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The Move from the Principal's Office to the Police Station: Criminalizing Nonviolent Student Behavior

Joseph Michael Magro

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I. INTRODUCTION

School violence is one of the most hotly debated issues today.[1] The issue's popularity is based on the misconception, particularly in the wake of tragedies like the Columbine shootings, that school violence has reached an all-time high.[2] These tragedies, coupled with high juvenile crime rates in the 1980s and early 1990s and the media's disproportionate coverage of violent juvenile behavior, caused the public to believe that the United States was facing a coming wave of "superpredators."[3] These "superpredators" were presented as the product of "permissive single-parent families, poverty, and a lenient judicial system."[4] They evoke fear, not compassion; as such, they make great villains. In order to support the politically friendly "get tough on crime" stance, contemporary decision-makers like legislators, prosecutors, and police have played on the public's fears and have urged the country to end leniency toward juvenile thugs and to develop more punitive measures to punish and lock up the superpredators.[5] As a result, legislators across the country passed laws aimed facilitating the punishment of children

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* J.D. Candidate, May 2013, Seton Hall University School of Law; B.A., 2009 Princeton University. I would like to thank my mother, Anne Foster, for teaching me that there are two sides to every story. She is not only a great parent, but also a great role model and human being. She is the main inspiration for this paper as many of the youths discussed within were not fortunate enough to have someone in their lives to provide them with guidance, love, and support.

[1] Marcia Johnson, *Texas Revised Juvenile Justice and Education Codes: Not all Change is Good*, 19 J. JUV. L. 1, 1 (1998).

[2] DEBORAH FOWLER, TEXAS APPLESEED, TEXAS' SCHOOL TO PRISON PIPELINE: TICKETING, ARREST & USE OF FORCE IN SCHOOLS, HOW THE MYTH OF THE "BLACKBOARD JUNGLE" RESHAPED SCHOOL DISCIPLINARY POLICY 3 (2010) ("Media Accounts of isolated deadly shootings, such as occurred at Columbine High School in Colorado, fanned public fears of 'gun-wielding disaffected youth' and shifted the public policy dialogue from school crime to school violence.").

[3] Mark H. Moore, *Youth Violence in America*, 24 CRIME & JUST. 1, 2 (1998); Sacha M. Coupet, *What to do with the Sheep in Wolf's Clothing: The Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. PA. L. REV. 1303, 1331–32 (2000).

[4] Judith A. Browne, *Derailed: The Schoolhouse to Jailhouse Track* 7 (2003).

[5] Moore, *supra* note 3, at 1; Coupet, *supra* note 3, at 1332.

who offended at school through the juvenile justice system. This projected plague of superpredators, however, did not come to fruition. In fact, youth violence, particularly in schools, has followed a downward trend in national crime rates from the mid 1990s and remains relatively low today.[6]

As a result of this fear of the "superpredator," legislators on the local, state, and federal levels have enacted legislation that facilitates the prosecution of school students by criminalizing[7] nonviolent student behavior. This phenomenon has a name: the school-to-prison pipeline.[8] The school-to-prison pipeline is a system whereby "school administrators and security personnel enjoy wide discretion to decide which students are referred to juvenile court for behavioral infractions."[9] It funnels children out of school and into the juvenile justice system.[10] As a result, the police and courts, instead of school administrators, are used to punish student behavior that was once deemed merely unusual or annoying.[11] Incidents such as schoolyard scuffles and shoving matches—incident formerly dealt with exclusively by the schools—have become so menacing as to warrant police intervention.[12] The behavior could be as innocuous as

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[6] Phillip J. Cook et al., *School Crime Control and Prevention*, 39 CRIME & JUST. 313, 313 (2010); *see also* CHARLES PUZZANCHERA, U.S. DEP'T OF JUSTICE, JUVENILE JUSTICE BULLETIN: JUVENILE ARRESTS 2008 1 (2009), www.ncjrs.gov/pdffiles1/ojjdp/228479.pdf (The 2008 arrest rates for Violent Crime Index offenses were substantially lower than the rates in the 1994 peak year for every age group younger than forty. Similarly, between 1999 and 2008, juvenile arrests for aggravated assault decreased 22% for males and 17% for females).

[7] The author acknowledges that the juvenile justice system is a civil, not a criminal, venue. But, for the purposes of this paper, this comment will refer to the effect of some statutes as "criminalizing student behavior." Part of the reason for this is that, even though these statutes are imposing civil penalties, they ultimately have the same effect as criminal sanctions. Further, some statutes, like Texas TEX. EDUC. CODE ANN. § 37.124, are adjudicated in Municipal or Justice of the Peace courts, and thus impose criminal, not civil sanctions. This will be elaborated further in Section III.A.

[8] Heather Cobb, *Separate and Unequal: The Disparate Impact of School-Based Referrals to Juvenile Court*, 44 HARV. C.R.-C.L. L. REV. 581, 582 (2009).

[9] Id.

[10] *School-to-Prison Pipeline*, AM. CIVIL LIBERTIES UNION, http://www.aclu.org/racial-justice/school-prison-pipeline (last visited Jan 19, 2012).

[11] Augustina Reyes, *The Criminalization of Student Discipline Programs and Adolescent Behavior*, 21 ST. JOHN'S J. LEGAL COMMENT. 73, 91 (2006).

[12] Lisa H. Thurau, *Controlling Partners: When Law Enforcement meets Discipline in Public Schools*, 54 N.Y.L. SCH. L. REV. 977, 978 (2010).

a student refusing to sit down in class, blowing a spitball, or a dress code violation.[13] Rather than receiving detention or a suspension for this behavior, children are now being arrested and thereby subjected to the juvenile or criminal justice system.

The creation and enforcement of laws governing school behavior is a consequence of the change in society's philosophy towards juvenile offenders, which was a result of the dramatic rise in juvenile violent crime rates in the 1980s through the 1990s. The current philosophy endorses the move away from rehabilitation and instead towards punishment.[14] While youth violence has decreased dramatically,[15] legislators have failed to follow in-step by repealing certain statutes or at least halting the implementation of new laws aimed at criminalizing minor misconduct.[16] The net cast by the "Tough on Crime" philosophy has become increasingly wide, catching more and more juveniles. As a result, juveniles are being cited and arrested for nonviolent crimes and are more frequently coming into contact with the juvenile and criminal justice systems. This comes with dramatic consequences for youths: being expelled from high school, diminishing chances of getting into college, or being ineligible for military service.

It is the system, not our youth, which has a problem. The system is broken and needs to be fixed. But there is no single way to fix it, no single piece of legislation that could be enacted, repealed, or amended that would solve this great problem facing today's youth. Rather, every facet of government and society needs to work together in order to look past the fallacies surrounding violent juvenile crime and move away from a system that devotes more resources to punishment than it does to education and rehabilitation. The dramatic drop in violent crime

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[13] *Id.* at 979 n.6.
[14] Juan Alberto Arteaga, *Juvenile (In)justice: Congressional Attempts to Abrogate the Procedural Rights of Juvenile Defendants*, 102 COLUM. L. REV. 1051, 1052–53 (2002).
[15] *See* discussion *infra* Parts II.C.
[16] *See* discussion *infra* Parts II.C.

during the last decade is evidence that people, particularly youths, can change. It is now time for the system to change accordingly.

This Comment will examine the numerous negative ramifications that criminalizing nonviolent student behavior has on today's youth, both immediately and in the future, and will argue for a complete overhaul of the current system. Section II will provide a background of the juvenile justice system and document certain important changes in both the crime rate and society's thinking, which have led to the enactment and increased use of laws criminalizing student behavior. Section III will explore a variety of punitive statutes and discuss their immediate effect on today's youth. It will discuss the long-term ramifications of the school-to-prison pipeline, including hurdles put in place to block reassimilation into mainstream schools as well as the problems associated with dropping out of high school. This Section will argue that these statutes go far beyond their original legislative intent—school safety—and are currently being used to remove children who exhibit no violence whatsoever from school. Section IV will explore effective alternatives to the current punitive system and will advocate implementing programs such as Positive Behavior Support Programs and Restorative Justice Programs. It will then propose a model statute and discuss the benefits of its limited enforcement. Section V will conclude by advocating a dramatic departure from the status quo and call for a system that puts rehabilitation before punishment.

