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Plugging the School-to-Prison Pipeline by Improving Behavior and Protecting Core Judicial Functions: A Constitutional Crisis Looms.

Patrick S. Metze

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ARTICLE

PLUGGING THE SCHOOL-TO-PRISON PIPELINE BY IMPROVING BEHAVIOR AND PROTECTING CORE JUDICIAL FUNCTIONS: *A CONSTITUTIONAL CRISIS LOOMS*

PATRICK S. METZE*

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Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.

The Spirit of the Laws, vol. 1,
Charles de Secondat, Baron de Montesquieu (1689–1755)¹

I. INTRODUCTION

In my first paper of this series, I addressed the exclusion of children from public education through the use of disciplinary techniques developed during the zero tolerance insanity of the 1990s.² I proposed a method to retain more children in public schools with the corresponding benefits of a less hostile school environment and a more educated youth population.³ The technique—increasingly being used throughout the

1. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 202 (David Wallace Carrithers ed., 1977).

2. Patrick S. Metze, *Plugging the School to Prison Pipeline by Addressing Cultural Racism in Public Education Discipline*, 16 U.C. DAVIS J. JUV. L. & POL'Y 203, 203 (2012). In my first article, I took “a critical look at the failure of the public schools.” *Id.* I complained of the criminalization and alienation of “students of color and economic disadvantage [who] are forced out of their schools and into the juvenile justice system as the first step to a life of reduced expectations and productivity.” *Id.* at 203–04. Moreover, I addressed school discipline and the exclusion of certain children from school by “the overuse of suspensions, expulsions, and disciplinary alternate education.” *Id.* at 204. Finally, I suggested eliminating the use of Disciplinary Alternative Education Programs and returning all children to their home campus with faculty, staff, and behavioral professionals trained in the use of Positive Behavioral Interventions and Supports (PBIS). *Id.*

3. For example, I suggested:

The Legislature should force the districts to hire the necessary professionals to provide the training and expertise to create a statewide implementation of PBIS Eliminate the DAEP's [Disciplinary Alternative Education Programs] as they now exist and reunite all children with their home schools. Give the local districts no other option but to deal with their children and train all the teachers and staff on campus who contact students, “how to reinforce positive

United States—is an evidenced-based, modern approach to positively modify behavior by using Positive Behavioral Interventions and Supports (PBIS).⁴ When used in the juvenile justice context,⁵ and even in the adult correctional setting,⁶ PBIS has shown to be a more effective alternative compared to time-honored disciplinary techniques.⁷ I argued that if this technique works with children and adults who are incarcerated in a state correctional setting, then surely the technique will work in a public school setting with those who have not yet reached higher levels of misbehavior.⁸

In 2001, the Texas Legislature ordered changes in discipline throughout Texas public schools.⁹ This resulted in the creation of the Behavior Support Initiative to provide Positive Behavior Support (PBS or PBIS) information to schools through a statewide network.¹⁰ By the end of 2008, the Texas Youth Commission (TYC) began to recognize the need for such programs to improve disciplinary management in schools.¹¹ The

behavior and how to teach, model and reinforce standards of behavior expected at school . . . to improve school climate, reduce disciplinary referrals and boost academic performance.” We must stop telling these children they belong in alternate education, especially disciplinary alternate education.

Id. at 311 (quoting Deborah Fowler, *How to Break Racial Disparities-Discipline Cycle*, DALLAS MORNING NEWS (Mar. 16, 2011, 1:26 PM), <http://www.dallasnews.com/opinion/latest-columns/20110316-deborah-fowler-how-to-break-racial-disparities-discipline-cycle.ece>).

4. See POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS, <http://www.pbis.org> (last visited Nov. 7, 2013) (promoting a framework for academic and behavioral practices that encourage positive behavior).

5. See *Positive Behavior Support in the Juvenile Justice System*, PBIS NEWSL. (OSEP Technical Assistance Ctr. on Positive Behavioral Interventions & Supports, Eugene, Or.), May 2008, available at http://www.pbis.org/pbis_newsletter/volume_4/issue3.aspx (referring to a noticeable reduction in behavioral infractions after implementation of positive behavioral support).

6. Cf. Eugene W. Wang et al., *The Effectiveness of Rehabilitation with Persistently Violent Male Prisoners*, 44 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 505, 509 (2000) (discussing the positive results after implementation of the Program for the Aggressive Mentally Ill Offender (PAMIO) on violent male prisoners, a program similar to PBIS that “uses behavioral and cognitive-behavioral therapeutic techniques such as extinction responding, a level system, and cognitive restructuring”).

7. See Patrick S. Metze, *Plugging the School to Prison Pipeline by Addressing Cultural Racism in Public Education Discipline*, 16 U.C. DAVIS J. JUV. L. & POL’Y 203, 284 n.328 (2012) (citing U.S. DEPT OF JUSTICE, JUVENILE JUSTICE REFORM INITIATIVES IN THE STATES 1994–1996: PROGRAM REPORT 29 (Oct. 1997), available at <https://www.ncjrs.gov/pdffiles/reform.pdf>) (questioning the efficacy of some traditional disciplinary programs such as juvenile boot camp).

8. *Id.* at 204 (calling for the elimination of Disciplinary Alternative Education Programs in schools in favor of PBIS).

9. Act of May 8, 2001, 77th Leg., ch. 212, § 1 2001 Tex. Gen. Laws 405, 405–07 (codified at TEX. EDUC. CODE ANN. § 37.0021 (West 2012)).

10. See TEX. BEHAVIOR SUPPORT, <http://www.txbehaviorsupport.org/> (last visited Nov. 7, 2013) (describing the Texas Behavior Support network).

11. See generally SUNSET ADVISORY COMM’N, STAFF REPORT (Nov. 2008) (indicating that the

following year, the Texas Legislature passed,¹² and the Governor signed,¹³ legislation for reading improvement, recidivism reduction, and improvement in behavior in TYC classrooms.¹⁴ The requirements include:

(A) documentation of school-related disciplinary referrals, disaggregated by the type, location, and time of infraction[,] and by subgroups designated under commission rule; (B) documentation of school-related disciplinary actions, including time-out, placement in security, and use of restraints[,] and other aversive control measures, disaggregated by subgroups designated under commission rule; (C) validated measurement of systemic positive behavioral support interventions; and (D) the number of minutes students are out of the regular classroom because of disciplinary reasons.¹⁵

For the 7th Annual Criminal Law Symposium at Texas Tech University School of Law in April 2013, I prepared a comparative analysis of the procedural rights of adults and children to answer the question of whether adults and children should have more, less, the same, or different procedural rights.¹⁶ I argued for the complete restructuring of how we handle the young who violate our criminal and societal rules.¹⁷ I suggested that we adopt a system similar to New Zealand—and other aboriginal societies—and use restorative justice techniques to address children's transgressions.¹⁸ In fact, I argued that citizens should not be

TYC had identified a deficiency in programs promoting behavioral support).

12. H.J. of Tex., 81st Leg., R.S. 6976 (2009); S.J. of Tex., 81st Leg., R.S. 5153 (2009).

13. H.J. of Tex., 81st Leg., R.S. 6979 (2009).

14. Act of June 19, 2009, 81st Leg., ch. 1187, § 4.003, 2009 Tex. Gen. Laws 3774, 3789–3791 (codified at TEX. EDUC. CODE ANN. § 30.106(a) (West 2012)) (“Because learning and behavior are inextricably linked and learning and improved behavior correlate with decreased recidivism rates, the Texas Youth Commission shall not only fulfill the commission’s duties under state and federal law to provide general and special educational services to students in commission educational programs[,] but also shall implement a comprehensive plan to improve the reading skills and behavior of those students.”); *see also* TEX. LEGIS., <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=81R&Bill=HB3689> (last visited Nov. 7, 2013) (delineating the legislative history of House Bill 3689).

15. TEX. EDUC. CODE ANN. § 30.106(c)(3) (West 2012).

16. Patrick S. Metzke, *Feed Me Seymour: The Never-Ending Hunger of the Criminal Process for Procedural Rights and Removing Children from Its Shop of Horrors*, 46 TEX. TECH L. REV. (forthcoming 2013) (manuscript at 3) (on file with author).

17. *Id.*

18. *Id.* at 104–06. The New Zealand model is not without its critics. Juan Marcellus Tauri, a self-proclaimed “indigenous commentator,” is critical of the New Zealand adaptation of restorative justice:

held accountable for their “criminal” conduct until they are fully developed at the age of twenty-five.¹⁹ Removing the taint of criminality from the young and dealing with them in a positive manner will give more young adults and children the opportunity to achieve their potential, as they will be unshackled from the burdens of criminal labels and collateral consequences.²⁰

In my study of institutional reactions to delinquent behavior, I examined the procedural structure of Texas juvenile law and was struck with the constitutional problem created by the merger of the Texas Juvenile Probation Commission (TJPC) and the TYC into the new Texas Juvenile Justice Department (TJJD).²¹ As Texas has now taken the major step of unifying the punishment and rehabilitation functions of juvenile law, I fear that we will once again turn away from the care and rehabilitation of troubled children and return to “incarceration and punishment.”²² We cannot implement the proposals I have suggested—

The [rediscovery] of restorative, communitarian responses to criminal [behavior] by neo-colonial states appears ironic to some indigenous commentators. After all, one of the key platforms of the introduction of restorative justice policies and initiatives is their comparability to traditional indigenous justice practice. The irony arises from the current situation developing in the neo-colonial jurisdictions of Canada, New Zealand and Australia, where contemporary use of supposedly indigenous justice philosophies and practices is being driven by, or at the behest of, the very system that sought the eradication of these social control mechanisms throughout the [colonization] process.

Juan Marcellus Tauri, *An Indigenous Perspective on the Standardisation of Restorative Justice in New Zealand and Canada*, 20 INDIGENOUS POLY J., Fall 2009 at 1, 5, (citations omitted), available at <http://indigenouspolicy.org/index.php/ipj/article/view/76/44>.

19. Patrick S. Metze, *Feed Me Seymour: The Never Ending Hunger of the Criminal Process for Procedural Rights and Removing Children from Its Shop of Horrors*, 46 TEX. TECH L. REV. (forthcoming 2013) (manuscript at 104) (on file with author).

20. *Id.*

21. See Act of May 19, 2011, 82d Leg., R.S., ch. 85, § 4.001(b), 2011 Tex. Sess. Law Serv. 366, 441 (West) (codified at TEX. HUM. RES. CODE ANN. tit. 12 (West 2013)) (abolishing the TYC and TJPC, and merging the two into the TJJD).

22. Email from Dr. William S. Bush, Assistant Professor of History, Tex. A&M Univ.-San Antonio Sys. Ctr. to Tex. Sunset Comm’n (Dec. 17, 2008, 9:32 AM), available at <http://www.sunset.state.tx.us/81streports/tyc/responses/234.pdf>. Dr. William S. Bush explained:

When TYC’s forerunner agency (the Texas State Youth Development Council) was first constituted in 1949, it was divided into two Directorates for “Institutions” and “Community Services.” The latter was supposed to assist local jurisdictions in developing probation, prevention, recreation, diversion, and parole programs.

... However, early in its existence, [Community Services] was quickly marginalized within TYC and then defunded by the legislature. By 1957, when TYC was re-authorized as an independent state agency, the agency had eliminated its community services directorate while expanding the construction of secure facilities for juvenile offenders.

....

whether it be an overhaul of public school discipline by the use of science to modify children's behavior, or the complete restructuring of the procedures that address the young who have transgressed—if we combine the traditional functions of the judiciary and the executive into one all-powerful juvenile agency.²³

This article will focus on two seemingly unrelated topics. The first topic, in Part II, will look at a new report on the effectiveness of the implementation of PBIS within the schools of the Texas juvenile correctional system.²⁴ This report provides even more evidence of the efficacy of PBIS in modifying behavior, adding support to the argument that all public schools—not just those in a correctional setting—should adopt these techniques.²⁵ The second topic of the article, in Parts III through V, will focus on TJJD; specifically, the newly created TJJD exposes our juvenile system to a potential abuse of constitutional authority and power. I reach this conclusion by taking a historical view of the courts' power to supervise children placed on probation. Part III of this article will examine the history leading up to the creation of the TJJD. Part IV of this article details the history of probation and its relationship to the judiciary. Finally, in Part V, I will examine the constitutionality of the TJJD.

Both topics are addressed together in an effort to affect change on public school discipline by highlighting the good work of our juvenile justice system on a state level with the increasing use of more enlightened approaches to discipline, such as PBIS.²⁶ At the same time, I fear that the advances in treatment of the young will fall prey to the influences over

... TYC abandoned its community services function in favor of institutions in the 1950s and 60s for several reasons: a national panic over juvenile crime, a political climate that was hostile to less punitive interventions for juvenile offenders, and the bureaucratic imperative for self-preservation.

... But what happens when the pendulum swings, as history suggests it well might? An omnibus agency [such as TJJD] might prove easier prey for a shift back toward incarceration and punishment.

Id.

23. *See id.* (expressing concern over the consolidation of the Texas Youth Commission and the Texas Juvenile Probation Commission).

24. TEX. JUVENILE JUSTICE DEP'T, EFFECTIVENESS OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, A REPORT TO THE TEXAS LEGISLATURE 20 (Dec. 2012), available at <http://www.tjjd.texas.gov/publications/reports/PBISLegislativeReport2012-12.pdf>.

