013–2014 data, South Carolina ranks second in the nation in the percentage of schools with an assigned SRO, and eighth in the nation for percentage of students arrested.<sup>89</sup> Prior research indicates that this result should cause no surprise. For

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87. See DEREK W. BLACK, *ENDING ZERO TOLERANCE: THE CRISIS OF ABSOLUTE SCHOOL DISCIPLINE* 94 (2016) (noting “numerous” stories of “school resource officers and officials choking, handcuffing, restraining, and locking up in isolation rooms elementary and middle school students, including those with special needs”); Evie Blad & Alex Harwin, *Black Students More Likely to Be Arrested at School*, *EDUC. WK.* (Jan. 24, 2017), <http://www.edweek.org/ew/articles/2017/01/25/black-students-more-likely-to-be-arrested.html> [<https://perma.cc/C874-7X3Z>] (listing examples in Virginia, Missouri, and Alabama); Jason P. Nance, *Rethinking Law Enforcement Officers in Schools*, 84 *GEO. WASH. L. REV. ARGUENDO* 151, 151 (2016) [hereinafter Nance, *Rethinking Law Enforcement Officers in Schools*] (“Indeed, evidence of law enforcement officers mishandling student disciplinary problems abound.”).

88. Fedders, *supra* note 41, at 565.

89. *Policing America's Schools: An Education Week Analysis: Which Students Are Arrested the Most?*, *EDUC. WK.* (Jan. 24, 2017), <https://www.edweek.org/medias/ew/19policing/index.html#/overview> [<https://perma.cc/PP2K-WF2G>].



example, Jason Nance empirically studied strict security measures including the presence of police officers at schools.<sup>90</sup> He concluded that the percentage of minority students enrolled at a school predicts the use of such security measures, even when controlling for other variables such as school and neighborhood crime rates.<sup>91</sup> In addition, larger schools, urban schools, and southern schools all are more likely to have stricter security measures.<sup>92</sup> Spring Valley High School fits part of the profile for schools where one might expect strict security measures and resulting arrests. Spring Valley's student population is 52% Black.<sup>93</sup> It is a large school—enrolling more than 2000 students<sup>94</sup>—and is located at the edge of Columbia,<sup>95</sup> South Carolina's capital city. By contract between the Richland County School District Two and the Richland County Sheriff's Department, two sheriff deputies were assigned to Spring Valley as SROs.<sup>96</sup>

Still, Spring Valley is far from alone, and far from the top of the list for school arrests. Spring Valley's arrest rate of 0.531% is higher than the national average, but it still ranks below 127 other South Carolina

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90. See generally Jason P. Nance, *Students, Security, and Race*, 63 EMORY L.J. 1 (2013) [hereinafter Nance, *Students, Security, and Race*]. Nance defined “strict security measures” this way: “Strict security measures include using metal detectors, conducting random sweeps for contraband, hiring law enforcement officers or guards, controlling access to school grounds, and installing security cameras. These measures, particularly when used in combination, can create an intense, prison-like environment that deteriorates the learning climate.” *Id.* at 5.

91. *Id.* at 41; see also Evie Blad & Alex Harwin, *Black Students More Likely to Be Arrested at School*, EDUC. WK., (Jan. 24, 2017), <http://www.edweek.org/ew/articles/2017/01/25/black-students-more-likely-to-be-arrested.html?print=1> [<https://perma.cc/YE8L-T735>] (reporting that Education Week analysis of federal data shows “that black students are more likely than students in any other racial or ethnic group to attend schools with police”).

92. Nance, *Students, Security, and Race*, *supra* note 90, at 41–42.

93. SPRING VALLEY HIGH SCHOOL, 2016–2017 SIC ANNUAL REPORT (2017) [hereinafter SPRING VALLEY ANNUAL REPORT], <https://www.richland2.org/Richland-District/media/Richland-District/Documents/2017%20School%20Annual%20Report/High/Spring-Valley-SIC-Brochure-2017.pdf> [<https://perma.cc/V53Y-JQS8>].

94. SPRING VALLEY HIGH SCHOOL, 2015 SOUTH CAROLINA STATE REPORT CARD (2016) [hereinafter SPRING VALLEY REPORT CARD], <http://ed.sc.gov/assets/reportCards/2015/high/c/h4002069.pdf> [<https://perma.cc/YG4Q-FSZ3>]. Other sources list a lower enrollment of 1885 students. See *Policing America's Schools: An Education Week Analysis: South Carolina School Data*, EDUC. WK. (Jan. 24, 2017) [hereinafter *South Carolina School Data*], <https://www.edweek.org/medias/ew/19policing/index.html#/state/SC> [<https://perma.cc/U2AZ-N85U>].

95. Spring Valley High School is located between U.S. Route 1 and Interstate 20, north of Fort Jackson and a 20–25 minute drive from the South Carolina State House in downtown Columbia.

96. Memorandum of Agreement between Richland County School District Two and the Richland County Sheriff's Department for the 2015–2016 School Year (Mar. 1, 2015) (on file with author) [hereinafter Richland 2—RCS D 2015–16 MOA].

high schools (there are 1225 total), whose arrest rates range up to 29.310%.<sup>97</sup> Spring Valley also does not fit other stereotypes; it is a relatively high-achieving school<sup>98</sup> with a diverse student body.<sup>99</sup> The incident thus demonstrates that the school-to-prison pipeline can exist even at a relatively high-achieving school.

## 2. *Intensive Advocacy in South Carolina for Reform*

South Carolina is also worthy of a case study because of intensive advocacy efforts underway within the state, which illustrate both the promise and the difficulty of the work required to prevent the juvenile justice system from being used to handle school discipline matters.

Reform efforts were beginning even before the Spring Valley High School incident. In the school district in which Spring Valley is located, a group of parents formed the Richland Two Black Parents' Association in 2014 and focused on the number of Black students, especially Black boys, subject to suspension and expulsion.<sup>100</sup> The DOJ Office of Justice Programs, Office for Civil Rights began reviewing the Richland County SRO program prior to the Spring Valley incident.<sup>101</sup> This review resulted from "data collected by the DOJ and other federal agencies on the county's juvenile population and arrest rates; information on school-based arrests, referrals to law enforcement and exclusionary discipline in the county; and concerns about the SRO program voiced by Richland County community members."<sup>102</sup>

97. *South Carolina School Data*, *supra* note 94 (providing data by percentage of arrest and allowing the author of this Article to sort and count the number of schools listed above Spring Valley).

98. SPRING VALLEY REPORT CARD, *supra* note 94, at 3 (listing graduation rates and end of course test scores which compare favorably to state averages).

99. Rather than a segregated school, Spring Valley is a picture of diversity. SPRING VALLEY ANNUAL REPORT, *supra* note 93, at 2 (noting the demographics of students and staff as "52% African American, 28% White, 10% Hispanic, 6% Asian, 4% Other").

100. Carolyn Click, *New Richland 2 Parent Group Wants to Discuss Race*, THE STATE (Mar. 31, 2014), <http://www.thestate.com/news/local/article13845191.html> [<https://perma.cc/K888-MRVE>].

101. See U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE FOR CIVIL RIGHTS, 15-OCR-67, LETTER RE: COMPLIANCE REVIEW OF THE RICHLAND COUNTY SHERIFF'S DEPARTMENT 3 (2016) [hereinafter DOJ COMPLIANCE REVIEW LETTER], <https://ojp.gov/about/ocr/pdfs/RCSO-SRO-ComplianceReview-08102016.pdf> [<https://perma.cc/AJK7-XBPZ>]. The DOJ letter refers to actions taken before the October 2015 incident at Spring Valley High School. See *id.* (noting site visit by DOJ Office of Civil Rights staff in September 2015).

102. *Id.*

Reform efforts accelerated after the Spring Valley incident. The General Assembly considered a bill (sponsored by a legislator whose district includes Spring Valley High School) to dramatically narrow the disturbing schools statute.<sup>103</sup> The American Civil Liberties Union (“ACLU”) filed a lawsuit seeking to enjoin enforcement of the disturbing schools and disorderly conduct statutes against students attending their schools.<sup>104</sup> The South Carolina Department of Education convened a Safe Schools Task Force with a goal of reviewing policies and regulations that may have contributed to the incident or to other less well-publicized problems.<sup>105</sup> The Richland County Sheriff’s Department entered a voluntary resolution agreement with DOJ requiring reforms to its SRO program.<sup>106</sup> The sheriff’s department and local school districts renegotiated their memoranda of agreement to include more provisions to discourage arresting and charging students.<sup>107</sup>

These reform efforts have made some important progress. The number of disturbing schools charges have dropped by half, and particularly strong reductions have occurred in Richland County.<sup>108</sup> A bill to narrow the disturbing school statute passed one house of the South Carolina General Assembly.<sup>109</sup> The South Carolina Department of Education promulgated regulations limiting when schools can refer routine school discipline matters to SROs.<sup>110</sup> But South Carolina’s historical and recent reform efforts also illustrate a final point—the need to reform multiple pieces of law. Because multiple pieces of law form the school-to-prison pipeline’s legal architecture, reforming only one or two will leave others contributing to the pipeline.

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103. S. 131, 122nd Gen. Assemb., Reg. Sess. (S.C. 2017), [http://www.scstatehouse.gov/sess122\\_2017-2018/bills/131.htm](http://www.scstatehouse.gov/sess122_2017-2018/bills/131.htm) [<https://perma.cc/RP9D-T94M>].

104. *Kenny v. Wilson* Complaint, *supra* note 64. District Court granted defendants’ motion to dismiss, and the plaintiffs have appealed. *Id.* The case is currently pending before the U.S. Court of Appeals for the Fourth Circuit. *See also infra* notes 270–75 and accompanying text. In addition, Niya Kenny filed a tort suit against the Richland County Sheriff’s Department and the Richland County School District 2 seeking damages for false imprisonment, defamation, negligence, and negligent hiring and supervision. *Kenny v. Richland County Sheriff’s Dept.*, 2017-CP-40-05034 (filed Aug. 22, 2017), <https://www.scribd.com/document/357039190/Niya-Kenny-Lawsuit#download> [<https://perma.cc/3YE9-65BN>].

105. *See infra* note 356.

106. DOJ COMPLIANCE REVIEW LETTER, *supra* note 101, at 1.

107. *See discussion infra* Section III.B.1.

108. *Infra* notes 298–99 and 324–30 and accompanying text.

109. *See infra* Section III.A.1.

110. *See infra* Section III.B.2.

## II. SPRING VALLEY INCIDENT REVEALS THE PIPELINE'S LEGAL ARCHITECTURE

The Spring Valley incident, and the broader practice of charging children for misbehavior at school, results from at least four legal elements, which form the school-to-prison pipeline's legal architecture.

The first element is the broad criminal law.<sup>111</sup> The charge of disturbing schools permits law enforcement authorities to treat a wide swath of student behavior as crime.<sup>112</sup> This section will analyze the disturbing schools statute and its operation in South Carolina, and how it illustrates problems with similar statutes in nearly half of all states, as well as other broad misdemeanor statutes elsewhere.

The second element is how SROs' prominent role in school discipline incidents can transform those incidents into criminal or delinquency charges.<sup>113</sup> Multiple years of research have not established whether SROs improve school safety, but they have clearly shown that SROs' presence significantly increases the likelihood that students will be arrested and charged with relatively minor offenses.<sup>114</sup>

It is less clear if the law can effectively cabin SROs' role. This section will explore the laws and legal instruments governing the SRO's involvement in the Spring Valley incident, and explain how those laws permitted, if not encouraged, transforming a school disciplinary incident into a criminal justice matter. At a minimum, the Spring Valley incident illustrates the necessity of more effectively distinguishing the SRO's law enforcement role from school discipline, and thus keeping SROs out of school discipline matters.

Third, while many youth-focused diversion programs exist, they are largely operated through law enforcement agencies or prosecution offices, leading authorities to involve SROs in discipline matters or to charge children as a means of accessing such programs.<sup>115</sup> The intent to use such programs is commendable, but placing them outside of schools leads to the unnecessary involvement of law enforcement in school discipline matters.

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111. *See infra* Section II.A.

112. *See* S.C. CODE ANN. § 16-17-420 (2010).

113. *See infra* Section II.B.

114. Fedders, *supra* note 41, at 571; Nance, *Students, Police, and the School-to-Prison Pipeline*, *supra* note 40, at 948–54.

115. *See infra* Section II.C.

Fourth, prosecutorial discretion too often deemphasizes the essential determination of whether prosecuting children is necessary to protect the public or to rehabilitate children.<sup>116</sup> Such a consideration was notably absent from the elected prosecutor's public statements about the Spring Valley incident. Restoring that consideration would help limit charges and prosecutions of incidents that schools can handle better than courts.

### A. Wide Criminal Law: Disturbing Schools Statutes and Their Disparate Impact

#### 1. Statutory Terms Criminalizing Ordinary School Misbehavior

The breadth of South Carolina's criminal law was an essential legal piece that transformed a student's non-violent non-compliance with a teacher into two criminal charges. The SRO arrested the two girls for the crime of disturbing schools. Specifically, in South Carolina, it is a crime "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."<sup>117</sup> The law is incredibly broad—disturbing a school "in any way" is a crime,<sup>118</sup> so it is easy to see how school officials or the officer concluded that the child who refused to put away her cell phone or leave the classroom at her teacher's instruction had committed a crime. Following a detailed investigation, the local elected prosecutor concluded that the first student did disturb the school.<sup>119</sup> But even the prosecutor concluded that Niya Kenny's conduct—objecting to the officer's conduct—did not rise to a crime.<sup>120</sup> Authorities have used this charge with great frequency—1324 disturbing schools charges were sent to South Carolina family courts in 2015–2016, making it the second most frequent delinquency charge.<sup>121</sup> Several hundred more individuals ages seventeen and older were charged with disturbing schools as adults.<sup>122</sup>

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116. See *infra* Section II.D.

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

118. *Id.*

119. Solicitor Investigation Summary, *supra* note 26, at 11.

120. *Id.*

121. S.C. DEP'T OF JUVENILE JUSTICE, ANNUAL STATISTICAL REPORT 2015–2016, at 13 (2016) [hereinafter S.C. REPORT 2015–2016], <http://www.state.sc.us/djj/pdfs/2015-16%20Annual%20Statistical%20Report%20Final.pdf> [<https://perma.cc/NT3J-DWZW>].

122. Under current law, juvenile court jurisdiction ends at seventeen, which is set to change to eighteen in 2019. S.C. CODE ANN. § 63-19-20(1) (2008) (defining child

South Carolina's statute is one of many. At least twenty other states have some kind of statute criminalizing misbehavior at school,<sup>123</sup> many of which prosecute similarly large numbers of children under their statutes.<sup>124</sup> *The Atlantic* concluded that more than 10,000 disturbing schools charges are filed nationally each year.<sup>125</sup> Beyond state statutes, many municipalities also outlaw disturbing schools.<sup>126</sup>

Many jurisdictions with disturbing schools statutes have had officers arrest students under disturbing schools statutes for non-violent conduct that would be more appropriately treated as school discipline than as delinquency matters. In New Mexico, for instance, a seventh grade student was arrested for “interfere[nce] with the educational process” for a series of burps.<sup>127</sup> As the U.S. Court of Appeals for the Tenth Circuit later summarized the alleged crime, the child “had generated several fake burps” in gym class, “which made

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under current law as under seventeen); 2016 S.C. Acts 1751 (redefining child as under eighteen). Statistics for seventeen-year-olds (and older individuals) charged with disturbing schools are difficult to find because those charges are filed in local summary courts and no statewide data is tracked. When the South Carolina Revenue and Fiscal Affairs Office estimated the impact of a bill to narrow the disturbing schools statute (discussed in Section III.A.1), it reported 132 convictions for disturbing schools in 2015–2016. S.C. REVENUE & FISCAL AFFAIRS OFFICE, STATEMENT OF ESTIMATED FISCAL IMPACT S. 0131, at 2 (2017), <http://rfa.sc.gov/files/impact/S0131%202017-01-10%20Introduced.pdf> [<https://perma.cc/B2W6-JEYS>]. That figure only includes results from twenty-seven percent of magistrate's courts, and only includes prosecutions, excluding cases that were dismissed or diverted. *Id.* The total number of disturbing schools charges filed against those seventeen and older is, therefore, likely to be several hundred.

