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Plugging the School-to-Prison Pipeline by Improving Behavior and Protecting Core Judicial Functions

Patrick Metze, Texas Tech University

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Plugging the School-to-Prison Pipeline by Improving Behavior and Protecting Core Judicial Functions

A Constitutional Crisis Looms

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ABSTRACT

The consolidation of the Texas Youth Commission (TYC) and the Texas Juvenile Probation Commission (TJPC) into the Texas Juvenile Justice Department (TJJD) in 2011, produced a unified state juvenile justice agency to promote public safety first and to produce positive outcomes for youth, families, and communities second. As Professor Metze’s second paper discussing ways to effect a change in the School-to-Prison Pipeline, he first highlights the progress of TJJD’s use of Positive Behavioral Interventions and Supports (PBIS) in the Texas juvenile correctional context as continued evidence that such techniques, if effective in the correctional setting, will certainly work in the public schools. PBIS continues to show itself as an effective behavioral modification technique that should be mandated by the Legislature to be used in all Texas Public Schools on a local level. The creation of the TJJD though has created a constitutional intrusion into a core judicial function of the courts that have jurisdiction over juveniles on a local level. This paper will address these seemingly unrelated topics that both relate to efforts to plug the school-to-prison pipeline: (1) by increasing the ability of local public schools to deal with behavioral problems with the concomitant benefit of educating more of our youth who otherwise would be excluded from a public education and (2) by preserving the constitutional authority of local courts in the supervision and rehabilitation of those under its jurisdiction by removing even a threat to the local court’s power to divert juveniles from the pipeline by meaningful community-based rehabilitation.

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1 The Mission of the TJJD is “to create a safe Texas through the establishment of a continuum of services that promotes positive youth outcomes…. The TJJD’s vision is to provide “safety for citizens of the State of Texas through partnership with communities and the delivery of a continuum of services and programs to help youth enrich and value their lives and the community by focusing on accountability of their actions and planning for a successful future.” See Agency Mission & Purpose, Tex. Juvenile Justice Dep’t (Feb. 23, 2013), http://www.tjjd.texas.gov/aboutus/agencymission.aspx.
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Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

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

A. 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. I proposed a method to retain more children in the public schools with the corresponding benefits of a less hostile school environment and a more educated youth population. The technique – increasingly being used

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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 (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 [that] 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. I addressed school discipline and how certain children are excluded from school by the overuse of suspensions, expulsions, and disciplinary alternate education. Id. My solution is the elimination of the Disciplinary Education Alternative Programs and the return of all children to their home campus with training of faculty, staff, and behavioral professionals in the use of Positive Behavioral Interventions and Supports. Id.

3 Id. at 311.

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 Alternate 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 a campus who contact students, “how to reinforce positive 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
throughout the United States -- is an evidenced-based, modern approach to positively modifying behavior through the use of Positive Behavioral Interventions and Supports (PBIS). When used in the juvenile justice context, and even in the adult correctional setting, PBIS has shown to be a more effective alternative to time honored disciplinary techniques. My argument was that if this technique would work with children and adults who are incarcerated in a state correctional setting—children and adults who few would argue have already earned their bad behavioral credentials—then surely the technique would work in a public school setting with those who have not yet reached the higher levels of misbehavior.

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

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6 See, e.g., 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).


8 See supra note 2.

9 TEX. EDUC. CODE ANN. § 37.0021 (West 2011).

10 See generally, TEXAS BEHAVIORAL SUPPORT (Jan. 27, 2013), http://www.txbehaviorsupport.org/ (consisting of representatives from each of the Texas Education service Centers and the Texas Education Agency (TEA) and providing statewide leadership for the network).
The following year the Texas Legislature passed, and the Governor signed, legislation for reading improvement, recidivism reduction, and improvement in behavior in the classrooms of TYC. Among the requirements were:

(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.

For an upcoming symposium, I was asked to prepare a comparative analysis of procedural rights of adults and children and to answer the question of whether adults and children should have more, less, the same, or different procedural rights. In that paper, I argued for the complete restructuring of how we handle the young who violate one of our many criminal and societal rules. My suggestion is we adopt a system similar to New Zealand -- and many aboriginal societies -- and use restorative justice techniques to address children’s transgressions. In fact, I argued that

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13 See TEX. EDUC. CODE ANN. § 106(c) (West 2009).


15 Id. 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 in a “top-down managerialism…state-centred…process designed to ensure state control of programme design, delivery and funding.” Juan Marcellus Tauri, An Indigenous Perspective on the Standardisation of Restorative Justice in New Zealand and Canada, Vol. XX INDIGENOUS POLICY JOURNAL, no. 3, Fall 2009 at 1, 6-7 (Fall 2009), available at http://indigenouspolicy.org/index.php/ipj/article/viewFile/76/44; see also KERRY CARRINGTON, MATTHEW BALL, ERIN O’BRIEN & JUAN TAURI, CRIME, JUSTICE AND SOCIAL DEMOCRACY, INTERNATIONAL PERSPECTIVES 217 (2013)
citizens should not be held accountable for their “criminal” conduct until they are fully developed at age 25. 16 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, unshackled from the burdens of criminal labels and collateral consequences.

In my study of institutional reactions to delinquent behavior, I examined the procedural structure of Texas Juvenile Law and was struck with a constitutional problem created by the merger of the Texas Juvenile Probation Commission (TJPC) and the Texas Youth Commission (TYC) into the new Texas Juvenile Justice Department (TJJD). 17 As Texas has now taken the major step of unifying the punishment and rehabilitation functions of juvenile law, I fear that soon we will once again turn away from the care and rehabilitation of children in trouble and return to “incarceration and punishment.” 18 We cannot implement the proposals I have suggested -- whether it is an overhaul of public school discipline by the use of science to modify children’s behavior, or the complete (discussing the New Zealand model in Chapter 15, Indigenous Critique of Authoritarian Criminology).


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, this directorate [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…. 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 the TJJD] might prove easier prey for a shift back toward incarceration and punishment. Id.
Restructuring of the procedures used to address the young who have transgressed -- if we combine the traditional functions of the judiciary and the executive into one all-powerful juvenile agency.

This article will focus on two seemingly unrelated topics. First, I will look at a new report on the effectiveness of the implementation of Positive Behavior Interventions and Supports (PBIS) within the schools of the Texas juvenile correctional system. This report provides even more evidence of the efficacy of PBIS in modifying behavior, adding to my argument that all public schools -- not just those in a correctional setting -- should adopt these techniques. Finally I will tackle the bigger problem, that the newly created TJJD exposes our juvenile system to a potential abuse of constitutional authority and power. As I see the creation of the TJJD to be a violation of the court’s power to supervise the children it places on probation, I take a historic look at TYC and TJPC as the agencies combined to create the TJJD and examine the courts’ relation to probation and suspended sentences as a core function of the judiciary.

These two topics relate to efforts to plug the school-to-prison pipeline by increasing the ability of local public schools to deal with behavioral problems with the concomitant benefit of educating more of our youth who otherwise would be excluded from a public education and by preserving the constitutional authority local courts have in the supervision and rehabilitation of those under its jurisdiction. The legislature can benefit public education by requiring the use of evidenced-based behavioral modification techniques in all public schools and at the same time preserve local control over a primary function of the judiciary – rehabilitation of those who break the law – by removing the responsibilities of oversight and assistance to local juvenile probation departments from the supervision of the executive branch.

It is my hope to affect change on public school discipline by highlighting the good work of our juvenile justice system on a state level with their increasing use of more enlightened approaches to discipline. But at the same time, I must not fail to criticize the State for the potential of restraint upon the judiciary’s ability to address children’s needs on probation on the local level, even if that potential is inadvertent. Both of these issues must be addressed together. My fear is that advances in our treatment of the young will fall prey to the influences over past efforts to

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The wisdom of PBIS could surely be lost in reactionary foolishness and ill-advised austerity.

B. TYC: Positive Behavioral Interventions and Support

The Texas Legislature dictated the implementation of Positive Behavioral Interventions and Support (PBIS) in the schools of the Texas Youth Commission (TYC), and in response, the TYC, through policy changes, directed all facilities with schools within the TYC system to implement PBIS. In September 2010, TYC had ten schools within which to implement PBIS; but by July 2011, only six schools remained open. Under the new policies, children leaving TYC had to show that "behavioral skills necessary" or "appropriate transition support" exist for the child to "transition" to future placements, and certain statistics had to be kept. Also, stage progression, earning privileges, and consideration for parole were all tied to participation in PBIS.