II. BACKGROUND

A. The Origins of the Juvenile Justice System.

The original focus of the juvenile justice system, which began in Chicago, Illinois in 1899, was "the juvenile offender—rather than the offense."[17] The juvenile justice system is

[17] SHAY BILCHIK, U.S. DEP'T OF JUSTICE, JUVENILE JUSTICE: A CENTURY OF CHANGE, 1 (1999), *available at* www.ncjrs.gov/pdffiles1/ojjdp/178995.pdf; *see also* Hilary Blalock, *The Purpose of the Youth Court: Exploring the*

based on the idea that children are developmentally different from adults; accordingly, rehabilitation is possible and deemed more important than punishment.[18] At the heart of the juvenile justice system is the need to balance rehabilitation and treatment with sanctions that effectively curb future offenses.[19] The criminal justice system, on the other hand, differs in that rehabilitation is not considered to be a primary goal; rather, deterrence is seen as a successful outcome of punishment.[20]

Because of the different philosophies and goals of each, the juvenile justice system is in many ways different from the criminal justice system. The juvenile justice system follows the "psychological casework approach," which, in order to meet the specific needs of the offender,

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Recent Trend Away From Juvenile Delinquent Rehabilitation in Mississippi, the Resulting Consequences, and the Possible Solutions, 30 MISS. C. L. REV. 543, 543 (2012). During the 18th century children under the age of seven were exempt from prosecution and punishment because they were presumed to be incapable of forming the required criminal intent. Children seven years of age or older, however, were tried in criminal courts and sentenced to prison if found guilty. The practice of treating children seven or older as adults changed in the wake of European educational reform movements which dramatically changed the perception of children: they were no longer miniature adults but rather were persons with not yet fully developed moral and cognitive capacities. The change in perception led to Illinois passing the Juvenile Court Act of 1899, which established the first juvenile court. *Parens patriae* or 'the State as parent' was the rationale for the State's right to intervene in the lives of children. Under this philosophy, the State had not only the power but also the responsibility to provide protection for children. BILCHIK, supra note 15, at 2.

[18] Blalock, *supra* note 17, at 543 (citing Wallace J. Mlyniec, *The Special Issues of Juvenile Justice: An Introduction*, 15 CRIM. JUST. 4, 4 (2000)).

[19] BILCHIK, supra note 17, at 1; *see also* Julianne P. Sheffer, *Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation within the Juvenile Justice System*, 48 VAND. L. REV. 479, 484 (1995).

[20] *Juvenile Justice*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/stats/juvvsadult.html (last visited Feb. 3, 2010) (citing BILCHIK, *supra* note 15); *see, e.g.*, N.J. STAT. ANN. § 2C:1-2 (West 2012) stating that the purpose of criminal law is "[to] forbid, prevent, and condemn conduct that unjustifiably and inexcusably inflicts or threatens serious harm to individual or public interests."; David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1565–6 (2004) (The rehabilitative view of punishment is based on *parens patriae* philosophy. It sees crime as the expression of antisocial behavior, itself the product of social dysfunction, and "sees the goal of punishment as the rehabilitation and resocialization of the individual into constructive and socially acceptable behavior." It requires that we punish antisocial behavior, but only in a manner and to the extent necessary to resocialize the offender. On the other hand, the punitive view prevalent in the criminal justice system is based on corrective and consequentialist conceptions of punishment. It is based on the idea that we should punish those whose punishment would deter crime and that we should punish in a manner and to the extent necessary to secure this deterrent effect.); *See also* Michelle Migdal Gee, *Possibility of Rehabilitation as Affecting Whether Juvenile Offender Should be Tried as Adult*, 22 A.L.R. 1162 (1983) (concluding that that main factor in determining between juvenile and criminal prosecution is amenability: whether or not the child would be receptive to rehabilitative programs. In making this decision, the court will examine four factors: the seriousness of the offense, the history of delinquency, the probable cause of such delinquent behavior, and the facilities available for treating the minor. If the child is deemed to be amenable to rehabilitation, he or she enters the juvenile justice system. If the child is deemed to be not amenable, he or she enters the criminal justice system).

takes into account a detailed assessment of his history.[21] If necessary, the juvenile offender faces a hearing in which legal factors are balanced with his social history.[22] In the criminal justice system, on the other hand, the defendant's history takes a back seat to the facts of the case.[23]

In the juvenile justice system, a juvenile offender is judged delinquent ran than guilty.[24] In keeping with the individualized nature of the juvenile justice system and its designed purpose of rehabilitation, a juvenile offender judged delinquent may receive a variety of sentences, the selection of which is supposed to depend on a number of factors, including the severity of the offense and the individual's offense history.[25] After the disposition hearing, the court may "suspend the juvenile delinquency, place him on probation, or commit him to official detention which may include a term of juvenile delinquent supervision to follow detention."[26] In contrast to the juvenile justice system, a defendant in the criminal justice system is found "innocent" or "guilty."[27] Further, judges in the criminal justice system are not afforded the same leeway as judges in the juvenile justice system, and are often handcuffed by sentencing requirements based on the offense at hand and may not use discretion.[28]

Paternalistic legislation designed to protect juvenile offenders and aid them in their rehabilitation reached its apex in the 1970s.[29] "Community-based programs, diversion, and

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[21] FRONTLINE, *supra* note 20.
[22] *Id.*
[23] *Id.*
[24] *See* N.Y. FAM. LAW § 301.2 (McKinney 2012) (stating "'Juvenile delinquent' means a person over seven and less than sixteen years of age, who, having committed an act that would constitute a crime if committed by an adult, (a) is not criminally responsible for such conduct by reason of infancy, or (b) is the defendant in an action ordered removed from a criminal law court to the family court pursuant to article seven hundred twenty-five of the criminal procedure law.").
[25] *See e.g.*, N.J. STAT. ANN. § 2A:4A-44 (West 2002) (stating that in determining whether incarceration is an appropriate disposition, the court shall consider the following circumstances: ~~the juvenile's age or mental capacity~~, the juvenile's character and attitude, and the juvenile's prior record).
[26] 18 U.S.C. § 5037 (2002).
[27] FRONTLINE, *supra* note 20.
[28] *See, e.g.*, FED. SENT. L. & PRAC. § 1B1.2 (2011).
[29] BILCHIK, supra note 17, at 1

deinstitutionalization" were the banners of juvenile justice policy during this period.[30] The Juvenile Justice and Delinquency Prevention Act of 1974 ("Delinquency Prevention Act") highlighted these measures.[31] The Delinquency Prevention Act conditioned State receipt of federal grant monies on the "deinstitutionalization of status offenders and nonoffenders as well as the separation of juvenile delinquents from adult offenders."[32]

B. The Increased Crime Rate of the 1980s and 1990s and the Legislative Response

The shift away from rehabilitation and towards punishment began in the 1980s and remains prevalent today.[33] This shift in thinking is attributable to a dramatic increase in the crime rate from the late 1980s through the mid 1990s.[34] Juvenile violent crime—murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault—rose every year from 1987 through 1994 and did not fall to pre-1987 levels until 2000.[35] At the peak of juvenile violent crime in 1994, there were about 520 arrests per 100,000 juveniles ages ten through

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[30] BILCHIK, *supra* note 17 at 4.

[31] 42 U.S.C. § 5601 (1974); *see also* Juvenile Justiceand Delinquency Prevention Act of 1974, Pub. L. No. 93–415, § 102(a) (1974) (The Delinquency Prevention Acts' purpose was to "provide the necessary resources, leadership, and coordination (1) to develop and implement effective methods of preventing and reducing juvenile delinquency; (2) to develop and conduct effective programs to prevent delinquency, to divert juveniles from the traditional juvenile justice system and to provide critically needed alternatives to institutionalization; (3) to improve the quality of juvenile justice in the United States; and (4) to increase the capacity of state and local governments and public and private agencies to conduct effective juvenile justice delinquency prevention and rehabilitation programs and to provide research, evaluation, and training services in the field of juvenile delinquency prevention." Another of the Delinquency Prevention Acts' purpose was to "keep students in elementary and secondary schools and to prevent unwarranted and arbitrary suspensions and expulsions.").