123. See ARIZ. REV. STAT. ANN. § 13-2911 (2016); ARK. CODE ANN. § 6-21-606 (West 2005); CAL. EDUC. CODE § 32210 (West 1983); COLO. REV. STAT. ANN. § 18-9-109 (West 2005); DEL. CODE. ANN. tit. 14, § 4110 (West 2017); FLA. STAT. ANN. § 871.01 (West 2006); ME. REV. STAT. ANN. tit. 20-A, § 6804 (2001); MD. CODE ANN., EDUC. § 26-101 (West 1978); MISS. CODE ANN. § 37-11-23 (West 1970); MONT. CODE ANN. § 20-1-206 (West 1947); NEV. ADMIN. CODE §§ 392.180 & 392.910(2) (2016); N.H. REV. STAT. ANN. § 193:11 (2017); N.M. STAT. ANN. § 30-20-13 (West 1970); N.C. GEN. STAT. ANN. § 14-288.4(a)(6) (West 2013); N.D. CENT. CODE ANN. § 15.1-06-16 (West 1999); 11 R.I. GEN. LAWS ANN. § 11-11-1 (West 2007); S.D. CODIFIED LAWS § 13-32-6 (2017); WASH. REV. CODE ANN. § 28A.635.030 (West 2017); W. VA. CODE ANN. § 61-6-14 (West 2017).

124. Ripley, *supra* note 44 (reporting similarly large numbers in Maryland, Florida, Kentucky, and North Carolina).

125. *Id.*

126. *E.g.*, SELMA ALA., CODE ORDINANCES § 17-33 (2017).

127. *A.M. v. Holmes*, 830 F.3d 1123, 1139 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 2151 (2017). This case upheld dismissal of the lawsuit for unlawful arrest against the officer, and is notable in part because it featured a stinging dissent by then-Judge Neil Gorsuch. See *id.* at 1169–70 (Gorsuch, J., dissenting).

the other students laugh and hampered class proceedings.”<sup>128</sup> The teacher then told the child to sit in the hallway, but “he leaned into the classroom entranceway and continued to burp and laugh.”<sup>129</sup> The teacher called the SRO, who arrested the child.<sup>130</sup> In another New Mexico case, an SRO arrested a fourteen-year-old for texting in class and refusing to turn over her cell phone.<sup>131</sup> In Texas, children were arrested for using perfume and throwing a paper airplane in school.<sup>132</sup> In New York, children have been arrested for writing on their desks with markers.<sup>133</sup> In Connecticut, a student was arrested for allegedly stealing a beef patty from the cafeteria.<sup>134</sup> The student’s brother was arrested when he asked officers why they were arresting (and using a Taser against) his brother.<sup>135</sup>

States need not have a disturbing schools statute on the books to charge children for petty misbehavior. When the DOJ investigated the Ferguson, Missouri Police Department, it interviewed an SRO who reported arresting students, mostly for “minor offenses— Disorderly Conduct, Peace Disturbance, and Failure to Comply with instructions.”<sup>136</sup> Other cases around the country involving a variety of charges for relatively minor misbehavior at school have been

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128. *Id.* at 1129.

129. *Id.* at 1129–30.

130. *Id.* at 1130.

131. G.M. *ex rel.* B.M. v. Casalduc, 982 F. Supp. 2d 1235, 1240 (D.N.M. 2013).

132. Chris McGreal, *The US Schools with Their Own Police*, THE GUARDIAN (Jan. 9, 2012), <https://www.theguardian.com/world/2012/jan/09/texas-police-schools> [<https://perma.cc/5SAT-JDD8>]. Texas effectively repealed its disturbing schools statute in 2013. *See infra* notes 301–02 and accompanying text.

133. Stephanie Chen, *Girl’s Arrest for Doodling Raises Concerns About Zero Tolerance*, CNN (Feb. 18, 2010), <http://www.cnn.com/2010/CRIME/02/18/new.york.doodle.arrest/index.html?hpt=C1> [<https://perma.cc/XP4K-R6SY>].

134. Claire Michalewicz, *Mom of Boy Tasered in High School Cafeteria Files Lawsuit*, MIDDLETOWN PRESS (June 14, 2011), <http://www.middletownpress.com/general-news/20110614/mom-of-boy-tasered-in-high-school-cafeteria-files-lawsuit-documents?viewmode=fullstory> [<https://perma.cc/QJ2N-7EHK>].

135. *Id.*

136. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 37 (2015) [hereinafter INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT], <https://www.courts.mo.gov/file.jsp?id=95274> [<https://perma.cc/YQ4X-XARP>].

catalogued,<sup>137</sup> including charges against young children with autism and other disabilities.<sup>138</sup>

South Carolina is notable for having one of the broadest, if not the broadest, disturbing schools statutes in the nation. South Carolina is the only state that criminalizes behavior which disturbs a school “in any way”—a phrase absent from other states’ otherwise similar statutes.<sup>139</sup> Moreover, South Carolina’s broad language contrasts with limiting language in several other states’ statutes.<sup>140</sup> For example, Arizona limits “interference with or disruption of an educational institution” to behavior involving threats of physical injury or threats of damage to any educational institution.<sup>141</sup> Nevada’s statute requires any disturbance to be created “maliciously.”<sup>142</sup> New Hampshire limits its statute’s scope to “[a]ny person not a pupil,” thus excluding students who misbehave at their own school.<sup>143</sup> Colorado only criminalizes disturbances “through the use of restraint, abduction, coercion, or intimidation or when force and violence are present or threatened.”<sup>144</sup>

Importantly, South Carolina courts have declined to narrow the scope of the disturbing schools statute, in contrast with other state courts which have done so. Westlaw reports only six South Carolina cases in which children appealed their convictions for disturbing schools, and every decision that ruled on the meaning of the statute affirmed the convictions.<sup>145</sup> In the leading case, *In re Amir X.S.*, the

137. *E.g.*, Gary Fields & John R. Emshwiller, *For More Teens, Arrests by Police Replace School Discipline*, WALL ST. J. (Oct. 20, 2014), <https://www.wsj.com/articles/for-more-teens-arrests-by-police-replace-school-discipline-1413858602> [<https://perma.cc/YN2R-QNE6>].

138. *See, e.g.*, Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147, 147–48 (2015) (describing three such cases).

139. *Compare* S.C. CODE ANN. § 16-17-420 (2010), *with* statutes cited *supra* note 123.

140. *E.g.*, FLA. STAT. ANN. § 871.01 (West 2006) (“Whoever willfully interrupts or disturbs any school . . . commits a misdemeanor . . .”); CAL. PENAL CODE § 32210 (West 2014) (willful disturbance); N.C. GEN. STAT. ANN. § 14-288.4(a)(6) (West 2013) (“[d]isrupts, disturbs or interferes with the teaching of students . . .”).

141. ARIZ. REV. STAT. ANN. § 13-2911(A)(1) (2016).

142. NEV. REV. STAT. ANN. § 392.910(3) (West 2015).

143. N.H. REV. STAT. ANN. § 193:11 (2017).

144. COLO. REV. STAT. ANN. § 18-9-109(2) (West 2017); *see* *People ex rel. J.P.L.*, 49 P.3d 1209, 1211–12 (Colo. App. 2002).

145. *See generally* *In re* Michael E., No. 2006-MO-043, 2006 WL 7353470 (S.C. 2006); *In re* Mathew M., No. 2006-MO-044, 2006 WL 7353471 (S.C. 2006); *In re* Amir X.S., 371 S.C. 380 (2006); *In re* Joelle T., No. 2010-UP-547, 2010 WL 10088227 (S.C. Ct. App. 2010); *In re* John Doe, 318 S.C. 527, 535 (Ct. App. 1995). The only case to reverse a conviction did so on procedural grounds. *See In re Johnny Lee W.*, 371 S.C.



South Carolina Supreme Court rejected an argument that the statute was overbroad.<sup>146</sup> It relied on the state's strong interest "in maintaining the integrity of its education system."<sup>147</sup> The court stated that "[b]ecause the school environment is fragile by its nature, . . . [a]ny conduct in this context that interferes with the State's legitimate objectives may be prohibited."<sup>148</sup> The Court conceded that a "fertile legal imagination can dream up conceivable ways" in which the disturbing schools statute might be applied to violate First Amendment rights, but such examples were not "substantial" enough to support a conclusion that the statute was overbroad.<sup>149</sup> While a future case could challenge the statute on other grounds,<sup>150</sup> the South Carolina Supreme Court's rejection of the overbreadth challenge in *Amir X.S.* permits the disturbing schools statute to criminalize *any* behavior which disturbs a school, even slightly.

In contrast to South Carolina, several other state courts have limited the scope of their disturbing schools statutes, specifically requiring a disturbance to be significant to qualify as a crime. For example, Maryland courts have noted that various "[d]isruptions of one kind or another" are inevitable any time large groups of children come together.<sup>151</sup> "[T]here is a level of disturbance that is simply part of the school activity, that is intended to be dealt with in the context of school administration, and that is necessarily outside the ambit of" the disturbing schools statute.<sup>152</sup> For a school disturbance to amount to a crime in Maryland, it "must be one that *significantly* interferes with the orderly activities, administration, or classes at the school."<sup>153</sup> Similarly, a New Mexico court interpreted a predecessor to its disturbing schools statute as requiring a "more substantial, more

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217, 221 (2006), (reversing a conviction based on a conditional guilty plea because South Carolina law forbids such pleas).

146. *In re Amir X.S.*, 371 S.C. at 384, 389 (2006).

147. *Id.* at 390.

148. *Id.* (quotation and citation omitted).

149. *Id.* at 391.

150. *In re Amir X.S.* also involved a challenge to the statute as void for vagueness. The Court held that the child lacked standing to facially challenge the statute on this ground because "[t]here can be no doubt that Appellant's conduct falls within the most narrow application of § 16-17-420." *Id.* at 391. A future case involving different conduct could challenge the statute as void for vagueness. A federal lawsuit seeking to enjoin enforcement of the disturbing schools statute on students alleges that the statute is unconstitutionally vague. *Kenny v. Wilson Complaint*, *supra* note 64, ¶ 106.

151. *In re Jason W.*, 837 A.2d 168, 174 (Md. 2003).

152. *Id.*

153. *Id.* at 175 (emphasis added).

physical invasion” of a school environment.<sup>154</sup> Florida courts have interpreted its disturbing school statute to only apply to behavior “specifically and intentionally designed to stop or temporarily impede” a “normal school function” and that the disruption must be “material[ ].”<sup>155</sup> The North Carolina Supreme Court has defined criminal school disturbance to require a “substantial interference” even though the term “substantial” does not appear in the statute.<sup>156</sup>

## 2. *Disparities by Race, Sex, and Disability*

The Spring Valley incident, involving a White officer and two Black girls, immediately touched a nerve about disparities in policing generally and school-based arrests specifically. Both state and federal prosecutors declined to charge the officer with any criminal offense, including any civil rights offense.<sup>157</sup> Beyond that individual case, the large disparities in aggregate school arrests and charging decisions both in South Carolina and nationally present a strong case that race, sex, and disabilities have an impact on arrest decisions.

South Carolina’s experience with its disturbing schools statute and other school-based arrests illustrates the particularly strong concerns about racial disparities that are present in school discipline, law enforcement referrals, and arrests across the country. Black children make up 33% of all South Carolina children,<sup>158</sup> and were defendants in 56% of all delinquency cases referred to South Carolina family

154. *State v. Silva*, 525 P.2d 903, 907 (N.M. Ct. App. 1974). How far this decision reaches was contested in *A.M. v. Holmes*, 830 F.3d 1123, 1143–50 (10th Cir. 2016) (Gorsuch, J., dissenting), the burping case discussed, *supra* notes 126–29 and accompanying text. The child arrested for his disruptive burping and then Judge Gorsuch argued that *Silva* provided clearly established law that the child’s conduct was not severe enough to justify the arrest. The officer and school defendants argued, and the two-judge majority agreed, that *Silva* did not clearly apply to the newer disturbing schools statute nor clearly exclude the middle school burper’s conduct from the scope of the criminal law. *See id.*

155. *J.J. v. State*, 944 So. 2d 518, 519 (Fla. Dist. Ct. App. 2006) (quotations and citations omitted).

156. *In re Eller*, 417 S.E.2d 479, 482 (N.C. 1992) (quotation and citation omitted).

157. *See* Solicitor Investigation Summary, *supra* note 26, at 11; Press Release, U.S. Att’y Office, Dist. of S.C., Federal Officials Close Investigation into Use of Force by School Resource Officer at Spring Valley, South Carolina, High School (Jan. 13, 2017), <https://www.justice.gov/usao-sc/pr/federal-officials-close-investigation-use-force-school-resource-officer-spring-valley> [<https://perma.cc/YR6L-EVJW>].

158. *Children Under 18 Years of Age by Race/Ethnicity*, ANNIE E. CASEY FOUND., KIDS COUNT DATA CTR. (2017), <http://datacenter.kidscount.org/data/tables/6132-children-under-18-years-of-age-by-race-ethnicity?loc=42&loct=2#detailed/2/any/true/868,867,133,38,35/66,67,4262,3/12804,15653> [<https://perma.cc/EU98-C7CG>].

courts in 2015–2016.<sup>159</sup> The disparities are even greater in disturbing schools cases, in which Black children account for more than three quarters of all defendants.<sup>160</sup> The South Carolina Department of Juvenile Justice published data from the 2008–2009 school year that showed that Black boys were charged with disturbing schools at 4.9 times the rate of White boys, and Black girls were charged at 6.2 times the rate of White girls.<sup>161</sup> A more recent study of all school-based arrests showed smaller, but still significant disproportionality in arrest rates of boys and girls—Black boys were arrested 2.68 times as frequently as White boys, and Black girls were arrested 2.95 times as frequently as White girls.<sup>162</sup>

Similar disparities are evident nationally. The U.S. Department of Education has reported that, nationally, Black children account for 16% of all students, but 27% of students referred to law enforcement and 31% of school-related arrests.<sup>163</sup> Earlier research has made clear that different rates of misbehavior cannot explain these disparities.<sup>164</sup>

National measures suggest that, as in South Carolina,<sup>165</sup> racial disparities among girls are larger than among boys. Across the country, Black boys were suspended out of school 3.33 times more frequently than White boys,<sup>166</sup> while Black girls were suspended out

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159. S.C. REPORT 2015–2016, *supra* note 121, at 11.

160. S.C. DEP'T OF JUVENILE JUSTICE, DISTURBING SCHOOLS DATA FY 2008–2009, slide 3 [hereinafter DISTURBING SCHOOLS DATA FY 2008–2009], [http://www.state.sc.us/djj/2010%20disturbing%20schools%20presentation\\_files/frame.htm](http://www.state.sc.us/djj/2010%20disturbing%20schools%20presentation_files/frame.htm) [<https://perma.cc/WN7G-76HW>]. The ACLU alleged similar figures continue in more recent years, with Black students “nearly 4 times as likely as their white classmates to be charged with Disturbing Schools.” *Kenny v. Wilson Complaint*, *supra* note 64, ¶ 76.

161. The S.C. DJJ reported that 14.2 of every 1000 Black boys were charged with disturbing schools, compared with 2.9 for White boys. DISTURBING SCHOOLS DATA FY 2008–2009, *supra* note 160, slide 5. The rates were 9.3 for Black girls and 1.5 for White girls. *Id.*

162. HOLLY GROOVER, S.C. STAT. ANALYSIS CTR., STATISTICS FOR YEARS 2011–2013 REGARDING DISPROPORTIONALITY AND DISPROPORTIONATE MINORITY CONTACT (DMC) IN SOUTH CAROLINA JUVENILE ARRESTS FOR OFFENSES AT SCHOOL USING DATA FROM THE SOUTH CAROLINA INCIDENT-BASED REPORTING SYSTEM (SCIBRS), at 1, 12 (2016), [http://www.scdps.gov/ohsjp/stats/Juveniles/Juvenile\\_DMC\\_in\\_Schools\\_Report.pdf](http://www.scdps.gov/ohsjp/stats/Juveniles/Juvenile_DMC_in_Schools_Report.pdf) [<https://perma.cc/R4DD-WFLW>].

163. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: SCHOOL DISCIPLINE 6 (2014) [hereinafter OCR DATA SNAPSHOT], <https://ocrdata.ed.gov/downloads/crdc-school-discipline-snapshot.pdf> [<https://perma.cc/65H6-ZZR4>].

164. *See, e.g.*, Am. Psychological Ass'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOL. 852, 854 (2008).

165. *See supra* notes 161–62 and accompanying text.

166. OCR DATA SNAPSHOT, *supra* note 163, at 12.

of school 6 times more frequently than White girls.<sup>167</sup> Advocates have argued that “[g]ender and race intersect to create categories of girls who are especially vulnerable to certain system policies and practices,”<sup>168</sup> leading Black girls to account for 43% of all girls subject to a school-related arrest.<sup>169</sup> Advocates allege that these disparities “are often tied to racial and cultural biases or subjective expectations of what makes a ‘good’ girl,”<sup>170</sup> and perceptions by both school and law enforcement officials that Black girls are less innocent and deserve harsher punishment than other girls exhibiting similar behavior.<sup>171</sup> As a result, Black girls who engaged in behavior perceived as particularly loud or angry could be subject to unnecessarily harsh consequences.<sup>172</sup> Commentators have used the arrests of the two girls in the Spring Valley High School incident to illustrate the phenomenon.<sup>173</sup> Advocates recommend attacking this problem by “decriminaliz[ing] minor school-based offenses commonly charged to girls, such as verbally disruptive behavior.”<sup>174</sup>

The intersection of race and disability is another essential factor. Nationally, children with a disability account for 12% of all students, but 25% of all children referred to law enforcement and 25% of all school-related arrests.<sup>175</sup> Similar disproportionalities exist within South Carolina.<sup>176</sup> Black children with disabilities encounter even

167. *Id.* at 14.