25. *See id.* at 11 (asserting the effectiveness of PBIS by pointing to a decrease in the occurrences of disciplinary referrals per student).

26. *See generally id.* (providing an overview of how PBIS works and its effect on youth in correctional settings).

past efforts to consolidate juvenile justice.²⁷ The wisdom of PBIS could easily be lost in reactionary foolishness and ill-advised austerity.

II. IMPLEMENTATION OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORT IN TEXAS YOUTH COMMISSION SCHOOLS

In 2009, the Texas Legislature dictated that PBIS must be implemented in TYC schools,²⁸ and in response, the TYC directed all of its facilities with schools to comply.²⁹ In September 2010, TYC had ten schools within which to implement PBIS;³⁰ but by July 2011, only six schools remained open.³¹ Under the new policies, children leaving TYC had to show that they possessed the “behavioral skills necessary,” or that “appropriate transition supports” existed for the child to successfully “transition” to future placements.³² Stage progression, earning privileges, and consideration for parole were also tied to participation in PBIS.³³

Periodic evaluations to test the effectiveness of implementing PBIS within the TYC school system were also established.³⁴ The Texas Legislature ordered a report on the effectiveness of the reading plan and the implementation of positive behavior supports by December 1, 2010.³⁵

27. See Email from Dr. William S. Bush, Assistant Professor of History, Tex. A&M Univ.-San Antonio Sys. Ctr. to Tex. Sunset Comm’n (Dec. 17, 2008, 9:32 AM), *available at* <http://www.sunset.state.tx.us/81streports/tyc/responses/234.pdf> (suggesting the potential negative effects of the same consolidation attempts fifty years prior).

28. Act of June 19, 2009, 81st Leg., ch. 1187, § 4.003, 2009 Tex. Gen. Laws 3774, 3789–3791 (codified at TEX. EDUC. CODE ANN. § 30.106(c)(1) (West 2012)) (mandating that the TYC universally adopt PBIS); *see also* 37 TEX. ADMIN. CODE ANN. § 380.9155(d) (West 2013) (Tex. Youth Comm’n Participation and Reporting Requirements of the Reading Improvement Program and PBIS System) (providing that each TYC-operated school implement a PBIS system).

29. *See generally* TEX. YOUTH COMM’N, IMPLEMENTATION STATUS REPORT OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS (PBIS) SYSTEM IN TEXAS YOUTH COMMISSION (Dec. 2010) (on file with author) (describing the initial stages of PBIS implementation in TYC facilities).

30. Letter from Cheryl K. Townsend, Exec. Dir., Tex. Youth Comm’n, to Tex. Youth Comm’n Staff (Sept. 17, 2010) (on file with author).

31. TEX. JUVENILE JUSTICE DEP’T, EFFECTIVENESS OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, A REPORT TO THE TEXAS LEGISLATURE, at Executive Summary (Dec. 2012), *available at* <http://www.tjjd.texas.gov/publications/reports/PBISLegislativeReport2012-12.pdf> (“When the legislation was initiated during the 81st legislative session in 2009, nine secure facility schools were recipients of the PBIS implementation, and currently, following facility closures in 2011, there are six.”).

32. ADMIN. § 380.9155(f)(2).

33. *Id.* § 380.9155(d)(4)–(5).

34. *See generally id.* § 380.9155(g) (outlining guidelines for evaluating the effectiveness of the PBIS system).

35. Act of June 19, 2009, 81st Leg., ch. 1187, § 4.003, 2009 Tex. Gen. Laws 3774, 3789–3791 (codified at TEX. EDUC. CODE ANN. § 30.106 (West 2012)); *see also* TEX. YOUTH COMM’N,

As to the implementation of PBIS, limited findings were reported, and no specific data was forthcoming except for an anecdotal comment about the improvement in attendance during the 2010–2011 school year.³⁶ By January 21, 2011, the Executive Director of TYC reported to the Board that PBIS was implemented at all TYC educational facilities.³⁷

A. *Final Report on the Effectiveness of PBIS*

In compliance with the legislative order,³⁸ the final report on the effectiveness of PBIS was filed on December 2, 2012.³⁹ This “exhaustive” twenty-three-page report included a three-page introduction giving a generic summary of the PBIS framework, structure, purposes, historical ties to its cousin—Response to Intervention, and a three-page restatement of the December 2010 report.⁴⁰ The only new development during the implementation period was the selection of an instrument to monitor, assess, set goals, evaluate, and revise procedures “toward effective implementation” of PBIS.⁴¹ The data in the report was evaluated using an advanced method of comparing data per student, per

IMPLEMENTATION STATUS REPORT OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS (PBIS) SYSTEM IN TEXAS YOUTH COMMISSION 1–5 (Dec. 2010) (on file with author) (reporting on the implementation of PBIS as required by the Texas legislature). The report detailed the future of PBIS and noted that two experts in PBIS evaluation contracted to work with the TYC in early 2010. *Id.* at 2. In addition, an agreement was forged with Texas State University to provide research and technical assistance to local facilities implementing PBIS. *Id.* The TYC also created statewide and local leadership teams in March 2010, set the first orientation for educators for June 2010 (with formal training to begin in January 2011), and purchased behavioral data-tracking access in September 2010. *Id.* at 4. However, the legislative mandate for participation in PBIS for parole was not fulfilled, and only a Tier 1 rollout was ongoing by the date of the report. *Id.* at 5.

36. *See id.* (“The school attendance rate is higher in 2010–11 than any year in the last [ten] years.”). Any improvement in attendance could not possibly be tied to the implementation of PBIS because formal training for the education staff was not set until January 3, 2011. *Id.* The five-page report did not provide specific data and contained very little information. *See generally id.* (briefing the Texas Legislature on the initial findings after PBIS implementation).

37. CHERYLN K. TOWNSEND, EXEC. DIR. TEX. YOUTH COMM’N, REPORT TO TEXAS YOUTH COMMISSION BOARD 4 (Jan. 21, 2011), available at <https://www.tjtd.texas.gov/home/TYCMetings/archive/012111%20Board%20Meeting%20Minutes%20-%20final%20draft.pdf>.

38. TEX. EDUC. CODE ANN. § 30.106(g) (West 2012) (expired Jan. 1, 2013).

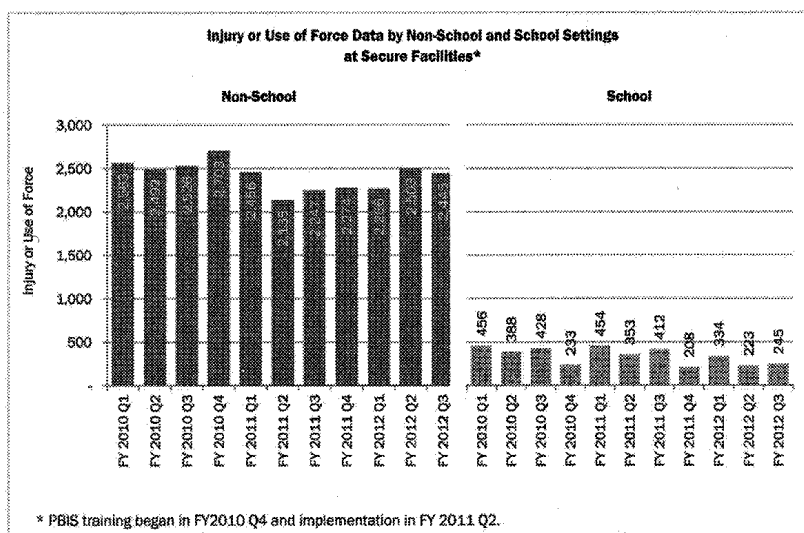
39. *See generally* TEX. JUVENILE JUSTICE DEP’T, EFFECTIVENESS OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, A REPORT TO THE TEXAS LEGISLATURE (Dec. 2012), available at <http://www.tjtd.texas.gov/publications/reports/PBISLegislativeReport2012-12.pdf> (reporting on the effectiveness of PBIS implementation as per the legislative mandate).

40. *Id.* at 1–3. With the exception of new material regarding the selection of a tool to measure interventions, pages four through six of the new report were essentially identical to a substantial part of the December 2010 report, with only minor grammatical edits. *Id.* at 4–6.

41. *Id.* at 6. The PBIS planning team chose the Facility-Wide Evaluation Tool (FET), which was developed by its consultant Dr. C. Michael Nelson in October 2009. *Id.*

month, and per facility with “(1) [m]ajor incidents[,] (2) [r]eferrals to security[,] and] (3) [a]dmissions to security.”⁴²

The Executive Summary of the report summarized TJJD’s conclusions on the effectiveness of PBIS implementation.⁴³ The following section of this paper analyzes the major findings of the report; a look at each finding is revealing. First, TJJD stated, “PBIS appears to be having an impact on the behavior and academic outcomes of youth in secure facilities.”⁴⁴



TEX. JUVENILE JUSTICE DEP’T, EFFECTIVENESS OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, A REPORT TO THE TEXAS LEGISLATURE 8 (Dec. 2012).

TJJD asserted that “[t]he number of incidents, both minor and major, are four times higher in non-school settings than in school, where PBIS has been implemented.”⁴⁵ PBIS was implemented in the second quarter of fiscal year 2011,⁴⁶ which includes December 2010, January 2011, and February 2011.⁴⁷ At that time, the number of major incidents—reflecting injury or use of force—in non-school settings was six times higher than major incidents in school settings.⁴⁸ During the first fifteen months of

42. *Id.* at 7.

43. *Id.* at Executive Summary.

44. *Id.*

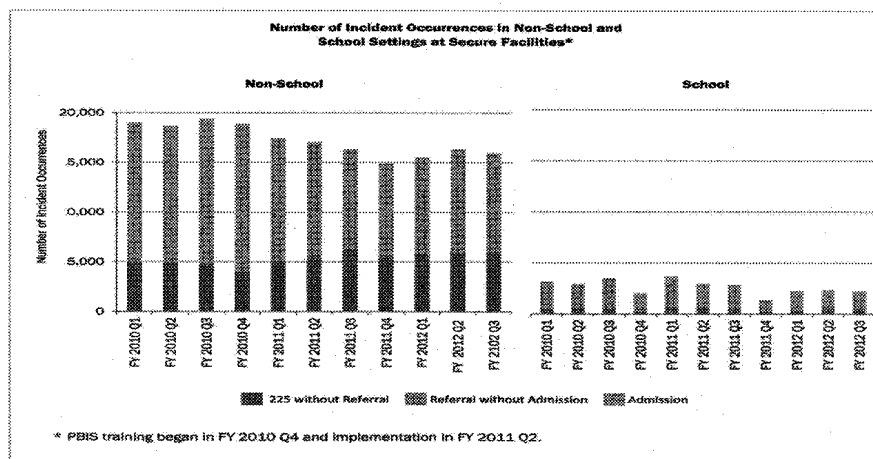
45. *Id.*

46. *Id.* at 8.

47. *Id.*

48. *Id.* The number of major incidents in the second quarter of fiscal year 2011 in non-school settings was 2,135, and the number in school settings was 353. *Id.* For the year preceding implementation, the per-quarter average was 6.77%. *Id.* Thus, the figure from the second quarter of

PBIS implementation, non-school incidents were ten and eleven times higher, indicating a significant reduction in the number of incidents requiring a written citation.⁴⁹ The first year saw a 37% reduction in major incident reports in the school setting and a 17% increase in reports in the non-school environments.⁵⁰ Admittedly, these calculations do not take into account any increase or decrease in youth population,⁵¹ or other variables such as staff training and ratio.⁵² Nevertheless, to see these trends going in the right direction should encourage TJJD to implement PBIS in non-school settings as soon as possible.



TEX. JUVENILE JUSTICE DEP'T, EFFECTIVENESS OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, A REPORT TO THE TEXAS LEGISLATURE 9 (Dec. 2012).

fiscal year 2011 was in line with the previous year with a modest 10% decrease in reports during the first quartile of implementation. *Id.*

49. See TEX. JUVENILE JUSTICE DEP'T, EFFECTIVENESS OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, A REPORT TO THE TEXAS LEGISLATURE 8 (Dec. 2012), available at <http://www.tjjd.texas.gov/publications/reports/PBISLegislativeReport2012-12.pdf> (indicating a per quarter average for the year preceding implementation as being 6.77%, which was in line with the modest 10% decrease in reports during first quartile of implementation).

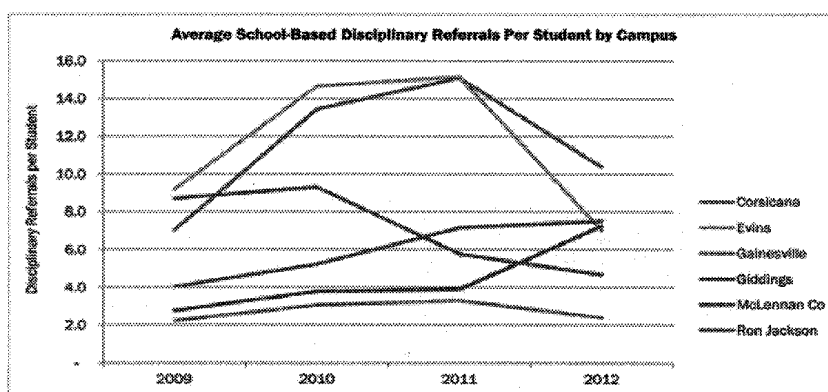
50. *Id.*

51. See Ryan Murphy, *Census Interactive: Mapping Texas' Surging Youth Population*, TEX. TRIB. (July 11, 2013), <http://www.texastribune.org/library/data/census-hispanic-youth-growth/> (providing "a fresh snapshot of Texas'[s] growing youth population as of July 6, 2012").