[32] *Id.*; *see also* 18 U.S.C. § 5039 (2006) ("No juvenile committed, whether pursuant to an adjudication of delinquency or conviction for an offense, to the custody of the Attorney General may be placed or retained in an adult jail or correctional institution in which he has regular contact with adults incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges.").

[33] BILCHIK, *supra* note 17, at 4. "In the 1980s, the pendulum began to swing toward law and order.").

[34] *Id.* ("During the 1980's, the public perceived that serious juvenile crime was increasing and that the system was too lenient with offenders…many states responded by passing more punitive laws. Some laws removed certain classes of offenders from the juvenile justice system and handled them as adult criminals in criminal court. Others required the juvenile justice system to treat certain classes of juvenile offenders as criminals but in the juvenile court.").

[35] PUZZANCHERA, *supra* note 6, at 5; *see also* U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, CRIME IN SCHOOLS AND COLLEGES: A STUDY OF OFFENDERS AND ARRESTEES REPORTED VIA NATIONAL INCIDENT-BASED REPORTING SYSTEM DATA, 2007, available at http://www.fbi.gov/about-us/cjis/ucr/nibrs/crime-in-schools-and-colleges/crime_in_schools_and_colleges#Summary (last visited Feb. 22, 2012) [hereinafter "Crime in Schools and Colleges."]

seventeen.[36] Juvenile property crime—burglary, larceny-theft, motor vehicle theft, and arson—followed a similar trend.[37] Juvenile property crime remained high from 1980 through 1997 and began to flatten out during the 2000s.[38] At its peak in 1991, there were about 2,600 arrests per 100,000 juveniles between the ages of ten through seventeen.[39] The juvenile arrest rate for simple assault followed in step: it increased 156% between 1980 and 1997, peaking in 1997 with a rate of roughly 780 juvenile arrests per 100,000 juveniles ages ten through seventeen.[40]

The legislative response to this increase in juvenile crime was swift. In the scope of the juvenile justice system, the 1990s are defined as a time of unprecedented change as legislators cracked down on juvenile crime.[41] From 1992 through 1997, legislators in forty-seven states enacted laws to make their juvenile justice systems more punitive.[42] These laws focused on five primary areas of change: transfers provisions—facilitated transfer from the juvenile to the criminal justice system; sentencing—gave juvenile and criminal courts expanded sentencing options; confidentiality—modified or removed juvenile court confidentiality provisions; victim's rights—increased the role of victims in the juvenile justice process; and correctional programming—developed new programs.[43] Federal laws allow and/or facilitate transfer to district courts for a variety of offenses.[44] Forty-five states have enacted similar statutes.[45]

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[36] PUZZANCHERA, *supra* note 6, at 5.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* at 10.
[41] BILCHIK supra note 17, at 5; *see also* Samuel Marion Davis, *The Criminalization of Juvenile Justice: Legislative Response to "The Phantom Menace,"* 70 MISS. L.J. 1, 1 (2000) (stating "for the last decade in particular, a trend has been developing toward more punitive treatment of juveniles.").
[42] BILCHIK, *supra* note 17, at 5; *see also* Davis, *supra* note 35, at 2 (stating "Over the last twenty years virtually every state has enacted laws designed to address what is perceived as a worsening juvenile crime problem.").
[43] BILCHIK, *supra* note 17, at 5.
[44] *See, e.g.*, 18 U.S.C. 5032 (providing that "A juvenile who is alleged to have committed an act of juvenile delinquency . . . shall be proceeded against under this chapter unless he has requested in writing upon advice of counsel to be proceeded against as an adult, except that, with respect to a juvenile fifteen years and older alleged to have committed an act after his fifteenth birthday which if committed by an adult would be a felony that is a crime of violence or an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), or section

C. The Drop in Crime

The extraordinarily high juvenile violent and property crime rates of the 1980s and 1990s are a thing of the past. Arrests for juvenile violent crimes reached a historic low in 2004, dropping 49% from its 1994 peak.[46] And while there was a slight jump between 2004 and 2006, the jump was followed by another decrease, leaving the 2008 juvenile violent crime arrest rate at roughly 290 arrests per 100,000 juveniles ages ten through seventeen, down from 520 in 1994.[47] Arrests for juvenile property crimes followed a similar trend: arrests in 2008 were down 49% from the 1991 peak, representing a drop in arrests from the 1991 high of 2,600 arrests per 100,000 juveniles ages 10-17 to 1,300 arrests per 100,000 juveniles ages ten through 17 in 2008.[48]

The logical conclusion is that the "get tough on crime" legislation of the 1990s is at least partially responsible for the dramatic decrease in juvenile violent and property crime. With the drop in violent crime rates, it would make sense that there would be no need to pass and enforce more legislation aimed at curbing youth violence. This, however, is not the case. In fact, as juvenile violent and property crime has decreased, prosecution of juveniles for relatively minor offenses has dramatically increased.[49]

III. ANALYSIS OF STATUTES ACROSS THE COUNTRY CRIMINALIZING STUDENT BEHAVIOR

1002(a), 1005, or 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, 959), or section 922(x) of this title, or in section 924(b), (g), or (h) of this title, criminal prosecution on the basis of the alleged act may be begun by motion to transfer of the Attorney General in the appropriate district court of the United States, if such court finds, after hearing, such transfer would be in the interest of justice.").

[45] BILCHIK, *supra* note 17, at 5; *see e.g.*, N.J. STAT. ANN. § 5:22-2 and ALA. CODE § 12-15-204 which govern transfer to criminal court of juvenile offenders.

[46] PUZZANCHERA, supra note 6, at 5; see also Grace E. Shear, *The Disregarding of the Rehabilitative Spirit of Juvenile Coides: Addressing Resentencing Hearing in Blended Sentencing Schemes*, 99 KY. L.J. 211, 218 (2011) (stating that "although a 2008 study reported a decrease in juvenile violent crime rates for the preceding fourteen years, state legislatures around the nation have drafted their juvenile codes and court systems to reflect increased criminalization of juvenile behavior.").

[47] PUZZANCHERA, *supra* note 6, at 5.

[48] *Id.*

[49] *See infra* p. 10 and notes 50–52.

A. Criminalizing Student Behavior and its Immediate Effect on Today's Youth

The "get tough on crime" legislation of the 1990s was arguably successful and at least partially responsible for the dramatic decrease in crime in the years following its inception.[50] Its success, coupled with the misconception that youth violence remains high, has allowed "get tough on crime" legislation to grow and cast a wider net in its search for the "superpredator."[51] The newest branch of the "get tough on crime" legislation is the trend of criminalizing nonviolent student behavior.[52] It has negatively affected students in all areas of the country.[53] It shares the same philosophy as the 1990s legislative reforms of the juvenile justice system—the move away from rehabilitation and towards punishment—yet it lacks the exigent circumstances of the 1980s and 1990s: Juvenile violence has dropped dramatically and it is been over a decade since the Columbia shootings.