168. FRANCINE T. SHERMAN & ANNIE BALCK, *GENDER INJUSTICE: SYSTEM-LEVEL JUVENILE JUSTICE REFORMS FOR GIRLS* 22 (2015), [http://www.nationalcrittenton.org/wp-content/uploads/2015/09/Gender\\_Injustice\\_Report.pdf](http://www.nationalcrittenton.org/wp-content/uploads/2015/09/Gender_Injustice_Report.pdf) [<https://perma.cc/562W-BT67>].

169. NAACP LEGAL DEFENSE & EDUC. FUND, INC. & NAT’L WOMEN’S LAW CTR., *UNLOCKING OPPORTUNITY FOR AFRICAN-AMERICAN GIRLS: A CALL TO ACTION FOR EDUCATIONAL EQUITY* 16 (2014), [http://www.naacpldf.org/files/publications/Unlocking%20Opportunity%20for%20African%20American%20Girls\\_0.pdf](http://www.naacpldf.org/files/publications/Unlocking%20Opportunity%20for%20African%20American%20Girls_0.pdf) [<https://perma.cc/S8LR-BRA8>].

170. SHERMAN & BALCK, *supra* note 168, at 23.

171. Rebecca Epstein et al., *Girlhood Interrupted: the Erasure of Black Girls’ Childhood*, GEO. U. L. CTR., CTR. ON POVERTY & INEQ. 1 (2017), <http://www.law.georgetown.edu/academics/centers-institutes/poverty-inequality/upload/girlhood-interrupted.pdf> [<https://perma.cc/Y6FW-UW3K>]. Research also supports similar arguments regarding Black boys. *Id.* at 2.

172. *Id.* at 1.

173. *E.g.*, RITCHIE, *supra* note 44, at 73.

174. SHERMAN & BALCK, *supra* note 168, at 39.

175. *Id.* at 7. Children with a disability include, for purposes of this data point, children who have been deemed to have a disability under the Individuals with Disability Education Act, 20 U.S.C. §§ 1400–1401 (2012).

176. JOINT CITIZENS & LEGISLATIVE COMM. ON CHILDREN, 2017 ANNUAL REPORT 27 (2017), [http://www.sc.edu/jclcc/doc/2017\\_JCCLC\\_Annual\\_Report.pdf](http://www.sc.edu/jclcc/doc/2017_JCCLC_Annual_Report.pdf) [<https://perma.cc/UZA8-V6KS>].

more severe disparities: The UCLA Civil Rights Project calculated, for instance, that Black students on average are about 12% more likely to face suspension than White students, while Black students with disabilities are 15% more likely to be suspended than White students with disabilities.<sup>177</sup> Using an earlier data set, the Civil Rights Project calculated that South Carolina's school suspension rate for Black, White, and Hispanic children with disabilities all exceeded national averages, as did the gap between Black and White children with disabilities.<sup>178</sup>

Perhaps the most powerful explanation for these wide disparities relates to implicit bias. Research has shown that different behavior by different groups of students does not explain the disparities.<sup>179</sup> Sarah Redfield and Jason Nance have argued that implicit biases explain many of the large racial disparities in the school-to-prison pipeline.<sup>180</sup>

Implicit biases are a particularly large concern in the application of broad criminal laws like disturbing schools. An implicit bias "is an association or preference that is unconscious and experienced without awareness" and often (if not usually) conflicts with an individual's beliefs.<sup>181</sup> Forced to make a quick decision with limited information, an implicit bias may lead school officials or police officers to view the behavior of Black children (or Black girls or Black children with disabilities) as more disruptive or threatening than similar behavior by White children, and thus take more punitive actions against Black children.<sup>182</sup> As the DOJ wrote in a statement of interest in *Kenny v.*

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177. Daniel J. Losen et al., *Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special Education Identification and Discipline*, UCLA C.R. PROJECT 1, 8 (2013), <https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/state-reports/disturbing-inequities-exploring-the-relationship-between-racial-disparities-in-special-education-identification-and-discipline> [https://perma.cc/EH98-98YK].

178. Daniel J. Losen, *Discipline Policies, Successful Schools, and Racial Justice*, UCLA C.R. PROJECT 1, 5 (2011), [https://www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/discipline-policies-successful-schools-and-racial-justice/NEPC-SchoolDiscipline-Losen-1-PB\\_FINAL.pdf](https://www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/discipline-policies-successful-schools-and-racial-justice/NEPC-SchoolDiscipline-Losen-1-PB_FINAL.pdf) [https://perma.cc/965R-UN8W].

179. See SARAH E. REDFIELD & JASON P. NANCE, AM. BAR ASS'N, SCHOOL-TO-PRISON PIPELINE PRELIMINARY REPORT 1, 15–20 (2016), [https://www.americanbar.org/content/dam/aba/administrative/diversity\\_pipeline/stp\\_preliminary\\_report\\_final.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/diversity_pipeline/stp_preliminary_report_final.authcheckdam.pdf) [https://perma.cc/57JC-K9GV].

180. *Id.* at 54–56. Redfield and Nance have collected various studies which demonstrate how implicit biases affect a range of educational decisions and outcomes. *Id.* at 61–62.

181. *Id.* at 55.

182. See *id.* 61–62; see also *id.* at 58 (“Implicit bias is at play in discretionary situations and influences disciplinary and other youth related decisions.”).

*Wilson*, such broad statutes may “fail to provide sufficient guidance to police,” and “officers who lack clear guidelines regarding what conduct is criminal and when enforcement is appropriate may not apply the law equitably, whether or not the differences in enforcement are intentional.”<sup>183</sup> Accordingly, it is recommended that the American Bar Association enacts “legislation eliminating criminalizing student misbehavior that does not endanger others.”<sup>184</sup>

### **B. Legal Instruments’ Failure to Prevent Law Enforcement Involvement in School Discipline**

The Spring Valley incident also occurred because of other legal structures that put the SRO in a position to enforce the broad criminal law. The SRO was not only stationed at the school, but he became a key feature of school discipline. His role was not limited to protecting students from assailants with weapons, or even responding to situations which might reasonably be considered security risks, such as the suspected presence of illegal drugs. Rather, the SRO was the person called by the school administrator to enforce the teacher’s and the administrator’s direction that the student leave the classroom.<sup>185</sup> His role in the Spring Valley incident illustrates Catherine Kim’s conclusion that “schools increasingly rely on law enforcement to maintain order,” to the detriment of overall student outcomes.<sup>186</sup>

Various authorities have argued for a much more limited role for SROs. Noting the harms to students from school-based arrests and the racial disparities among such arrests, the U.S. Department of Education in 2014<sup>187</sup> recommended that SROs’ role “focus[ ] on protecting the physical safety of the school or preventing the criminal conduct of persons other than students, while reducing inappropriate student referrals to law enforcement.”<sup>188</sup> SROs, according to the U.S.

183. *Kenny v. Wilson* Complaint, *supra* note 64, at 12–13. DOJ argued that other broad and vague criminal statutes had similar problems. *Id.* at 14–17.

184. REDFIELD & NANCE, *supra* note 179, at 13.

185. See *supra* notes 51–57 and accompanying text (describing how the SRO was a step in a chain of progressive discipline).

186. Kim, *supra* note 41, at 864.

187. The date of this guidance may prove important. It was issued during the Obama Administration, like other federal guidance noted in this Article. Although it seems unlikely that the Trump Administration will similarly push for limits on SROs, it is less clear if it will seek to undo Obama-era guidance.

188. U.S. DEP’T OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE 9 (2014), <https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf> [<https://perma.cc/TW6M-PLY5>].

Department of Education, should be responsible for “addressing and preventing serious, real, and immediate threats to the physical safety of the school and its community,” but not have any involvement with “routine discipline matters.”<sup>189</sup>

One leading recommendation for keeping SROs out of regular school discipline has been for school districts and law enforcement entities to enter into memoranda of agreement that clearly delineate what SROs will and will not do.<sup>190</sup> This recommendation was followed by the local authorities at the time of the Spring Valley incident—a memorandum of agreement (“MOA”) was in place between the local school district and the sheriff’s department.<sup>191</sup> But the MOA failed to stop the SRO from becoming involved in a school disciplinary matter and arresting and charging the two girls for disturbing schools, in part because it required school officials to inform SROs of any criminal conduct at school.<sup>192</sup> The MOA’s failure illustrates an essential point: if districts are to permit SROs in their schools, it is important both that MOAs exist, and that their terms effectively keep SROs out of regular school discipline.

The MOA in effect during the Spring Valley incident represents a middle spot between proposed memoranda, which do not provide much meaningful guidance, and those that significantly limit when schools can turn students over to SROs and when SROs can arrest or charge students. Spring Valley High School’s MOA was based on a template designed by the DOJ program which funded many SROs around the country.<sup>193</sup> The DOJ summarized a model memorandum in 2013 and recommended that memoranda of agreement list some examples of what SROs would do, but did not recommend any terms which would limit SROs’ role.<sup>194</sup> The National Association of School

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189. *Id.* at 10.

190. *See id.* at 3, 10 (encouraging schools to “provide clear definitions of the officers’ roles and responsibilities on campus” and “document those expectations in a written agreement or memorandum of understanding”); *see also* NAT’L ASS’N OF SCH. RES. OFFICERS, NASRO POSITION STATEMENT ON POLICE INVOLVEMENT IN STUDENT DISCIPLINE (2015), <https://nasro.org/news/nasro-updates/nasro-position-statement-police-involvement-student-discipline/> [<https://perma.cc/77LD-HGGS>] (“A Clear and Concise Memorandum of Understanding is Essential.”); Nance, *Students, Police, and the School-to-Prison Pipeline*, *supra* note 40, at 982.

191. *See* Richland 2—RCS D 2015–16 MOA, *supra* note 96.

192. *See infra* notes 204–206 and accompanying text.

193. S.C. DEP’T OF EDUC., SOUTH CAROLINA SAFE SCHOOLS TASKFORCE REPORT 5 (2016), <http://scsba.org/wp-content/uploads/2016/08/2016-schoolaw-presentation-taks-force-richardson.pdf> [<https://perma.cc/JQ6L-ZMF2>].

194. U.S. DEP’T OF JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERVS., FACT SHEET: MEMORANDUM OF UNDERSTANDING FOR FY2013 SCHOOL-BASED

Resource Officers (“NASRO”) recommended sample memoranda which more actively blur the line between SRO duties and school discipline. One such model states that SROs should “be an extension of the principal’s office” and should be involved in *both* “law enforcement matters and school code violations.”<sup>195</sup> NASRO suggests a difference between law enforcement and school discipline, stating that SROs should bring students to the principal’s office for punishment for school discipline code violations.<sup>196</sup> But involvement in school disciplinary incidents—even if theoretically limited to escorting students to the principal’s office—risks transforming school discipline matters into arrests or charges. Such a concern is consistent with the empirical record, which shows that SRO presence at schools increases the likelihood of arrests, “even for low-level violations of school behavioral codes.”<sup>197</sup> And the Association’s proposed memoranda impose no limits on when school officials can refer situations to SROs or when SROs may arrest or charge children for minor offenses.<sup>198</sup>

In contrast, the Advancement Project (a civil rights advocacy organization) proposed a sample memorandum of understanding (“MOU”) that would only permit school officials to refer students to SROs if an incident created a risk of “imminent harm.”<sup>199</sup> When SROs do get involved, the Advancement Project’s proposed MOU would prevent arrests or charges for minor offenses. Fights, for

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PARTNERSHIPS 2 (2013), [https://cops.usdoj.gov/pdf/2013\\_MOU-FactSheet\\_v2\\_091613.pdf](https://cops.usdoj.gov/pdf/2013_MOU-FactSheet_v2_091613.pdf) [<https://perma.cc/WT5X-N8EK>].

195. NAT’L ASS’N OF SCH. RES. OFFICERS, SCHOOL RESOURCE OFFICER AGREEMENT 2 (2012), <https://nasro.org/cms/wp-content/uploads/2014/04/MOUsampleA2012.pdf> [<https://perma.cc/CY7L-8F3E>].

196. *Id.* at 2–3. The Association offers two other sample memoranda. Although their language varies, the bottom line policies are consistent. NAT’L ASS’N OF SCH. RES. OFFICERS, AGREEMENT BETWEEN THE \_\_\_ POLICE DEPARTMENT AND THE \_\_\_ SCHOOL DISTRICT FOR THE SCHOOL RESOURCE OFFICER PROGRAM (2012), <https://nasro.org/cms/wp-content/uploads/2014/04/MOUsampleC2012.pdf> [<https://perma.cc/AWC3-9XGZ>] (template memorandum of agreement); NAT’L ASS’N OF SCH. RES. OFFICERS, MEMORANDUM OF UNDERSTANDING SCHOOL RESOURCE OFFICER PROGRAM AT \_\_\_ SCHOOLS (2012), <https://nasro.org/cms/wp-content/uploads/2014/04/MOUsampleB2012.pdf> [<https://perma.cc/SJ2H-WXDP>] (template memorandum of understanding).

197. REDFIELD & NANCE, *supra* note 179, at 53.

198. *See generally* sample memoranda cited *supra* note 196.

199. ADVANCEMENT PROJECT, PROPOSED MEMORANDUM OF UNDERSTANDING BETWEEN THE SCHOOL DISTRICT AND POLICE DEPARTMENT 1 (2013), [http://b3cdn.net/advancement/cf357b9f96d8c55ff8\\_rdm6ib9js.pdf](http://b3cdn.net/advancement/cf357b9f96d8c55ff8_rdm6ib9js.pdf) [<https://perma.cc/6Q35-UJ4B>]; Fedders, *supra* note 41, at 571.



instance, could only trigger arrests or charges if they caused “serious bodily harm” or “necessitate[d] medical treatment.”<sup>200</sup>

The Richland County MOA<sup>201</sup> attempted, but largely failed, to limit SROs’ role—thus making it more like the federal and NASRO models than the model pushed by advocates like the Advancement Project. The Richland County MOA’s failure thus illustrates weakness in the federal and NASRO models. The MOA includes language reflecting the understanding that a line exists between law enforcement and school discipline. “First and foremost the SROs will perform law enforcement duties in the school such as handling assaults, theft, burglary, bomb threats, weapons, and drug incidents.”<sup>202</sup> Moreover, the Richland County MOA states that an “SRO shall not act as a school disciplinarian, as disciplining students is a school responsibility.”<sup>203</sup> Despite those efforts to distinguish law enforcement from school discipline, the MOA’s very next sentence turns school disciplinary incidents into matters for law enforcement: “However, if the incident is a violation of the law, the principal shall contact the SRO or their supervisor in a timely manner and the SRO shall then determine whether law enforcement action is appropriate.”<sup>204</sup> Thus, by contract, any time a student violates broad criminal laws—like disturbing schools, disorderly conduct, or breach of peace—school administrators must notify police.<sup>205</sup> Any fight or petty theft—a student taking another’s cell phone, for instance—would trigger law enforcement involvement, with no consideration of whether the school could or should properly handle such actions without law enforcement.<sup>206</sup>

The Richland County MOA language was particularly important because no other source of law limited SROs’ role. One statute defined SROs and clarified that they are empowered to arrest any

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200. *Id.*

201. The MOA is also notable for the financial cost imposed on the district. In the year of the Spring Valley incident, the Richland County School District Two paid the Richland County Sheriff’s Department \$690,992 for nineteen sheriff deputies to serve as SROs at fourteen separate schools (two each were assigned to high schools, including Spring Valley). Richland 2—RCSD 2015–16 MOA, *supra* note 96, at 1. The cost of SROs has been criticized for “tak[ing] away needed resources that could otherwise be used to hire more counselors, mental resources specialists, and implement the alternative programs” to arrests and school exclusions. Nance, *Tools for Change*, *supra* note 40, at 339.

202. Richland 2—RCSD 2015–16 MOA, *supra* note 96, at 2.

203. *Id.* at 3.

204. *Id.*

205. *Id.*

206. *See id.*

individual for “crimes in connection with a school activity or school-sponsored event” anywhere in the state.<sup>207</sup> But this statute offered no limitation for when SROs should exercise such authority.<sup>208</sup> No law or regulation existed requiring a district to have an MOA, let alone governing what might be included in such an MOA. Similarly, school district discipline policies did not limit the role of SROs, and, in fact, read as if law enforcement should provide disciplinary back-up to teachers. The Richland County School District Two 2016–2017 handbook noted that teachers can handle most discipline problems.<sup>209</sup> But “in cases where the student’s behavior affects the safety or learning opportunities of other students,” further action is authorized, including action in conjunction with local law enforcement agencies.<sup>210</sup> Notably, behavior which might affect other students’ “learning opportunities” would involve a much wider range of conduct than criminal activity, let alone criminal activity that creates safety risks.