52. See TEX. JUVENILE JUSTICE DEP'T, EFFECTIVENESS OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, A REPORT TO THE TEXAS LEGISLATURE 7 (Dec. 2012), available at <http://www.tjjd.texas.gov/publications/reports/PBISLegislativeReport2012-12.pdf> (concluding that due to the highly mobile population, data would be most accurate if collected per student, per month, and per facility, and then compared to major incidents, referrals to security, and admissions to security).

The fact that the TJJD stopped providing specific numbers and used ill-defined bar graphs makes specific analysis difficult. However, a few assumptions can be made with reasonable certainty. As to the total incidents reflected in the graph on page nine of the report, it is apparent that for each quarter following implementation, the total number of incidents, major and minor, decreased in both non-school and school settings.⁵³

Between mid-2011 and mid-2012, four of six TYC schools showed marked reductions in the average school disciplinary referrals per student.⁵⁴



TEX. JUVENILE JUSTICE DEP'T, EFFECTIVENESS OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, A REPORT TO THE TEXAS LEGISLATURE 11 (Dec. 2012).

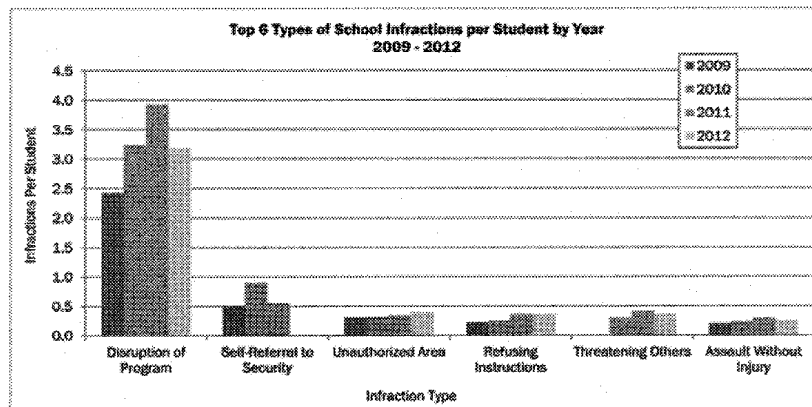
Of the six types of school infractions during this same period, there were discernible decreases in at least two types of infractions, namely disruption of program and self-referral to security.⁵⁵ The size of the graph and the lack of specifics provided make it difficult to evaluate any progress in the other types of infractions, which include presence in an unauthorized area, refusing instructions, threatening others, and assault without injury.⁵⁶

53. *Id.* at 9.

54. *Id.* at 11.

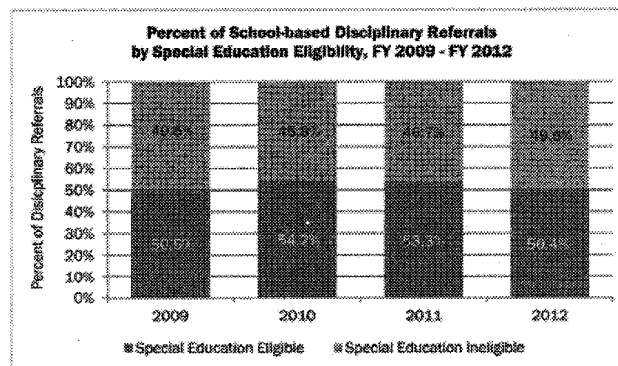
55. *Id.*

56. *Id.*



TEX. JUVENILE JUSTICE DEP'T, EFFECTIVENESS OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, A REPORT TO THE TEXAS LEGISLATURE 11 (Dec. 2012).

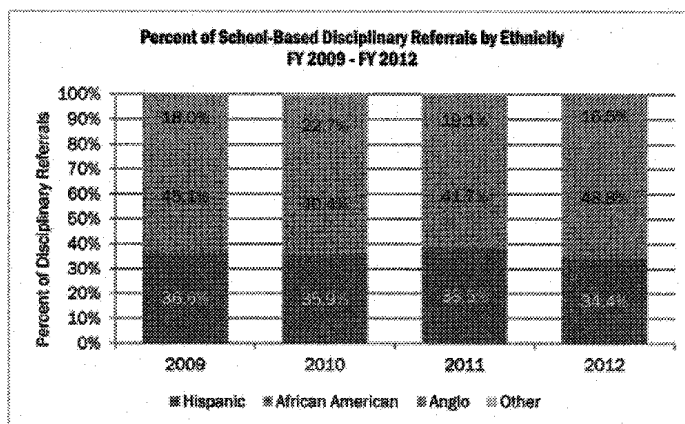
TJJD found it significant that the percentage of special education students receiving disciplinary referrals dropped from 53.3% of the total referrals to 50.4% during the implementation period.⁵⁷



TEX. JUVENILE JUSTICE DEP'T, EFFECTIVENESS OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, A REPORT TO THE TEXAS LEGISLATURE 12 (Dec. 2012).

57. See *id.* at 12 (showing a drop in the number of special education students receiving disciplinary referrals). The graph on page twelve of the report is particularly difficult to interpret. Although there was a decrease in the total number of referrals, a 3% drop in school-based disciplinary referrals does not seem significant. *Id.* The graph does not specify the types of referrals it shows, whether they were major or minor incidents, or whether it includes all referrals. *Id.* Assuming the total number of incidents was around 2,500 at the first, then the special education students' portion would have dropped from about 1,332 incidents to about 1,008 incidents by the date of the report, indicating a decrease of 324, or about one per day. *Id.* at 12. If TJJD was speaking strictly of major incidents, then the decrease would be from 188 incidents to 112 or seventy-six, or about six per month. *Id.* at 13. The term "significant" takes on new meaning when six fewer people per month are injured or are the recipients of force. This is at least a significant improvement in the way special education students are treated, if not also an overall improvement in their classroom behavior.

In the glass is half-full category, TJJD also found it significant that fewer Hispanic and Anglo students received disciplinary referrals.⁵⁸ However, the number of disciplinary referrals for African-American students increased considerably.⁵⁹



TEX. JUVENILE JUSTICE DEP'T, EFFECTIVENESS OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, A REPORT TO THE TEXAS LEGISLATURE 12 (Dec. 2012).

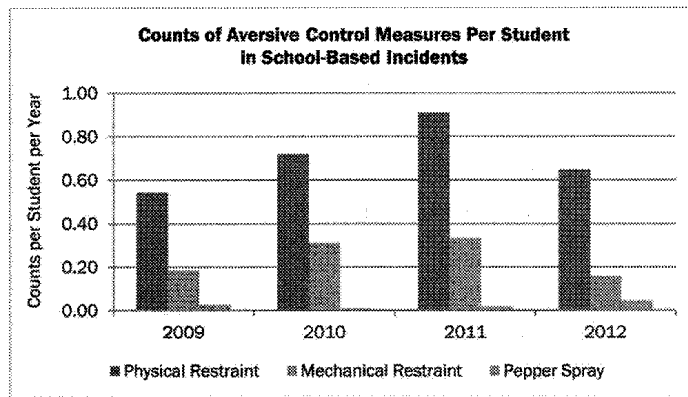
On a positive note, the use of aversive control measures⁶⁰ decreased during the implementation period,⁶¹ which is encouraging.

58. *Id.* at 13. The rate of disciplinary referrals for Hispanic students decreased 2.6% since the implementation of PBIS, whereas disciplinary referrals for Anglo students decreased 4.1%. *Id.* This was one of the “significant findings” stated in the Executive Summary. *Id.* at Executive Summary.

59. *Id.* at 13. The number of disciplinary referrals for African-American students increased by 7.1%; presumably, if the percentage of referrals for African-American students rose from 41.7% in 2011 to 48.8% in 2012, and the percentage of referrals for Anglo students dropped from 19.1% to 16.5% during the same period, one could deduce that there was some type of bias either in the PBIS implementation or in the mechanism for referrals. *Id.* Further studies should be conducted, as these figures are not consistent with the proper implementation of PBIS. *See generally* Claudia G. Vincent et al., *Do Elementary Schools That Document Reductions in Overall Office Discipline Referrals Document Reductions Across All Student Races and Ethnicities?*, POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS (Oct. 2009), http://www.pbis.org/evaluation/evaluation_briefs/oct_09.aspx (acknowledging evidence that “students from minority backgrounds, especially African-American students” receive disciplinary referrals in schools at a disproportionately higher rate than white students).

60. Aversive control measures include the use of physical or mechanical restraints and pepper spray. TEX. JUVENILE JUSTICE DEP'T, EFFECTIVENESS OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, A REPORT TO THE TEXAS LEGISLATURE 14 (Dec. 2012), *available at* <http://www.tjjd.texas.gov/publications/reports/PBISLegislativeReport2012-12.pdf>.

61. *Id.* Reductions occurred in the use of physical and mechanical restraint with a slight increase in the use of pepper spray. *Id.* This could be because staff members were attempting to use less severe methods, or it could be a factor of the bias in implementation mentioned previously. *Supra* note 59. The use of restraint—physical or mechanical—and the use of pepper spray on special education students also dropped slightly, but not significantly; TJJD did not mention this in its



TEX. JUVENILE JUSTICE DEP'T, EFFECTIVENESS OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, A REPORT TO THE TEXAS LEGISLATURE 14 (Dec. 2012).

TJJD was proud of the increase in the average daily attendance (ADA), as well as academic performance “in all categories of measured outcomes.”⁶²

Campus	2009-2010 ADA (pre-PBIS)	% of Time Missed that was Due to Discipline	2010-2011 ADA (PBIS)
Al Price*	97%	70.3%	99.6%
Corsicana RTC	96%	15.8%	99.1%
Crockett*	89%	63.3%	97.8%
Evins	99%	28.6%	98.7%
Gainesville	77%	46.6%	98.2%
Giddings	99%	66.7%	98.6%
Mart 2	63%	69.8%	99.1%
RJ 1 (Girls)	80%	65.85%	99.8%

* Facilities closed July 2011

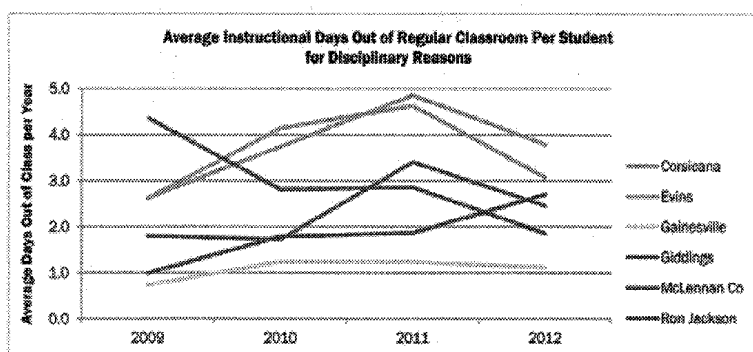
TEX. JUVENILE JUSTICE DEP'T, EFFECTIVENESS OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, A REPORT TO THE TEXAS LEGISLATURE 20 (Dec. 2012).

Two final areas were encouraging as far as the effectiveness of PBIS.

summary of findings. TEX. JUVENILE JUSTICE DEP'T, EFFECTIVENESS OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, A REPORT TO THE TEXAS LEGISLATURE 15-16 (Dec. 2012), available at <http://www.tjjd.texas.gov/publications/reports/PBISLegislativeReport2012-12.pdf>. I am not sure these changes can be totally accredited to the implementation of PBIS. The decrease in the overall use of aversive control measures could evidence that PBIS is working; however, staff reactions to behavior evolve more from a personnel dynamic, and the use of such methods should continue to decline as PBIS becomes more commonplace.

62. TEX. JUVENILE JUSTICE DEP'T, EFFECTIVENESS OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, A REPORT TO THE TEXAS LEGISLATURE Executive Summary (Dec. 2012), available at <http://www.tjjd.texas.gov/publications/reports/PBISLegislativeReport2012-12.pdf>.

During the implementation period, “[five] of [six] schools . . . saw a reduction of time per student outside the regular classroom for disciplinary reasons.”⁶³ Almost immediately upon implementation of PBIS, four of those five schools saw a significant drop in absences due to discipline.⁶⁴



TEX. JUVENILE JUSTICE DEP'T, EFFECTIVENESS OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, A REPORT TO THE TEXAS LEGISLATURE 15–16 (Dec. 2012).

From the 2009–2010 school year until the end of the 2011–2012 school year, there was improvement in the percentage of students making one-month reading and math gains per month of instruction.⁶⁵

**Aggregate Education Academic Performance Measures
FY 2009 – FY 2012**

	2009-10	2010-11	2011-12
Percent of Students Making One Month Reading Gain per Month of Instruction	58.39	58.85	59.04
Percent of Students Making One Month Math Gain per Month of Instruction	51.88	51.51	53.26
Percent of Students Age 18+ Earning a Diploma or GED within 90 Days of Release	34.9	38.72	41.43
Percent of Students Reading at Grade Level at Release	12.7	14.61	16.27

TEX. JUVENILE JUSTICE DEP'T, EFFECTIVENESS OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, A REPORT TO THE TEXAS LEGISLATURE 21 (Dec. 2012).