A periodic evaluation process to test the effectiveness of the implementation of PBIS within the TYC school system was established. The Texas Legislature ordered a report on the effectiveness of the reading

20 See supra note 18.

21 TEX. EDUC. CODE ANN. § 30.106 (West 2011).


25 TEX. ADMIN. CODE § 380.9155(f)(2); (g)(2)(A) (“The evaluation of outcomes shall be 'disaggregated' by type, location, and time of infraction, whether the student is classified as general education, special education or English as a second language students, and by ethnicity.”). Further, statistics are to be kept as to the disciplinary actions taken, whether time-out, security, restraints, or other 'aversive' measures, and 'disaggregated' by general education, special education or English as a second language students, and by ethnicity. Id. at (g)(2)(B).

26 Id. at (d)(4) and (5).
plan and the implementation of the positive behavior supports by December 1, 2010, which was filed. 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, which could not possibly be tied to the implementation of PBIS as formal training for the education staff was not set until January 3, 2011. But somehow, by January 21, 2011, the Executive Director of TYC reported to her Board that PBIS was “implemented at all educational facilities” within TYC.

1. Final Report on the Effectiveness of PBIS

The final report on the effectiveness of PBIS was filed December 2, 2012, as was ordered by the Legislature. This “exhaustive” twenty-three page report provided a three-page introduction giving a generic summary of the PBIS framework, structure, purposes, and historical ties to its cousin, Response to Intervention (RtI), and a 3 page restatement of the December 2010 report. The only thing new during the implementation period was

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27 TEX. EDUC. CODE ANN. § 30.106(f). Mandated Legislative Report, IMPLEMENTATION STATUS REPORT OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS (PBIS) SYSTEM IN TEXAS YOUTH COMMISSION, Dec. 1, 2010 (copy on file with author). (In describing implementation, this report showed contracts with two experts were signed in early 2010, a leadership team was created beginning in March 2010, an agreement with Texas State University was reached for research assistance, the first orientation to educators was June 2010, behavioral data tracking access was purchased in September 2010, formal training for all Education staff was set for January 3, 2011, the legislative mandate for participation in PBIS for parole was ignored, and only a Tier 1 rollout was ongoing by the date of the report.). Id.

28 Id. Early results showed school attendance rate was higher at the beginning of the 2010-2011 school year than in the previous 10 years and TYC (presumably only the schools) were seeing a “significant reduction in referrals to Security.” No specific data was provided and very little other information was contained in the five page report. Id.


30 TEX. EDUC. CODE ANN. § 30.106(g) (2011). Both subsections (f) and (g) expired Jan. 1, 2013. Id. § 30.106(h).

31 Effectiveness of Positive Behavioral Interventions and Supports, A Report to the Texas Legislature, TEXAS JUVENILE JUSTICE DEPARTMENT 1-6, (December 2012), available at http://www.tjjd.texas.gov/publications/reports/PBISLegislativeReport2012-12.pdf (last visited February 17, 2013). With the exception of the new material in regard to the selection of a tool to measure interventions, pages 4-6 of the new report are identical to a
the selection of an instrument to monitor, assess, set goals, evaluate, and revise procedures “toward effective implementation” of PBIS. The data in the report was evaluated per student, per month, per facility on (1) major incidents, (2) referrals to security, and (3) admissions to security.

The Executive Summary of the report listed the TJJD’s conclusions on the effectiveness of its implementation of PBIS. Here are the major findings. First, TJJD states PBIS “appears to be having an impact on the behavior and academic outcomes of youth in secure facilities.” A look at each finding is revealing.

“The number of incidents, both minor and major, are four times higher in non-school settings than in school, where PBIS has been implemented.” PBIS was implemented in CY 2011 Q2, which would be April, May, and June of 2011. In reality, in CY 2011 Q2, the number of

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32 Id. at 6. The PBIS planning team chose the Facility-Wide Evaluation Tool (FET) developed by their consultant Dr. C. Michael Nelson, Oct. 2009.

33 Id. at 7. It is difficult, if not impossible, to determine the time frame of the data. Id. Although the report indicates it included all nine facilities until three were closed in the summer 2011, the beginning and end dates for the data are unclear as most data is expressed in months, quarters of a year, or yearly totals and the TJJD is unclear on the difference between fiscal years and calendar years. Id. The first two graphs, on pages 8-9, indicate PBIS training began in FY 2010 Q4, which would be July, August, September 2011, with implementation in FY 2011 Q2, which would be January, February, March 2012. Id. at 8-9. This same graph shows data for FY 2012 Q3 which would be April, May, and June 2013. Id. This is an obvious mistake as at the time of writing this article, February 2013, we are still in FY 2012 Q2. Id. So for the purposes of this paper, I am going to assume whenever the TJJD reported FY (fiscal year, which always begins in Texas October 1st), that what was intended is CY (calendar year) and the editors just missed it. See id. Previous statements by the Executive Director are in direct conflict with this report. Id. She indicated PBIS had been implemented in all TYC education facilities in January 2011, which would be FY 2010 Q2 or CY 2011 Q1. Id. PBIS training didn’t begin until early in 2011 at the earliest which would make implementation later in 2011. Id. The graphs on pages 8-9 of the report if they should have read CY instead of FY then training began in October, November and December 2010, which would make implementation in some schools possible by January 2011. Id. This is why I am using calendar year for this discussion as beginning implementation in April, 2011, would fit initial trainings in January of that year and initial training of some facilities in late 2010. See id. I would suspect pilot programs had been initiated at a few select schools before January 2011, but not full implementation. See id.

34 Id.

35 Id.

36 Id. at 8. This graph shows the relation of injury or use of force incidents by non-school and school settings at TYC secure facilities. Id. It also indicates the PBIS training began
non-school major incidents – reflecting injury or use of force -- were six times higher than the school incidents.\textsuperscript{37} A year later in CY 2012 Q2 the non-school incidents were eleven times higher and ten times higher in CY 2012 Q3, indicating a significant reduction over eighteen months of the number of incidents involving injury or use of force during the first year-to-year and one-half of implementation within the schools.\textsuperscript{38} The first year saw a 37\% reduction in major incident reports in schools\textsuperscript{39} and a 17\% increase in reports in non-school environments.\textsuperscript{40} Admittedly, this does not factor in an increase or decrease in youth population, or other variables such as staff training and ratio, but to see these trends going in the right directions should encourage TJJD to implement PBIS in non-school settings as soon as possible.

The fact that the TJJD at this point stopped providing specific numbers and used ill-defined bar graphs makes specific analysis difficult. However certain assumptions can be made. As to the total minor 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 schools but likewise decreased in non-school settings.\textsuperscript{41}

Whether implementation began in FY 2011 Q2 (January, February, and March 2012) or more likely in CY 2011 Q2 (April, May, and June 2011), the graph on page ten of the report showing the number of minor and major incidents by type of referral in a school setting is for a period in FY (CY)2010 Q4 (October, November and December 2010) with implementation beginning in FY (CY)2011 Q2, April, May and June 2011. \textit{Id.}

\textsuperscript{37} \textit{Id.} The number of major incidents in FY (CY) 2011 Q2 (April, May and June 2011) in non-school settings was 2135 and the number in school settings was 353. \textit{Id.} For the year preceding the implementation, the per quarter average was 6.77\%. \textit{Id.} This would show the FY (CY) 2011 Q2 (April, May and June 2011) figure was in line with the previous year with a modest 10\% decrease in reports during the first quartile of implementation. \textit{Id.}

\textsuperscript{38} \textit{Id.} FY (CY) 2012 Q2 showed 2503 non-school major incidents and 223 school major incidents. \textit{Id.} During the third quarter of FY (CY) 2012 the non-school major incidents were consistent at 2445 and the school incidents were similar to the previous quarter at 245. \textit{Id.}


\textsuperscript{40} \textit{Id.} The number of reports rose from 2135 in FY (CY) 2011 Q2 to 2503 in FY (CY) 2012. \textit{Id.}

\textsuperscript{41} \textit{Id.} at 9.
well preceding the implementation of PBIS. So, the data has no value in evaluating the effectiveness of PBIS since implementation and prior to December 2012.

Between mid-2011 and mid-2012, four of six TYC schools showed marked reductions in the average school disciplinary referrals per student. Of the six types of school infractions during this same period, there were discernible decreases in those disrupting a program and self-referring to security. The TJJD sees as a significant finding that the percentage of special education students receiving disciplinary referrals dropped during the implementation period from 53.3% of the total referrals to 50.4%. In the glass is half full category, TJJD finds significant that the percentage of Hispanic and Anglo students receiving disciplinary referrals is down, but African American students receiving disciplinary referrals is down.