One South Carolina statute even encouraged schools to report some incidents to law enforcement. A statute enacted in 1994 requires schools to:

[C]ontact law enforcement authorities immediately upon notice that a person is engaging or has engaged in activities on school property or at a school-sanctioned or -sponsored activity which may result or results in injury or serious threat of injury to the person or to another person or his property as defined in local board policy.<sup>211</sup>

The statute’s timing is notable. It was enacted in an era when juvenile crime rates peaked, and when states widely enacted a range

207. S.C. CODE ANN. § 5-7-12 (2013).

208. *Id.* South Carolina statutes include only one limitation on the role of SROs—SROs are exempted from a statute requiring police officers to investigate whether certain individuals are present lawfully in the country. S.C. CODE ANN. § 17-13-170(B)(6) (2011). A federal court enjoined enforcement of the statute, so this limitation is moot. *United States v. South Carolina*, 906 F. Supp. 2d 463 (D.S.C. 2012) (enjoining enforcement), *affirmed* 720 F.3d 518 (4th Cir. 2013).

209. RICHLAND SCH. DIST. TWO, 2016–2017 BACK-2-SCHOOL HANDBOOK, at 14 (2016), <https://www.richland2.org/RichlandDistrict/media/Richland-District/Advanced/Standard%202.1/2-1-2016-2017-Richland-Two-Employee-Handbook.pdf> [<https://perma.cc/FM9X-YTWS>].

210. *Id.*; see also RICHLAND SCH. DIST. TWO, STUDENT DISCIPLINE (2017), <https://www.richland2.org/Departments/Administrative-Services/Student-Services/Student-Discipline> [<https://perma.cc/YT4T-K2Z5>] (providing that when “the student’s behavior affects the safety or learning opportunities of other students, additional disciplinary action must be taken”).

211. S.C. CODE ANN. § 59-24-60 (1994).

of “tough-on-crime” juvenile justice reforms.<sup>212</sup> This statute was not triggered by the student’s refusal to put away her cell phone in the Spring Valley incident—that behavior did not threaten, let alone cause, any injury. But it would apply to a range of other common behavior, such as schoolyard fights or threats, which a school district could consider to fall under the statute.<sup>213</sup>

As with South Carolina’s disturbing schools statute,<sup>214</sup> the state’s statute requiring schools to report certain behaviors to law enforcement is among the broadest in the nation.<sup>215</sup> The DOJ even held it up as a model of a strong reporting statute in 2002 (though the DOJ did not evaluate concerns that too much reporting might call law enforcement attention to situations that did not require it).<sup>216</sup>

But South Carolina is not alone—other states have reporting laws, but their breadth varies, as Jason Nance has catalogued.<sup>217</sup> Some require schools to inform police of any “violent, disruptive incidents”<sup>218</sup> or any assault at school, even if it does not cause any injury.<sup>219</sup> Other states require reporting, but in narrower circumstances, such as in cases of criminal bullying,<sup>220</sup> “intimidation,”<sup>221</sup> or possession of controlled substances or weapons.<sup>222</sup>

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212. See, e.g., PATRICIA TORBET ET AL., NAT’L CTR. FOR JUVENILE JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 1, 59 (1996), <http://www.ncjj.org/pdf/statresp.pdf> [<https://perma.cc/7Y3U-AASP>] (describing wide-ranging, tough-on-crime reforms); Barry Feld, *The Transformation of the Juvenile Court—Part II: Race and the “Crack Down” on Youth Crime*, 84 MINN. L. REV. 327, 327–28 (1999) (arguing that increasing juvenile crime rates, racialized fear of crime, and decreasing faith in rehabilitation triggered “tough-on-crime” reforms).

213. See 2010 WL 2678697, at \*2 (S.C.A.G. 2010) (offering attorney general’s opinion that “a school district is required to report all suspected crimes to law enforcement”).

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

215. See *supra* note 139 and accompanying text.

216. U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE FOR VICTIMS OF CRIME, REPORTING SCHOOL VIOLENCE 2–3, 5 (2002), [https://www.ncjrs.gov/ovc\\_archives/bulletins/legalseries/bulletin2/welcome.html](https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin2/welcome.html) [<https://perma.cc/6F5F-XKY9>].

217. Nance, *Students, Police, and the School-to-Prison Pipeline*, *supra* note 40, at 934–36.

218. ALA. CODE § 16-1-24(b) (2014).

219. See VA. CODE ANN. § 22.1-279-3:1(A) (West 2014).

220. CONN. GEN. STAT. § 10-222d(b)(15) (2014).

221. 105 ILL. COMP. STAT. 5/34-84a.1 (2014).

222. See CAL. EDUC. CODE § 48902(c) (West 2013).

### C. Diversion Programs Available Through Law Enforcement, Not School

Authorities do not prosecute every child who an officer arrests or charges, and officers sometimes do not intend for children they arrest or charge to be prosecuted. A large number are diverted. That is, the child-defendant is offered the opportunity for charges against him or her to be dropped if he or she participates in a program designed to help the child understand his or her error, take steps to avoid repeating that error, and/or make amends with the victim.<sup>223</sup>

One problem, however, is created when law enforcement agencies operate diversion programs and when there are insufficient school-based diversion programs. That scenario furthers the school-to-prison pipeline by inducing officers to arrest and charge children who they do not wish to prosecute, and school officials to involve officers in disciplinary matters as a means of accessing diversion programs. Law enforcement diversion programs are good alternatives to prosecution, but not to school discipline.

A challenge exists in the structure of such programs when, as in South Carolina, accessing them most easily occurs through police departments or prosecutors' offices, rather than purely through schools.<sup>224</sup> This practice furthers the school-to-prison pipeline both through the arrest or charge itself—which can label the child delinquent—and because sometimes such cases inadvertently lead to prosecutions. The Spring Valley incident does not illustrate this issue—there is no public record suggesting that the SRO wanted either child he arrested to be diverted or that the solicitor considered it. But the practice certainly exists in South Carolina.

The practice is illustrated through a case handled by the author's juvenile defense clinic which arose from a different high school in Columbia, South Carolina.<sup>225</sup> A sixteen-year-old was accused of petit larceny for stealing cash from a guidance counselor's desk.<sup>226</sup> The boy was caught on video, confessed, and apologized to the guidance

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223. S.C. REPORT 2015–2016, *supra* note 121, at 5. (The South Carolina Department of Juvenile Justice, for instance, reports that thirty-five percent of all referrals to family court are diverted. Forty-five percent are prosecuted and the remainder are dismissed.)

224. *See, e.g.*, APPENZELLER ET AL., *supra* note 20, at 12 (describing South Carolina's "Youth Arbitration Program" as involving youth charged with crimes).

225. References to cases handled by the Author are protected by confidentiality laws. For more information, see Redacted Petition (on file with the author).

226. In South Carolina, petit larceny covers theft of money or goods up to \$2000. S.C. CODE ANN. § 16-13-30(A) (2012). In the case described, the child was accused of stealing less than \$400.

counselor. He was also punished by the school with a long-term suspension requiring him to attend an alternative school for the remainder of the school year. The guidance counselor and SRO agreed that the boy did not need to be charged or convicted. They did want him to agree to pay back the money that was stolen, and knew that a diversion program operated by the sheriff's department would require restitution payments. So they charged him, and included with his charging documents a form recommending that he be permitted to participate in that program. But that program refused to accept the child because he had previously completed (successfully) a diversion program for an earlier minor offense. So the solicitor proceeded to prosecute the case. After students working in the juvenile defense clinic got involved, the child offered to pay back the money and the guidance counselor wrote a statement asking the prosecutor to drop the charges, which she did.

This case reveals the harms that can come from depending on law enforcement referrals for diversion programs. Simply facing these charges, which included court appearances, increased this child's likelihood of dropping out of high school fourfold.<sup>227</sup> In addition, one wonders what would have happened to this child had his student attorneys not explored each avenue for a dismissal, and how many other children who lack such representation are prosecuted and convicted.<sup>228</sup>

This process shows how the existing legal structure funneled a boy, who authorities did not even want to charge, into the legal system. All the victim of this crime wanted was restitution. As the child's guidance counselor, he determined that a diversion program, which would require restitution, was the most effective way to both hold the child accountable and help prevent him from committing other crimes. Yet this teacher had no school-based diversion program to

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227. Sweeten, *supra* note 81, at 463.

228. Advocating for diversion options is an element of strong juvenile defense counsel. See ROBIN WALKER-STERLING ET AL., NAT'L JUVENILE DEFENDER CTR., ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT 22 (2009), [https://www.americanbar.org/content/dam/aba/images/youth\\_at\\_risk/SUPP2-NJDC-ROC.pdf](https://www.americanbar.org/content/dam/aba/images/youth_at_risk/SUPP2-NJDC-ROC.pdf) [<https://perma.cc/U33F-4L7K>]. One assessment of juvenile defense in South Carolina noted that juvenile defenders could advocate to the solicitor to refer children to diversion programs, but that the majority of defenders surveyed did not do so. See MARY ANN SCALI ET AL., NAT'L JUVENILE DEFENDER CTR., SOUTH CAROLINA JUVENILE INDIGENT DEFENSE: A REPORT ON ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 30 (2010), <http://childlaw.sc.edu/frmPublications/SC%20Juvenile%20Defense%20Assessment.pdf> [<https://perma.cc/64NA-7LQA>].

turn to. The only perceived option was turning the child's mistake into a law enforcement matter.

This example shows that access to such diversion programs is structured inadequately because it requires school officials and SROs to arrest and charge individuals.<sup>229</sup> One of the most frequently used diversion programs in South Carolina—and the program in the case study above that the guidance counselor and SRO recommended—is an “arbitration” program, a form of victim-offender mediation informed by restorative justice principles.<sup>230</sup> The program is designed “[to] bring[ ] together the juvenile offender, victim, and community directly or indirectly under the guidance of a trained volunteer to determine what actions the offender must take to restore and enhance justice.”<sup>231</sup> This program is similar to a large number of restorative justice programs that exist around the country.<sup>232</sup> In South Carolina, this program is operated by local prosecutors' and sheriffs' offices through a contract with the Department of Juvenile Justice (“DJJ”).<sup>233</sup> DJJ guidelines define who is eligible and exclude any child who has a prior offense.<sup>234</sup> That provision excluded the child in the case study. These guidelines contain rather strict criteria, especially when compared to leading efforts in other jurisdictions to limit the school-to-prison pipeline by preventing charges for a list of misdemeanors unless it is the third offense in a single school year.<sup>235</sup>

The South Carolina status quo also stands in contrast to a leading diversion structure in place in Clayton County, Georgia, outside Atlanta. In place of arrests or charges (even those expected to lead to diversion programs), schools refer children directly to school-based programs.<sup>236</sup> Similarly, the U.S. Department of Education in 2016

229. As noted in the Introduction, a full exploration of various diversion programs that could be appropriate for minor school-based offenses which currently lead to delinquency charges is beyond the scope of this Article.

230. APPENZELLER ET AL., *supra* note 20, at 1.

231. *Id.* at 1, 11–13 (describing the program and similar programs nationally).

232. *Id.* at 11 (noting “many” similar programs).

233. *Id.* at 12.

234. *Id.* at 13 (noting eligibility is limited to first time offenders).

235. *See, e.g.*, CLAYTON COUNTY SCHOOL PROTOCOL AGREEMENT 5, [http://www.ncjfcj.org/sites/default/files/Clayton%20Co.%20School%20Protocol%20Agreement%20\(2\).pdf](http://www.ncjfcj.org/sites/default/files/Clayton%20Co.%20School%20Protocol%20Agreement%20(2).pdf) [<https://perma.cc/ZH3A-YPVS>] (“Misdemeanor type delinquent acts involving offenses against public order . . . shall not result in the filing of a complaint alleging delinquency unless the student has committed his or her third or subsequent similar offense during the school year . . .”).

236. Even a second offense in the same school year leads to a school-based diversion program. *See id.* at 6. A third or subsequent offense in the same school year could lead to a court complaint. *Id.* at 5–6; *see also* Evie Blad, *Atlanta Schools Start Over with Police*, EDUC. WK. (Feb. 7, 2017), <https://www.edweek.org/ew/>

urged schools to develop more “corrective, non-punitive interventions, including restorative justice programs and mental health supports.”<sup>237</sup> Such programs should “eliminate overreliance on SROs in schools.”<sup>238</sup> In Denver, for instance, restorative justice programs have helped reduce school-based law enforcement referrals significantly.<sup>239</sup> But such structures were not available or considered during the Spring Valley incident. In South Carolina, an easy path to similar programs is through law enforcement referrals.

#### D. Prosecutorial Discretion

When SROs decide to charge children, the charges are funneled to juvenile court authorities, who must determine whether to prosecute, divert, or dismiss each case. These intake decisions are important in their own right and may also affect school and SRO decisions whether to arrest or charge children in the first instance.<sup>240</sup> These decisions are especially important when the criminal law has a particularly wide scope, giving authorities tremendous discretion to determine which school misbehavior will be prosecuted.<sup>241</sup>

Juvenile court intake decisions have long been essential features of our juvenile justice system, and have distinguished that system from the criminal justice system for adults.<sup>242</sup> A central principle is that juvenile court authorities should consider two factors when deciding

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articles/2017/02/08/atlanta-schools-start-over-with-police.html [https://perma.cc/DTM2-M93E] (describing how an Atlanta program modeled after the Clayton County program encourages school officials “to channel misdemeanor offenses and delinquent acts through a tiered system of interventions rather than immediately filing court complaints”).

237. John B. King, Jr., *Key Policy Letters Signed by the Education Secretary or Deputy Secretary*, U.S. DEP’T EDUC. (Sept. 8, 2016) [hereinafter *Dear Colleagues Letter*], <https://www2.ed.gov/policy/elsec/guid/secletter/160907.html> [https://perma.cc/96U7-798L]; see also Nance, *Students, Police, and the School-to-Prison Pipeline*, *supra* note 40, at 981 (recommending school-based restorative justice programs).

238. *Dear Colleagues Letter*, *supra* note 237.

239. *E.g.*, Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281, 334 (2012).

240. See Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 430 (2013) (“By declining to prosecute categories of adolescent behavior, prosecutors set the standard for juvenile court intake and over time may significantly influence patterns of arrest and referral.”).

241. See Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173, 191–92 (2017) (describing wide prosecutorial discretion in juvenile courts and how that can lead to overcriminalization); see also *supra* Section II.A.1–2 (describing how broad criminal laws create significant discretion which permits implicit biases to operate).

242. See Gupta-Kagan, *supra* note 28.

whether to prosecute a child: first, whether they can prove a child has committed a crime and, second, whether prosecuting a child for such a crime is necessary to protect the public or to serve the juvenile justice system's rehabilitative ends.<sup>243</sup> As a result, juvenile courts should practice "judicious nonintervention."<sup>244</sup> The second factor, in practice, ought to screen out many school-to-prison pipeline cases from juvenile court dockets.

Here too, the Spring Valley incident is instructive because of the unusually public statements about whether to press the disturbing schools charges, and the concerning absence of any consideration of that essential second factor in those statements. The Richland County solicitor issued two public statements regarding the disturbing schools charges filed by the SRO against the two girls.<sup>245</sup> Both statements emphasized whether evidence could prove the girls guilty of the crime.<sup>246</sup> Neither statement discussed whether prosecuting the charges would help rehabilitate them or protect the public, or even noted such questions as an element of prosecutorial discretion.<sup>247</sup>

One earlier South Carolina disturbing schools case illustrates a similar concern. The case involved a ten-year-old elementary school student who hit a teacher's aide.<sup>248</sup> By his own admission, he then "proceeded to scream as loud as he could for one hour."<sup>249</sup> Then, while sitting in an administrative office, he said he tried to kill himself when a police officer walked in.<sup>250</sup> The appellate record does not reveal why this child was prosecuted. The bare facts reported on appeal make one wonder whether mental health interventions might have served this young child's, and the public's, interest more effectively than the juvenile justice system. There is no provision in South Carolina law explicitly designed to ensure that authorities fully consider whether prosecution serves the purpose of the juvenile justice system. Other scholarship proposes legal reforms to do so.<sup>251</sup>

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243. See discussion *supra* Introduction.

244. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE ON JUVENILE DELINQUENCY, JUVENILE DELINQUENCY AND YOUTH CRIME: REPORT ON JUVENILE JUSTICE AND CONSULTANTS' PAPERS 96 (1967).

245. *Supra* notes 73–78 and accompanying text.

246. *Supra* notes 73–78 and accompanying text.

247. *Supra* notes 73–78 and accompanying text.