During this same period, “41.43[%] of youth aged [sixteen] or older earned a high school diploma or GED within [ninety] days of release from

63. *Id.* at 20.

64. *See id.* (referring to Corsicana, Evins, McLennan County, and Ron Jackson schools as showing a decrease in days missed for disciplinary reasons).

65. *See id.* at 21 (illustrating an increase in reading from 58.39% to 59.04% and math from 51.88% to 53.26%).

a TJJD institution.”⁶⁶ Finally, the percentage of students with grade level reading ability upon release from a TYC facility increased from 12.7% in the 2009–2010 school year to 16.27% in the 2011–2012 school year.⁶⁷

Unfortunately, TJJD did not provide more specific data in its report. Nonetheless, I hope PBIS will continue to improve the behavior of juveniles in its facilities. While the future of TJJD and its role in all aspects of juvenile justice remains unclear, TJJD's recent history makes its institutional history less than impressive.⁶⁸ The history of how Texas deals with the juvenile delinquent, or a juvenile on his or her way to delinquency, is a dichotomy of treatment and punishment.⁶⁹ With the implementation of PBIS, Texas has correctly shifted its focus to the treatment function.⁷⁰ However, our modern approach has been long coming, and if recent constitutional issues are not addressed, I fear we will choose punishment over enlightenment once again.⁷¹

III. HISTORY OF THE TEXAS YOUTH COMMISSION AND TEXAS JUVENILE PROBATION COMMISSION

A. TYC

In 1887, the Texas Legislature authorized the creation of a “house of correction and reformatory for the confinement of youthful convicts.”⁷²

66. *Id.*

67. *Id.* Page twenty-one of the report includes other measures of success, such as the number of industrial certifications earned and college course enrollment and completion. *Id.*

68. See *A Brief History of the Texas Youth Commission From the Roots of Texas Juvenile Justice Through the Present*, TEX. YOUTH COMM'N, [http://www.lb5.uscourts.gov/ArchivedURLs/Files/08-70042\(1\).pdf](http://www.lb5.uscourts.gov/ArchivedURLs/Files/08-70042(1).pdf) (last updated Nov. 23, 2009) (illustrating the brief history of the TYC, including the fact that the TYC Board was dissolved and the agency was placed under conservatorship by the Governor in March 2007 due to allegations of abuse and treatment programming inadequacies).

69. See *id.* (“TYC must concentrate on its basic mission with the dual responsibility of providing public safety by holding youth accountable and providing treatment to youth in hopes they will learn to become law-abiding adults.”).

70. See, e.g., SUNSET ADVISORY COMM'N, FINAL REPORT: TEXAS YOUTH COMMISSION, TEXAS JUVENILE PROBATION COMMISSION, OFFICE OF INDEPENDENT OMBUDSMAN 1 (July 2011), available at http://www.sunset.state.tx.us/81streports/tyc/tyc_fr.pdf (summarizing the implementation of diversionary and treatment programs for at-risk and delinquent youth).

71. See E-mail from William S. Bush, Assistant Professor of History, Tex. A&M Univ.-San Antonio Sys. Ctr., to Tex. Sunset Comm'n (Dec. 17, 2008, 9:32 AM), available at <http://www.sunset.state.tx.us/81streports/tyc/responses/234.pdf> (indicating the TYC's treatment of juveniles faced strict inspection).

72. Act approved Mar. 29, 1887, 20th Leg., R.S., ch. 84, § 1, 1887 Tex. Gen. Laws 64, 64. Initially, the school housed boys aged sixteen and under “who shall hereafter be convicted of a felony in any court in this State whose term of confinement shall not exceed five years.” *Id.* at 66. The boys were “taught habits of industry and sobriety, some useful trade, and to read and write.” *Id.* at 65. In

The school opened in 1889.⁷³ The legislature established a similar school for girls in 1913,⁷⁴ which began operation in 1916.⁷⁵ Prior to the creation of the Texas State Board of Control in 1919, “separate boards of directors managed” the boys and girls schools and “reported directly to the Governor.”⁷⁶ From 1920 to 1949, the Texas State Board of Control managed the three juvenile schools.⁷⁷

In 1947, the Texas Legislature authorized the Governor to appoint the

1913, the Texas Legislature passed a bill providing that seventeen-year-old boys would also be confined to the juvenile facility. See WILLIAM S. BUSH, PROTECTING TEXAS’ MOST PRECIOUS RESOURCE: A HISTORY OF JUVENILE JUSTICE POLICY IN TEXAS, PART I 2 (2008), available at <http://texascjc.org/sites/default/files/publications/History%20of%20JJ%20Policy%20In%20TX%20Part%201%20%28Sep%202008%29.pdf> (explaining the Juvenile Delinquency Act of 1913).

73. *Texas Youth Commission: An Inventory of Records at the Texas State Archives, 1886–1892, 1902, 1909–2003, Undated (Bulk 1949–2000)*, TEX. ARCHIVAL RES. ONLINE, <http://www.lib.utexas.edu/taro/tslac/20124/tsl-20124.html> (last visited Nov. 7, 2013). The school started with sixty-eight inmates in 1889, and the population of the boy’s school grew to 767 juveniles by 1940. James W. Markham & William T. Field, *Gatesville State School for Boys*, HANDBOOK OF TEX. ONLINE, <http://www.tshaonline.org/handbook/online/articles/jjg02> (last visited Nov. 7, 2013). The school was finally “renamed the Gatesville State School for Boys in 1939.” *Texas House of Correction and Reformatory: An Inventory of Reports at the Texas State Archives, 1890–1892*, TEX. ARCHIVAL RES. ONLINE, <http://www.lib.utexas.edu/taro/tslac/20045/tsl-20045.html> (last visited Nov. 7, 2013). By 1970, Gatesville housed 1,830 boys in five separate units, including “Hilltop, Riverside, Valley, Hackberry, and Terrace schools.” James W. Markham & William T. Field, *Gatesville State School for Boys*, HANDBOOK OF TEX. ONLINE, <http://www.tshaonline.org/handbook/online/articles/jjg02> (last visited Nov. 7, 2013). The Texas Youth Council also operated a maximum-security facility called Mountain View School for Boys. *Id.*

74. See WILLIAM S. BUSH, PROTECTING TEXAS’ MOST PRECIOUS RESOURCE: A HISTORY OF JUVENILE JUSTICE POLICY IN TEXAS, PART I 7 (2008), available at <http://texascjc.org/sites/default/files/publications/History%20of%20JJ%20Policy%20In%20TX%20Part%201%20%28Sep%202008%29.pdf> (denoting the history of the “first facility for delinquent girls,” and reiterating its stated mission, “to provide a home for delinquent and dependent girls where they may be trained in those useful arts and sciences to which women are adapted”).

75. *Texas Youth Commission: An Inventory of Records at the Texas State Archives, 1886–1892, 1902, 1909–2003, Undated (Bulk 1949–2000)*, TEX. ARCHIVAL RES. ONLINE, <http://www.lib.utexas.edu/taro/tslac/20124/tsl-20124.html> (last visited Nov. 7, 2013). The legislature authorized the creation of a separate institution for Delinquent and Dependent Colored Girls in 1945, which opened in Brady, Texas in 1947. See WILLIAM S. BUSH, PROTECTING TEXAS’ MOST PRECIOUS RESOURCE: A HISTORY OF JUVENILE JUSTICE POLICY IN TEXAS, PART I 15 (2008), available at <http://texascjc.org/sites/default/files/publications/History%20of%20JJ%20Policy%20In%20TX%20Part%201%20%28Sep%202008%29.pdf> (describing the founding of the institution for Delinquent and Dependent Colored Girls); see also *Texas Youth Commission: An Inventory of Records at the Texas State Archives, 1886–1892, 1902, 1909–2003, Undated (Bulk 1949–2000)*, TEX. ARCHIVAL RES. ONLINE, <http://www.lib.utexas.edu/taro/tslac/20124/tsl-20124.html> (last visited Nov. 7, 2013) (noting the creation of the institution for Delinquent and Dependent Colored Girls).

76. *Texas Youth Commission: An Inventory of Records at the Texas State Archives, 1886–1892, 1902, 1909–2003, Undated (Bulk 1949–2000)*, TEX. ARCHIVAL RES. ONLINE, <http://www.lib.utexas.edu/taro/tslac/20124/tsl-20124.html> (last visited Nov. 7, 2013).

77. *Id.*

Texas Training School Code Commission⁷⁸ to study juvenile delinquency in schools.⁷⁹ Two years later, the legislature created the State Youth Development Council.⁸⁰ The Council initially consisted of fourteen members—six appointed by the Governor, including the chairman and eight ex-officio government officials.⁸¹ The purpose “of the Council was to coordinate state efforts to help communities develop and strengthen all child services” while administering the “correctional facilities for delinquent children by providing a program of constructive training aimed at the rehabilitation and successful reestablishment of these children into society.”⁸² In 1957, the Council became the Texas Youth Council.⁸³ Initially composed of only three members appointed by the Governor,⁸⁴ the size of the Council rose to six in 1975.⁸⁵ In 1983, the Council’s name was changed to the Texas Youth Commission (TYC).⁸⁶

In December 2008, “TYC had a staff of approximately 4,200 with about 335 positions in TYC’s headquarters in Austin.”⁸⁷ Downsizing began in 2007, and by July 2011, TYC reduced its staff to 3,500 with only 266

78. See WILLIAM S. BUSH, PROTECTING TEXAS’ MOST PRECIOUS RESOURCE: A HISTORY OF JUVENILE JUSTICE POLICY IN TEXAS, PART I 22 (2008), available at <http://texascjc.org/sites/default/files/publications/History%20of%20JJ%20Policy%20In%20TX%20Part%201%20%28Sep%202008%29.pdf> (explaining the creation and purpose of the Texas Training School Code Commission).

79. *Texas Youth Commission: An Inventory of Records at the Texas State Archives, 1886–1892, 1902, 1909–2003, Undated (Bulk 1949–2000)*, TEX. ARCHIVAL RES. ONLINE, <http://www.lib.utexas.edu/taro/tslac/20124/tsl-20124.html> (last visited Nov. 7, 2013).

80. Act of July 5, 1949, 51st Leg., R.S., ch. 538, § 1, 1949 Tex. Gen. Laws 988, 988, *repealed by* Act of Apr. 5, 1977, 65th Leg., R.S., ch. 52, § 1 1977 Tex. Gen. Laws 108, 108.

81. *Id.* at 988–89. The members consisted of:

[S]ix “influential” citizens appointed by the Governor . . . and eight ex-officio members—Chairman, Board of Control; Executive Director, Department of Public Welfare; Commissioner of Education; Executive Director, Board for State Hospitals and Special Schools; State Health Officer; Director, Department of Public Safety; Executive Secretary, State Parks Board; and Chairman, Texas Employment Commission.

Texas Youth Commission: An Inventory of Records at the Texas State Archives, 1886–1892, 1902, 1909–2003, Undated (Bulk 1949–2000), TEX. ARCHIVAL RES. ONLINE, <http://www.lib.utexas.edu/taro/tslac/20124/tsl-20124.html> (last visited Nov. 7, 2013).

82. *Id.*

83. Act of May 23, 1957, 55th Leg., R.S., ch. 281, § 1, 1957 Tex. Gen. Laws 660, 660, *amended by* Act of May 5, 1975, 64th Leg., R.S., ch. 121, § 1, 1975 Tex. Gen. Laws 279, 279.

84. *Id.*

85. Act of May 5, 1975, 64th Leg., R.S., ch. 121, § 1, 1975 Tex. Gen. Laws 279, 279.

86. Act of Feb. 17, 1983, 68th Leg., R.S., ch. 44, art. 2 § 1, 1983 Tex. Gen. Laws 160, 163 *repealed by* Act of May 19, 2011, 82d Leg., R.S., ch. 85, § 4.001, 2011 Tex. Sess. Law Serv. 366, 441.

87. HOUSE COMM. ON CORR., INTERIM REPORT TO THE 81ST TEXAS LEGISLATURE 20 (Jan. 2009), available at http://www.house.state.tx.us/_media/pdf/committees/reports/80interim/80Corrections.pdf.

remaining in the Austin locale.⁸⁸ The average daily population of youth in TYC facilities fell from 4,910 in fiscal year 2005 to 1,977 in fiscal year 2010, amounting to an almost 60% reduction in six years.⁸⁹ Additionally, the number of TYC institutions fell from twelve in July 2009 to six in July 2011, a 50% reduction in institutional facilities in two years.⁹⁰

B. TJPC

In the 1960s, critics and reformists began to abandon a penal system focused solely on incarceration and proposed new approaches and philosophies, including community-based corrections, promising a reduction in crime for both adults and juveniles.⁹¹ During the 1970s, TYC responded by providing subsidies to county governments to defray the costs of local juvenile programs.⁹² To respond to the local need for assistance, in 1981 the legislature created the Texas Juvenile Probation Commission (TJPC).⁹³

At its inception, the TJPC was:

to make probation services available throughout the state for juveniles, to improve the effectiveness of probation services, to provide alternatives to the commitment of juveniles by providing financial aid to juvenile boards for the establishment and improvement of probation services, to establish

88. SUNSET ADVISORY COMM'N, FINAL REPORT: TEXAS YOUTH COMMISSION, TEXAS JUVENILE PROBATION COMMISSION, OFFICE OF INDEPENDENT OMBUDSMAN 3 (July 2011), available at http://www.sunset.state.tx.us/82ndreports/tyc/tyc_fr.pdf.