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42 *Id.* at 10. This graph is for the period September 2010, to May 2011 and breaks incidents down by type of referral, minor w/o referral, minor w/ referral w/ no admission, minor w/ referral and admission, and major incidents with the same three results. *Id.*

43 *Id.* at 11.

44 *Id.* The other four areas, unauthorized area, refusing instructions, threatening others and assault without injury are difficult to evaluate because of the size of the graph and the lack of specifics provided. *Id.*

45 *Id.* at 12. This graph is particularly difficult to interpret. *Id.* Less than a 3% drop in these referrals doesn’t seem significant to me, although coupled with that is a decrease in the total number of referrals. *Id.* As I don’t know if this is all referrals, or just major or minor incidents, it is difficult to have an opinion. *Id.* Assuming the total number of incidents is around 2500 at the first, then special education students portion would have dropped from about 1332 incidents to about 1008 incidents by the date of the report, a difference of 324, or about one per day decrease. *Id.* This could be interpreted as significant. *Id.* If TJJD is speaking strictly of major incidents, then the drop would be from 188 incidents to 112 or 76, or about 6 per month decrease. *Id.* Again, the term “significant” takes on new meaning when 6 fewer people per month are injured or against whom force must be used. *Id.* I will give them that this is a significant improvement in at least the way in which special education students are treated, if not an improvement overall in their classroom behavior. *Id.*

46 *Id.* This is one of the “significant findings” in the Executive Summary. *Id.*
disciplinary referrals are significantly up.\textsuperscript{47} Also encouraging is that aversive control measures are down during the implementation period.\textsuperscript{48}

TJJD is proud that the average daily attendance (ADA) and academic performance have increased in their schools during this period in “all categories of measure outcomes.”\textsuperscript{49} Although the chart on the top of page twenty would indicate an increase in attendance from pre- to post-PBIS, once again I would submit the data is not present to make that finding.\textsuperscript{50} Assuming once more that PBIS was not implemented at the earliest until April of 2011, this would be at the end of the 2010-2011 school year, and ADA figures would not be reliable for the final month or two of school. Perhaps the increase over the 2009-2010 school year is because the staff were being trained, to some degree, during the 2010-2011 school year, but I find this increase due to PBIS implementation in just a month or two implausible. Once again the report shows figures for FY 2012 at a 97.9% ADA without knowing if that is an error and it should have read CY 2012. If the figure is actually for the month of October 2012, being all that would be available in FY 2012 -- as the report was due December 1, 2012 -- then one month of ADA is hardly a trend.

\textsuperscript{47} Id. at 13. TJJD finds the decrease in Hispanic and Anglo students as significant in that it is their lowest numbers since 2009. \textit{Id.} It should not take implementation of PBIS to return disciplinary referrals to pre-PBIS numbers. \textit{Id.} This is actually quite discouraging. \textit{Id.} If African American students referrals rise from 41.7\% in 2011 to 48.8\% in 2012, and Anglo students referrals drop from 19.1\% to 16.5\% for the same period, I would think this should signal some type of bias either in the implementation of PBIS or in the mechanism for referrals. \textit{Id.} Further study should be done as these figures are not consistent with the proper implementation of PBIS. \textit{Id.}

\textsuperscript{48} Id. p. 14. These two graphs show decreases in two of the three aversive control techniques from 2011 to 2012. \textit{Id.} Reductions occurred in the use of physical restraint and mechanical restraint with a slight increase in the use of pepper spray. \textit{Id.} This could be because staff are attempting to use less severe methods and it could be a factor of the bias in implementation or mechanism mentioned in the previous footnote. \textit{Id.} Also, the use of physical or mechanical restraint of special education students, and the use of pepper spray on them, dropped slightly, but not significantly, and the TJJD did not mention it in their summary of findings. \textit{Id.} at 15, 16. On pages 18 & 19 are three graphs showing the breakdown by ethnicity on the use of physical and mechanical restraint and pepper spray. \textit{Id.} at 18,19. I can find no consistencies that can be accredited to the implementation of PBIS. \textit{Id.} Whereas the overall numbers of referrals are down could be because PBIS is working, how staff reacts to behavior is more a personnel dynamic in my opinion and in time the use of such methods should continue to decline. \textit{Id.} The methods used will not change until another system is developed to restrain an out of control youth and protect the staff. \textit{Id.}

\textsuperscript{49} Id. Executive Summary.

There are, however, two final areas that are encouraging for the effectiveness of PBIS. During the implementation period, “5 of 6 schools . . . saw a reduction of time per student outside the regular classroom for disciplinary reasons.”\textsuperscript{51} Beginning almost immediately upon the implementation of PBIS, four of these five schools saw a significant drop in absences due to discipline.\textsuperscript{52}

From the 2009-2010 school year until the end of the 2011-2012 school year, students improved in the percentage of students making one month reading and math gain per month of instruction.\textsuperscript{53} During this same period the percentage of students age sixteen or more earning a high school diploma or a GED within ninety days of being released rose from 34.9\% to 41.43\%.\textsuperscript{54} And finally, the percentage of students reading at grade level when released from TYC increased from 12.7\% in 2009-2010 to 16.27\% in 2010-2011, a 28\% increase.\textsuperscript{55}

Although I am disappointed that the TJJD did not provide more specific data in their report to the legislature, in time, I am confident that PBIS will continue to improve behavior, assuming TJJD remains faithful in their implementation and training. But the future of the TJJD and its role in all aspects of juvenile justice is unclear. TJJD has a recent history, which makes its institutional history less than impressive.\textsuperscript{56} The history of how Texas deals with the juvenile delinquent, or the juvenile on his way to delinquency, creates a dichotomy of treatment and punishment.\textsuperscript{57} With the

\textsuperscript{51} Id. at 20.

\textsuperscript{52} Id.

\textsuperscript{53} Id. at 21. Those increasing one month in reading rose from 58.39\% to 59.04\% and in math from 51.88\% to 53.26\%. Id.

\textsuperscript{54} Id. (I wonder if these numbers are because of the implementation of PBIS? Certainly the combination of more time in class, less disruption, and teacher awareness of PBIS has aided in any successes.).

\textsuperscript{55} Id. On page 21 of the report are also other measures of success. Id. Last year 349 industrial certificates were earned and 67 students completed 122 college courses for dual high school and college credit. Id.

\textsuperscript{56} A Brief History of the Texas Youth Commission available at http://www.lb5.uscourts.gov/ArchivedURLs/Files/08-70042%281%29.pdf (last visited Feb. 19, 2013) (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, which included the closing of the school in Pyote, Texas, and other reforms during 2007 and 2008 to change the culture of TYC.). Id.

\textsuperscript{57} Id. “TYC must concentrate on its basic mission with the dual responsibility of providing public safety by holding youth accountable [punishment] and providing treatment to youth in hopes they will learn to become law-abiding adults [treatment].” Id.
implementation of PBIS, the treatment function of juvenile justice finds itself at its proper place at the juvenile correctional table. But 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.\textsuperscript{58}

\textit{C. History of TYC and TJPC}

1. TYC

In 1889, Texas opened its first “juvenile training school” for boys,\textsuperscript{59} and in 1916, the first “training school” for girls.\textsuperscript{60} In 1947, the “State Training School for Delinquent and Dependent Colored Girls” opened in Brady.\textsuperscript{61} Prior to the creation of the Texas State Board of Control in 1920,\textsuperscript{62} separate boards of directors managed the boys and girls schools, who answered to the governor.\textsuperscript{63} From 1920 to 1949, the State Board of Control managed the three juvenile schools.\textsuperscript{64}

\textsuperscript{58} See \textit{supra} note 18

\textsuperscript{59} House Bill 21, 20\textsuperscript{th} Legislature, Regular Session created a House of Correction and Reformatory which opened in Gatesville. With some exceptions, initially the school was designed for boys under 16 in the state prison and those under 16 convicted of crimes in the future. \textit{Id.} The boys “were to be taught habits of industry and sobriety, some useful trade, and to read and write.” \textit{Id.} White and “colored” children were to be “kept, worked, and educated separately.” \textit{Id.} House Bill 27, 33\textsuperscript{rd} Legislature, First Called Session (1913), changed the age of receiving boys to those under 17 to be released before becoming 22, for no more than five year terms. \textit{Id.} The school was finally renamed to the Gatesville State School for Boys in 1939. See Texas House of Correction and Reformatory: \textit{An Inventory of Reports at the Texas State Archives, 1880-1892. available at http://www.lib.utexas.edu/taro/tslac/20045/tsl-20045.html} (last visited Feb. 10, 2013). Starting with 68 inmates in 1889, the population of the boy’s school grew to 767 juveniles under that age of 17 upon admission, by 1940. \textit{Id.} By 1970, the population grew to 1830 boys in six facilities, Hilltop (Gatesville), Riverside, Valley, Hackberry, Terrace, and Mountain View. \textit{Id.} By 1979, Gatesville was closed and five schools opened at Brownwood, Crockett, Gainesville, Giddings and Pyote. \textit{Id.} Later Hilltop, Riverside, Valley, Hackberry, and Terrace were converted to adult use. James W. Markham and William T. Field, \textit{Gatesville State School for Boys. HANDBOOK OF TEXAS ONLINE http://www.tshaonline.org/handbook/online/articles/jjg02} (last visited Feb. 10, 2013).