248. See *In re John Doe*, 318 S.C. 527, 535 (Ct. App. 1995).

249. See *id.* at 529, 558.

250. *Id.*

251. *E.g.*, Gupta-Kagan, *supra* note 28.



### III. REFORM EFFORTS AFTER SPRING VALLEY AND WHY COMPREHENSIVE REFORM IS NEEDED

Intensive reform efforts have been underway in South Carolina since the Spring Valley High incident.<sup>252</sup> Legislators and litigators have targeted the disturbing schools statute.<sup>253</sup> School districts and law enforcement agencies in Richland County have renegotiated memoranda of agreement regarding SROs.<sup>254</sup> The South Carolina Department of Education has promulgated regulations which might limit the role of SROs to school discipline.<sup>255</sup>

This Part will explore those reform efforts. These efforts are positive<sup>256</sup> and have the potential to limit school-to-prison pipeline arrests, charges, and prosecutions in South Carolina. However, these efforts are also limited. Efforts to narrow the disturbing schools statute are welcome—but may not stop authorities from charging children with other offenses, and levers other than legislative changes can lead to significant reductions in disturbing schools charges.<sup>257</sup> Efforts to renegotiate memoranda of agreement have yielded some improved memoranda, but still direct schools to refer all cases involving suspected crimes (no matter how minor) to law enforcement.<sup>258</sup> State regulatory efforts are perhaps most promising in that they limit SRO involvement in school discipline incidents unless it is a more serious crime, creates an immediate safety risk, or represents the third such crime or more during a school year.<sup>259</sup> Yet

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252. *See supra* Section I.C.2.

253. *See infra* Section III.A.1.

254. *See infra* Section III.B.1.b.

255. *See infra* Section III.B.2.

256. In full disclosure, I have had a small role in advocating for some of these reforms. I have written and testified in favor of the bill to narrow the scope of the disturbing schools statute. Cynthia Roldán, *Senate Proposal Limiting SC's "Disturbing Schools" Law Hits a Snag*, THE STATE (Feb. 15, 2017), <http://www.thestate.com/news/local/crime/article132992254.html> [<https://perma.cc/8WAW-H5YP>] (noting my testimony in favor of the bill); Josh Gupta-Kagan, *Let School Officials Handle Discipline, Police Handle Threats*, THE STATE (Nov. 2, 2015), <http://www.thestate.com/opinion/op-ed/article41960976.html> [<https://perma.cc/N3V7-C9R5>] (urging the legislature to narrow the disturbing schools statute and school districts and law enforcement agencies to “establish clear boundaries for school resource officers.”). I have commented on proposed regulations, encouraging the Department of Education to revise such regulations to more effectively limit SROs actions to law enforcement and leave school discipline to school staff. Letter from Josh Gupta-Kagan to Dr. Sabrina Moore (Aug. 11, 2016) (on file with author) (regarding proposed Regulations 43-279 and 43-210).

257. *See infra* Section III.A.2.

258. *See infra* notes 345–46 and accompanying text.

259. *See infra* Section III.B.2.

even these regulations leave much discretion with school officials and SROs.<sup>260</sup> And no significant efforts are underway to expand school-based diversion programs or to ensure that charging decisions consider whether prosecuting children for school-based offenses serves the juvenile justice system's rehabilitative mission.<sup>261</sup>

### A. Narrowing Criminal Law

This section will analyze legislative and litigation efforts seeking to narrow significantly the scope of the disturbing schools statute. It will also explain how South Carolina's experience beyond the Spring Valley incident demonstrates that such efforts, while positive, will not fully address the problem of legal practices transforming school misbehavior into juvenile delinquency issues.

#### 1. *Disturbing Schools Legislation and Kenny v. Wilson*

In 2017, the South Carolina Senate passed a bill which would dramatically narrow the scope of South Carolina's disturbing schools statute.<sup>262</sup> The South Carolina House of Representatives did not act on the bill before recessing for 2017, but may consider the bill when it reconvenes in 2018.<sup>263</sup> The bill would mostly exempt students permitted to be at their school from the scope of the law.<sup>264</sup> The only way a student could be guilty of disturbing his or her own school is if they threatened "to take the life of or to inflict bodily harm upon another."<sup>265</sup>

Advocacy for the 2017 bill includes one detail rich in historical irony. The current version of the disturbing schools law was enacted

260. *See id.*

261. *See infra* Section III.C.2.

262. S. 131, 122nd Gen. Assemb., Reg. Sess. (S.C. 2017), [http://www.scstatehouse.gov/sess122\\_2017-2018/bills/131.htm](http://www.scstatehouse.gov/sess122_2017-2018/bills/131.htm) [<https://perma.cc/RP9D-T94M>].

263. The South Carolina General Assembly recessed for 2017 on May 11, 2017. The Joint Citizens and Legislative Committee on Children, which includes both legislators and relevant executive agency directors, also endorsed this bill. JOINT CITIZENS & LEGISLATIVE COMM. ON CHILDREN, *supra* note 176, at 28.

264. The bill would amend the disturbing schools law so that its main section would only apply to a "person who is not a student," defined as someone "who is not enrolled in, or who is suspended or expelled from" the school at which any incident occurs. S. 131 § 1(B), 122nd Gen. Assemb., Reg. Sess. (S.C. 2017), [http://www.scstatehouse.gov/sess122\\_2017-2018/bills/131.htm](http://www.scstatehouse.gov/sess122_2017-2018/bills/131.htm) [<https://perma.cc/RP9D-T94M>].

265. *Id.* § 2.

in 1968 in response to civil rights protests in South Carolina.<sup>266</sup> The law's sponsor told the press, "I'm interested in keeping outside agitators off campus."<sup>267</sup> The sponsor of the 2017 bill to narrow the disturbing schools statute has used that historically resonant phrase to advocate for her bill.<sup>268</sup> She has argued that her bill would "take our 'disturbing schools' law back to its original intent, which is to protect our (in-school) students from outside agitators."<sup>269</sup> A phrase used in the 1960s to describe civil rights activists derisively is now used to support reforming the school-to-prison pipeline, a central goal of the contemporary civil rights movement.

Where the pending bill seeks to stop charging students with disturbing schools, pending federal litigation seeks to enjoin enforcement of the statute against students. The ACLU has sued the state of South Carolina claiming to represent a class of all South Carolina school children, with Niya Kenny as a named plaintiff, seeking an injunction against enforcement of both the disturbing schools and disorderly conduct statutes against them.<sup>270</sup> The core

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266. S.C. Act 943, an Act to Amend Section 16-551, Code of Laws of South Carolina, 1962, Relating to Disturbances at Schools Attended by Women or Girls, so as to Include All Schools Within the Provisions of the Section, 1968 S.C. Stat. 2308. The original version of the bill, enacted in 1919, only applied to schools "attended by women or girls." 1919 S.C. Acts 156, § 1, 1919 S.C. Stat. 239. The 1968 amendment struck the language regarding women and girls, thus rendering the statute applicable to all students. The Legislature gave final approval to the expansion on March 2, 1968. 1968 S.C. Acts 943. That approval came less than one month after the Orangeburg Massacre, in which South Carolina state troopers killed three unarmed black men protesting ongoing segregation in Orangeburg, South Carolina. Caitlin Byrd, *To the Archives! Remembering the Orangeburg Massacre and Its Place in Civil Rights History*, POST & COURIER (Feb. 9, 2017), [http://www.postandcourier.com/news/to-the-archives-remembering-the-orangeburg-massacre-and-its-place/article\\_a89cb158-ef06-11e6-849c-03ed94e98f57.html](http://www.postandcourier.com/news/to-the-archives-remembering-the-orangeburg-massacre-and-its-place/article_a89cb158-ef06-11e6-849c-03ed94e98f57.html) [https://perma.cc/HSP3-HNNU]. In yet another historical connection, Bakari Sellers, son of Cleveland Sellers, who helped lead to civil rights protests in Orangeburg in February 1968, now represents Niya Kenny in one of her civil suits. *See id.* (discussing Cleveland Sellers' role and Bakari Sellers' perspective on it); *see also* sources cited *supra* note 104.

267. Ripley, *supra* note 44, at 6.

268. *See* Mia McLeod, *Why I'm Running*, MIA MCLEOD FOR SENATE, <http://miaforsenate.com/blog/why-im-running/> [https://perma.cc/KG4W-V8UF].

269. *Id.* Local media has picked up the description as well, describing the bill as "aim[ing] to return the disturbing schools law to its original intent of protecting students and school staffers from 'outside agitators.'" Cynthia Roldán, *Legislators Debating Where 'Obnoxious Adolescent Behavior' Ends, Criminal Behavior Begins at SC Schools*, THE STATE (Mar. 9, 2017), <http://www.thestate.com/news/local/crime/article137592723.html> [https://perma.cc/4WEQ-LPQL].

270. The named plaintiffs include Niya Kenny—the second girl arrested for disturbing schools in the Spring Valley incident—and several other individuals and organizations. *See* *Kenny v. Wilson Complaint*, *supra* note 64.

issue is the same one litigated unsuccessfully on behalf of individual clients discussed in Section II.A—whether the disturbing schools statute is unconstitutionally vague.<sup>271</sup> *Kenny v. Wilson* remains unresolved.<sup>272</sup>

Notably, the ACLU litigation seeks relief that is broader than the pending bill—an injunction against enforcing both disturbing schools and disorderly conduct against students.<sup>273</sup> This goal implies an important concern: stopping enforcement of the disturbing schools statute might prevent some of the more extreme examples of charges, but will not limit the school-to-prison pipeline as broadly as advocates hope. The ACLU's complaint notes how different charges can be interchangeable.<sup>274</sup> For example, Kenny's police report states that she was arrested for disorderly conduct, but she was charged with disturbing schools.<sup>275</sup> Such a concern is entirely appropriate, as discussed below.

## 2. *South Carolina Experience Demonstrates that Narrowing the Criminal Law Is an Important but Insufficient Reform*

The proposed bill to limit the scope of the disturbing schools statute would likely prevent the most egregious prosecutions for which no other criminal law is applicable—such as those at issue in the Spring Valley High School incident. But past experiences elsewhere in South Carolina demonstrate that authorities have used other charges in a large number of cases and thus perpetuated the school-to-prison pipeline.<sup>276</sup> Those experiences contrast with the experience of Texas where broader reforms, including narrowing the criminal law, led to significant declines in school-based arrests.<sup>277</sup> At a minimum, this contrast shows that the effect of narrowing the

271. See *Kenny v. Wilson* Complaint, *supra* note 64, at 1, 3; Motion For Preliminary Injunction and Memorandum of Law in Support at 17, 26, *Kenny v. Wilson*, No. 16 Civ. 2794 (D.S.C. filed Aug. 11, 2016) (arguing that both § 16-17-420 and § 16-17-530 are vague).

272. The United States District Court for the District of South Carolina dismissed the case, finding that plaintiffs' fear of arrest or charges under the disturbing schools statute was insufficiently imminent to grant them standing to seek an injunction against its enforcement and making no ruling on the plaintiffs' substantive legal claims. *Id.*, Docket Number 90, Order, at 16–21. The plaintiffs have appealed that ruling and the matter is pending before the United States Court of Appeals for the Fourth Circuit. *Id.*, Docket No. 95, Notice of Appeal.

273. *Kenny v. Wilson* Complaint, *supra* note 64, at 27.

274. See *id.* ¶ 17.

275. *Id.*

276. *Infra* notes 287–300 and accompanying text.

277. *Infra* notes 301–05 and accompanying text.

criminal law may vary significantly by jurisdiction. At a maximum, it suggests that reforming disturbing school statutes or otherwise narrowing one portion of the criminal law without broader reforms will only have a modest impact. Moreover, recent South Carolina data reveal a dramatic drop in disturbing schools charges without any statutory change—suggesting that factors other than the statute itself are particularly impactful.<sup>278</sup>

The historic experience of Lexington County, South Carolina—a large suburban and rural county on the west side of the Congaree River across from Columbia—is particularly instructive. In 2010, more than five years before the Spring Valley High School incident, the elected solicitor decided to limit disturbing schools prosecutions.<sup>279</sup> In a letter to the local school superintendent, the solicitor noted his office’s “very long” dockets and schools’ ability to serve kids with behavior problems outside of the justice system.<sup>280</sup> He said his office “will no longer prosecute a juvenile’s first two offenses of [d]isturbing [s]chools (DS) or [d]isorderly [c]onduct (DC).”<sup>281</sup>

The solicitor’s announcement had the intended effect on disturbing schools charges—they plummeted.<sup>282</sup> In four of the five preceding

278. *Infra* notes 298–300 and accompanying text.

279. Letter from Donald V. Myers, Solicitor, to Dr. Karen Woodward, Superintendent (June 3, 2010) (on file with author) [hereinafter Myers Letter].

280. *Id.*

281. *Id.*

282. See S.C. DEP’T OF JUVENILE JUSTICE, STATISTICAL COUNTY DATASHEET 2015–2016 (2016) [hereinafter S.C. COUNTY 2015–2016], <http://www.state.sc.us/djj/pdfs/2015-2016%20County%20Datasheets.pdf> [https://perma.cc/8YZS-3YKN]; S.C. DEP’T OF JUVENILE JUSTICE, STATISTICAL COUNTY DATASHEET 2014–2015 (2015) [hereinafter S.C. COUNTY 2014–2015], <http://www.state.sc.us/djj/pdfs/2015-County-Datasheets.pdf> [https://perma.cc/DX3W-T6P8]; S.C. DEP’T OF JUVENILE JUSTICE, STATISTICAL COUNTY DATASHEET 2013–2014 (2014) [hereinafter S.C. COUNTY 2013–2014], <http://www.state.sc.us/djj/pdfs/2014%20County%20Datasheets.pdf> [https://perma.cc/LR5F-U9XC]; S.C. DEP’T OF JUVENILE JUSTICE, STATISTICAL COUNTY DATASHEET 2012–2013 (2013) [hereinafter S.C. COUNTY 2012–2013], <http://www.state.sc.us/djj/pdfs/2012-13%20county%20datasheets.pdf> [https://perma.cc/Q5TQ-7RZR]; S.C. DEP’T OF JUVENILE JUSTICE, STATISTICAL COUNTY DATASHEET 2011–2012 (2012) [hereinafter S.C. COUNTY 2011–2012], <http://www.state.sc.us/djj/pdfs/2011%20county%20datasheets.pdf> [https://perma.cc/T4EG-N2JH]; S.C. DEP’T OF JUVENILE JUSTICE, STATISTICAL COUNTY DATASHEET 2010–2011 (2011) [hereinafter S.C. COUNTY 2010–2011], <http://www.state.sc.us/djj/pdfs/10-11%20County%20Data sheets.pdf> [https://perma.cc/KLP3-DJY9]; S.C. DEP’T OF JUVENILE JUSTICE, STATISTICAL COUNTY DATASHEET 2009–2010 (2010) [hereinafter S.C. COUNTY 2009–2010], <http://www.state.sc.us/djj/pdfs/2010%20county%20datasheets.pdf> [https://perma.cc/Q6E2-GQM7]; S.C. DEP’T OF JUVENILE JUSTICE, STATISTICAL COUNTY DATASHEET 2008–2009 (2009) [hereinafter S.C. COUNTY 2008–2009], <http://www.state.sc.us/djj/pdfs/2008-2009-County-Datasheets.pdf> [https://perma.cc/5S KJ-N28T]; S.C. DEP’T OF JUVENILE JUSTICE, STATISTICAL COUNTY DATASHEET

years, disturbing schools had been the single most frequent charge for children referred to the Lexington County Family Court, accounting for 98 to 161 cases in each of those preceding five years.<sup>283</sup> After the letter was sent, the charge dropped out of the top five most frequent charges<sup>284</sup> and has remained out of the top five ever since.<sup>285</sup> Even if the charge was a close sixth place, it would account for no more than 24 to 54 charges, depending on the year.<sup>286</sup>

But Lexington County statistics suggest that this change had, at most, a small effect on the number of overall charges. While disturbing schools charges declined, simple assault and battery<sup>287</sup> charges spiked.<sup>288</sup> This suggests that authorities charged disturbing schools cases as something else. Where there had been 88, 61, and 89 simple assault charges in the three years preceding the solicitor's announcement, there were 189, 126, and 140 charges in the three subsequent years.<sup>289</sup> The three-year average increased by 91.2%.<sup>290</sup> That dramatic rise would be notable under any circumstances, and is particularly notable given the simultaneous decline in overall charges, and the shift away from using the disturbing schools charge.