89. See *id.* at 4 (referencing a chart with average daily populations at various TYC facilities).

90. *Id.*; see also TEX. JUVENILE JUSTICE DEP'T, EFFECTIVENESS OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, A REPORT TO THE TEXAS LEGISLATURE 7 (Dec. 2012), available at <http://www.tjjd.texas.gov/publications/reports/PBISLegislativeReport2012-12.pdf> (indicating only six schools remained operational in secured facilities).

91. See Eric J. Wodahl & Brett Garland, *The Evolution of Community Corrections: The Enduring Influence of the Prison*; THE PRISON J. 81S, 92S–93S (2009) (observing the changes and reforms of parole and probation from community-based programs, including expanding from 1.3 million adults to nearly 5 million); see also David M. Altschuler & Troy L. Armstrong, *Juvenile Corrections and Continuity of Care in a Community Context—The Evidence and Promising Directions*, 66 FED. PROBATION 72, 72 (2002) (discussing “re-entry” or aftercare programs in a community-based context for juveniles upon their return from a correctional incarceration); Peter Scharf, *Towards a Philosophy for the Diversion of Juvenile Offenders*, J. JUV. & FAM. CTS. 13, 19 (1978) (making an early argument for the rerouting of children from the justice system into a mandatory diversion system for certain juvenile offenders).

92. See *Texas Youth Commission: An Inventory of Records at the Texas State Archives, 1886–1892, 1902, 1909–2003, Undated (Bulk 1949–2000)*, TEX. ARCHIVAL RES. ONLINE, <http://www.lib.utexas.edu/taro/tslac/20124/tsl-20124.html> (last visited Nov. 7, 2013) (“[T]he [Texas] Youth Council initiated a county juvenile probation subsidy program.”).

93. Act of June 15, 1981, 67th Leg., R.S., ch. 617, § 1, 1981 Tex. Gen. Laws 2419, 2420 (“The Texas Juvenile Probation Commission is created.”), *repealed by* Act of June 14, 1989, 71st Leg., R.S., ch. 352, § 5(1), 1989 Tex. Gen. Laws 1323, 1429.

uniform probation administration standards, and to improve communications between state and local entities within the juvenile justice system.⁹⁴

Additionally, TJPC duties included:

(1) establishing minimum standards for personnel, staffing, case loads, programs, facilities, record keeping, equipment, and other aspects of the operation of a juvenile board necessary for the provision of adequate and effective probation services; (2) establishing a code of ethics for probation officers and providing for the enforcement of the code; and (3) establishing appropriate educational, preservice and in-service training, and certification standards for probation officers or court-supervised[,] community-based program personnel.⁹⁵

Further, the legislature reaffirmed the previous policy of providing financial assistance to local juvenile boards.⁹⁶ The Community Assistance Program (CAP) became part of the TJPC to aid in providing financial assistance to local juvenile boards.⁹⁷ By 1984, all 254 Texas counties “had probation services available to them.”⁹⁸

By 1991, the TJPC employed more than twenty people and had a \$21 million operating budget.⁹⁹ By 2008, the TJPC had sixty-seven employees¹⁰⁰ with a requested budget for 2010 and 2011 of more than \$150 million.¹⁰¹ In January 2009, the county probation departments employed approximately 5,799 probation and detention officers, all certified and monitored by the TJPC.¹⁰² During that year, those departments supervised 103,368 youth, and the TJPC provided 26% of

94. *Id.* at 2419.

95. *Id.* at 2421.

96. *Id.* at 2423.

97. *Id.*

98. SUNSET ADVISORY COMM'N, FINAL REPORT: TEXAS YOUTH COMMISSION, TEXAS JUVENILE PROBATION COMMISSION, OFFICE OF INDEPENDENT OMBUDSMAN 7 (July 2011), available at http://www.sunset.state.tx.us/82ndreports/tyc/tyc_fr.pdf.

99. Laurie E. Jasinski, *Texas Juvenile Probation Commission*, HANDBOOK OF TEX. ONLINE, <http://www.tshaonline.org/handbook/online/articles/mdtyd> (last visited Nov. 7, 2013).

100. HOUSE COMM. ON CORR., INTERIM REPORT TO THE 81ST TEXAS LEGISLATURE 23 (Jan. 2009), available at http://www.house.state.tx.us/_media/pdf/committees/reports/80interim/80Corrections.pdf.

101. TEX. JUVENILE PROB. COMM'N, LEGISLATIVE APPROPRIATIONS REQUEST FOR FISCAL YEARS 2010 AND 2011, § 2.A., p. 3 (Aug. 6, 2008).

102. HOUSE COMM. ON CORR., INTERIM REPORT TO THE 81ST TEXAS LEGISLATURE 23 (Jan. 2009), available at http://www.house.state.tx.us/_media/pdf/committees/reports/80interim/80Corrections.pdf.

local probation departments' operating budgets.¹⁰³ Similar to the TYC, the Governor appointed a policy-making board to oversee the daily operations of the TJPC.¹⁰⁴ What started as a small program with limited resources and purposes quickly grew into a commission with substantial responsibilities and power.¹⁰⁵ Nevertheless, in 2011, the Texas Legislature abolished the TJPC, and combined it with the TYC to create one juvenile justice agency—the Texas Juvenile Justice Department (TJJD).¹⁰⁶

IV. PROBATION: AN INHERENT OR CORE JUDICIAL FUNCTION

A. *History of the Suspended Sentence in Texas*

Early in the twentieth century, the limits of the inherent powers of the Texas executive and judiciary were tested as to the granting of suspended sentences, or probation.¹⁰⁷ The Texas Court of Criminal Appeals held

103. SUNSET ADVISORY COMM'N, FINAL REPORT: TEXAS YOUTH COMMISSION, TEXAS JUVENILE PROBATION COMMISSION, OFFICE OF INDEPENDENT OMBUDSMAN 7–8 (July 2011), available at http://www.sunset.state.tx.us/82ndreports/tyc/tyc_fr.pdf.

104. *Texas Juvenile Probation Commission: An Inventory of Juvenile Probation Commission Executive Correspondence and Meeting Files at the Texas State Archives, 1982–1996*, TEX, ARCHIVAL RES. ONLINE, <http://www.lib.utexas.edu/taro/tslac/20140/tsl-20140.html> (last visited Nov. 7, 2013).

105. See TEX. JUVENILE PROB. COMM'N, SELF-EVALUATION REPORT: A REPORT FOR THE SUNSET ADVISORY COMMISSION 3–5 (Aug. 2007), available at <http://www.sunset.state.tx.us/81streports/tjpc/ser.pdf> (describing the “agency’s mission, objectives and key functions”). The TJPC functions included a “comprehensive range of funding, monitoring and technical assistance, [and] programs and services . . . to assist the local juvenile boards,” including (1) serving as a “[c]onduit for [l]egislative [a]ppropriations;” (2) allocation to local juvenile probation departments of grants and contracts—\$260 million in the 2006–2007 biennium; (3) legal and technical assistance and training; (4) regulation and promulgation of standards for stakeholders; (5) “[c]ertification of [p]robation and [d]etention [o]fficers” (3,814 were certified in the 2005 fiscal year alone); (6) strategic planning, policy development, research and statistics; (7) the establishment of a statewide facility registry and secure database; (8) maintenance of a management information system; (9) developing interagency workgroups; and (10) investigations of child abuse, neglect, and exploitation. *Id.* For a flowchart of TJPC’s organization, see SUNSET ADVISORY COMM'N, FINAL REPORT: TEXAS YOUTH COMMISSION, TEXAS JUVENILE PROBATION COMMISSION, OFFICE OF INDEPENDENT OMBUDSMAN 80 (July 2009), available at http://www.sunset.state.tx.us/81streports/tyc/tyc_fr.pdf.

106. Act of May 19, 2011, 82d Leg., R.S., ch. 85, § 4.001(b), 2011 Tex. Sess. Law. Serv. 366, 441 (West) (codified at TEX. HUM. RES. CODE ANN., tit. 12 (West 2012)).

107. Probation is the common term for “community supervision,” which is:

[T]he placement of a defendant by a court under a continuum of programs and sanctions, with conditions imposed by the court for a specified period during which: (A) criminal proceedings are deferred without an adjudication of guilt; or (B) a sentence of imprisonment or confinement, imprisonment and fine, or confinement and fine, is probated and the imposition of sentence is suspended in whole or in part.

TEX. CODE CRIM. PROC. ANN. art. 42.12 § 2 (West Supp. 2012). See *Ex parte Spicuzza*, 903

Texas's first probation statute¹⁰⁸ unconstitutional as "an indirect exercise of the power to pardon," and thus, an encroachment on the constitutional power of the executive to pardon.¹⁰⁹ The Texas Court of Criminal Appeals also found the statute allowed the courts to set aside and annul a conviction after a jury-assessed punishment.¹¹⁰ The legislature soon rewrote the statute and gave the jury the power to recommend suspension of a sentence.¹¹¹ The court upheld the new law, deeming it within the constitutional power of the legislature to set punishment for criminal acts and within the jury's power to assess punishment.¹¹²

B. *Texas Constitutional Authority*

Four years later, the Constitution was amended, authorizing courts to suspend a sentence and place a defendant on probation "under such conditions as the Legislature may prescribe."¹¹³ Those conditions

S.W.2d 381, 382 n.1 (Tex. App.—Houston [1st Dist.] 1995, writ ref'd) (explaining that in 1993 the legislature replaced the term "probation" with the term "community supervision," and those previously placed on probation were in effect placed on community supervision).

108. Act of Mar. 11, 1911, 32d Leg., R. S., ch. 44, § 1, 1911 Tex. Gen. Laws 67, 67–68. The Texas Court of Criminal Appeals declared this Act unconstitutional one year after its enactment. *See Snodgrass v. State*, 150 S.W. 162, 165–67 (Tex. Crim. App. 1912) (finding Texas's first probation law was unconstitutional).

109. *See Snodgrass*, 150 S.W. at 165–67 (finding the legislation enabling district courts to grant probation violated the Texas Constitution for conferring on the courts the power to pardon, a power that the Texas Constitution delegated specifically to the Governor).

110. *See id.* at 165 ("This act by its provisions provides that . . . the defendant may apply to the court to have the judgment of conviction set aside, and . . . the judgment of conviction shall be set aside and annulled, thus giving to the district courts the power and authority to exempt from punishment a person legally convicted of crime . . .").

111. Act of Feb. 11, 1913, 33d Leg., R.S., ch. 7, § 1, 1913 Tex. Gen. Laws 8, 8–9. Remnants of this original Act can be found in the current version of the Texas Code of Criminal Procedure. *See generally* CRIM. PROC. art. 42.12 (West Supp. 2012) ("It is the purpose of this article to place wholly within the state courts the responsibility for determining when the imposition of sentence in certain cases shall be suspended, the conditions of community supervision, and the supervision of defendants placed on community supervision, in consonance with the powers assigned to the judicial branch of this government by the Constitution of Texas.").

112. *See Baker v. State*, 158 S.W. 998, 1003 (Tex. Crim. App. 1913) (upholding the right of the jury to suspend a sentence rather than confinement to the penitentiary).

113. *See* TEX. CONST. art. IV, § 11A (conferring on the Texas courts the power to suspend a criminal sentence and place the convict on probation instead). Because the amendment was not self-enacting, in 1947 the Legislature passed the Adult Probation and Parole Law, giving effect to the amendment. Adult Probation and Parole Law, 50th Leg., R.S., ch. 452, § 1, 1947 Tex. Gen. Laws 1049, 1050. Section 1 of the Adult Probation and Parole Law provides:

The courts of the State of Texas having original jurisdiction of criminal actions, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public as well as the defendant will be subserved thereby, shall have the power, after conviction or a plea of guilty for any crime or offense except murder, rape, and offenses against morals,

appeared in the 1935 statute enacting Article IV, Section 11A of the Texas Constitution, which authorized courts to suspend sentences and grant probation, with the legislative assurance that “[a]ny such person placed on probation shall be under the supervision of such court and a probation . . . officer serving such court as hereinafter provided.”¹¹⁴ The constitutional power of the Texas judiciary to grant probation, under conditions set by the legislature, became readily apparent.¹¹⁵ The judiciary now had the constitutional and statutory power to supervise persons placed on probation, a power implicit in the court’s ability to “reimpose” the sentence while maintaining jurisdiction.¹¹⁶ The probation officers supervising those placed on probation served the court as long as the court retained jurisdiction.¹¹⁷

C. *Current Statutory Authority*

The Texas Code of Criminal Procedure sets out the current legislative conditions for granting probation.¹¹⁸ In the first section of article 42.12

decency, and chastity where the maximum punishment assessed the defendant does not exceed ten (10) years imprisonment, and where the defendant has not been previously convicted of a felony, to suspend the imposition or the execution of sentence and may place the defendant on probation for the maximum period of the sentence imposed[,] or if no sentence has been imposed[,] for the maximum period for which the defendant might have been sentenced, or impose a fine applicable to the offense committed and also place the defendant on probation as hereinafter provided.