\textsuperscript{60} House Bill 570, 33\textsuperscript{rd} Legislature, Regular Session created the Girl’s Training School, which opened in Gainesville.

\textsuperscript{61} Senate Bill 46, 49\textsuperscript{th} Legislature, Regular Session.

\textsuperscript{62} Senate Bill 147, 36\textsuperscript{th} Legislature, Regular Session.


\textsuperscript{64} \textit{Id.}
In 1947, a state commission was appointed to study the schools and look at juvenile delinquency, which led to the creation of the State Youth Development Council in 1949. The council initially had fourteen members, six appointed by the governor, including the chairman, and eight ex-officio government officials. 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.” The council became the Texas Youth Council in 1957. Initially consisting of only three members appointed by the governor, the size of the council rose to six in 1975, still appointed by the governor. In 1983, the council became the Texas Youth Commission (TYC).

In December 2008, TYC had a staff of approximately 4,200, with about 335 at their headquarters in Austin. With the downsizing of TYC, which began in 2007, by January 2011, staff was reduced to 3,500 with 266 employees remaining in the Austin office. The average daily population of youth in TYC facilities fell from 4,910 in FY 2005 to 1,977

65 Senate Concurrent Resolution 34, 50th Legislature, Regular Session.
66 House Bill 705, 51st Legislature, Regular Session.
68 Id.
69 Senate Bill 303, 55th Legislature, Regular Session.
71 Senate Bill 278, 64th Legislature, Regular Session.
72 Senate Bill 422, 68th Legislature, Regular Session. See Title 3, Chap. 61, Texas Human Resources Code and Title 3, Family Code.
in FY 2010 showing almost a 60% reduction in six years.\textsuperscript{75} Additionally
the number of TYC secure institutions fell from twelve in July 2009\textsuperscript{76} to
six in July 2011, a 50% reduction in institutional facilities in two years.\textsuperscript{77}

In 2011, the TYC was abolished and combined with the Texas
Juvenile Probation Commission (TJPC) into the new Texas Juvenile
Justice Department (TJJD) assuming all the duties of the former Texas
Youth Commission and Texas Juvenile Probation Commission.\textsuperscript{78} From
the very beginning of institutionalized juvenile correction in Texas, it is
the power of the executive branch from which the authority of juvenile
corrections draws.\textsuperscript{79} An organizational flowchart of the old TYC shows
the authority of TYC flowed from the governor as the chief executive of
the state.\textsuperscript{80}

2. TJPC

New approaches and philosophies, including community-based
corrections, were proposed during the 1960s promising a reduction in
crime for both adults and juveniles.\textsuperscript{81} In response to this, during the 1970s,

\begin{itemize}
  \item \textsuperscript{75} Id. at 4.
  \item \textsuperscript{76} Id.
  \item \textsuperscript{77} Effectiveness of Positive Behavioral Interventions and Supports, A Report to the Texas Legislature, TEXAS JUVENILE JUSTICE DEPARTMENT 7, (Dec. 2012).
  \item \textsuperscript{78} Senate Bill 653, 82\textsuperscript{nd} Legislature, Regular Session, codified in V.T.C.A., Human Resources Code, Title 12, Juvenile Justice Services and Facilities (2012). The Juvenile Justice Department is now governed by a thirteen member board appointed by the Governor, with the advice and consent of the Senate. \textit{Id.} § 202.001.
  \item \textsuperscript{79} An organizational flowchart of the new Texas Juvenile Justice Department shows all power and responsibility flows to and from the governor. See http://www.tjjd.texas.gov/images/TJJD_Executive_Org_Chart_01-01-2013.pdf (last visited on Feb. 10, 2013).
  \item \textsuperscript{80} See Appendix A.
  \item \textsuperscript{81} Gerald Bayens and John Ortiz Smykla, Preface to Probation, Parole, and Community-Based Corrections, p. xvii, McGraw-Hill Higher Education (2013), available at www.coursesmart.com (last visited February 23, 2013); Eric J. Wodahl and Brett Garland, The Evolution of Community Corrections: The Enduring Influence of the Prison; The Prison Journal 2009 89: 81S, p. 93S (2009). (Reforms during the last thirty years saw community-based programs, such as probation, grow from 1.3 million adults to almost 5 million from 1980 to 2009.); Peter Scharf, Towards a Philosophy for the Diversion of Juvenile Offenders, 29 J. Juv. & Fam. Cts. 13 (1978)(Making an early argument for the diversion of children from the justice system into a mandatory diversion system for certain juvenile offenders.); and David M. Altschuler and Troy L. Armstrong, Juvenile Corrections and Continuity of Care in a Community Context—The Evidence and Promising Directions, 66 Federal Probation 2, p. 72 (Sep2002)(A discussion of “re-entry” or aftercare programs for juveniles upon their return from a correctional incarceration, in a community-based context.).
\end{itemize}
the Texas Youth Council began to provide subsidies to county
governments to defray the costs of local juvenile programs.82 To respond
to the local need for assistance, in 1981, the legislature created the Texas
Juvenile Probation Commission (TJPC).83

Not to be satisfied with providing only financial assistance, 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 uniform probation administration standards, and
to improve communications between state and local entities
within the juvenile justice system.84

As additional duties, the TJPC was to provide minimum standards for
juvenile boards, probation offices, personnel, staffing, case loads,
programs, facilities record keeping, equipment, and other operational
aspects, which included establishing a code of ethics for probation officers
with enforcement; instituting training and technical assistance to counties,
juvenile boards, and probation offices; and creating certification
standards for probation officers, personnel, and juvenile detention
facilities.85

82 Texas Youth Commission: An Inventory of Records at the Texas State Archives, 1886-
http://www.lib.utexas.edu/taro/tslac/20124/tsl-20124.html (last visited February 10,
2013).
83 House Bill 1904, 67th Legislature, Regular Session.
84 TEX. HUM. RES. CODE ANN. § 75.001(West 2011), Acts 1981, 67th Leg., 2419, ch. 617,
sec. 1, eff. Sept. 1, 1981; In 1989 § 75.001 et seq., was re-codified, Acts 1989, 71st Leg.,
ch. 352, sec. 1, eff. Sept. 1, 1989 as § 141.001 et seq., Human Resources Code.
Interestingly, the Legislative intent to the 1989 changes showed a recodification only
with no substantive change. Id. However, § 141.001(6) was added to the designated
purposes of the TJPC. Id. This subparagraph added to the purposes for the TJPC to
“promote delinquency prevention and early intervention programs and activities for
juveniles.” Id. This prevention and intervention was not a part of Sec. 75.001, Human
Resources Code as originally written in 1981 or amended. Id.
85 TEX. HUM. RES. CODE ANN. §§ 75.041, 75.042, 75.043, Acts 1981, re-codified as
Secs.141.041, 141.042, 141.043, 141.061 Human Resources Code in 1989. Along with
the re-codifying, other duties of the TJPC were added which are not germane to the
current discussion. Id.
With the creation of the TJPC,\textsuperscript{86} the previous policy of the TYC to provide financial assistance to the local juvenile boards was reaffirmed.\textsuperscript{87} This TYC program was known as the Community Assistance Program (CAP), and all the CAP employees of TYC became instant employees of the TJPC upon creation.\textsuperscript{88} All of the 254 Texas counties were served by the TJPC by 1984.\textsuperscript{89}

By 1991, the TJPC had over twenty employees with an operating budget of over $21 million.\textsuperscript{90} By 2008, the TJPC had 65 employees with a requested budget for 2010 and 2011 of well over $150 million.\textsuperscript{91} In January 2009, the county probation departments employed 5799 probation and detention officers all certified and monitored by the TJPC.\textsuperscript{92} During that year those departments supervised 103,368 youth and the TJPC provided 26\% of the local probation department’s operating budgets.\textsuperscript{93}