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2007–2008 (2008) [hereinafter S.C. COUNTY 2007–2008], <http://www.state.sc.us/djj/pdfs/2008%20County%20Datasheets.pdf> [<https://perma.cc/29PX-M4M5>]

In Lexington County, there were 132 disturbing schools charges in 2005–06, 161 in 2006–07, 115 in 2007–08, 98 in 2008–09, and 117 in 2009–10. *See* sources cited *supra*. Disturbing schools was the most frequent charge in Lexington County in each of those years except 2008–09, when it was the second most frequent charge. *See* sources cited *supra*. The solicitor announced his policy change in June 2010. *See* Myers Letter, *supra* note 279. That is fortunate timing for statistical purposes because the fiscal year ends in June, so the new policy coincides with the change from the 2009–10 reporting year to the 2010–11 reporting year. For every year from 2010–11 through 2014–15, disturbing schools is not on the list of top five most frequent referrals, and the fifth most frequent charge accounted for 32, 55, 47, 25, and 52 cases in each of those years, respectively. *See* S.C. COUNTY 2014–2015, *supra*; S.C. COUNTY 2013–2014, *supra*; S.C. COUNTY 2012–2013, *supra*; S.C. COUNTY 2011–2012, *supra*; S.C. COUNTY 2010–2011, *supra* (noting collectively that only the top five charges are publicly reported).

283. *See* sources cited *supra* note 282.

284. *See* sources cited *supra* note 282.

285. *See* sources cited *supra* note 282.

286. *See* sources cited *supra* note 282.

287. The Department of Juvenile Justice reports the number of “simple assault and battery” charges per county. *See* sources cited *supra* note 282. This charge is statutorily known as assault and battery in the third degree, a misdemeanor and the least severe form of criminal assault. S.C. CODE ANN. § 16-3-600(E) (2015).

288. *See* sources cited *supra* note 282.

289. *See* sources cited *supra* note 282.

290. The average in the three years before the police change was 79 simple assault charges per year, compared with 152 in the three years which followed. *See* sources cited *supra* note 282.

The overall number of charges in the county did drop after the solicitor's 2010 letter.<sup>291</sup> However, that decline was part of a county- and state-wide trend of fewer family court referrals (which most likely largely follows reducing juvenile crime rates). The average total referrals in Lexington County for the three years before the 2010 letter were 19.7% higher than the average total referrals for the subsequent three years.<sup>292</sup> But statewide, the total number of charges dropped even more—22.7%<sup>293</sup>—raising doubt that the Lexington County solicitor's policy towards disturbing schools had much of an impact on the overall decline.

Statewide trends also suggest that authorities have historically replaced disturbing schools with simple assault and battery charges.

291. See sources cited *supra* note 282.

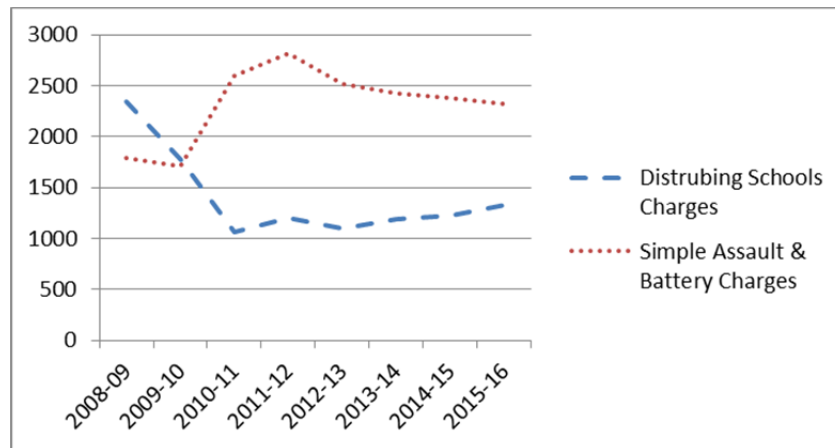
292. The S.C. county data sheets report 1011 charges in 2007–08, 1043 in 2008–09, and 1078 in 2009–10, for an average of 1044 per year. See sources cited *supra* note 282 (showing those figures had been declining from figures above 1100 in 2005–06 and 2006–07). There were 888 charges in 2010–11, 821 in 2011–12, and 805 in 2012–13, for an average of 838 charges per year—a figure of 19.7% less than 1044. See sources cited *supra* note 282.

293. For statewide totals, see S.C. REPORT 2015–2016, *supra* note 121; S.C. DEP'T OF JUVENILE JUSTICE, ANNUAL STATISTICAL REPORT 2014–2015 (2015) [hereinafter S.C. REPORT 2014–2015], <http://www.state.sc.us/djj/pdfs/2015-Annual-Statistical-Report.pdf> [<https://perma.cc/4CVN-WCPG>]; S.C. DEP'T OF JUVENILE JUSTICE, ANNUAL STATISTICAL REPORT 2013–2014 (2014) [hereinafter S.C. REPORT 2013–2014], <http://www.state.sc.us/djj/pdfs/2014%20Annual%20Statistical%20Report.pdf> [<https://perma.cc/56X9-QNEM>]; S.C. DEP'T OF JUVENILE JUSTICE, ANNUAL STATISTICAL REPORT 2012–2013 (2013) [hereinafter S.C. REPORT 2012–2013], <http://www.state.sc.us/djj/pdfs/2012-13%20Annual%20Statistical%20Report.pdf> [<https://perma.cc/G2TF-6UTS>]; S.C. DEP'T OF JUVENILE JUSTICE, ANNUAL STATISTICAL REPORT 2011–2012 (2012) [hereinafter S.C. REPORT 2011–2012], <http://www.state.sc.us/djj/pdfs/2011-12%20Annual%20Statistical%20Report.pdf> [<https://perma.cc/KCA9-L876>]; S.C. DEP'T OF JUVENILE JUSTICE, ANNUAL STATISTICAL REPORT 2010–2011 (2011) [hereinafter S.C. REPORT 2010–2011], <http://www.state.sc.us/djj/pdfs/2010-11%20Annual%20Statistical%20Report.pdf> [<https://perma.cc/L8YW-Y959>]; S.C. DEP'T OF JUVENILE JUSTICE, ANNUAL STATISTICAL REPORT 2009–2010 (2010) [hereinafter S.C. REPORT 2009–2010], <http://www.state.sc.us/djj/pdfs/2010%20Annual%20Statistical%20Report.pdf> [<https://perma.cc/MJ9W-UWSS>]; S.C. DEP'T OF JUVENILE JUSTICE, ANNUAL STATISTICAL REPORT 2008–2009 (2009) [hereinafter S.C. REPORT 2008–2009], <http://www.state.sc.us/djj/pdfs/2008-09-Annual-Statistical-Report.pdf> [<https://perma.cc/8HV3-3L8Q>]; S.C. DEP'T OF JUVENILE JUSTICE, ANNUAL STATISTICAL REPORT 2007–2008 (2008) [hereinafter S.C. REPORT 2007–2008], <http://www.state.sc.us/djj/pdfs/2008-Statistical-Report.pdf> [<https://perma.cc/6UGX-WF9A>].

There were 23,826 statewide charges in 2007–08, 23,111 in 2008–09, and 20,394 in 2009–10, for an average of 22,444. See sources cited *supra*. In the next three years, there were 18,114 in 2010–11, 17,180 in 2011–12, and 16,754 in 2012–13, for a three-year average of 17,349. See sources cited *supra*. That reflects a 22.7% decline. See sources cited *supra*.

After the South Carolina Department of Juvenile Justice studied disturbing schools charges (and the racial disparities within them) in the 2008–2009 fiscal year,<sup>294</sup> the number of disturbing schools charges declined—from 2339 in 2008–2009 to 1780 in the following year and 1067 in 2010–2011.<sup>295</sup> As in Lexington County, when disturbing schools charges declined, simple assault and battery charges picked up much of the slack. They spiked by nearly 900 in 2010–2011, and subsequently disturbing schools charges have crept back up while simple assault and battery charges have crept down in tandem.<sup>296</sup> Notably, as Figure 1 illustrates, the trend line for each charge appears to be a mirror image of the trend line for the other.

Figure 1. The relationship between disturbing schools and simple assault and battery charges in South Carolina Family Courts.<sup>297</sup>



The most likely explanation of these data is that when authorities charged children for disturbing schools less frequently, they started charging them for simple assault (and likely other charges) that could be applied to schoolyard fights and other misbehavior. Fewer disturbing schools charges is still a good thing. It would be difficult to frame the Spring Valley High School student's refusal to put away her

294. DISTURBING SCHOOLS DATA FY 2008–2009, *supra* note 160, at slide 5.

295. *Id.*

296. *See infra* Figure 1 and note 297.

297. For the source of the collected data presented in Figure 1, see S.C. REPORT 2015–2016, *supra* note 121; S.C. REPORT 2014–2015, *supra* note 293; S.C. REPORT 2013–2014, *supra* note 293; S.C. REPORT 2012–2013, *supra* note 293; S.C. REPORT 2011–2012, *supra* note 293; S.C. REPORT 2010–2011, *supra* note 293; S.C. REPORT 2009–2010, *supra* note 293; S.C. REPORT 2008–2009, *supra* note 293.



cell phone as simple assault, and thus similar conduct would not likely be charged if the disturbing schools statute is amended. But the close relationship between disturbing schools and simple assault and battery charges should give some caution to advocates for narrowing the criminal law. That step without others will probably reduce the number of children arrested and charged for misbehavior at school somewhat, but is unlikely to cause more dramatic change.

South Carolina appears to be in the process of breaking this pattern—but the bottom line is that advocates should look beyond the scope of the criminal law. The most recent year's data reveals a 50% decline in the number of disturbing schools charges—from 1324 in 2015–2016 to 652 in 2016–2017.<sup>298</sup> It appears that some disturbing schools cases are, consistent with prior practice, simply being charged as other crimes. While overall charges decreased 12% and non-violent charges decreased 14%,<sup>299</sup> public disorderly conduct charges actually increased slightly—suggesting that some disturbing schools cases are being charged as disorderly conduct.<sup>300</sup> Even so, the dramatic drop in disturbing schools charges significantly outweighs any such shift. Notably, this dramatic decline happened without any statutory changes, as efforts to reform the disturbing schools statute remain pending. Some other legal reforms or practice changes must therefore explain the reduction in disturbing schools charges. This conclusion should not discourage efforts to reform the disturbing schools statute—it remains an overly broad and frequently used criminal law. This conclusion should, however, focus efforts on other reforms beyond disturbing schools legislation as even more powerful means to limit the school-to-prison pipeline.

Texas has an instructive and optimistic experience. In 2013, Texas narrowed its version of disturbing schools—misdemeanor offenses of “disruption of class” and “disruption of [school] transportation”—so they do not apply to children attending their own school.<sup>301</sup> A

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298. S.C. DEP'T OF JUVENILE JUSTICE, ANNUAL STATISTICAL REPORT 2016–2017, at 13 (2017) [hereinafter S.C. REPORT 2016–2017], <http://www.state.sc.us/djj/pdfs/2016-17%20Annual%20Statistical%20Report.pdf> [<https://perma.cc/TA2E-FK28>].

299. *Id.* at 11. Total referrals decreased from 15,429 in 2015–2016 to 13,591 in 2016–2017, or 11.9%. *Id.* Nonviolent referrals decreased from 14,172 in 2015–2016 to 12,194 in 2016–2017, a 14.0% decrease. *Id.*

300. Compare S.C. REPORT 2016–2017, *supra* note 298, at 13, with S.C. REPORT 2015–2016, *supra* note 121, at 13. That some disturbing schools cases could now be charged as disorderly conduct cases should not come as a surprise since the deputy in the Spring Valley incident initially charged Niya Kenny with disorderly conduct. See *supra* text accompanying note 67.

301. Act of Sept. 1, 2013, Tex. S.B. No. 1114, §§ 6–7 (2013), <http://www.capitol.state.tx.us/tlodocs/83R/billtext/pdf/SB01114F.pdf#navpanes=0>

significant change promptly followed. Citations issued to students fell by about fifty percent immediately, and reduced school-based arrests by one-third.<sup>302</sup> But it is hard to attribute this decline entirely to that statutory change, because the legislature enacted other reforms at the same time—prohibiting officers from ticketing children at school and requiring them to complete complaints, including sworn statements by school officials about any disabilities the child may have and what “graduated sanctions” the school attempted.<sup>303</sup> And even in Texas there was still a substitution effect, showing that the Texas reforms did not stop authorities from using arrests as a form of school discipline. A 2016 review of Texas data found a greater reliance on disorderly conduct charges after the 2013 legislative change, “suggesting that Disorderly Conduct has replaced Disruption of Class and Transportation as a general catch-all offense.”<sup>304</sup> Schoolyard fights, disorderly conduct, and similar charges continue to account for more than half of all school-based incidents which lead to court action.<sup>305</sup>

Skepticism that narrowing the criminal law alone will dramatically reduce school-based arrests and charges is consistent with the experience of other states discussed in Section II.A.1. Even when other states did not have disturbing schools statutes, authorities charged children for petty school misbehavior by labeling it something else—disorderly conduct or “failure to comply.”<sup>306</sup> Relabeling relatively less severe offenses has occurred in other juvenile justice contexts, and we should expect no different here.<sup>307</sup>

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[<https://perma.cc/AL6C-NE3B>] (providing for the prosecution of certain misdemeanor offenses committed by children and to school district law enforcement) (amending TEX. EDUC. CODE ANN. §§ 37.124 & 27.126).

302. TEX. APPLESEED & TEX. CARE FOR CHILDREN, DANGEROUS DISCIPLINE: HOW TEXAS SCHOOLS ARE RELYING ON LAW ENFORCEMENT, COURTS, AND JUVENILE PROBATION TO DISCIPLINE STUDENTS 11 (2016) [hereinafter TEXAS APPLESEED], <http://stories.texasappleseed.org/dangerous-discipline> [<https://perma.cc/XWZ8-TK> AQ].

303. Act of May 20, 2013, Tex. S.B. No. 393 § 12 <http://www.capitol.state.tx.us/tlodocs/83R/billtext/pdf/SB00393F.pdf#navpanes=0> [<https://perma.cc/FZE3-DGN8>] (regarding the criminal procedures related to children who commit certain Class C misdemeanors) (codified at TEX. EDUC. CODE ANN. § 37.146).

304. TEXAS APPLESEED, *supra* note 302, at 11.

305. *Id.* at 5.

306. S.C. DEP’T OF EDUC., *supra* note 193, at 9.

307. See Barry C. Feld, *Violent Girls or Relabeled Status Offenders? An Alternative Interpretation of the Data*, 55 CRIME & DELINQ. 241, 242 (2009) (arguing that increasing arrests of girls for simple assaults, especially domestic assaults, were relabeled status offenses after statutes limited states’ ability to incarcerate status offenders).

This analysis should not dissuade advocates from working to repeal or narrow disturbing schools statutes, but rather, puts such efforts into context. Compared with the status quo disturbing schools statute, it would be preferable to have no disturbing schools statute applicable at all or at least to have such a statute narrowed by statutory language or court decision, as several states have done.<sup>308</sup> But if either of these preferences were followed absent other changes, one should expect only a modest limitation on the school-to-prison pipeline, and for authorities to rely more frequently on charges other than disturbing schools. How many school-based arrests and charges will occur will vary from state to state. But even when large reductions are possible, narrowing the criminal law will leave plenty of incidents best handled at school within the boundaries of the criminal law. Thus, narrowing efforts are helpful, but will not solve the entire school-to-prison pipeline problem.

### B. Governing the Role of SROs

Nationally, some of the most prominent efforts to reform the school-to-prison pipeline have focused on the role of SROs. Ferguson, Missouri, represents a leading illustration.<sup>309</sup> The DOJ's 2015 investigation of the Ferguson Police Department (triggered by protests surrounded the police shooting death of Michael Brown in 2014) included findings criticizing Ferguson SROs for "treat[ing] routine discipline issues as criminal matters," including frequently charging children with "[f]ailure to [c]omply, [r]esisting [a]rrest, and [p]eace [d]isturbance."<sup>310</sup> By the spring of 2016, the DOJ and Ferguson had entered into a consent decree which called for limiting SROs' role.<sup>311</sup> The consent decree requires "SRO Non-Involvement in School Discipline" and specifically directs school officials, rather than SROs, to handle "minor offenses committed by students, including, but not limited to, disorderly conduct, peace disturbance, loitering, trespass, profanity, dress code violations, and fighting not involving a weapon and not resulting in physical injury."<sup>312</sup> This provision recognizes that many incidents which fall within the

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308. *Supra* notes 151–56 and accompanying text.

309. *Cf.* INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 136 and accompanying text (discussing charges filed by SROs).

310. INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 136, at 37.

311. Consent Decree, *United States v. City of Ferguson*, 4:16-cv-00180-CDP, 48–52 (2016).

312. *Id.* at 50.

boundaries of the criminal law are best framed as school disciplinary matters rather than law enforcement matters.