Id. at 1050.

114. *Id.* at 1050–51. The probation portion of this statute was revised in 1965 to become article 42.12 of the Texas Code of Criminal Procedure. Act of June 18, 1965, 59th Leg., R.S., ch. 722, art. 54.02, § 1, 1965 Tex. Gen. Laws, vol. 2, 317, 563 (codified at TEX. CODE CRIM. PROC. art. 42.12 (West Supp. 2012)).

115. *State v. Klein*, 224 S.W.2d 250, 252 (Tex. Crim. App. 1949).

116. *Id.*

117. *Id.*

118. TEX. CODE CRIM. PROC. ANN. art. 42.12 (West Supp. 2012); *see also Klein*, 224 S.W.2d at 252 (noting the power of the legislature to prescribe conditions for placing a convict on probation). Article 42.12 has grown beyond comprehension, setting out rules for judge-ordered community supervision, limitations on judge-ordered community supervision, jury recommendations, deferred adjudication, shock probation provisions, boot camp, pre-sentence investigations, modification, revocation, basic conditions, confinement as condition, special provisions for driving while intoxicated, bias and prejudice crimes, sex offenses, firearms, violent offenses, gangs, driver’s licenses, Internet access, education classes, child abuse, family violence, drug treatment, state jail felonies, enhanced minor crimes, community service, changing residence, community correctional facilities, fees, reduction/termination, time credits, detention/hearing on violation, and continuation. *See* CRIM. PROC. art. 42.12 (providing provisions for many types of offenses). In my opinion, this is an incredible statute, which is virtually impossible for the average practitioner to fully understand and apply. *See* William G. Reid, Comment, *The Texas Code of Criminal Procedure*, 44 TEX. L. REV. 983, 1017–18 (1966) (noting the “obesity” of the Texas Code of Criminal Procedure and its failure to

of the Code, the legislature explains the purpose of the article.¹¹⁹ The Code places “wholly within the state courts” the responsibility (1) to determine when to impose probation in certain cases and suspend part or all of the sentence; (2) to establish the conditions of community supervision; and (3) to supervise “defendants placed on community supervision, in consonance with the powers assigned to the judicial branch of this government by the Constitution of Texas.”¹²⁰ To ensure there was no misunderstanding regarding the power of the courts over community supervision or probation, the legislature expressly denoted that the statutes’ final purpose was “to remove from existing statutes the limitations, other than questions of constitutionality, that have acted as barriers to effective systems of community supervision in the public interest.”¹²¹

D. *Relationship of Adult Probation Officers to the Courts*

Historically, Texas judges deemed adult probation officers as employees of the courts.¹²² “The district judges have ultimate control of the personnel decisions” regarding their local community supervision and corrections departments, and as such are their employers.¹²³ The Texas Government Code empowers judges trying criminal cases within a judicial district, including statutory county judges trying criminal cases,¹²⁴ to hire, and presumably fire, the director of the local community supervision

provide clear and precise statements of what is required of practitioners); *cf.* Ashley Stebbins, Comment, *A Tale of Two States Without a Sentencing Commission: How Divergent Sentencing Approaches in California and Texas Have Left Texas in a Better (And Model) Position*, 62 BAYLOR L. REV. 873, 886–87 (2010) (“Texas allows probation for a more expansive range of crimes than most states offer.”).

119. CRIM. PROC. art. 42.12 § 1.

120. *Id.*

121. *Id.*

122. *See* *Yowman v. Jefferson Cnty. Cmty. Supervision & Corr. Dep’t*, 370 F. Supp. 2d 568, 591 (E.D. Tex. 2005) (concluding district judges have control over probation departments); *Shore v. Howard*, 414 F. Supp. 379, 390 (N.D. Tex. 1976) (accepting that courts are responsible for the “facets of employment and dismissal of probation officers”); *Hardin Cnty. Cmty. Supervision & Corr. Dep’t v. Sullivan*, 106 S.W.3d 186, 190 (Tex. App.—Austin 2003, pet. denied) (holding that district court judges were the employers of adult probation officers in their respective districts); Tex. Att’y Gen. Op. No. JC-0314 (2000) (explaining that district judges “are ultimately responsible” for appointing correction’s department personnel).

123. *See* *De Santiago v. W. Tex. Cmty. Supervision & Corr. Dep’t*, 203 S.W.3d 387, 391–92, 397 (Tex. App.—El Paso 2006, no pet.) (observing that prior to the 2005 legislative changes, section 76.002(b) of the Texas Government Code provided that district judges were “entitled to participate” in managing the probation department).

124. *See* TEX. GOV’T CODE ANN. § 76.002(a) (West 2013) (providing for a “board of judges” to establish a community supervision and corrections department and to approve their budget and the local justice plan).

department.¹²⁵ This department director has enumerated responsibilities, including the obligation to employ officers and other employees to conduct the work of a probation department.¹²⁶ However, the Government Code specifically provides that the employees of the department are not state employees.¹²⁷ Thus, although the director of the local probation department works for the local judge, judges have limited power over the department; they are no longer involved in the management of the probation department since a 2005 amendment to the Government Code.¹²⁸

E. *Relationship of Juvenile Probation to the Courts*

As for juvenile probation, the Texas Human Resources Code authorizes the creation of a local Juvenile Board,¹²⁹ similar to the adult Board of Judges, to oversee and perform comparable functions within the juvenile justice arena.¹³⁰ Juvenile probation officers are “officers of the court, and

125. *Id.* §§ 76.004(a), (h).

126. *Id.* §§ 76.004 (a)(1), (b) (outlining the duty of the director to perform or delegate certain tasks, including (1) “the overseeing of the department’s daily operations;” (2) the budget; (3) contracting; (4) the creation of policies and procedures; (5) the development of personnel and disciplinary policies and procedures; (6) employment grievance procedures and practices; and (7) employment of officers and other employees to investigate, supervise[,] and rehabilitate defendants on community supervision).

127. *Id.* § 76.006(a).

128. *See* Acts 1995, 74th Leg., R.S., ch. 76, § 7.11, 1995 Tex. Gen. Laws 580, 580 (entitling district and county court judges who try criminal cases and are “served by a community supervision and corrections department” to participate in managing those departments), *repealed by* Acts 2005, 79th Leg., R.S., ch. 255, § 12, 2005 Tex. Gen. Laws 454, 457.

129. TEX. HUM. RES. CODE ANN. § 152.0032 (West 2013).

130. *Id.* at § 152.0007(a)(1). The statutory duties of the Juvenile Board are:

- (1) [E]stablish a juvenile probation department and employ a chief probation officer who meets the standards set by the Texas Juvenile Probation Commission; and (2) adopt a budget and establish policies, including financial policies, for juvenile services within the jurisdiction of the board.

Id. The Juvenile Board is charged with many other duties. *See* TEX. FAM. CODE ANN. § 51.04(b) (West 2008) (designating juvenile courts); *Id.* § 51.05(b) (providing an annual report to the commissioner’s court on the suitability of the facilities of the juvenile court); *Id.* § 51.12(c) (West Supp. 2012) (inspecting pre-adjudication secure detention facilities annually); *Id.* § 51.12(e) (authorizing the Board to designate a place of detention in another county for counties that do not have certified places of detention); *Id.* § 51.126(b) (inspecting non-secure correctional facilities); *Id.* § 52.02(b) (West 2008) (designating one or more places of detention within the county for a child to be detained). As these duties evince, the oversight of the Juvenile Board is more hands on than the oversight from the Board of Judges, making the relationship between juvenile probation and the courts more dependent. *See, e.g., How Offenders Move Through TJJD*, TEX. JUV. JUST. DEP’T, http://www.tjjd.texas.gov/about/how_movethru.aspx (last visited Nov. 7, 2013) (emphasizing the role of the courts in determining how a juvenile offender should be adjudicated).

as such are under the continuing direction of the court.”¹³¹ Like the adult probation board, the Juvenile Board is not involved in daily operations, and the chief juvenile probation officer hires, fires, and deals with personnel.¹³²

Juvenile probation is a local authority; in certain circumstances, a juvenile probation officer may arrest¹³³ a juvenile before the child is per se on probation.¹³⁴ As adult probation officers neither possess this power, nor have the responsibility to notify family upon arrest,¹³⁵ the juvenile probation officer's authority may likewise spring from the courts. However, the juvenile probation officer is in a unique position because while he or she has a responsibility to execute the orders of the court—such as arresting a juvenile—the officer also has a responsibility to protect the child in question.¹³⁶

131. *In re D.B.C.*, 695 S.W.2d 248, 249 (Tex. App.—Austin 1985, no writ) (citing *P.G. v. State*, 616 S.W.2d 635, 638 (Tex. Civ. App.—San Antonio 1981, writ ref'd n.r.e.)).

132. *See* HUM. RES. CODE § 152.0008 (outlining the duties of the chief juvenile probation officer).

133. FAM. CODE § 52.01(a)(4). Although a child is subject to the laws of arrest, the Texas Family Code is careful to reiterate that taking a juvenile into custody is not an arrest. *Id.* §§ 52.01(a)(2), 52.01(b). The act of taking a “child into custody is not an arrest,” except to determine the validity of the seizure (intake) or the constitutionality of a search. *Id.* § 52.01(b). An arrest warrant in juvenile law is called a “directive to apprehend.” *Id.* § 52.015. A law enforcement officer or a probation officer may ask a juvenile court to issue a directive to apprehend upon probable cause. *Id.* Although the Family Code goes to great lengths to state these detentions are not arrests, in my experience juveniles likely have difficulty understanding such a subtle difference when placed in a restrictive environment with hands and feet bound in chains by the probation officer. *Cf.* *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2402–03 (2011) (“In some circumstances, a child’s age ‘would have affected how a reasonable person’ in the suspect’s position ‘would perceive his or her freedom to leave.’” (quoting *Stansbury v. California*, 511 U.S. 318, 325 (1994) (per curiam))).

134. FAM. CODE § 52.01(a)(6) (permitting a juvenile probation officer to take a child into custody when “there is probable cause to believe the child has violated a condition of release”). In some circumstances, juvenile probation officers, and even law enforcement officers, may take a child into custody without a warrant. *Id.* §§ 52.01(a)(3)(C), 52.01(a)(4).

135. *See id.* § 52.02(b) (stating the person taking the child into custody “shall promptly give notice” to a parent, guardian, or custodian and provide a reason for the taking); *In re S.R.L.*, 546 S.W.2d 372, 373 (Tex. Civ. App.—Waco 1976, no writ) (supporting the proposition that the arresting officer need only make reference to the offense affecting the child, and not the actual reason for taking the child into custody, such as to interrogate).

136. *Cf.* *Gonzales v. State*, 67 S.W.3d 910, 912 (Tex. Crim. App. 2002) (requiring the child’s statement to be excluded when the police fail to notify the child’s parents that the child is in custody and there is “a causal connection between the failure to notify the juvenile’s parents and the juvenile’s execution of a written statement”). There are many other procedural rights afforded to children that are not available to adults, such as in taking statements and in using photographs and fingerprints. *See generally* Patrick S. Metzger, *Feed Me Seymour: The Never Ending Hunger of the Criminal Process for Procedural Rights and Removing Children from Its Shop of Horrors*, 46 TEX. TECH L. REV. (forthcoming 2013) (on file with author) (contrasting procedural rights afforded to children and adults).

Unlike the prescribed conditions of probation for qualified adults,¹³⁷ a child is placed on probation upon “reasonable and lawful terms as the court may determine” in the child’s home, the home of a relative or other fit person,¹³⁸ or, with proper findings,¹³⁹ in a foster home, a public or private licensed residential treatment facility, or a public or private secure correctional facility.¹⁴⁰ The relationship of the court to the placement of the child on probation, even if committed on a determinate sentence to the TYC,¹⁴¹ is significantly more complex than with adults.¹⁴² Texas statutes make the relationship of the juvenile probationer with the court more individualized.¹⁴³ Courts have long held that the juvenile court “cannot delegate its ultimate authority to determine, set and supervise the conditions of probation.”¹⁴⁴

137. See TEX. CODE CRIM. PROC. ANN. art. 42.12 (West 2012) (prescribing conditions of community supervision for adult criminal offenders); *Id.* art. 42.12, § 3g (specifying a list of offenses for which the judge may not recommend probation in lieu of a sentence of confinement); *Id.* art. 42.12, § 4(e) (providing that a jury may give probation, with certain limitations, upon the sworn motion of the defendant that he has never before been convicted of a felony—no such requirements exist in juvenile law in Texas).

138. FAM. CODE § 54.04 (d)(1)(A) (West 2012).

139. See *id.* § 54.04(c) (requiring a finding that “the child is in need of rehabilitation or the protection of the public or the child requires that disposition be made,” and that no disposition may be made outside the child’s home “unless the court or jury finds that the child, in the child’s home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of the probation”).

140. *Id.* § 54.04(d)(1)(B).