Statistics show that juvenile violent crime—murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault—as well as juvenile property crime—burglary, larceny-theft, motor vehicle theft, and arson—decreased dramatically from the mid-1990s to the present.[54] Strangely, the amount of arrests in schools increased every year from 2000 through 2004.[55] The most frequent offense committed in schools was simple assault as there were 51,462 reported in schools from 2000 through 2004.[56]

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[50] *See* discussion *supra* Part II.C.
[51] Cook, *supra* note 6, at 313.
[52] Cobb, *supra* note 8, at 582.
[53] *School to Prison Pipeline: Talking Points*, AM. CIVIL LIBERTIES UNION, http://www.aclu.org/racial-justice/school-prison-pipeline-talking-points (last visited Feb. 12, 2012) (noting that students of color and students with special needs are disproportionately represented in the school to prison pipeline).
[54] PUZZANCHERA, *supra* note 6, at 5.
[55] *Crime in Schools and Colleges*, *supra* note 35.
[56] *Id.*

Violent crime is down, yet the courts remain busy due to statutes criminalizing student behavior without regard to whether it poses a threat to society.[57] The immediate effect of criminalizing student behavior is that the municipal and juvenile courts have become the forum through which student misbehavior is dealt. It appears that the overall effect of the move from rehabilitation to punishment is that, in the search for the "superpredator," more and more children are losing the chance at education and are being subjected to the juvenile and criminal justice systems.

i. Criminalization of Student Behavior in Texas

The "tough on crime" mentality has found its way into Texas schools. Pursuant to TEX. EDUC. CODE ANN. § 37.123 and § 37.124, the Texas legislature criminalized certain student behavior. TEX. EDUC. CODE ANN. § 37.123 provides that a person commits a Class B Misdemeanor if the person intentionally engages in "disruptive activity" on the campus or property of any private or public school.[58] "Disruptive Activity," as defined by the statute, includes "obstructing or restraining the passage of persons in an exit, entrance, or hallway of a building;" "seizing control of a building . . . to interfere with an administrative, educational, research, or other authorized activity;" and "disrupting by force or violence or the threat of force or violence a lawful assembly in progress."[59]

TEX. EDUC. CODE ANN. § 37.124 differs from § 37.123 in that there is not a single reference to violence.[60] This statue is a perfect example of criminalizing student behavior

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[57] Sara Rimer, *Unruly Students Facing Arrest, Not Detention*, N.Y. TIMES, Jan. 4, 2004, http://www.nytimes.com/2004/01/04/us/unruly-students-facing-arrest-not-detention.html?pagewanted=all&src=pm- ("Juvenile court judges are complaining that their courtrooms are at risk of being overwhelmed by student misconduct cases that should be handed in schools.").

[58] TEX. EDUC. CODE ANN. § 37.123 (West 2011).

[59] *Id.*

[60] TEX. EDUC. CODE ANN. § 37.124 (West 2011).

generally deemed unusual or annoying.[61] Under this statute, a person commits a Class C misdemeanor if the person "intentionally disrupts the conduct of classes or other school activities."[62] Disruptive activities include making noises and enticing away from or preventing another student from attending a required class or school activity.[63] If the student's behavior does not fit into one of those already broad categories, then it may fall into the apparent catchall provision: disrupting class activities "through either acts of misconduct or the use of loud or profane language."[64]

These statutes have provided for a number of unusual arrests. Under § 37.123 and § 37.124, the police can and have been called to arrest a student "when a student uses food inappropriately, moons, possesses or uses a skateboard, scooter or in-line skates, pulls a chair out from under someone, or engages in inappropriate public display of affection."[65] In one instance 200 students were issued Class C misdemeanors for violating § 37.124 by cutting class in order to participate in protests against national immigration policy.[66] Police issued a Class C misdemeanor to a student when he purposely yelled out the wrong answer and then told the teacher that the correct answer could be found in her "culo."[67] Police issued another student a Class C misdemeanor for making paper airplanes with a staple at the end, throwing them up in the air, and causing them to stick in the ceiling.[68]

A 2010 study, in which twenty-two school districts and four municipal courts produced Class C misdemeanor ticketing data from 2006 to 2007, shows the that the above examples are

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[61] Reyes, *supra* note 11, at 91.
[62] § 37.124(a)–(b).
[63] § 37.124(c)(1)(A)–(C).
[64] § 37.124(c)(1)(D).
[65] Reyes, *supra* note 11, at 96.
[66] Tellez v. City of Round Rock, No. 17565, 2007 WL 1296799 April 12, 2007 (W.D. Tex.).
[67] FOWLER, *supra* note **Error! Bookmark not defined.**, at 84 (a 'culo' is Spanish for backside).
[68] *Id.*

not outliers.[69] The twenty-six participating school districts and municipal courts represent approximately twenty-three percent of the Texas student body during this period.[70] These districts issued nearly 32,000 Class C misdemeanor tickets during the 2006 to 2007 school year.[71] The study found that more than half of the Class C misdemeanors were for disorderly conduct and disruption of class or transportation.[72] Of the nearly 32,000 Class C misdemeanors, only about twelve percent were issued to students for violent behavior or weapons-related offenses.[73] Additionally, of the nearly 10,000 tickets issued for "Disorderly Conduct," forty-four percent were issued for either profanity or offense gestures.[74]

One of the main reasons for the increase in the amount of Class C misdemeanors is the increased presence of School Resource Officers (SROs).[75] It is argued that the presence of SROs in schools is responsible for the decrease of violent crime in schools. The data supports this argument, as there has been a decrease in violent crime from the mid-1990s through today.[76] The increased presence of SROs is not without its faults, however.

An SRO's job is specifically to issue out tickets, and they do so with staggering frequency. Data accumulated from a variety of Texas school districts suggests that the amount of tickets SROs issue increases at a rate significantly higher than the percentage of growth of the

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[69] *Id.* at 85.
[70] *Id.* at 77–78. The participating school districts and municipal courts were Alief, Austin, Brownsville, Castleberry, Corpus Christi, Dallas, East Central, Edgewood, El Paso, Galveston, Houston, Humble, Huntsville Municipal Court, Katy, Lewisville-Flower Mound Municipal Court, Midland, Pasadena, San Angelo, San Antonio, Somerville Municipal Court, Southlake Municipal Court, Spring Branch, United, Waco, White Settlement, Wichita Falls. *Id.*
[71] *Id.* at 81.
[72] FOWLER, *supra* note 2, at 82.
[73] *Id.* The study defined "violent behavior" as assault.
[74] *Id*; *Compare* § 37.124 (which makes it a Class C misdemeanor if the person intentionally disrupts the conduct of classes or other school activities through actions such as profanity or offensive gestures), *with* TEX. PENAL CODE ANN. § 42.01 (West 2011) (which makes it a Class C misdemeanor to use abusive, indecent profane, or vulgar language in a public place. The difference, however, is that § 42.01 is subject First Amendment protections and may only be prosecuted if the language by its very utterance tends to incite an immediate breach of the peace).
[75] Thurau, *supra* note 12, at 978. SROs are police officers in schools.
[76] *See supra* p. 10 and notes 50–52.

school district's SROs staff.[77] For example, while the amount of SROs in the Dallas School District grew by twenty-four percent, the amount of Class C misdemeanors issued rose by a staggering ninety-five percent during the same time period.[78] Another study from a Texas municipal court found that between 1994 and 2008, of the 42,283 tickets issued to juveniles, the percentage issued by SROs increased from two percent to over 40 percent.[79] In light of the fact that violent crime has dropped significantly from its peak in the mid-1990s, it appears that the § 37.123 and § 37.124, in conjunction with the increased presence of SROs, has the effect of creating crime.

While some of the above-mentioned incidents for which children in Texas were issued Class C misdemeanors may seem comical, the repercussions these children face are anything but. Criminalizing innocuous, nonviolent behavior has extremely negative effects on children in Texas.[80] The punishment for a Class C misdemeanor in Texas is a fine not to exceed $500.[81] While a fine of not more than $500 may not seem like too harsh a penalty, a Class C misdemeanor in Texas carries much more weight than a mere ticket and fine. People often equate these Class C misdemeanors to traffic tickets, which traditionally can be discharged by mailing in payment.[82] This view, however, is misguided.

In 1991, the Texas Legislature amended its laws so that juveniles charged with a Class C misdemeanor fall under the jurisdiction of the municipal or Justice of the Peace courts.[83] Prior to

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[77] FOWLER, *supra* note **Error! Bookmark not defined.**, at 83.
[78] *Id.*
[79] *Id.*
[80] This is not to suggest that the negative ramifications of overcriminalization are limited to youth in Texas.
[81] TEX. PENAL CODE ANN. § 12.23 (West 2011).
[82] FOWLER, *supra* note **Error! Bookmark not defined.**, at 78; *Compare* TEX. EDUC. CODE ANN. § 37.123 (which makes it a Class C misdemeanor if the person intentionally disrupts the conduct of classes or other school activities), *with* TEX. PENAL CODE ANN. § 42.105(b)(6) and § 42.01(a)(1) (which list other Class C misdemeanors, which carry the same punishment as § 37.124, such as attending a cockfight or exposing your anus or genitals in a public place).
[83] *Id.*; *see also* RYAN KELLUS TURNER & MARK GOODNER, PASSING THE PADDLE: NONDISCLOSURE OF CHILDREN'S CRIMINAL CASES (2010) (on file with author).