But wider federal reform efforts have not adequately addressed the role of SROs.<sup>313</sup> The federal involvement in Ferguson made it a unique case. The DOJ and the U.S. Department of Education's most recent guidance<sup>314</sup> offers much more modest reforms. As discussed above,<sup>315</sup> model memoranda of agreements from the government and NASRO at the time of the Spring Valley incident did not impose limits on when schools could refer children to SROs or what SROs could do in those situations. In September 2016, the Departments offered guidance calling for some improvements in managing SROs' activities, but which would not fundamentally limit their role. The Departments published a "Safe School-based Enforcement through Collaboration, Understanding, and Respect ("SECURE") State and Local Policy Rubric."<sup>316</sup> The SECURE rubric called on districts and local law enforcement agencies to enter into memoranda of understanding, and to "involve[ ] . . . community stakeholders in the development of [memoranda of understanding]," citing state statutes and regulations requiring such involvement.<sup>317</sup> Notably, neither the SECURE rubric nor the state laws it cited recommend or require memoranda of understanding to contain express limits on the actions of SROs such as those in the Ferguson consent decree. To the extent the SECURE rubric says anything about SROs' roles at school, it suggests that SROs should *remain* involved in petty criminal matters, such as disturbing schools, minor fights, and the like. It encourages

313. It is worth noting that some advocates have called for more dramatic reform "ending the regular presence of law enforcement in schools." DIGNITY IN SCH., COUNSELORS NOT COPS: ENDING THE REGULAR PRESENCE OF LAW ENFORCEMENT IN SCHOOLS 2 (2016), [http://www.dignityinschools.org/sites/default/files/DSC\\_Counselors\\_Not\\_Cops\\_Recommendations.pdf](http://www.dignityinschools.org/sites/default/files/DSC_Counselors_Not_Cops_Recommendations.pdf) [<https://perma.cc/9JWL-U9C2>]. While much can be said for such a call, I do not focus on it because it has not garnered much political traction nationally nor has it played a role in post-Spring Valley reform efforts in South Carolina. For purposes of this Article, I focus on efforts to exclude SROs' involvement from school disciplinary matters, and thus reduce the number of arrests and charges arising from such matters.

314. As noted, *supra* note 187, it remains to be seen whether the Trump Administration will revise this guidance.

315. *Supra* notes 199–205 and accompanying text.

316. U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., SAFE SCHOOL-BASED ENFORCEMENT THROUGH COLLABORATION, UNDERSTANDING, AND RESPECT (SECURE) STATE AND LOCAL POLICY RUBRIC [hereinafter SECURE RUBRIC], <https://www2.ed.gov/documents/press-releases/secure-policy.pdf> [<https://perma.cc/9QXN-PUK5>].

317. *Id.* at 2–4 (citing MO. REV. STAT. § 162.215 (2016); 22 PA. CODE § 10.11 (2012); N.J. ADMIN. CODE § 6A:16-6.2 (2014)).

memoranda of understanding to “[e]liminate the involvement of SROs in *non*-criminal matters,”<sup>318</sup> suggesting ongoing involvement in criminal matters.

The SECURE rubric also suggests that memoranda of understanding should “[e]ncourage officers to minimize arrests for minor school-based offenses.”<sup>319</sup> This “encouragement” is welcome, but the verb choice illustrates the guidance’s weakness; minimizing arrests is encouraged, but fundamentally optional. To its credit, the rubric does cite several sample memoranda of understanding with more specific limits.<sup>320</sup> For example, it cited a Broward County, Florida agreement providing that “[i]n any school year, the first instance of student misbehavior that rises to the level of a non-violent misdemeanor . . . should not result in arrest nor the filing of a criminal complaint.”<sup>321</sup> Even this MOU, however, ensures that SROs have the discretion to arrest any child for any crime.<sup>322</sup> Thus, model federal memoranda continue to eschew the recommendation of advocates like the Advancement Project, which propose memoranda that would limit when schools can refer children to SROs and when SROs can arrest or charge children.<sup>323</sup>

The federal guidance also urges memoranda of understanding to require school districts and law enforcement agencies to “collect[ ], analyz[e], and report[ ]” data regarding SROs—how often they arrest or charge children, and the demographics (including race) of those children.<sup>324</sup>

This section will describe efforts in South Carolina to limit the role of SROs—and, in particular, to keep SROs away from school discipline matters—both locally in the county where the Spring Valley incident occurred and statewide. Locally, these efforts include a voluntary agreement with DOJ, which mandates limits on SROs’ roles and revising memoranda of agreement regarding SROs subsequent to the Spring Valley incident. Statewide efforts include a 2017 South Carolina Department of Education regulation limiting when schools may involve SROs. The voluntary agreement with DOJ and the state regulations are the most promising reforms, and limit when schools can involve SROs more dramatically, while leaving

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318. *Id.* at 9 (emphasis added).

319. *Id.*

320. *Id.* at 9–13.

321. *Id.* at 10.

322. *Id.* at 11–12.

323. *Supra* notes 199–200 and accompanying text.

324. SECURE RUBRIC, *supra* note 316, at 6.

much discretion with individual school districts. The revised memoranda of agreement largely track the most recent federal guidance—they include some useful improvements but do not impose binding limits on SRO involvement.

### 1. *Local SRO Reforms in Richland County*

The most dramatic change in practice in South Carolina since the Spring Valley incident is evident in Richland County, where that incident occurred. The Richland County Sheriff's Department—the department that employed, and fired, the SRO involved in that incident—reports that it dramatically reduced arrests of children by SROs in the school year after the incident.<sup>325</sup> In the 2015–2016 school year, it reported 268 such arrests, compared with only 123 in the 2016–2017 school year, a 54% decrease,<sup>326</sup> with drug and weapon possession charges accounting for a majority of the remaining arrests.<sup>327</sup> Richland County reforms led to particularly dramatic changes compared with statewide trends. From 2015–2016 to 2016–2017, overall juvenile court referrals declined 11.9% statewide, and 22% in Richland County.<sup>328</sup> Disturbing schools charges fell particularly precipitously in Richland County—from 97 in 2014–2015<sup>329</sup> to 62 in 2015–2016,<sup>330</sup> to so few that the state does not report county specific numbers in 2016–2017.<sup>331</sup>

What legal reforms caused that decline? Following the Spring Valley incident and the DOJ's investigation of the Richland County Sheriff's Department, the sheriff's department took several steps to prevent SROs from becoming involved in regular school discipline. In particular, they agreed to several limits on SROs' roles via a voluntary agreement with the DOJ—entered into between the two school years noted above—and negotiated new memoranda of agreement with all of its local school districts to take effect in the

325. Deputy Chief Chris Cowan, The Richland County Sheriff's Departments SRO Program: Innovation and Excitement for the 21st Century, slide 19 (2017) (on file with author).

326. *Id.*

327. Telephone Interview with Captain John Ewing, Richland County Sheriff's Dep't (June 26, 2017).

328. S.C. DEP'T OF JUVENILE JUSTICE, STATISTICAL COUNTY DATASHEET 2016–2017, at 40 (2017) [hereinafter S.C. COUNTY 2016–2017], <http://www.state.sc.us/djj/pdfs/2016-2017%20County%20Datashets.pdf> [<https://perma.cc/8KFF-HPR3>].

329. S.C. COUNTY 2014–2015, *supra* note 282, at 40.

330. S.C. COUNTY 2015–2016, *supra* note 282, at 40.

331. The state reports the five most frequent charges in each county. Disturbing schools fell out of the top five in 2016–2017 for Richland County, meaning it was at least below 27 cases. S.C. COUNTY 2016–2017, *supra* note 328, at 40.

2017–2018 school year.<sup>332</sup> Just as the consent decree in Ferguson, Missouri contains stronger terms than national guidelines for memoranda of agreement, the Richland County voluntary agreement contains stronger provisions than the revised memoranda and is the clearest legal cause of the decline in arrests. That agreement, however, comes with a 2019 expiration date,<sup>333</sup> thus underscoring the ongoing need for stronger terms in memoranda of agreement.

*a. Voluntary Agreement with the DOJ*

In August 2016, the Richland County Sheriff’s Department entered into a voluntary agreement with the DOJ, in which the DOJ ended its investigation into the sheriff’s department early and the department agreed to a range of steps to improve its performance.<sup>334</sup> The voluntary agreement provides that SROs should not engage “in classroom management or school discipline matters that should be appropriately handled by school staff.”<sup>335</sup> But, where the revised memoranda continue to require schools to report incidents to SROs, the voluntary agreement includes provisions to keep SROs out of such incidents. The agreement, for instance, lists a range of offenses which “should typically be considered school discipline issues, and should be addressed by school personnel rather than SROs.”<sup>336</sup> That list reads more like the Ferguson, Missouri consent decree than the DOJ-recommended memoranda of agreement. It includes disorderly conduct, loitering, trespass, “fighting that does not involve a weapon or a physical injury that is more than *de minimis*,” and disturbing schools, unless there is a “serious, real, and immediate threat to the safety of the school and its community.”<sup>337</sup>

Consistent with that agreement, the department has changed many of its internal practices with the explicit goal of learning from the Spring Valley incident. In addition to significant training focused on

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332. 2017–18 Memoranda of Agreement with the Richland School District Two, Richland School District One and the Lexington-Richland School District Five [hereinafter 2017–18 Memoranda of Agreement] (on file with author). The agreements are identical with the exception of the specific schools to which they apply and the amount of money each district pays the sheriff’s department in exchange for SRO services. The sheriff’s department agreement with DOJ required it to review its memoranda of understanding with local school districts. DOJ COMPLIANCE REVIEW LETTER, *supra* note 101.

333. Reforms related to the selection, training, and supervision of SROs are beyond the scope of this Article.

334. DOJ COMPLIANCE REVIEW LETTER, *supra* note 101, ¶ 8, ¶¶ 74–75.

335. *Id.* ¶ 4.

336. *Id.* ¶ 55.

337. *Id.* ¶ 55.

alternatives to arrests and charges, and how traumas and mental health conditions affect children's behavior, the captain who supervises all SROs employed by the department meets with each SRO after an arrest to discuss whether an arrest was necessary in that situation.<sup>338</sup>

The agreement is only legally binding for three years,<sup>339</sup> making ongoing legal instruments, like memoranda of agreement between the department and school districts, of particular importance.

*b. Renegotiated Memoranda of Agreement*

Local authorities also renegotiated memoranda of agreement between the Richland County Sheriff's Department and local school districts. These renegotiated memoranda of agreement expand the SRO program. In the 2017–2018 school year, the Richland County School District Two will spend \$230,000 more for SROs than it did at the time of the Spring Valley incident.<sup>340</sup> The sheriff's department will assign four additional SROs to the school district.<sup>341</sup> Other provisions largely follow the 2016 federal guidance—they are a step forward from prior memoranda of agreement and discourage arrests of students, but continue to require school administrators to report any crime to SROs and leave individual SROs with the authority to determine whether to arrest any individual student.

The revised Richland County memoranda have several elements that track the 2016 federal guidance. They include several paragraphs that “strongly encourage” SROs to use alternatives to arrest for offenses such as disorderly conduct, trespassing, and loitering.<sup>342</sup> And they require the sheriff's department and SROs to track and make publicly available data regarding how frequently children are arrested or charged and the race (and other details) of children arrested or charged by SROs.<sup>343</sup> The latter step was explicitly required in the sheriff's department's agreement with the DOJ following the DOJ's investigation into its SROs.<sup>344</sup>

Despite those additions, the key legal points in these new memoranda of agreement remain unchanged from the memoranda in place at the time of the Spring Valley incident, and thus are less

338. Telephone Interview with Captain John Ewing, *supra* note 327.

339. DOJ COMPLIANCE REVIEW LETTER, *supra* note 101, ¶ 11.

340. 2017–18 Memoranda of Agreement, *supra* note 332, at 1.

341. *Id.*

342. *Id.* at 3 (emphasis in original).

343. *See id.* at 2.

344. DOJ COMPLIANCE REVIEW LETTER, *supra* note 101, ¶ 28, ¶ 45.



legally effective than the voluntary agreement in separating law enforcement from school discipline. Where the voluntary agreement includes provisions to keep SROs out of incidents better handled by school staff, the revised memoranda continue to require schools to report incidents to SROs.<sup>345</sup> The new memoranda emphasize in bold font the pre-existing language stating that SROs are not school disciplinarians but follow that language with the same troublesome provision requiring schools to report any criminal activity to the SRO.<sup>346</sup> That provision threatens to turn SROs into disciplinarians, whether in bold text or not. That risk is especially strong so long as disturbing schools remains a criminal charge in its current form. One might argue that if the disturbing schools bill is enacted and that law can no longer apply to children properly at their own school, then this provision in the memoranda will result in fewer cases referred to SROs. But the wide range of other charges which could substitute—and have substituted—for disturbing schools suggest that this MOA provision will still require a wide range of behavior to be referred to SROs. Moreover, this MOA language exceeds what the South Carolina reporting statute requires. Under that law, schools must only report conduct that results in injury or a serious threat of injury, and gives school boards authority to define those terms,<sup>347</sup> while the memoranda require the reporting of *any* crime. Consistent with the memoranda of agreement maintaining troublesome language requiring schools to refer crimes to SROs, the relevant school district policy continues to permit law enforcement involvement not only when crime occurs, but in pure school discipline situations, when one child's behavior affects another's "learning opportunities."<sup>348</sup>

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345. 2017–18 Memoranda of Agreement, *supra* note 332, at 3, ¶ 1.

346. The renegotiated MOA reads:

**The SRO shall not act as a school disciplinarian**, as disciplining students is a school responsibility. However, if the incident is a violation of the law, the Principal shall contact the SRO or their supervisor in a timely manner and the SRO shall then determine whether law enforcement action is appropriate.

*Id.* at 1, ¶ 1 (emphasis in original). This is the same precise language as was included in the prior MOA. *See supra* notes 202–03. The only difference is that the new MOA places this language in a more prominent location and has bolded the first phrase. *See also* 2017–18 Memoranda of Agreement, *supra* note 332, at 6, ¶ 30.

347. S.C. CODE ANN. § 59-24-60 (1994).

348. *Supra* note 209 and accompanying text.

The memoranda ensure that SROs have discretion whether to arrest or charge children for such incidents.<sup>349</sup> This discretion illustrates a concern raised by Barbara Fedders—that even improved agreements can preserve police authority to determine when to arrest children, thus limiting the effect of reforms.<sup>350</sup> That concern is particularly apt with the new memoranda because they are weaker than the model memoranda of agreement identified in the 2016 federal guidance—while the latter make clear that a first time non-violent misdemeanor should not lead to an arrest or charges,<sup>351</sup> no such limitation exists in the Richland County memoranda.

Jason Nance recommended that memoranda of agreement “specify that SROs will not become involved in routine disciplinary matters.”<sup>352</sup> The MOA in effect for the Spring Valley incident and the subsequently revised memoranda indicate that it does not suffice to simply state that SROs should not engage in school discipline. Memoranda of agreement should clearly prohibit schools from referring children to SROs absent imminent safety risks,<sup>353</sup> and prohibit SROs from arresting children for minor non-violent offenses unless the behavior is repeated and the school has tried other interventions.

The revised memoranda’s continued requirement that schools report all crime to SROs creates a tension with the voluntary agreement. Under the memoranda, school officials are contractually obligated to report misbehavior that amounts to minor crimes to SROs.<sup>354</sup> But under the voluntary agreement, SROs should consider such behavior to be school discipline rather than law enforcement matters, and not get involved.<sup>355</sup> An important reform would be to incorporate more of the voluntary agreement’s provisions into memoranda of agreement, especially once the voluntary agreement with the DOJ expires in 2019.

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349. 2017–18 Memoranda of Agreement, *supra* note 332, at 3 (“[T]he SRO shall then determine whether law enforcement action is appropriate. . . . The discretion of filing formal charges is left solely up to the SRO.”).

350. Fedders, *supra* note 41, at 585.

351. *Supra* note 325, at slide 16.

352. Nance, *Rethinking Law Enforcement Officers in Schools*, *supra* note 87, at 158.

353. *Id.*

354. 2017–18 Memoranda of Agreement, *supra* note 332, at 3, ¶ 1.

355. *See* 2017–18 Memoranda of Agreement, *supra* note 323, at 3.