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\textsuperscript{86} § 75.021, Acts 1981, re-codified as § 141.002(1) Human Resources Code, to be known thereafter as the “Commission.”
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\textsuperscript{88} See 1986 Pocket Part Historical Note following § 61.038, Human Resources Code, Repealed by Acts 1981, 67\textsuperscript{th} Leg., p. 2425, ch. 617, sec. 5, eff. Sept 1, 1981.
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\textsuperscript{89} Sunset Advisory Commission: Final Report 7 (July 2011), available at http://www.sunset.state.tx.us/82ndreports/tyc/tyc_fr.pdf (last visited Feb, 23, 2013). One of the initial primary purposes of the TIPC in 1981 upon its creation was to provide “access to juvenile probation services throughout the state. Texas reached that goal in 1984 when, for the first time, all counties had probation services available to them.” Id.
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\textsuperscript{90} Laurie E. Jasinski, Texas Juvenile Probation Commission, HANDBOOK OF TEXAS ONLINE (Feb. 10, 2013), http://www.tshaonline.org/handbook/online/articles/mdtyd.
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\textsuperscript{93} See supra note 91. Since the New Community Corrections Funding (Senate Bill 103 (2007)), resulting in $50 million for the 2008-2009 Biennium, the TJPC has seen their numbers rise from an average daily population of 38,465 youth in FY 2006 to 40,313 in FY 2008, an increase of almost 5\% in just three years. Id. The disaggregated FY 2008 total is deferred prosecution agreements (10,604), probation (23,217), intensive supervision probation (3,400), and in residential placement (3,092). See supra note 73.
\end{flushright}
What started as a small program with limited resources and purposes quickly grew into a “Commission” with substantial responsibilities and power. Nevertheless, in 2011, the TJPC, like the TYC, was abolished and combined with the TYC into one juvenile justice agency -- the Texas Juvenile Justice Department (TJJD).

Like the Texas Youth Council or the modern Texas Juvenile Justice Department, the TJPC had been overseen by a policymaking board appointed by the governor, with the advice and consent of the senate. However, the organization chart of TJPC flows from this governing board, not the governor, and oversight is obviously in the legislature.

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94 Along with the purposes listed in the former Chapter 141, Human Resources Code, the TJPC possessed a “comprehensive range of funding, monitoring and technical assistance, programs and services” to assist the local juvenile boards, including (1) a conduit for Legislative appropriations, (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) certification of probation and detention officers (3814 were certified in FY 2005 alone), (6) strategic planning, policy development, research and statistics, (7) the statewide facility registry and secure database, (8) the management information system, (9) interagency workgroups, and (10) investigations of child abuse, neglect and exploitation. Vicki Spriggs, Executive Director, *Texas Juvenile Probation Commission, 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](http://www.sunset.state.tx.us/81streports/tjpc/ser.pdf) (last visited Feb. 10, 2013).


Unlike the new TJJD, the TJPC was not a part of the executive branch or its organizational chart would show authority flowing from the governor.\textsuperscript{99}

\textbf{D. Probation: An Inherent or Core Judicial Function}

1. History of the Suspended Sentence in Texas

Early in the last century, the limits of the inherent powers of the executive and judiciary were tested as to the granting of suspended sentences, or probation.\textsuperscript{100} Texas first probation statute\textsuperscript{101} was declared unconstitutional as “an indirect exercise of the power to pardon,” violating the constitutional power of the executive to pardon,\textsuperscript{102} as the courts could set aside and annul a judgment of conviction after a jury assessed

\begin{quote}
Commission and the Texas Juvenile Probation Commission). The last Committee Report of the Juvenile Justice and Family Issues Committee was to the 80\textsuperscript{th} Legislature, Dated July 2006 (There is some confusion as to whether it is to the 80\textsuperscript{th} or 79\textsuperscript{th} Legislature). available at http://www.house.state.tx.us/_media/pdf/committees/reports/79interim/JuvJustsicefamilyissues.pdf (last visited Feb. 10, 2013).
\end{quote}

\textsuperscript{99} See Appendix B, attached.

\textsuperscript{100} Probation is the common term for “community supervision,” which is

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[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. \textsc{Tex. Code Crim. Proc. Ann.} art. 42.12 § 2 (West 2011).
\end{quote}

\begin{quote}
\textit{Id.}; See Ex parte Spicuzza, 903 S.W.2d 381, 382 n.1 (Tex.App.-Houston [1st Dist.] 1995) (explaining that the legislature in 1993 replaced the term “probation” with the term “community supervision” and those previously placed on probation were in effect placed on community supervision.). \textit{Id.} The terms mean essentially the same thing and are used interchangeably herein. \textit{Id.}
\end{quote}

\textsuperscript{101} Acts of 1911, 32\textsuperscript{nd} Legislature, Regular Session, ch. 44, 1911 Tex. Gen. Laws 67.

\textsuperscript{102} Snodgrass v. State, 150 S.W. 162, 166 (Tex. Crim. App. 1912). The version of the applicable portion of Texas Const. Art. 4, § 11 in effect in 1912 read, “In all criminal cases, except treason and impeachment, he [the Governor] shall have power, after conviction, to grant reprieves, commutations of punishment and pardons….” The current version of the applicable portion of Const. Art. 4, § 11(b) (2013) reads, “In all criminal cases, except treason and impeachment, the Governor shall have power, after conviction or successful completion of a term of deferred adjudication community supervision, on the written signed recommendation and advice of the Board of Pardons and Paroles, or a majority thereof, to grant reprieves and commutations of punishment and pardons . . . .” \textit{Id.}
punishment. The legislature soon rewrote the statute and gave the jury the power, while setting punishment, to recommend suspension of the sentence (probation). This new law was deemed within the constitutional power of the legislature to set punishments for criminal acts and within the jury’s power to assess punishment. In 1931, as part of the statute that permitted a waiver of jury trial, the legislature gave to the judiciary in those circumstances the power to suspend a sentence and grant a probation.

2. Texas Constitutional Authority

Soon the Constitution was amended to provide authority for the courts to suspend a sentence and place a defendant on probation, “under such conditions as the Legislature may prescribe.” Those conditions

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103 Id. at 165. “The defendant may apply to the court to have the judgment of conviction set aside, and, if it appears that he has not been convicted of any other offense, 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, and of which he has been adjudged guilty, and to which our laws affix a penalty.” Id.


105 Baker v. State, 158 S.W. 998 (Tex. Crim. App. 1913). The new law was so written that it became a part of the criminal statute prescribing the punishment.

The jury in passing on the guilt or innocence of the accused shall also hear evidence as to the life he has formerly led, and determine whether or not he is such a person as should be confined within the walls of the penitentiary. If they find from this evidence that the best interest of the citizen on trial and of the state will be subserved by compelling him to undergo no punishment, the Legislature has so framed the law as to give them the right to so provide in their verdict, coincident with and as a part of their verdict….” Baker at 1003.


107 TEX. CONST. art. IV, § 11A. This 1935 amendment to the Texas Constitution reads: ‘The Courts of the State of Texas having original jurisdiction of criminal actions shall have the power, after conviction, to suspend to imposition or execution of sentence and to place the defendant upon probation and to reimpose such sentence, under such conditions as the Legislature may prescribe.’ Because the amendment was not self-enacting, in 1947 the Legislature passed the Adult Probation and Parole Law giving effect to the amendment. Section 1 of the Adult Probation and Parole Law gives the courts of Texas original jurisdiction of criminal actions, and “when the ends of justice and the best interests of the public as well as the defendant will be subserved,” the courts shall have the power, after conviction or a plea of guilty, (with exceptions as to certain enumerated crimes, not set out herein),

[W]here 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
appeared in the statute enacting Art. IV, Sec. 11A of the Texas Constitution (1935), authorizing courts to suspend sentences and grant probation, with the Legislative assurance that “any such person placed on probation shall be under the supervision of such court and a probation... officer serving such court as hereinafter provided.”\textsuperscript{108} It finally became crystal clear that the judiciary in Texas had the constitutional power to grant probation -- upon the conditions set by the legislature -- that the judiciary had the constitutional and statutory power to supervise those placed on probation (which is implicit in the court’s ability to “reimpose” the sentence while maintaining jurisdiction), and that the probation officer supervising those placed on probation served the court as long as the court had jurisdiction.\textsuperscript{109}