1991, all juvenile offenses were handled by the juvenile courts.[84] The consequence of this change is great: municipal and Justice of the Peace courts are criminal venues.[85] Because of this, juveniles are no longer afforded many of the protections of the juvenile courts—civil venues. Appointment of counsel, a right of the juvenile court, does not apply in Class C misdemeanor cases.[86] As a result, children are more likely to plead guilty even when they may have a viable defense.[87]

Once a juvenile enters a guilty plea in the municipal courts, he ends up having a criminal record.[88] While Texas does have safeguards in place to protect the release of information regarding juveniles convicted of fine-only misdemeanors, they are not perfect.[89] Because of the fine—up to $500—the court fees—a base of $52—and the fact that it is not unusual for students to receive multiple tickets in school, it is often the case that children will not meet the requirements for nondisclosure because they are not able to satisfy the judgment.[90] In one Texas municipal court, more than 350 youths received multiple tickets, with some receiving six or more.[91] A parent of a Texas youth had this to say about Class C misdemeanors issued to her son:

> My son has received tickets for various offenses ranging from horseplay that resulted in accidental assault by contact, [to] having cigarette butts in his jeans pockets, a fight he did not start that he simply defended himself, three for foul language, [and] one huge one for missing school (classes—not whole days). The total for

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[84] FOWLER, supra note 2, at 78.
[85] *Id.*
[86] TEX. FAM. CODE ANN. § 54.01(b) (West 2005); *see also* FOWLER, *supra* note **Error! Bookmark not defined.**, at 71.
[87] FOWLER, *supra* note 2, at 71. "For example, 'self defense' is a defense to a charge of disorderly conduct for fighting, but few students or parents are aware of this." *Id.*
[88] Helen Giddings, *Breaking the Handcuffs on Texas Children*, THE DALLAS MORNING NEWS Apr. 15, 2011, http://www.dallasnews.com/opinion/latest-columns/20110415-rep.-helen-giddings-breaking-the-handcuffs-on-texas-children.ece.
[89] TEX. FAM. CODE ANN. § 58.00711 (West 2011) ("All records and files . . . relating to a child who is convicted of and has satisfied the judgment for a fine-only misdemeanor offense other than a traffic offense are confidential and may not be disclosed to the public.").
[90] FOWLER, *supra* note 2, at 69; *see also* § 58.00711.
[91] FOWLER, *supra* note **Error! Bookmark not defined.** at 69.

> said tickets was $1,520 [but] it might as well have been a million to someone in my financial situation.[92]

The $1,520 fine was apparently the least of this family's troubles. The child, now seventeen years old (he was fifteen and sixteen when the tickets were issued), is considered an adult, and was forced to go to court where he was told "if [the fine] wasn't paid immediately that he would be placed in an adult jail facility."[93] This appears to be a frequent occurrence for African American and Hispanic youth as a study of an urban municipal court showed that "30 percent of African American and 59 percent of Hispanic youth who received Class C misdemeanor tickets at school had a warrant issued for their arrest as a result of the failure to appear" in court.[94]

An analysis of Texas Seventy-Fourth Legislature meeting shows that statutes § 37.123 and § 37.124 simply cannot be reconciled with the Legislature's stated public education mission:

> The mission of the public education system of this state is to ensure that all Texas children have access to a quality education that enables them to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of our state and nation. That mission is grounded on the conviction that a general diffusion of knowledge is essential for the welfare of this state and for the preservation of the liberties and rights of citizens . . . .[95]

The effects of § 37.123 and § 37.124 are directly counter to the pubic education mission. By enforcing these statutes, Texas is systematically denying children access to a quality education and thereby preventing them from achieving their potential and from participating in future social, economic, and educational opportunities. Further, by depriving students of an education, enforcement of § 37.123 and § 37.124 is denying students what the legislature deems "essential

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[92] *Id.* at 69–70
[93] *Id.* at 70.
[94] *Id.*
[95] 1995 TEX. SESS. LAW SERV. Ch. 260 (West).

for the welfare of [Texas] and for the preservation of the liberties and rights of citizens": the general diffusion of knowledge.

Potential justifications for § 37.123 and § 37.124 are that they are a necessary response to high juvenile crime rates and to provide a safe learning environment. In fact, one of the public education objectives from the meeting of Texas' Seventy-Fourth Legislature was that "[s]chool campuses will maintain a safe and disciplined environment conducive to learning."[96] These justifications, however, are misguided because as mentioned above, violent youth crime has reached historic lows. Thus, it becomes clear that these statutes are primarily being used for one thing: discipline.

While student discipline is clearly important, there is no evidence of legislative intent that it be regarded as paramount to the overall public education mission.[97] In fact, challenging students "to meet their full educational potential" and encouraging students to remain in school until they obtain a high school diploma" are objectives listed before the safe and disciplined learning environment objective.[98] As such, a reasonable interpretation of the Texas Legislature's intent would be that encouraging students to reach their full educational potential and receiving a high school diploma are objectives at least as important, if not more important, than maintaining a safe and disciplined learning environment. Under this analysis, § 37.123 and § 37.124, particularly § 137.24's catchall provision, simply cannot be justified when used to remove a student who misbehaves in a nonviolent manner and to force him or her into the juvenile justice system. In these instances, children pose no safety threat to their fellow students or school faculty. With increasing frequency, however, teachers and law enforcement alike are all too

[96] *Id.*
[97] *Id.* (Listing maintaining a safe and disciplined environment conducive to student learning seventh in a list of nine objectives).
[98] *Id.*

willing to sacrifice the overarching mission of Texas public schools in order to enforce discipline, which, as mentioned above, is only one prong of an objective which is listed after objectives geared toward encouraging students to reach their full educational potential and receiving a high school diploma.

Further evidence that § 37.123 and § 37.124 distort the stated educational goals of the Texas Legislature can be seen in the Texas School Crime and Discipline Handbook distributed by the Office of the Texas Attorney General.[99] In regards to "laws that pertain to disciplinary punishment," the handbook states that "[to] maintain discipline and order in school, it is critical that teachers and administrators be able to act quickly and decisively when a student is disruptive or breaks the rules."[100] This section makes no reference to violence; accordingly, it is reasonable to infer that this section is directed entirely towards student discipline and not school safety. The handbook's sole recommendation is swift and decisive action through invoking § 37.123 or § 37.124.[101] It neither lists nor suggests possible alternatives to police intervention; in fact, the plain language of the handbook seems to encourage it.[102]

According to the handbook, the student's constitutional rights is the only stated concern that school faculty needs to be aware of.[103] While protection of a student's Fourteenth Amendment right to due process of law is of the utmost importance, it is discouraging that the handbook's only listed concern pertains to whether the "policy will withstand a court challenge" as this seems to suggest that it is far more concerned with a lawsuit than it is with furthering the

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[99] GREG ABBOTT, OFFICE OF THE ATT'Y GEN., SCHOOL CRIME AND DISCIPLINE HANDBOOK 9 (2010), *available at* www.oag.state.tx.us/AG_Publications/pdfs/schoolcrime_2010.pdf.
[100] *Id.* at 10.
[101] *Id.*
[102] *Id.*
[103] *Id.*

state's education mission to ensure that all Texas children have access to a quality education that enables them to achieve their potential.[104]

Despite the problems that have accompanied § 37.123 and § 37.124, they do have a place in society. When used responsibly, they can serve as an effective means of punishing and deterring violent crimes. When incorrectly used, however, they can, under the guise of student safety, deprive children from obtaining a meaningful education. This results in distorting the public education mission, economically burdening society with costs associated with police and judicial intervention as well as incarceration, and preventing the general diffusion of knowledge, which, as the Texas Legislature notes, is essential for the welfare and preservation of the liberties and rights of citizens.

ii. The Toledo Safe School Ordinance

Toledo, Ohio, with TOLEDO MUN. CODE § 537.16 ("Safe School Ordinance"), has a statute similar to Texas' TEX. EDUC. CODE ANN. § 37.123 and § 37.124.[105] The Safe School Ordinance passed in 1968 in response to a growing concern that schools had become dangerous.[106] The Toledo Safe School Ordinance begins "No person shall assault, strike, threaten or menace a teacher, instructor, professor, person in charge of a class of students or any employee of any school, college or university, while in the performance of his duty . . . ."[107] This section of the Safe School Ordinance, like § 37.123, pertains to violent acts and thus fits in perfectly with the "tough on crime" legislation passed in response to the escalating violence of the 1980s and 1990s.[108]

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[104] *Id.*
[105] *See supra* notes 53–59 and accompanying text.
[106] Rimer, *supra* note 57.
[107] TOLEDO MUN. CODE 537.16(a) (2010).
[108] *See supra* notes 53–59 and accompanying text.