141. *Id.* § 54.04(d)(3) (listing the offenses qualifying for a determinate sentence). A determinate sentence is a sentence to a TYC-operated facility “with a possible transfer to the Texas Department of Criminal Justice” for a minimum term of confinement, depending on the type of offense committed. *Id.*

142. Compare CRIM. PROC. art. 42.12 (describing procedures, requirements, and limitations for placing an adult on probation), with FAM. CODE § 54.04 (outlining the findings necessary for placing juveniles on probation).

143. See FAM. CODE § 54.04(d)(1) (addressing the Disposition Hearing, which is analogous to the punishment phase of an adult trial, and requiring individualized findings before adjudicating the child with only the short reference to “reasonable or lawful terms as the court may determine”). For some offenses, the court may impose special probation conditions. See *id.* § 54.0405(a)(1)(A) (requiring that a juvenile adjudicated of a sexual offense “attend psychological counseling sessions for sex offenders”); *Id.* § 54.0406(a) (establishing that the court must notify the probation officer of a child adjudicated of unlawful possession of a handgun about “the manner in which the child acquired the handgun, including the date and place of and any person involved in the acquisition”); *Id.* § 54.0407 (ordering psychological counseling for a juvenile with a cruelty to animals conviction); *Id.* § 54.042(a) (suspending the child’s driver’s license for violating laws enumerated in the Transportation Code); *Id.* § 54.046(a)(1)(A) (demanding that a child placed on probation “for [d]amaging [p]roperty [w]ith [g]raffiti” reimburse the property owner “for the cost of restoring the property”); *Id.* § 54.0491(b) (making participation in street gang intervention programs mandatory for a child found “to have engaged in delinquent conduct” that involved street gangs).

144. K.K.B. v. State, 609 S.W.2d 824, 825 (Tex. App.—Texarkana 1980, no writ).

V. CONSTITUTIONALITY OF THE TEXAS JUVENILE JUSTICE DEPARTMENT

I submit the creation of the Texas Juvenile Justice Department, merging the TJPC and the TYC, created a violation of the separation of powers doctrine. This is not the first allegation of this nature in regard to juvenile justice programs. In 1977, critics of the TYC Community Assistance Program (CAP) made similar separation of powers arguments when questioning the constitutionality of the program.¹⁴⁵ They argued that the CAP was unconstitutional because the amount of money awarded to a county depended on the county's reduction in TYC commitments.¹⁴⁶

However, the Texas Attorney General found the program constitutional.¹⁴⁷ Although it is forbidden for a person in one department of government to exercise "powers properly attached to either of the other two departments," the Attorney General opined that the TYC funding formula merely provided an incentive to reduce commitments.¹⁴⁸ The history of such constitutional interpretations may lead to a different conclusion.

A. *Separation of Powers*

James Madison defined tyranny as the "accumulation of all powers legislative, executive[,] and judiciary in the same hands"¹⁴⁹ Madison acknowledged that the structure of the federal government and the powers of the separate departments could be blended in such a way that "some of the essential parts of the edifice" would be in "danger of being crushed by the disproportionate weight of the other parts."¹⁵⁰ Our separation of powers doctrine "is basic and vital . . . to preclude a commingling of these essentially different powers of government in the same hands."¹⁵¹ A

145. Tex. Att'y. Gen. LO-959 (1977).

146. *Id.*

147. *Id.* (opining that CAP does not violate Article II, Section one of the Texas Constitution because the "funding formula is merely an incident of the exercise of the Council's administrative power to grant funds for local programs").

148. *Id.*

149. THE FEDERALIST NO. 47 (James Madison).

150. *Id.*

151. See *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933) (discussing the power of the legislative branch to reduce the compensation of the constitutionally created judiciary, and quoting James Wilson—one of the framers of the Constitution—that the independence of each department "should be free from the remotest influence, direct or indirect, of either of the other two powers" (quoting 1 JAMES DEWITT ANDREWS, THE WORKS OF JAMES WILSON 367 (1896))).

department “shall never be controlled by or subjected, directly or indirectly, to the coercive influence of either of the other departments.”¹⁵²

B. *Texas Constitution*

The Texas Constitution likewise provides that the powers of the three branches of state government shall be distinct.¹⁵³ The boundaries of a department’s “power” must be examined before determining whether one branch has invaded or usurped another branch. In *Baker v. State*,¹⁵⁴ the court reiterated that “certain powers are specifically conferred on the Legislature,”¹⁵⁵ and other powers are specifically reserved for the judiciary:

The power to determine [a] penalty is not conferred on the executive nor the judiciary, but is confided solely to the legislative branch of the government, and [neither the judiciary], nor the Governor, have authority nor power to prescribe to the legislative department what acts of omission or commission shall be made penal offenses, nor what punishment shall be assessed for a violation of such penal laws.¹⁵⁶

Therefore, once the legislature determines something is illegal and prescribes the punishment to be assessed by the judiciary, neither the legislative nor executive branch may interfere with the power of the judiciary to set punishment.¹⁵⁷

Further collaboration and cooperation—even sharing of powers—between government departments is allowed if the state constitution “expressly” permits it.¹⁵⁸ In direct opposition to a formalistic interpretation of the separation of powers,¹⁵⁹ functionally interpreting the United States Constitution validates using the Texas Constitution to protect the core constitutional functions of each branch of government—

152. *Id.* (quoting 1 JAMES DEWITT ANDREWS, *THE WORKS OF JAMES WILSON* 367 (1896)).

153. TEX. CONST. art. II, § 1; TEX. CONST. art. III, § 1; *see also* *Baker v. State*, 158 S.W. 998, 1002 (Tex. Crim. App. 1913) (“[N]o person . . . being of one of these departments shall exercise the power properly attached to either of the others . . .”).

154. *Baker v. State*, 158 S.W. 998 (Tex. Crim. App. 1913).

155. *Id.*; *see also* TEX. CONST. art. III, § 1 (providing that the Legislature is to enact laws).

156. TEX. CONST. art. III, § 1.

157. *See id.* (“The passage of this law . . . is a legislative act, passed within the scope of the power which they and they alone possess, to fix by law the punishment of any and all penal offenses.”).

158. TEX. CONST. art. II, § 1.

159. *Cf.* *Immigration & Naturalization Servs. v. Chadha*, 462 U.S. 919, 951 (1983) (“Although not ‘hermetically’ sealed from one another . . . the powers delegated to the three Branches are functionally identifiable. When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it.”).

applying checks and balances by using shared powers to control governmental power.¹⁶⁰

C. *Judicial Power*

Though the branches of government are “not ‘hermetically’ sealed from one another,”¹⁶¹ the judiciary must be independent “to protect the citizen from both government overreaching and individual self-help.”¹⁶² The core constitutional functions of the court arise “out of principles and doctrines that are so thoroughly embedded as to form the very foundation of our governmental structure.”¹⁶³ The powers of the judiciary cannot be impeded, even indirectly, by the legislative or executive branches.¹⁶⁴

Inherent judicial power is “not derived from legislative grant or specific constitutional provision, but from the very fact that the court has been created and charged by the constitution with certain duties and responsibilities.”¹⁶⁵ The separation of powers doctrine authorizes a court’s inherent power “to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity.”¹⁶⁶ When the legislative or executive branch interferes with the “functioning of the judicial process in a field constitutionally committed to the control of the courts,”¹⁶⁷ a constitutional crisis is imminent. “In the complex structure of [Texas] state government, . . . certain core powers must be reserved to officers having the special characteristics of the branch designed to discharge them.”¹⁶⁸

160. *Cf.* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.”); *see also* Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337, 1351 (1990) (“The more flexible function approach, which emphasizes the purposes of separated powers and asks whether core functions are threatened, better fits the complexity of state government [in Texas].”).

161. *Chadha*, 462 U.S. at 951.

162. *In re Barr*, 13 S.W.3d 525, 532 (Tex. Rev. Trib. 1998, no appeal) (“Members of the judiciary of the State of Texas . . . all serve as the collective guidon of the banner representing fairness and impartiality in our state.”).

163. *Mays v. Fifth Court of Appeals*, 755 S.W.2d 78, 80 (Tex. 1988) (Spears, J., concurring); *cf.* *Gen. Servs. Comm’n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 600 (Tex. 2001) (“The separation-of-powers doctrine prohibits one branch of government from exercising a power *inherently* belonging to another branch.” (emphasis added)).

164. *Mays*, 755 S.W.2d at 81 (Spears, J., concurring) (“[T]he judiciary is an integral part of our government and cannot be impeded in its function by legislative intransigence in funding.”).

165. *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398 (Tex. 1979).

166. *Id.*

167. *Gen. Servs. Comm’n*, 39 S.W.3d at 600.

168. Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337,

Specifically, the courts strike down legislation that interferes with the “functioning of the judicial process” as violating the separation of powers doctrine.¹⁶⁹ A two-part test determines if an act of the legislature unduly interferes with the powers of the judiciary: “First, is the law grounded in the Legislature’s own constitutionally assigned powers? Second, even if so, does the law unduly interfere, or even *threaten* to unduly interfere, with the judiciary’s effective exercise of *its* constitutionally assigned powers,”¹⁷⁰ or “core judicial function.”¹⁷¹

D. *State Agencies*

State government agencies are created by statute and have no inherent powers or authority.¹⁷² When the legislature creates an administrative agency or commission, the legislature uses its inherent ability to delegate its powers to that agency through legislative enactments.¹⁷³ Consequently, the agency’s authority extends only to the powers expressly given by statute and “those powers necessarily implied to carry out the specific powers delegated.”¹⁷⁴ By long standing interpretation, the courts have power to review administrative action, even absent statutory authority allowing such review.¹⁷⁵

E. *The Unconstitutionality of the TJJD*

At first glance, the creation of separate local juvenile boards appears to insulate the TJJD from exercising control over the courts.¹⁷⁶

1355 (1990) (comparing lawyers presiding over criminal trials to the Governor inappropriately dictating limitations to a trial court).

169. *State Bd. of Ins. v. Betts*, 308 S.W.2d 846, 851 (Tex. 1958); *see also Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex. Crim. App. 1990) (en banc) (holding a statute that limited a court’s ability to enter a final judgment for eighteen months after a bond forfeiture was an unconstitutional violation of the court’s core judicial function); *Meshell v. State*, 739 S.W.2d 246, 252–57 (Tex. Crim. App. 1987) (en banc) (ruling the Texas Speedy Trial Act an unconstitutional violation of inherent judicial powers under Article V, Section 21 of the Texas Constitution).

170. *In re Allcat Claims Serv., LP*, 356 S.W.3d 455, 488 (Tex. 2011) (citing *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 241 (Tex. Crim. App. 1990) (en banc)).

171. *See State v. Williams*, 938 S.W.2d 456, 458–59 (Tex. Crim. App. 1997) (holding a statute requiring dismissal of a criminal case within a stated period of the defendant’s arrival in Texas was not an unconstitutional violation of the court’s core judicial powers).

172. *Pub. Util. Comm’n v. GTE-Southwest, Inc.*, 901 S.W.2d 401, 406–07 (Tex. 1995).

173. *Id.*

174. *Tex. Comm’n on Envtl. Quality v. Abbott*, 311 S.W.3d 663, 673–74 (Tex. App.—Austin 2010, pet. denied).

175. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

176. *See TEX. HUM. RES. CODE ANN.* § 201.002(1) (West 2013) (outlining the purposes of the

Nonetheless, the opportunity for the TJJD to unconstitutionally exert its influence over courts exists. The TJJD now wields an extensive amount of control over local probation departments and, consequently, the courts. For example, the TJJD is instrumental in developing and administering treatment programs for youth, as well as assisting the local departments in implementing these programs.¹⁷⁷ The department is charged with investigating all complaints against local facilities and probation officers.¹⁷⁸ The TJJD makes rules and standards that govern local probation departments¹⁷⁹ and monitors these departments to ensure

juvenile justice system, including “creating a unified state juvenile justice agency that works in partnerships with local county governments, the courts, and communities to promote public safety by providing a full continuum of effective supports and services to youth from initial contact through termination of supervision”).

177. *See id.* § 203.0065(d) (allowing TJJD to “plan, develop, and administer a comprehensive and unified statewide delivery system” of prevention and intervention services, and to “assist local communities in the coordination and development” of these services); *Id.* § 203.015 (“The department shall establish and implement a system to evaluate the effectiveness of county and state programs and services for youth.”); *Id.* § 221.0035(b) (West Supp. 2013) (authorizing TJJD to develop “a recommended set of best practices” to be used by juvenile probation departments to improve the ability of the local departments to identify victims of sex trafficking); *Id.* § 221.006 (West 2013) (establishing that TJJD provides training for local probation departments in “violence prevention and conflict resolution programs” and noting the TJJD should encourage the inclusion of such programs “as a condition of probation”); *Id.* § 221.0061 (West Supp. 2013) (“The department shall provide trauma-informed care training during the preservice training the department provides for juvenile probation officers, juvenile supervision officers, juvenile correctional officers, and juvenile parole officers.”); *Id.* § 221.009 (West 2013) (including among TJJD duties the requirement to develop and implement plans for treating juveniles on probation).