3. Current Statutory Authority

Those “conditions set by the Legislature” are today found in the Code of Criminal Procedure (CCP).\textsuperscript{110} In the first section of Art. 42.12, CCP, the legislature sets out the purpose of the article. In doing so, the CCP 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) what the conditions of community supervision will be subject to legislative requirements; 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.”\textsuperscript{111}

\begin{quote}
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. \textit{Id.}
\end{quote}


\textsuperscript{110} \textsc{tex. code crim. proc. ann.} art. 42.12 (West 2011). This article 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, presentence investigations, modification, revocation, basic conditions, confinement as condition, special provisions for DWI, bias and prejudice crimes, sex offenses, firearms, violent offenses, gangs, driver’s licenses, Internet access, education classes, child abusers, 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. \textit{Id.} An incredible statute virtually impossible for the average practitioner to fully understand and apply. \textit{Id.}

\textsuperscript{111} \textit{Id.} § 1.
To ensure no misunderstanding of the power of the courts over community supervision or probation, the final purpose of this statute is “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.” 112

4. Relationship of Adult Probation Officers and the Courts

So historically, adult probation officers in Texas have been deemed to be employees of the courts. 113 The judges had the power to hire and fire probation officers who acted as agents of the courts. 114 It has been held that the adult probation officers were under the direct supervision of the judiciary. 115 “The district judges have ultimate control of the personnel decisions” over their local community supervision and corrections departments, and as such are their employer. 116 The Texas Government Code places the power to hire, and presumably fire, the director of the local community supervision department, 117 with the judges trying criminal cases in a judicial district, including the statutory county judges trying criminal cases. 118 This department director has enumerated responsibilities, including without limitation the obligation to employ

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112 Id.


116 De Santiago v. West Texas Community Supervision & Corrections Dept., 203 S.W.3d 387 (Tex.App.-El Paso 2006) (Prior to the 2005 Legislative changes, Sec. 76.002(b) Gov’t Code provided the district judges were “entitled to participate in the management of the [probation] department.” See infra note121.

117 TEX. GOV’T CODE ANN. § 76.004(a), (h) (West 2011).

118 § 76.002(a). Often referred to as the “Board of Judges” these judicial officers must establish a community supervision and corrections department, approve their budget and the local justice plan. Id. Other obligations of the Board include contracting with others to provide these services (Id.) and the appointment of a fiscal officer for the department. § 76.004.
officers and other employees to conduct the work of a probation department. The Government Code specifically provides that the employees of the department, other than the director, are employees “of the department and not of the judges or judicial districts.” Logically, the director, therefore, is an employee of the judges, even though the statutory judges’ power over the department is limited and the judges are no longer involved in the management of the department -- as they were prior to 2005.

5. Relationship of Juvenile Probation to the Courts

As to juvenile probation, the Texas Family Code sets up a local Juvenile Board, similar to the adult Board of Judges, to oversee and perform similar functions within the juvenile justice arena. And as to

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119 § 76.004 (a-1) and (b). The director shall either perform or delegate (1) the overseeing of the daily operations, (2) the budget, (3) contracting, (4) policies and procedures creation, (5) personnel and disciplinary policies and procedures, (6) and employment grievance procedures and practices. § 76.004 (a-1). Also, the director employs officers and employees to carry out the more traditional functions of such a department, such as "presentence investigations, supervise and rehabilitate defendants placed on community supervision, enforce the conditions of community supervision, and staff community corrections facilities." § 76.004(b).

120 § 76.006.

121 § 76.002(b), Government Code was repealed by Acts 2005, 79th Leg., ch. 255, sec. 12. Prior to its repeal this paragraph read: “(b) The district judges trying criminal cases and judges of the statutory county courts trying criminal cases that are served by a community supervision and corrections department are entitled to participate in the management of the department.” Id.

122 TEX. HUM. RES. CODE ANN. Ch. 152 (West 2011).

123 § 152.0032. The Juvenile Board are paid positions. § 152.0034 Human Resources Code. The Juvenile Board may however contain public members who are not members of the judiciary. TEX. HUM. RES. CODE ANN. Ch. 152 (West 2011).

124 The statutory duties of the Juvenile Board are: (1) to establish a juvenile probation department, (2) to employ the chief juvenile probation officer of county, set the budget, establish policies, and guidelines for initial assessment of children (Sec. 152.0007 Human Resources Code), (3) to provide an annual report to commissioner’s court on the suitability of the facilities of the juvenile court, (Sec. 51.05 (b) FC), (4) to designate the juvenile court(s) (Sec. 51.04 (b) FC), (5) to annually inspect pre-adjudication secure detention facilities (Sec. 51.12 (c)FC) and non-secure correctional facilities (Sec. 51.126 (b) FC), (6) to designate one or more places of detention within the county for a child to be detained (Sec. 52.02 (a)(3) FC) or if there is no certified place of detention in the county, the Board may designate a place of detention in another county (Sec. 51.12 (e) FC). 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.
juvenile probation officers, they are “officers of the court, and as such are under the continuing direction of the court.” Just as with adult probation, the board is not involved in daily operations and the chief juvenile probation officer hires, fires and deals with personnel.

And expressing the intent that juvenile probation is a local authority, in certain circumstances the juvenile probation officer has arrest powers, even without a warrant, not only after the child is placed on probation and sent to the officer for supervision by the court, but during the child’s pre-trial release. As adult probation officers neither possess these powers nor have the responsibility to notify family upon arrest, the juvenile probation officer’s authority may likewise spring from the courts but certain functions rise strictly from their responsibility to society in protecting children while at the same time executing the orders of the courts — such as the ability to arrest a juvenile probationer without a warrant.

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125 Chandler v. State, 695 S.W.2d 248, 249 (Tex.App.-Austin 1985) citing P.G. v. State, 616 S.W.2d 635 (Tex.App.- San Antonio 1981). Chandler held that § 53.07(c) Texas Family Code only requires a summons in a juvenile matter be served by a “suitable person” who is “under the direction of the [juvenile] court.” Id. at 249.


127 Although a child is subject to the laws or arrest (Tex. Fam. Code Ann. § 52.01 (2)), the Family Code is careful to say this is not an arrest. § 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. An arrest warrant in juvenile law is called a directive to apprehend. § 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.

128 A juvenile probation officer, and interestingly a law-enforcement officer, may both take a child into custody if there is probable cause the child has violated a condition of probation. §§ 52.01 (a)(3)(C); (a)(4).

129 A juvenile probation officer may additionally take a child into custody when there is probable cause a condition of release has been violated. § 52.01 (a)(6).

130 The person taking the child into custody “shall promptly give notice” to a parent, guardian or custodian giving a reason for the taking § 52.02 (b). See In re S.R.L., 546 S.W.2d 372, 373 (Tex.App. – Waco 1976) (The reason for taking the child into custody must be only a reference to the offense affecting the child, not the purpose of the officer taking the child -- such as to interrogate.).

131 Cf. Gonzales v. State, 67 S.W.3d 910, 912 (Tex.Crim.App.2002) (Failure of the police to attempt to notify the child’s parents requires the child’s statement be excluded when there is a casual connection between the failure to notify and the statement.). Although the Family Code goes to great lengths to at least say these detentions are not arrests (see supra note 127), the juvenile I am sure has difficulty understanding the subtle difference when he is placed in an environment restricting his leaving with perhaps his hands and feet bound by chains by the probation officer. Id. There are many other procedural rights afforded children not available to adults, such as in taking statements, the use of
Unlike the prescribed conditions of probation for qualified adults, 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; or with proper findings, outside the home in a foster home; a public or private licensed residential treatment facility; or a public or private secure correctional facility. The relationship of the court to the placement of the child on probation, even if committed on a determinate sentence to TYC, is significantly more complex than with adults. And the conditions of probation are more uncomplicated by statutes making the relationship of the probationer with the court more individualized. It


132 TEX. CODE CRIM. PROC. ANN. art. 42.12. See the restrictions on the courts placing certain adult violent and drug offenses on probation without a jury recommendation of art. 42.12 (3g). Further, 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. art. 42.12 (e). No such requirements exist in juvenile law in Texas. *Id.*

133 § 54.04 (d)(1)(A).

134 § 54.04 (d)(1)(B). Section 54.04(c) requires a finding the child “is in need or rehabilitation or the protection of the public or the child requires that disposition be made.” *Id.* This section goes on to say 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.” *Id.* Additional findings are found in paragraph (i)(1) of TEX. FAM. CODE ANN. § 54.04, if the child is placed on probation outside the home or if the child is committed to the Texas Youth Commission (TJJD).

135 § 54.04(d)(1)(B). The statute provides that the public or private licensed residential treatment facility or secure correctional facility shall not be one operated by the Texas Youth Commission. *Id.*

136 § 54.04 (d)(3). See § 53.045 for a list of the offenses qualifying for a determinate sentence.