The second part of the Safe School Ordinance, similar to § 37.124, is a catchall provision in which there is no mention of violence.[109] It states, "No person shall . . . disrupt, disturb or interfere with the teaching of any class of students or disrupt, disturb or interfere with any activity conducted in a school . . . ."[110] Anyone who violates the Safe School Ordinance is guilty of a misdemeanor in the first degree.[111]

The broad language of the Safe School Ordinance has resulted in students receiving misdemeanor charges "for anything from disrupting a class to assaulting a teacher."[112] In 2004, a fourteen-year-old girl was handcuffed by the school's SROs, put in the back of a police car, and placed in a juvenile detention center because she arrived to school in violation of the dress code wearing a "low-cut midriff top under an unbuttoned sweater" and refused to change.[113] This was but one of more than two-dozen arrests in a single month in Toledo for violations of the Safe School Ordinance.[114] Such violations included offenses like "being loud and disruptive, cursing at school officials, shouting at classmates and violating the dress code."[115] Other Safe School Ordinance arrests in 2004 included two middle school boys who turned off the lights in the girls' bathroom and an eleven-year-old girl who was "hiding out in the school and not going to class."[116]

While the Safe School Ordinance was passed in 1968, violations did not become prevalent until SROs began patrolling Toledo schools in the mid 1990s.[117] The SROs effect on

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[109] *See supra* notes 53–59 and accompanying text.
[110] TOLEDO MUN. CODE § 537.16(a) (2010)
[111] TOLEDO MUN. CODE § 537.16(b) (2010)
[112] Rimer, *supra* note 57.
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] Rimer, *supra* note 54. ("Juvenile court officials say relatively few students were charged with violating the ordinance before 1995, when Toledo police officers were assigned to secondary schools.").

Toledo schools mirrored the SROs effect on Texas schools.[118] In 1993, before SROs entered the Toledo public school scene, there were only 314 charged volitions of the Safe School Ordinance.[119] By 1997 there were 1,111 charged violations of the Safe School Ordinance.[120] By 2000 there were 1,237 charged violations of the Safe School ordinance.[121] By 2002 there were 1,727 charged violations of the Safe School Ordinance.[122] Safe School Ordinance violations have become so prevalent in Toledo school districts that from 2004 through 2007, they were the most referred filing, and accounted for 13 percent of offenses filed with the Juvenile Court.[123] In fact, Safe School Ordinance violations were nearly double the next leading referred offenses of assault and petty theft.[124]

While the number of violations of the Safe School Ordinance was increasing, the amount of violence was decreasing. The court intake officer for the Lucas County Juvenile Court reported that only 2 percent of the School Safety Ordinance violations were for "serious incidents like assaulting a teacher or taking a gun to school."[125] Children were increasingly being punished as violence decreased. And the means by which these children are punished holds severe consequences.

Students charged with violating the Safe School Ordinance are issued a First Degree misdemeanor.[126] A First Degree misdemeanor carries with it a maximum fine of $1000 and a

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[118] *See* FOWLER, *supra* note 2, at 40.
[119] Rimer, *supra* note 52.
[120] *Id.*
[121] *Id.*
[122] Id.
[123] DISPROPORTIONATE MINORITY CONTACT IN THE LUCAS COUNTY (OHIO) JUVENILE JUSTICE SYSTEM, ASSESSMENT REPORT, PHASE 1 EXECUTIVE SUMMARY 4 (2008), available at www.co.lucas.oh.us/DocumentView.aspx?DID=6027.
[124] *Id.* Assault and petty theft accounted for 7% of all filings. *Id.*
[125] Rimer, *supra* note 57.
[126] TOLEDO MUN. CODE § 537.16(b) (2010)

maximum term of imprisonment of 6 months.[127] Thus, consistent with the above-mentioned examples of violations of the Safe School Ordinance, a student could be sentenced to 6 months of detention or a $1,000 fine for committing a nonviolent offense such as a dress code violation.

The immediate consequence of criminalizing nonviolent behavior, as seen in Toledo, is that the "juvenile justice center has become an extension of the principal's office."[128] School officials in Toledo insist that there are no alternatives, and that each instance in which the Safe School Ordinance is invoked is in fact necessary and a means of last resort.[129] They claim "the goal is not to put kids out, but to maintain classrooms free of disruptions that make it impossible for teachers to teach and kids to learn."[130]

Eugene T.W. Sanders, Toledo's superintendent, in defense of the Safe School Ordinance, argued that "Toledo Public Schools is not in the business of arresting children and sending them to court. Our priority is to provide a safe and productive learning environment for our students, teachers, support staff, and parents . . ."[131] The problem with Superintendent Sanders's comments, similar to that of the Safe School Ordinance and Texas § 37.124, is the failure to distinguish violent behavior from disruptive behavior. The original intent of the Safe School Ordinance was to curb violent behavior, not disruptive behavior.[132] The Safe School Ordinance can, is, and should be used in instances of violence against a teacher or student. Unfortunately,

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[127] TOLEDO MUN. CODE § 501.99(a)
[128] Rimer, *supra* note 52.
[129] *Id.*
[130] *But see* Thurau, *supra* note 12, at 978 (arguing that officers' and principals' stated concerns about safety actually mask the true purpose of placing police in schools: to raise the stakes for misconduct and exclude youth who do not conform to behavioral, attitudinal, or educational demands); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 941–42 (2004) (arguing that federal legislation like the No Child Left Behind Act actually incentivizes schools to remove problem children as they typically score lower on standardized tests by making the receipt of federal funds dependent upon test score achievement. This could potentially motivate state legislatures and local school districts to criminalize student behavior and increase prosecution thereof so as to remove from the student population those who typically score the lowest on standardized tests: juvenile delinquents).
[131] Eugene T.W. Sanders, *In my Opinion: Go Directly to Jail?*, SCHOLASTIC, May 2004, http://www.scholastic.com/browse/article.jsp?id=34.
[132] *See supra* p. 18 and notes 95–97.

particularly for students in the Toledo School District, the Safe School Ordinance has morphed into a catchall provision harnessed to punish any behavior deemed inappropriate without regard to violence or the threat it poses to others. Accordingly, it can hardly be said that the Safe School Ordinance is being harnessed to curb the "superpredator." And while Toledo school officials claim that the Safe School Ordinance is only used when all other means have failed, it seems highly unlikely that there is no better alternative than arresting a fourteen-year-old girl for a dress code violation.