178. *See id.* § 203.008(j) (“The department shall be granted access at any reasonable time to any evidence that is related to any matter the department or executive director considers necessary to administer the department’s functions, powers, and duties.”); *Id.* § 203.010 (mandating that TJJD maintain a system to investigate and act on complaints “received by the department by or on behalf of a juvenile relating to the programs, services, or facilities of the department or a local juvenile probation department”); *Id.* § 221.010 (providing a procedure for investigating complaints against local juvenile boards); *Id.* § 221.011 (relaying that TJJD employs and commissions officers to investigate allegations of “abuse, neglect, and exploitation” in juvenile justice programs); *Id.* § 221.054 (establishing the right of TJJD to collect data “concerning the outcomes of local probation programs throughout the state”).

179. *Id.* § 221.002 (West Supp. 2013). This rather expansive provision allows TJJD to adopt rules that set “minimum standards for personnel, staffing, case loads, programs, facilities, record keeping, equipment, and other aspects of the operation of a juvenile board that are necessary to provide adequate and effective probation services.” *Id.* § 221.002(a)(1); *accord id.* § 221.002(a)(2) (authorizing the TJJD to create “a code of ethics for probation . . . officers,” as well as a mechanism to enforce that code); *Id.* § 221.002(a)(3) (setting certification standards for probation officers); *Id.* §§ 221.002(a)(4), (5) (establishing the minimum standards for juvenile facilities and alternative education programs). This section even dictates that juvenile facilities that do not accept state funding must report to the TJJD monthly on “the same data as that required of counties accepting state aid funding.” *Id.* § 221.002(e). Section 221.004 of the Texas Human Resources Code grants the TJJD significant control over local probation departments, stating:

(a) The board shall adopt rules that provide:

compliance.¹⁸⁰ It certifies all probation officers and provides educational training and technical assistance to the counties, juvenile boards, and probation officers.¹⁸¹ Juvenile probation departments that are “aggrieved” by a decision of the TJJD executive, “including a decision relating to the standards affecting juvenile probation, programs, services or facilities,” may appeal the decision to the TJJD Board; however, Board decisions are not appealable.¹⁸² Finally, and perhaps most significantly, the department is the primary financial conduit to operate local juvenile probation departments.¹⁸³ It may withhold funding from communities that do not measure up to TJJD standards.¹⁸⁴ In short, the TJJD—an agency of the executive branch—sets standards and provides funding for facilities, officers, and employees traditionally supervised by the judiciary.

(1) standards for the collection and reporting of information about juvenile offenders by local probation departments;

(2) performance measures to determine the effectiveness of probation services provided by local probation departments; and

(3) case management standards for all probation services provided by local probation departments.

(b) The department shall monitor local probation departments for compliance with the standards and measures that the board adopts.

(c) The department shall provide technical assistance to local probation departments to aid compliance with the standards and measures that the board adopts.

Id. § 221.004 (West 2013). Title 12 of the Texas Human Resources Code contains numerous provisions that specifically authorize the TJJD to promulgate standards for local juvenile departments. *See, e.g., id.* § 221.002 (outlining the minimum standards for probation officers).

180. *See id.* § 203.015 (“The department shall establish and implement a system to evaluate the effectiveness of county and state programs and services for youth.”); *Id.* § 221.007 (mandating every juvenile board keep records “the department considers necessary” and submit periodic reports to the TJJD as required); *Id.* § 221.008 (notifying local juvenile boards and probation departments that the TJJD may audit or inspect records, programs and facilities “to determine compliance with the board’s rules”); *see also id.* § 221.004(b) (warning the TJJD will monitor for compliance).

181. *Id.* § 221.004.

182. *Id.* § 203.001.

183. *See id.* § 223.001(a) (“The department shall annually allocate funds for financial assistance to juvenile boards to provide juvenile services according to current estimates of the number of juveniles in each county and other factors the department determines are appropriate.”); *Id.* § 223.002 (conditioning continuing financial aid on the local board’s demonstration “to the department’s satisfaction” that it spent the funds on juvenile services); *Id.* § 223.004(a) (stating funds are received when “the department determines that a juvenile board complies with the department’s standards”).

184. *Id.* § 223.005. This section, in its entirety, reads:

(a) The department may refuse, reduce, or suspend payment of state aid to: (1) a juvenile board that fails to comply with the department’s rules or fails to maintain local financial support; or (2) a county that fails to comply with the minimum standards provided under Section 221.002(a)(4).

(b) The department shall provide notice and a hearing in a case in which the department refuses, reduces, or suspends state aid.

Id.

VI. CONCLUSION

Probation, whether juvenile or adult, has long been the domain of the judiciary, and the supervision of those on probation has been within the jurisdiction of the courts.¹⁸⁵ Jurisdiction of all Texas courts, adult and juvenile, comes from “the Texas Constitution and state statutes.”¹⁸⁶ Once a court obtains jurisdiction, it “retains jurisdiction over the defendant until he successfully completes the entire [probation] term.”¹⁸⁷

It is entirely possible that political concerns could supersede the ultimate goal of rehabilitating juvenile offenders.¹⁸⁸ What would happen if the Governor, as the chief executive officer of the state, determined that local courts were being too easy on juvenile criminals, stripped local probation departments of discretion in supervising drug and sex crimes, and instead mandated prompt detention or arrest for even the slightest probation violation? What if the judge supervising these children believed in treatment for drug addiction and sex crimes in non-secure post-adjudication facilities and outpatient programs? What if the Governor also required the TJJD to withhold funding for treatment facilities in liberal counties? Or, suppose the Governor ordered the TJJD to rewrite the certification criteria for non-secure post-adjudication facilities and outpatient programs in such a way as to exclude them from funding? The solution is not for the legislature to promulgate specific rules governing the TJJD. Such a course of action poses risks, namely, the threat of an improper influence on the power to supervise juveniles on probation, a core judicial function.¹⁸⁹

As the TJJD has assumed the duties of the TJPC, its oversight of local juvenile probation personnel and facilities has grown. The TJPC set

185. *Hoffman v. State*, 922 S.W.2d 663, 668 (Tex. App.—Waco 1996, writ ref'd).

186. *Id.*

187. *Id.* at 669.

188. For those who may argue the Governor would never make decisions in the operation of agencies under his supervision for political reasons, recall the Governor's raid of the Texas Forensic Science Commission in 2009. Hilary Hylton, *Why Did Texas Gut Its Forensics Commission?*, TIME (Oct. 6, 2009) <http://www.time.com/time/nation/article/0,8599,1927855,00.html>. The Governor removed several members of the commission, including the chairman. *Id.* The raid came as the commission began an investigation into the possible innocence of Cameron Todd Willingham, a man put to death five years prior. *Id.* Critics of Governor Perry argued that the removal of “the board's well-respected chairman” resulted “in a delay in an important investigation of evidence in a death-penalty case that critics say will prove an innocent man was executed on Perry's watch.” *Id.* Perhaps not so coincidentally, this raid occurred during Governor Perry's contested bid for reelection. *See id.* (observing that Governor Perry was “facing a potentially bruising GOP primary battle”).

189. *See Hoffman*, 922 S.W.2d at 668 (affirming that probation is a function of the judiciary).

standards for juvenile boards, probation officers, and facilities.¹⁹⁰ The TJPC also provided educational training and technical assistance to the counties, juvenile boards, and probation offices; it performed inspections and audits of juvenile boards; and it had the right to suspend or refuse to pay state aid.¹⁹¹ Now, the TJJD performs all these duties and more.¹⁹² The TJJD, like its TYC predecessor, is under the authority of the executive branch.¹⁹³ The TJPC was a state agency with oversight in the legislature.¹⁹⁴ With the functions of the TJPC inherited by the TJJD, the TJPC, although technically abolished, is now effectively an agency of the executive branch.¹⁹⁵ When the attorney general wrote his opinion in 1977 in regard to the TYC CAP,¹⁹⁶ the TYC was under the control of the Governor.¹⁹⁷ Surely, concerns over separation-of-powers led to the creation of the TJPC outside the executive branch in 1981.¹⁹⁸

The executive branch cannot be allowed to impede, even indirectly, into the core constitutional functions of the judiciary to supervise those within its jurisdiction,¹⁹⁹ including court supervision of probation. This is an inherent power of the courts—the very “functioning of the judicial

190. Act of June 15, 1981, 67th Leg., R.S., ch. 617, § 1, 1981 Tex. Gen. Laws 2419, 2420, *repealed by* Act of June 14, 1989, 71st Leg., R.S., ch. 352, § 5(1), 1989 Tex. Gen. Laws 1323, 1429.

191. *See id.* (addressing state aid provided for local juvenile probation departments).

192. Act of May 19, 2011, 82d Leg., R.S., ch. 85, § 4.001(b), 2011 Tex. Sess. Law Serv. 366, 441 (West) (codified at TEX. HUM. RES. CODE ANN. tit. 12 (West 2013)).

193. *Compare* SUNSET ADVISORY COMM’N, FINAL REPORT: TEXAS YOUTH COMMISSION, TEXAS JUVENILE PROBATION COMMISSION, OFFICE OF INDEPENDENT OMBUDSMAN 62 (July 2009), *available at* http://www.sunset.state.tx.us/81streports/tyc/tyc_fr.pdf (illustrating the organization of the TYC and its relation to Governor) *with* TEX. JUV. JUST. DEP’T, <http://www.tjjd.texas.gov/docs/TJJDOrgChart1.pdf> (last visited Nov. 7, 2013) (depicting the organizational structure of the newly created TJJD).

194. *See* SUNSET ADVISORY COMM’N, FINAL REPORT: TEXAS YOUTH COMMISSION, TEXAS JUVENILE PROBATION COMMISSION, OFFICE OF INDEPENDENT OMBUDSMAN 80 (July 2009), *available at* http://www.sunset.state.tx.us/81streports/tyc/tyc_fr.pdf (providing the TJPC structure).

195. Act of May 19, 2011, 82d Leg., R.S., ch. 85, § 4.001(b), 2011 Tex. Sess. Law Serv. 366, 441 (West) (codified at TEX. HUM. RES. CODE ANN. tit. 12 (West 2013)).

196. Tex. Att’y Gen. LO-959 (1977).

197. *See e.g.*, Act of May 5, 1975, 64th Leg., R.S., ch. 121, § 1, 1975 Tex. Gen. Laws 279, 279 (authorizing the Governor to appoint the members of the TYC).

198. Act of June 15, 1981, 67th Leg., R.S., ch. 617, § 1, 1981 Tex. Gen. Laws 2419, 2420 (creating an independent Texas Juvenile Probation Commission), *repealed by* Act of June 14, 1989, 71st Leg., R.S., ch. 352, § 5(1), 1989 Tex. Gen. Laws 1323, 1429.

199. *Gen. Servs. Comm’n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 600 (Tex. 2001); *accord Mays v. Fifth Court of Appeals*, 755 S.W.2d 78, 80 (Tex. 1988) (Spears, J., concurring) (“This inherent power of the courts to preserve their efficient functioning thus derives from the very creation of the judiciary as a separate branch of government.”); *see also* THE FEDERALIST NO. 47 (James Madison) (stressing the judiciary must remain independent from the other branches).

process.”²⁰⁰ The TJJD is certainly grounded in the legislature’s own constitutionally assigned powers, but the primary question is “does the law unduly interfere, or even threaten to unduly interfere, with the judiciary’s effective exercise of its constitutionally assigned powers” or core judicial function?²⁰¹ At the very least, the threat exists to unduly interfere with the court’s powers in supervising juveniles under its jurisdiction.

Either the Constitution must be amended to remove the TJJD from the executive branch—an unlikely proposition under the current retributive system of justice—or the rehabilitative and community functions of the TJJD must be returned to an agency outside the executive with legislative oversight. Perhaps the best way to meet this challenge is to reconstruct the juvenile system, remove children from the taint of criminality, and address their needs until maturity.²⁰² Under this recommendation, the TJJD should be abolished, the juvenile courts turned into mediation courts, and the power to guide the development of youth properly placed in the hands of the community against whom the child has transgressed.

Whether we maintain the current structure of judicial interventions and punishments; improve the current system by continuing to increase the use of evidenced-based methods of behavioral modification; continue to decentralize juvenile justice, forcing more and more responsibility on local authorities; or completely rewrite our approach to the young with a modern approach based upon current developments in behavioral and brain science tied to the aboriginal traditions of family and community—we must change our approach. We must begin at the prenatal stage and address the medical and psychological needs of the child, the mother, and the family, not as separate pieces in the community puzzle, but as integral cogs in the machine to realize society’s potential for all of us.²⁰³

200. See THE FEDERALIST NO. 47 (James Madison) (emphasizing the importance of an independent judicial branch).

201. See *In re Allcat Claims Serv., LP*, 356 S.W.3d 455, 488 (Tex. 2011) (citing *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 241 (Tex. Crim. App. 1990) (en banc) (identifying questions of law as core judicial functions); *Baker v. State*, 70 Tex. Crim. 618, 158 S.W. 998, 1002 (Tex. Crim. App. 1913) (holding that Article II, Section One of the Texas Constitution forbids any one person of the legislative, executive, or judicial branches to exercise a power delegated to another branch).

202. Patrick S. Metze, *Feed Me Seymour: The Never Ending Hunger of the Criminal Process for Procedural Rights and Removing Children from Its Shop of Horrors*, 46 TEX. TECH L. REV. (forthcoming 2013) (manuscript at 104–06) (on file with author).

203. See generally *id.* (discussing alternatives to criminally punishing children who break laws).