## 2. South Carolina Department of Education Regulations

The South Carolina Department of Education promulgated regulations which more effectively distinguish law enforcement from school discipline by limiting when schools may refer behavior to SROs.<sup>356</sup> The regulations explicitly exempt certain conduct from the list of crimes that must trigger automatic law enforcement referrals—disturbing schools, breach of peace, disorderly conduct, affray, and assault and battery which does not pose “a serious threat of injury or result[ ] in physical harm.”<sup>357</sup> Schools may refer such less severe offenses to SROs “only when the conduct rises to a level of criminality, and the conduct presents an immediate safety risk to one or more people or it is the third or subsequent act which rises to a level of criminality in that school year.”<sup>358</sup> This language is based on the Ferguson consent decree, which keeps SROs out of routine school disciplinary incidents,<sup>359</sup> and a leading interagency agreement, which prevents arrests or prosecutions for a similar list of minor charges unless a student has committed at least three offenses in the school

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356. See 41(5) S.C. Reg. 57–65 (May 26, 2017), [http://www.scstatehouse.gov/state\\_register.php](http://www.scstatehouse.gov/state_register.php) [<https://perma.cc/WZK3-D7JY>] (codified at S.C. Reg. 43-279 & 43-210). Although an examination of the drafting history of these regulations is beyond the scope of this Article, it is worth noting how various advocates’ efforts improved these regulations. Shortly after the Spring Valley incident, the South Carolina Department of Education convened a Safe Schools Task Force, which recommended new regulation regarding SROs, and revisions to an existing regulation regarding school discipline codes. See S.C. DEP’T EDUC., SOUTH CAROLINA SAFE SCHOOLS TASKFORCE REPORT 5 (2016), <http://ed.sc.gov/newsroom/public-information-resources/south-carolina-safe-schools-taskforce-report/> [<https://perma.cc/ZZ8G-XD> SQ]. Those proposed regulations would not have prevented the Spring Valley incident. The SRO regulation would have required memoranda of agreement but did not require any specific limitations on the role of SROs. *Id.* at 17–18. And the discipline regulation (like the MOA in effect for the Spring Valley incident) would have required schools to report any criminal conduct, no matter how minor, to law enforcement. *Id.* at 12 (proposed S.C. Reg. 43-279(IV)(B)(3)(d)). Following critical comments from multiple advocates (including, in full disclosure, myself), the South Carolina Senate Education Committee returned the regulations to the Department, insisting that it revise them. Regulation Document Numbers 4657 & 4659 (reporting that “Committee Requested Withdrawal” and that the regulations were “Withdrawn and Resubmitted”), <http://www.scstatehouse.gov/regnsrch.php> [<https://perma.cc/5KSK-M74S>]. The revisions included the limits on SRO contacts and law enforcement referrals discussed in this section.

357. S.C. CODE ANN. REGS. 43-279(IV)(C)(2)(a) & (3) (2017). Exempting this list of offenses echoes provisions of the Richland County Sheriff’s Department’s voluntary agreement with the DOJ. See DOJ COMPLIANCE REVIEW LETTER, *supra* note 101, at 12–13, ¶ 55.

358. S.C. CODE ANN. REGS. 43-279(IV)(B)(3)(d) & 43-210(IV)(A) (2017).

359. See *supra* notes 311–12 and accompanying text.

year at issue.<sup>360</sup> Further regulatory limits on law enforcement referrals are not likely possible in South Carolina so long as the statute requires referrals whenever an action “may result or results in injury or serious threat of injury.”<sup>361</sup>

The regulation requires law enforcement agencies and school districts to enter memoranda of agreement before placing SROs in schools, and those memoranda must include the regulatory limitations on SROs’ roles.<sup>362</sup> This provision should require a re-evaluation of the terms criticized in Section III.B.1 that continue to require schools to refer all incidents that amount to a crime to SROs.

These regulations are the furthest reaching statewide reform since the Spring Valley incident. They explicitly prevent referrals to law enforcement for misdemeanor offenses—and do so more strongly than the revised Richland County memoranda of agreement.<sup>363</sup> By limiting the number of cases that schools can refer to SROs, it avoids the concern that authorities can simply re-label disturbing schools as another offense.<sup>364</sup> Quite simply, if law enforcement is not involved in a school discipline situation, then law enforcement cannot arrest or charge children in that situation.

Nonetheless, even these revised regulations would still permit schools to inform SROs of any incident involving a petty crime that the school interprets to pose a safety threat of any kind. The regulation leaves it to schools to define what conduct “presents an immediate safety risk” and to determine which such conduct they will refer to SROs. The regulation also permits schools to determine when a simple assault “poses a serious threat of injury or results in physical harm” (and thus triggers an automatic law enforcement referral).<sup>365</sup> Reporting a child to law enforcement for refusing to put a cell phone away, as in the Spring Valley incident, would likely have been prohibited. But in common situations of school fights, any fight could be reasonably feared to pose a threat of injury to others and thus involve SROs. The effect of this promising new regulation, therefore, will depend on how schools implement it.

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360. *See supra* note 235.

361. S.C. CODE ANN. § 59-24-60 (1994).

362. S.C. CODE ANN. REGS. 43-210(V) (2017).

363. *See supra* Section III.B.1.b.

364. *See supra* Section III.A.

365. S.C. CODE ANN. REGS 43-279(IV)(B)(3)(d) & (C)(2)(a) (2017).

### C. Other Pillars of the Pipeline

While Sections III.A and III.B summarize some impressive legal reform efforts, those efforts only address a portion of the laws that structure the school-to-prison pipeline. Several key pieces of the pipeline's legal architecture remain untouched by reform efforts.

#### 1. Reporting Statutes

First, there has been no effort to narrow the statute requiring schools to report to law enforcement incidents posing a “serious threat of injury” to a person or property.<sup>366</sup> Juvenile justice law is now evolving towards a less punitive and more rehabilitative model, which includes questioning tough-on-crime era reforms such as this reporting statute.<sup>367</sup> But no bill challenging the reporting requirement has been introduced in the South Carolina legislature. Until that happens, many fights at school must, by law, be reported to law enforcement, even when a school-based disciplinary intervention is more appropriate. The statute includes language permitting schools to define what level of injury or threat triggers this requirement. At most, however, that language allows some school districts to narrow their reporting obligations under this statute. Naturally, only school districts that wish to narrow their obligations will do so. As under the new state regulations, districts remain free to report a broad range of incidents to law enforcement.

#### 2. Absence of School-Based Diversion Programs

Second, diversion programs have expanded—but they largely continue to operate through law enforcement rather than through schools. In Richland County, law enforcement-based programs are growing pursuant to the Richland County Sheriff's Department's voluntary resolution agreement with the DOJ. That agreement requires SROs to use the “least coercive measures” possible in response to students, including “restorative justice approaches.”<sup>368</sup> In addition, the agreement requires that the sheriff's department train

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366. S.C. CODE ANN. § 59-24-60 (1994).

367. See Sayali Himanshu Bapat & Barbara Bennett Woodhouse, *Is There Justice for Juveniles in the United States, India, and Italy?: Towards a Framework for Transnational Comparisons*, in *THE FUTURE OF JUVENILE JUSTICE: PROCEDURE AND PRACTICE FROM A COMPARATIVE PERSPECTIVE* 37, 45–46 (Tamar R. Birckhead & Solange Muthaan eds., 2016).

368. DOJ COMPLIANCE REVIEW LETTER, *supra* note 101, at 12–13, ¶ 55(d); see also *id.* at 13, ¶ 58 (listing restorative justice practices as possible means to address student misbehavior).

SROs in any school-based restorative justice or other diversion programs,<sup>369</sup> and to maximize use of all available programs.<sup>370</sup> On a statewide level, the revised state disciplinary regulations list restorative justice and other interventions as alternatives to more punitive interventions for student misconduct.<sup>371</sup>

But neither the voluntary agreement nor the new state regulations actually create (or require districts to create) diversion programs operated through school systems.<sup>372</sup> Such programs have grown slightly, but remain sparse. The revised Richland County memoranda of agreement encourage SROs to access diversion programs, but note that they are operated through the Richland County Sheriff's Department Youth Services Division.<sup>373</sup> Small school-based restorative justice programs exist in a small number of local school districts in the state. The Richland One School District has a pilot restorative justice program run with law student volunteers, but the program was so small as to not be included on the district's website as of this writing.<sup>374</sup> The Charleston School District announced plans to start restorative justice programs in three schools in the 2017–2018 school year.<sup>375</sup> These are hopeful but small steps and there has been no concerted effort as yet to develop such programs statewide. Law enforcement involvement thus remains essential to accessing diversion programs.

### 3. *Prosecutorial Discretion*

Third, there has been no legal reform effort to reconsider how authorities determine which charges to prosecute and which to divert

369. *See id.* at 14, ¶ 59(d) & 17, ¶ 66(e).

370. *See id.* at 9, ¶ 38.

371. 41(5) S.C. Reg. 60 (May 26, 2017), [http://www.scstatehouse.gov/state\\_register.php](http://www.scstatehouse.gov/state_register.php) [<https://perma.cc/UL67-XRN6>] (codified at S.C. CODE ANN. REGS. 43-279(IV)(B)(3)(c) (2017)).

372. For the voluntary agreement, see DOJ COMPLIANCE REVIEW LETTER, *supra* note 101. For the regulations, see S.C. CODE ANN. § 59-24-60 (1994).

373. *See* DOJ COMPLIANCE REVIEW LETTER, *supra* note 101, at 3.

374. *See* Email from Brittney Alls, Richland One School District Ombudsman, to author (Jan. 25, 2017) (on file with author).

375. *See* Email from Jennifer Coker to Heather Goergen, Juris Doctor Candidate, University of South Carolina School of Law (June 13, 2017, 7:38 AM EDT) (on file with author) (“We are just beginning our Restorative Practices initiative in 2017–2018 with 3 schools . . .”). This effort follows a revision to the Charleston school district's discipline code, which explicitly identified a category of less serious misbehavior as incidents that should be “Teacher Managed.” Email from Jennifer Coker to Heather Goergen, Juris Doctor Candidate, University of South Carolina School of Law (July 14, 2017, 3:30 PM EDT) (on file with author).

or dismiss. Consider what could happen even if reformers succeed in narrowing disturbing schools statutes and in limiting rules for when schools may refer incidents to SROs. SROs will still be present in schools, and will still have the potential to arrest and charge students for misbehavior better dealt with at school. SROs could encounter fights in the hallway, or school officials could report incidents to SROs (even in violation of the statute). The school could even skip the SRO and file charges directly.<sup>376</sup> How would individual children fight resulting charges? Indeed, even if school officials reported the incident to an SRO in violation of the new state regulations, nothing in those revised regulations or existing MOAs provides individual children with a direct legal remedy. Absent such a remedy, it is not difficult to imagine school districts violating the spirit, if not the letter of the regulation, and continuing to involve law enforcement in a range of student misbehavior. And it is similarly easy to imagine law enforcement encountering incidents at school and arresting or filing charges against children.

In such cases, the question then becomes whether authorities prosecute such charges and, if they do, how the child might fight them. Limited data in South Carolina's record suggests that agencies are more likely to consider whether prosecuting a particular child serves the system's rehabilitative goals and thus dismiss a case.<sup>377</sup> The ACLU's examination of South Carolina data found that in twenty percent of cases in which the agency recommended diverting children accused of minor school-based offenses, elected prosecutors overruled those recommendations and prosecuted the children.<sup>378</sup> An

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376. In South Carolina, anyone can file delinquency charges. See S.C. CODE ANN. 63-19-1020 (2008). Although uncommon, several other statutes permit anyone to file delinquency cases. *E.g.*, ALA. CODE § 12-15-121(A) (2017); DEL. CODE ANN. 10, § 1003 (West 1994); MINN. STAT. ANN. §§ 260B.141(subd. 1) (West 1999) & 260C.141(subd. 1) (2012); N.H. REV. STAT. ANN. §§ 169-B:6 (2014) & 169-C:7 (2017); OHIO REV. CODE ANN. § 2151.27(A)(1) (West 2017); 23 PA. CONS. STAT. § 6334(a) (2014); 14 R.I. GEN. LAWS § 14-1-11(b) (2015); TENN. CODE ANN. § 37-1-119 (1970). I have called for states to remove this authority, which is a relic of the early family court, in favor of juvenile justice authorities screening all such referrals to determine the strength of the evidence of a crime and whether prosecution is necessary to rehabilitate a child, an analysis that should include whether the incident is better handled at school. Gupta-Kagan, *supra* note 28.

377. *Cf. supra* notes 246–49 and accompanying text.

378. *Kenny v. Wilson Complaint*, *supra* note 64, ¶ 78 (“In about twenty percent of cases in which DJJ [Department of Juvenile Justice] recommended diversion, solicitor’s offices moved forward with prosecution.”). An academic empirical study of this hypothesis is currently underway in South Carolina. Several colleagues and I are surveying county practices to determine in which counties prosecutors make decisions without consulting the Department of Juvenile Justice and in which

agency model would lend itself to judicial review of decisions to prosecute cases, especially when the agency failed to seriously consider whether such prosecution served the child's or the public's interest.<sup>379</sup> However, there has been no movement towards such a model, nor has there been any movement to change how prosecutors determine which charges to prosecute.

### CONCLUSION

The Spring Valley incident of 2015 and South Carolina's broader experience illustrate much about the school-to-prison pipeline's legal architecture—both how the law permits the pipeline to operate and how legal reforms can address it. The incident did not result from a single law or legal practice, but from several—the presence of broad criminal laws, the wide presence of SROs in schools, absence of effective limits on those officers' roles, and prosecutorial discretion that does not adequately consider whether specific incidents warrant juvenile prosecutions.<sup>380</sup> Even when the widely recommended step of establishing memoranda of agreements governing SROs is taken, it is insufficient when those memoranda do not impose meaningful limits on when schools can refer students to SROs or when SROs can arrest students.<sup>381</sup> Finally, concentrating diversion programs in law enforcement and prosecution agencies helps lead cases to those agencies, including cases that could be better handled through programs operated at schools without the involvement of law enforcement.<sup>382</sup>

Post-Spring Valley efforts to reform the law to limit the school-to-prison pipeline have been heartening in multiple respects. First, the existence of meaningful (however incomplete) reforms in a jurisdiction with a particularly active pipeline demonstrates that reform can happen anywhere.<sup>383</sup> The dramatic statewide decline in disturbing schools charges should be celebrated. Second, the transition of local officials involved in this incident—the sheriff and administrators of the affected school district—into advocates for legal reform is notable, and provided advocates with prominent support of

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counties DJJ recommends whether to prosecute or not specific cases to prosecutors, and whether varying procedures correlate with different outcomes.

379. Gupta-Kagan, *supra* note 28.

380. *See supra* Section I.A.

381. *See supra* Section III.B.

382. *See supra* Section II.C.

383. *See supra* Section II.D.



certain reform efforts.<sup>384</sup> The decline in arrests by Richland County SROs is particularly dramatic,<sup>385</sup> and suggests that the voluntary agreement terms which led to that decline should be incorporated through memoranda of agreement and elsewhere across the state.

Those reforms, however, remain incomplete, and they illustrate several lessons for advocates in South Carolina and elsewhere. First, while incremental reform may be necessary, advocates must be clear that success on one or two elements does not render the job complete. In particular, this Article has demonstrated how narrowing criminal statutes—while positive and important—will not stop authorities from arresting and charging children for relatively minor offenses at school in some states.<sup>386</sup> Legislatures should narrow such statutes, but that is a first, not a last step.

Second, statewide rules limiting schools' ability to make law enforcement referrals are possible. The most dramatic statewide reform in South Carolina thus far has been the state Department of Education's new regulations limiting when schools can refer children to law enforcement.<sup>387</sup> Prohibiting such referrals for minor offenses, absent repeat offenses or an imminent safety risk, is a dramatic development which could serve as a model for other state regulations or statutes.<sup>388</sup> States, including South Carolina, should repeal statutes requiring schools to report broad sets of crimes to law enforcement, and states should consider enacting statutes or regulations like South Carolina's prohibiting the reporting of minor crimes absent immediate safety risks or repeat offenses.<sup>389</sup>

Third, stronger memoranda of agreement between schools and law enforcement agencies are essential. An MOA simply stating that SROs do not engage in school discipline did not prevent the Spring Valley incident, especially when the MOA required schools to report all crimes to SROs.<sup>390</sup> It is unlikely that more clearly encouraging SROs to avoid arrests will have a dramatic effect, especially when the MOA continues to require schools to report all crimes to SROs.<sup>391</sup> School districts and law enforcement agencies should reconsider such

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384. Both the Richland County sheriff and Richland County School District Two superintendent advocated narrowing the disturbing schools' statute. *See* Roldán, *supra* note 255.

385. *See supra* Section III.B.1.

386. *See supra* Section III.A.

387. *See supra* Section III.B.2.

388. *See supra* Section III.B.2.

389. *See supra* Section III.B.2.

390. *See supra* Section III.B.

391. *See supra* Section III.B.

terms, and include more explicit limitations on SROs' roles such as those included in South Carolina's new regulation and in the Richland County Sheriff's Department's voluntary agreement with DOJ.<sup>392</sup>

Fourth, reformers should consider all the different authorities that may be able to influence relevant points of law. Individual school districts develop discipline codes, establish (or do not establish) diversion programs within their schools, and negotiate memoranda of agreement with law enforcement agencies.<sup>393</sup> Advocacy with those local entities, in addition to the statewide advocacy that has already occurred, is an important piece of the puzzle.<sup>394</sup>

These steps, coupled with advocacy for reforms that are beyond the scope of this Article (such as improving teacher and SRO training, and developing positive school culture that does not depend on law enforcement), have great promise for preventing future Spring Valley incidents and for significantly narrowing the school-to-prison pipeline.

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392. *See supra* Section III.B.

393. *See generally supra* Part II.

394. *See generally supra* Section I.C.2.