A Lucas Country juvenile judge said that he sympathizes with school officials.[133] He went on to say that "[t]he schools have been called upon to fix everything that hasn't been working up to this point.[134] Juvenile court, however, is not the appropriate place to solve [these] adolescent problems."[135]

Proponents of these laws argue that they instill accountability by providing consequences for negative behavior.[136] The cost born by the individual, though, is overlooked. The teenager who talks back to a teacher or refuses to sit down in class or the children who turn the light off in the girls' bathroom all suffer severe consequences, particularly when compared to the offense committed. The mentality towards youth should not be that the ends justify the means. The end achieved through "Tough on Crime" legislation was an ultimate decrease in violent crime.[137] It benefitted society as a whole and provided a safer learning environment for children.[138] Now that violence is down, the legislative net should be reined in, not made wider. Legislatures

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[133] Rimer, *supra* note 57.
[134] *Id.* (noting that due the economic decline of Toledo and the lack of labor jobs in the area, schools are being called upon to educate a wider range of students than ever before. In the past, students who did not perform well were counseled to drop out and obtain jobs in auto plants or other factories).
[135] *Id.*
[136] *Id.*
[137] *See* discussion *supra* Part II.C.
[138] *See* discussion *supra* Part II.C.

should focus on what has worked—punishing violent offenders—while still recognizing the capacity for change for nonviolent juvenile offenders.

A fundamental change in the Safe School Ordinance's language and its enforcement is necessary to reverse the trend of criminalizing nonviolent behavior and substituting the police station for the principal's office. First, in order to curb the amount of students referred to the juvenile justice system, it is imperative that the Safe School Ordinance's "catchall" provision be repealed.[139] By eliminating the section under which students may be arrested for merely disrupting, disturbing, or interfering, school faculty and administration will no longer be able to refer students to the juvenile justice system for nonviolent behavior.[140]

Second, once the catchall provision is removed, school faculty, the police, and the courts will have to exercise great discretion in the manner in which they handle referrals for Safe School Ordinance violations. Severe punishments should meet serious acts of violence, including referral to the juvenile justice system. Acts of minor violence, however, should not necessarily be met with police intervention. It is very difficult to create a bright-line rule that defines the level of violence that necessitates police intervention. Some examples in which police intervention may be necessary are (1) in-school fights during which a student uses a weapon against another student or faculty member; (2) in-school fights during which a group of students acts together to cause serious physical harm to an individual student or faculty member; or (3) in-school fights during which a student causes significant bodily harm to another student or a faculty member.

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[139] *See supra* pp. 18–19 and notes 95–99. "No person shall . . . disrupt, disturb or interfere with the teaching of any class of students or disrupt, disturb or interfere with any activity conducted in a school . . . ."

[140] This is not to suggest that students couldn't, or shouldn't, be referred to the criminal justice system for vandalism or theft of school property, or for drug offenses.

The abovementioned list is a general starting point for distinguishing when police intervention is or is not needed and is certainly not meant to be exclusive. The faculty and administration's use of discretion is integral to the decision of whether to use police intervention. After all, it is the teachers, not the police, who know the students best. As such, teachers and school administrators should use their discretion in determining the proper disciplinary sanctions based on the circumstances and severity of the incident, as well as the student's behavioral history. In making these determinations, it would be useful for school personnel to import one of the safeguards of our justice system: prosecutorial discretion.

George D. Mosee, Jr., deputy district attorney in charge of the Juvenile Division in the Philadelphia District Attorney's office, commenting on the role of prosecutorial discretion in the juvenile context: Nonviolent first-time offending adolescents should be held accountable, but if their rehabilitative, supervision, and/or treatment needs don't warrant an adjudication of delinquency, diversion should be considered . . . . Diversion can be considered when the juvenile's needs can be addressed without compromising public safety."[141] While Mosee was referring exclusively to prosecutorial discretion, the crux of the message fights squarely within the school context. If the incident was relatively minor, if it was a momentary lapse of judgment, if the student does not have a history of violence or misbehavior, then it is the duty of the school faculty and administration to employ every means possible before referring that student to the juvenile justice system.

Despite concerns, stemming the flow of disruptive students to the police station will not result in a second coming of the high crime rates of the 1980's through the mid-1990's, nor will it result in the emergence of a superpredator.[142] The current state of the Ohio's Lucas County

[141] George D. Mosee, Jr., *Juvenile Prosecution—It's the Same, but Different*, 25 CRIM. JUST. 64, 64 (2010).
[142] *See* discussion *supra* Part II.C.

supports this position. In 2010, the number of offenses referred to the Lucas County Juvenile Court dropped seventeen percent from the previous year.[143] More telling, however, is the decrease in the amount of Safe School Ordinance violations, dropping thirteen percent from 2009, to 979 from 1,119.[144] Compare the 979 Safe School Ordinance referrals to the juvenile courts to the 1,727 referrals in 2002; that's 748 fewer students subjected to the juvenile justice system.[145] That's 748 students with an opportunity to finish their education. And, importantly, this drop in referrals was not met by the emergence of a group of young superpredators.

The recent drop in referrals, while greatly beneficial to Lucas County youth, was the result of budget cuts, contract disputes, and layoffs of the County's police force, rather than a fundamental change in the wording and enforcement of the Safe School Ordinance.[146] Unfortunately, Toledo Public Schools still endorses the use of the Safe School Ordinance.[147] This is seen in the "Safety and Security" section of the Toledo Public School's website:

> In the interest of safety and a productive learning environment, TPS deals decisively with any adult or student disrupting or attempting to disrupt a school. Such disturbances will be dealt with using the municipal law of the Safe Schools Ordinance. The strong internal security system and established partnership with the Toledo Police Department and the Lucas County Sheriff's Office allow TPS to resolve distractions or threats quickly and efficiently, thus maintaining an environment conducive to learning.[148]

Because of this, it is essential to amend the Safe School Ordinance's language and that it is narrowly tailored to instances in which there is no alternative means of effective punishment or

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[143] Erica Blake, *Juvenile Crime Takes Dramatic Tumble Again*, TOLEDO BLADE, Jan. 8, 2011, http://www.toledoblade.com/local/2011/01/09/Juvenile-crime-takes-dramatic-tumble-again.html.
[144] *Id.*
[145] *See supra* note 122.
[146] Blake, *supra* note 143.
[147] SAFETY & SECURITY, TOLEDO PUBLIC SCHOOLS, Feb. 4, 2010, http://www.tps.org/safety-security/safety-a-security.html.
[148] *Id.*

where the student presents a danger to public safety. In doing so, referrals to the juvenile system in Lucas County will continue to decrease while not stifling its students' potential.

B. The Long-Term Effects of Criminalizing Nonviolent Student Behavior

The negative effects of criminalizing nonviolent student behavior do not end with the referral to the juvenile or criminal justice systems. In many instances, the negative effects are just beginning when that occurs. Children who enter the juvenile and criminal justice systems are much more likely to drop out of school than those who have never been involved with either.[149] The likelihood of dropping out of school is bolstered in some cases by barriers put in place in order to block reassimilation into mainstream schools.[150] Such barriers include the student's inability to provide the proper enrollment documentation or the school's reluctance to accept credits earned by students while in the juvenile justice system.[151] Regardless of the reasons, the fact is that children who enter the juvenile justice system are significantly less likely to graduate high school and thus face life with additional hurdle: the lack of a high school diploma.[152]

An Iowa study shows that students who drop out of high school are projected to earn significantly less than those who finish high school as well as those who go on to finish college.[153] The study showed that of those youth who failed to graduate high school, seventy percent were working in labor, services, or clerical positions; only 1.6 percent were working as

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[149] CORA ROY-STEVENS, OVERCOMING BARRIERS TO SCHOOL REENTRY, OFF. OF JUV. JUST. & DELINQ. PREVENTION FACT SHEET (U.S. DEP'T OF JUSTICE, D.C.), Oct. 2004, available at http://www.ncjrs.gov/pdffiles1/ojjdp/fs200403.pdf.

[150] Jessica Feierman, *The School-to-Prison Pipeline . . . and Back: Obstacles and Remedies for the Re-Enrollment of Adjudicated Youth*, 54 N.Y.L. SCH. L. REV. 1115, 1116 (2010).

[151] *Id.* at 1117.