137 Sec. 54.04 of the Family Code addresses the Disposition Hearing (analogous to the punishment phase of an adult trial) and is much more concerned with the placement of the child, with only the short reference to “reasonable or lawful terms as the court may determine.” *Id.* § (d)(1). There are other provisions within Chapter 54 of the Family Code as to children on probation for sexual offenses (§ 54.0405), weapons (§ 54.0406), cruelty to animals (§ 54.0407), driver’s license suspension (§ 54.042), community service (§ 54.044), graffiti (§ 54.046), alcohol offenses (§ 54.047), restitution (§ 54.048 FC et seq.) cemeteries (§ 54.049), gangs (§ 54.0491), and whatever the cause of the day is in the legislature when they meet. *See id.* These special probation conditions are similar to the special provisions required of adults in comparable circumstances. *Id.*
has long been held the juvenile court “cannot delegate its ultimate authority to determine, set and supervise the conditions of probation.”

E. Constitutionality of the TJJD

I submit the creation of the Texas Juvenile Justice Department (TJJD), merging the Texas Juvenile Probation Commission (TJPC) and the Texas Youth Commission (TYC), created a violation of the separation of powers doctrine. The issue of separation of powers was previously addressed when the TYC CAP program was questioned as being unconstitutional as the amount of money awarded to a county depended upon the county’s reduction in commitments to TYC. The Office of the Attorney General, State of Texas, found the program to be constitutional. Although it is forbidden for a person in one department of government to exercise “powers attached to either of the other two departments,” the TYC funding formula merely provided an incentive to reduce commitments. But the history of such constitutional interpretations may lead to a different conclusion.

1. Separation of Powers

James Madison defined tyranny as the “accumulation of all powers, legislative, executive and judiciary, in the same hands.” Speaking on the structure of our federal government and its distribution of powers, Madison acknowledged, however, that the powers of the separate departments can be blended in such a way that “some of the essential parts of the edifice” could be in “danger of being crushed by the disproportionate weight of the other parts.” So the warning trumpet was sounded early that great caution should follow in the application of the powers of the branches of government and in the inevitable sharing or consolidation of power. Our separation of powers doctrine “is basic and vital . . ., to preclude a commingling of these essentially different powers


140 Id. The opinion of the Attorney General is CAP does not violate article 2, section 1 of the Texas Constitution “as an infringement upon the power of the judiciary to dispose of cases involving juveniles.” Id.

141 Id.


143 Id.
of government in the same hands.”\textsuperscript{144} The departments of government “shall never be controlled by or subjected, directly or indirectly, to the coercive influence of either of the other departments.”\textsuperscript{145}

2. Texas Constitution

The Texas Constitution likewise provides that the powers of the three departments, or branches, of state government shall be distinct.\textsuperscript{146} So the initial analysis must be a determination of the “powers” of a department, more so than any attempt by another department to invade or usurp power. Certain powers are specifically conferred on the legislature,\textsuperscript{147} and certain powers are specifically conferred on the judiciary.\textsuperscript{148} “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 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 assess for a violation of such penal laws.”\textsuperscript{149} Therefore, once the legislature determines something to be illegal and prescribes what punishment may be assessed by the judiciary, neither the legislative or executive branch may interfere in the “power” of the judiciary to exercise its “power” to set punishment, so long as the punishment is within that set by the legislative branch.\textsuperscript{150}

\textsuperscript{144} O’Donoghue v. U.S., 289 U.S. 516, 530 (1933). The Supreme Court in discussing the power of the legislative branch to reduce the compensation of constitutionally created judiciary, quoted 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.” Andrews, the Works of James Wilson (1896), vol. 1, p. 367.” O’Donoghue, at 530.

\textsuperscript{145} Id.

\textsuperscript{146} TEX. CONST. § 1, art.2, & art. 13. “No person being of one of these departments shall exercise the power properly attached to either of the others.” Baker v. State, 158 S.W. 998, 1002 (Tex. Crim. App. 1913).

\textsuperscript{147} Sec. 1, art.3, Texas Constitution. The Legislature is to enact laws.

\textsuperscript{148} TEX. CONST. art. V, Judicial Department, “The Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto.”

\textsuperscript{149} Baker v. State, 158 S.W. 998, 1002 (Tex. Crim. App. 1913). “This power is confided solely to the legislative branch of the government, and in this act the Legislature has not sought to excuse from punishment any one after conviction and penalty assessed.” Id.

\textsuperscript{150} 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.” Id.
The Texas State Constitution sets out a governmental structure with essentially the same division of departments as the federal government, warning that “no person, or collection of persons, being one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.” So collaboration and cooperation between the departments of the state government is allowed -- even a sharing of powers -- if the state constitution “expressly” permits it. In direct opposition to a formalistic interpretation of the separation of powers, the use of functionalism within the interpretations of the U.S. Constitution provides Texas a mechanism, through its constitution, to likewise protect the core constitutional functions of each branch of government applying checks and balances by the use of shared powers to control governmental power.

3. Judicial Power

These “core constitutional functions” are the “inherent” powers in the courts that arise “out of principles and doctrines that are so thoroughly embedded as to form the very foundation of our governmental structure.” And these powers cannot be impeded, even indirectly, by

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151 TEX. CONST. art. II, § 1.

152 Cf. INS v. Chadha, 462 U.S. 919 (1983)(using formalism to preserve the three separate branches of government). “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.” Chadha, 462 U.S. 919 at 951.

153 Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (holding the U.S. Constitution allows shared powers between the separate, interdependent and autonomous branches)

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Id. at 635.

See also Harold H. Bruff, Separation of Powers Under the Texas Constitution, 68 TEX. L. REV. 1337, 1351 (1989-1990) (“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].).

154 Mays v. Fifth Court of Appeals, 755 S.W.2d 78, 80 (Tex. 1988) (Spears, J., concurring); Cf. Gen.Servs. Com’n v. Little—Tex Insulation Co., Inc., 39 S.W.3d 591,
the legislative or executive branches, especially in the area of funding.\textsuperscript{155} The judiciary must be independent “to protect the citizen from both government overreaching and individual self-help.”\textsuperscript{156} 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.”\textsuperscript{157} The separation-of-powers doctrine authorizes a court’s inherent powers “to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity.”\textsuperscript{158} When the legislative or executive branch does interfere “with the functioning of the judicial process in a field constitutionally committed to the control of the courts,”\textsuperscript{159} one can assume a constitutional crisis is on the horizon. “In the complex structure of [Texas] state government,… certain core powers must be reserved to officers having special characteristics of the branch designed to discharge them.”\textsuperscript{160} Specifically, the courts have struck down overreaches by the legislature that interfere with this “functioning of the judicial process” as violating the separation of powers doctrine.\textsuperscript{161} A two-question test will

\textsuperscript{155} Mays, 755 S.W.2d at 81. Justice Spears in speaking to the power of the judiciary as an equal branch of government to award compensation from the State to one wrongfully convicted of a crime said, “The judiciary is an integral part of our government and cannot be impeded in its function by legislative intransigence in funding.” \textit{Id.}

\textsuperscript{156} In re Barr, 13 S.W.3d 525, 532 (Tex. Rev. Trib. 1998). “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….\textit{ Id.}

\textsuperscript{157} Eichelberger v. Eichelberger, 582 S.W.2d 395, 398 (Tex. 1979).

\textsuperscript{158} \textit{Id.}

\textsuperscript{159} Gen. Servs. Com’n v. Little-Tex Insulation Co., 39 S.W.3d 600 (Tex. 2001).

\textsuperscript{160} Harold H. Bruff, \textit{Separation of Powers Under the Texas Constitution}, 68 TEX. L. REV. 1337, 1354 (1989-1990). Bruff makes the point that even though prosecutors are “judicial” officers in Texas, they are not allowed to preside over criminal trials as only judges have the traditional characteristics to perform that duty. \textit{Id.} at 1354-55. This would be analogous to having the governor dictate to a trial court limitations on those duties traditionally reserved by a court. \textit{Id.}

\textsuperscript{161} Betts, 308 S.W.2d at 851; Cf. Armadillo Bail Bonds v. State, 802 S.W.2d at 239 (A statute 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. The rendering of judgments is a core function of the judiciary beyond the authority of the Legislature to affect.); Meshell v. State, 739 S.W.2d 246, 252-57 (Tex. Crim. App. 1987) (The Texas Speedy Trial Act was an unconstitutional violation of inherent judicial powers. Art. V, sec. 21, Texas Constitution.).
determine if the acts of the legislature unduly interfere 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,” 162 or “core judicial function.” 163

4. State Agencies

Agencies of state government, however, are created by statute and have no inherent powers or authority. 164 If the legislature creates an administrative agency – or commission – the legislature can delegate its powers to the agency through its inherent power to create statutes. 165 Consequently, the agency is limited to the authority given it in the statute or “implied” necessary to complete the assigned duties. 166 And by long standing interpretation, the courts have inherent judicial power to review administrative action, including the power to control executive action, even absent statutory authority allowing such review. 167 Before the merger, the TJPC was clearly not a branch of the executive. 168 Now, as a part of the TJJD, all the functions of the former TJPC fall under the supervision and control of the governor – the executive branch. 169

Although the creation of separate local Juvenile Boards may appear to insulate the TJJD from exercising control over the courts, 170 the

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163 Id.; Cf. State v. Williams, 938 S.W.2d 456, 458-59 (Tex. Crim. App. 1997) (Williams held 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.”).


165 Id.


167 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

168 See supra note 98 and Appendix B hereto.

169 See Appendix C hereto, organization chart of the Texas Juvenile Justice Department.

170 TEX. HUM. RES. CODE ANN. § 203.001 et seq.
opportunity for influence exists.\(^\text{171}\) After all, the TJJD monitors whether local probation departments comply with their own standards,\(^\text{172}\) facilities are subject to state standards,\(^\text{173}\) all probation officers are certified by the TJJD,\(^\text{174}\) and the TJJD is the primary funding conduit for money for the operation of the local juvenile probation department.\(^\text{175}\) In short, the TJJD – an agency of the executive branch -- sets standards for facilities, officers and, employees and can withhold funding to implement those standards all being related to the operation of the local juvenile probation office whose traditional primary function is to assist the courts in the rehabilitation of juveniles on probation.

\section*{F. Conclusion}

Probation, whether juvenile or adult, has long been the domain of the judiciary and the supervision of those on probation within the jurisdiction of the courts. Jurisdiction of all Texas courts, adult and juvenile, comes from the Texas Constitution and state statutes.\(^\text{176}\) Once a court obtains jurisdiction, it “retains jurisdiction over the defendant until he successfully completes the entire term” of his probation.\(^\text{177}\) The Texas Constitution

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\(^{171}\) See TEX. HUM. RES. CODE ANN. § 221.002(e). Even juvenile boards that do not accept state money “shall report to the department each month on a form provided by the department the same data as that required of counties accepting state aid.” \textit{Id.} The TJJD has its influence seen at all levels of government servicing juveniles, even those local governments that do ask for help. \textit{Id.}

\(^{172}\) § 221.004.

\(^{173}\) § 221.056. State may contact with local agencies to provide care for children with mental illness or emotional injury who, “as a condition of juvenile probation, are ordered by a court to reside at the facility.” \textit{Id.} at (a). The facility may be shut down by the state for its inability to provide “adequate and sufficient education opportunities and services to juveniles residing at the facility.” \textit{Id.} at (c).

\(^{174}\) TEX. HUM. RES. CODE ANN. ch. 222, Standards for and Regulation of Certain Officers and Employees. Besides certification and other matters, this chapter also sets minimum standards for probation officers, detention officers, and certain employees in non-secure correctional facilities. \textit{Id.}

\(^{175}\) TEX. HUM. RES. CODE ANN. ch. 223, State Aid. These sections provide for state aid allocated to the juvenile boards, including § 223.005, which allows for refusal, reduction, or suspension of state aid to a board (1) “that fails to comply with the department’s (TJJD’s) rules or fails to maintain local financial support or (2) a county that fails to comply with the minimum standards provided” by the Legislature. § 223.005 (a).


\(^{177}\) \textit{Id.} at 669.
forbids a branch of government to exercise any power properly delegated to another Branch.\footnote{Ex parte Giles, 502 S.W.2d 774, 780 (Tex Crim. App. 1973); See TEX. CONST. art.II, § 1.}

What would happen if the governor, as the chief executive officer of the state, instructed the TJJD that the local courts are being too easy on juvenile criminals and that to properly exercise the duties of a probation officer, a local department should have no discretion in the supervision of drug and sex crimes, that those children upon the first or slightest violation of a probation are to be promptly detained, or arrested, and motions to modify seeking commitment should be filed in the best interests of the child as the safety of the public requires it? What if the judge supervising these children believes in treatment for drugs and sex crimes in non-secure post adjudication facilities and outpatient programs? The actions of the governor in this scenario would clearly violate the separation of powers in my opinion. But what if the governor also has the TJJD withhold funding to the counties for the treatment facilities this “liberal, activist” judge prefers? Or, what if the governor has the TJJD rewrite the certification criteria for non-secure post adjudication facilities and outpatient programs in such a way as to exclude them from funding? Should the legislature set specific rules for the TJJD in this regard, this would have the same effect that being at the very least, the “threat” of an improper influence on a core judicial function—the power to supervise juveniles on probation and supervised by the court.

The Community Assistance Program (CAP) of the Texas Youth Council (TYC) was deemed constitutional in 1977 because the TYC did not attempt to limit the number of commitments to their facilities a county could make, only giving incentives to reduce the number of children sent to state care.\footnote{Tex. Atty. Gen. Op. H-959, 1977 WL 26298 (Tex. A.G.).} Now however, the number of commitments is limited only to children who have committed felonies and all misdemeanor crimes are handled on a local level.\footnote{TEX. FAM. CODE ANN. § 54.04(d)(2).} In 1977, the only function of the CAP was to exercise TYC’s “administrative power to grant funds for local programs.”\footnote{Tex. Atty. Gen. Op. H-959, 1977 WL 26298 (Tex.A.G.).}

Now, the TJJD has great oversight of local juvenile probation personnel and facilities assuming the duties of the TJPC, which was created in 1981.\footnote{See supra note 82.} The TJPC set standards for juvenile boards, probation...
officers, and facilities, provided educational training and technical assistance to the counties, juvenile boards, and probation offices,” performed inspections and audits of juvenile boards, and had the right to suspend or refuse to pay state aid. Now the TJJD performs all these duties, and more. The TYC was, and likewise, the TJJD is under the authority of the executive branch. The TJPC was a state agency with oversight in the legislature. With the functions of the TJPC now in the TJJD, the former TJPC, its employees and duties—although “abolished” — becomes an agency of the executive branch. When the attorney general wrote his opinion in 1977 in regard to TYC’s Community Assistance Program, the TYC was under the control of the governor, and surely concerns over separation-of-powers led to the creation of the TJPC outside the executive branch in 1981.

And for those that argue the governor would never make decisions in the operation of agencies under his supervision for political reasons, I only have to remind the reader of the governor’s raid of the Texas Forensic Science Commission in 2010 when several members of the commission, including the Chairman, were removed shortly before the agency began an investigation into the possibilities that Cameron Todd Willingham had been convicted, executed, and may indeed have been innocent. The new chairman of the commission was a conservative political ally of the governor who saw that the commission made findings that were politically advantageous for the governor -- all this just prior to the governor’s contested re-election bid.

183 See supra note 82-84.
184 TEX. HUM. RES. CODE ANN. Title 12.
185 See Appendix A, organizational chart for TYC, and Appendix C, organization chart for TJJD.
186 See Appendix B, organizational chart for the TJPC.
The executive branch cannot be allowed to impede, “even indirectly,” into the “core constitutional functions” of the judiciary to supervise those over which it still has jurisdiction,191(i.e. those on probation to the courts). This is an “inherent” power of the courts -- the very “functioning of the judicial process.”192 There is little doubt the creation of the TJJD is 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?”193 Surely, at the very least, the threat is there to unduly interfere with the court’s powers in supervising those juveniles under its jurisdiction.

Either the constitution must be amended removing the TJJD from the executive branch -- which is unlikely as long as we have 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, as I have previously proposed, and remove children from the taint of criminality and address their needs until maturity.194 The TJJD should be abolished, the juvenile courts turned into mediation courts, and the power to guide the development of our youth properly placed in the hands of the community to 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 to our children. We have to begin prenatal and address the medical and psychological needs of the child, mother, and family not as separate pieces in the community puzzle but as integral cogs in the machine that makes our society finally reach its potential that all of

191 Mays v. Fifth Court of Appeals; Gen. Servs. Com’n v. Little—Tex Insulation Co., Inc.;
See supra note 145.

192 See supra note 145, 146.

193 In re Allcat Claims Service, L.P.; see supra note153.

us, not just those of privilege, may find a productive, satisfying road through life.