[152] *Id.*

[153] *The Cost of Dropping out of School*, The Central Iowa Employment and Training Consortium and Des Moines Area Community College, at 5 (2003), *available at* http://www.doleta.gov/usworkforce/communityaudits/docs/Files%20for%20CA%20Website/IA-Central/IA-Central-Product-HS%20Dropout%20Report.pdf.

managers and none were working in professional or technical areas; and overall were making between eight dollars and thirteen dollars an hour.[154]

Those students who are able to make their way back into mainstream schools face obstacles in pursuit of higher education. In Texas, for example, students who receive three Class B misdemeanors for violating TEX. EDUC. CODE ANN. § 37.124, are subject to a provision banning them from attending a state-sponsored institution of higher learning.[155] The Texas statute states that "[a]ny person who is convicted the third time of violating this section is ineligible to attend to any institution of higher education receiving funds from this state before the second anniversary of the third conviction."[156]

Another obstacle faced by Texas students in pursuit of higher education is the fact that Class C misdemeanors are handled in the municipal and Justice of Peace courts rather than the juvenile courts; consequently, children are faced with the stigma of a criminal record.[157] In instances where the juvenile records are sealed or expunged pursuant to state or federal statutes, certain colleges and professional schools still require the disclosure of an applicant's criminal history. The long-term effects of criminalizing nonviolent student behavior, however, are not limited merely to the individual student; rather, they have significant consequences on society as a whole.

IV. PROPOSED CHANGES TO "TOUGH ON CRIME" LEGISLATION

A. Effective Alternatives to Criminalizing Student Behavior

Laws that are "tough on crime" are not fundamentally flawed. It is the enforcement of these laws that must be completely reevaluated and ultimately changed in order to better serve

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[154] *Id.*
[155] TEX. EDUC. CODE ANN. § 37.124.
[156] *Id.*
[157] *See supra* pp. 14–15 and notes 77– 87 discussing that children are often not able to pay the fines associated with Class C misdemeanors and thus their criminal records are not properly expunged.

the needs of the individual as well as society as a whole. There are numerous problems with criminalizing nonviolent student behavior. Using the courts as an extension of the principal's office has caused a large number of students to be subjected to the juvenile and criminal justice systems and thereby has greatly hindered their future educational and employment prospects.[158] Luckily, however, there are a variety of changes that to impliment in order to better serve safety and social concerns of this nation's youth. Implementing these changes will not be easy, but it is possible. It will take a coordinated effort across all spheres of government to fix a system that is currently broken.

All levels of government should look to the evolution of the War on Drugs, as it is analogous to "Tough on Crime" legislation.[159] In both situations there was a society-perceived problem, a legislative response, and a subsequent change in behavior while laws remained stagnant.[160] The difference, though, is that the War on Drugs is evolving while "Tough on Crime" legislation, for the most part, is not.[161] In 2010 Congress passed the Fair Sentencing Act which was aimed at closing the large gap between criminal sentences for crack-cocaine and powder cocaine possession.[162] Before the Fair Sentencing Act was enacted, a defendant would need to possess 500 grams of powder cocaine in order to warrant a five-year mandatory sentence while that same defendant would only need to possess five grams of crack-cocaine in order to receive the five-year mandatory sentence.[163] The Fair Sentencing Act reduced the disparity in sentences to eighteen to one.

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[158] *See supra* Part III-B.
[159] *See supra* text accompanying notes 160–167.
[160] *Id.*
[161] *Id.*
[162] 21 U.S.C. 841 (2006); see also Kyle Graham, *Sorry Seems to be the Hardest Word: The Fair Sentencing Act of 2010, Crack, and Methamphetamine*, 45 U. RICH. L. REV. 765, 765, 769 (2011).
[163] *The Fair Sentencing Act Corrects a Long-time Wrong in Cocaine Cases*, THE WASHINGTON POST, Aug. 3, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/08/02/AR2010080204360.html [hereinafter "*A Long-Time Wrong*"]; *see also* Graham, *supra* note 146, at 765–66.

As a direct result of the Fair Sentencing Act, thousands of people, predominately African Americans, were released from jail and given the option to enter drug rehabilitation facilities. It appears that the Fair Sentencing Act has fostered across the country the idea of rehabilitation for nonviolent offenders.[164] As recently as January 17, 2012, New Jersey Governor Chris Christie advocated a radical change to New Jersey's criminal justice system.[165] Governor Christie proposed reforms that would provide mandatory treatment, not punishment, for low-level drug offenders.[166] The caveat to the second chance proposal is that he is pushing for stricter bail guidelines that would make it more difficult for violent drug dealers to obtain bail.[167] Governor Christie's proposal is a perfect example of legislation that remains tough on offenders who pose the greatest threat to society—violent drug dealers—while pushing for rehabilitation for those who pose little danger to society. Governor Christie's proposal shows that it is possible to remain tough on violent crime while simultaneously striving for rehabilitation and a second chance for nonviolent offenders.

This is exactly the mindset that needs to enter the arena of "Tough on Crime" legislation. Cast a smaller net. Focus punitive measures on violent offenders. Redirect resources to crime prevention, not merely punishment, and do it in a variety of ways. Redirecting legislative attention from punishment to deterrence and rehabilitation through programs like Positive Behavioral Support Systems, Restorative Justice Programs and through legislation like the Office for Safe Schools and Florida's Civil Citation Program will have the ultimate effect of reducing the amount of children subject to the criminal justice system, saving resources at the federal, state, and local level, and most importantly, giving nonviolent offenders a second chance to be

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[164] *Id.*
[165] *Id.*
[166] Heather Haddon, *Christie Pushes Rehab Over Jail*, WALL ST. J., Jan. 20, 2012, http://online.wsj.com/article/SB10001424052970204680045771698041985597 54.html.
[167] *Id.*

productive citizens. These programs and statutes, used together, will not weaken the criminal justice system nor will they allow violent criminals to go unpunished. Rather, they will have the net effect of freeing up resources that could be directed towards punishment of serious juvenile offenders as well as the creation of prevention strategies.

As it currently stands, increased criminalization and prosecution of nonviolent criminal behavior is a waste of state and federal resources. Florida and California currently spend more money on corrections than they do on education.[168] The average cost of incarcerating a child for one year is between $35,000 and $64,000.[169] In New Jersey and California, the average cost incarceration cost per prisoner is about $39,000 and $47,000 per year, respectively.[170] To put this in perspective, the average per year in-state tuition for Rutgers University and UCLA is $12,755 and $12,686, respectively.[171] This means that New Jersey could send on a state-sponsored scholarship to Rutgers University three students by removing from prison one inmate. Similarly, California could send on a state-sponsored scholarship to UCLA roughly four students by removing from prison one inmate.

The legislative focus should be moved away from punishment and towards prevention, particularly for non- or low-violent incidents. An ACLU study shows that early intervention programs are significantly more successful than the deterrence by punishment model currently in effect throughout the country.[172] The ACLU study found that "[e]arly intervention programs that

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[168] *ACLU Fact Sheet on the Juvenile Justice System*, AM. CIVIL LIBERTIES UNION, http://www.aclu.org/racial-justice/aclu-fact-sheet-juvenile-justice-syst (last visited Feb. 10, 2012).
[169] *Id.*
[170] *Proposed Bill Would Charge N.J. Prisoners for Cost of Incarceration*, NJ.COM, May 14, 2009, http://www.nj.com/news/index.ssf/2009/05/proposed_bill_would_charge_pri.html; Legislative Analyst's Office, http://www.lao.ca.gov/laoapp/laomenus/sections/crim_justice/6_cj_inmatecost.aspx?catid=3 (last visited Feb. 24, 2012).
[171] Rutgers Undergraduate Admissions, http://admissions.rutgers.edu/costs/tuitionandfees.aspx#1 (last visited Feb. 24, 2012); UCLA Undergraduate Admissions, http://www.admissions.ucla.edu/prospect/budget.htm (last visited Feb. 24, 2012).
[172] ACLU Fact Sheet on the Juvenile Justice System, *supra* note 168.

try to steer young people away from wrongdoing—modest graduation incentives . . . or intense delinquent supervision—can prevent as much as 250 crimes per $1,000,000 spent."[173] The same amount spent on prisons has a deterrent effect of only sixty crimes per year.[174]

A great example of implementing change to a broken system is seen in Hillsborough County, Florida. Florida, like Texas and Ohio, is no stranger to increased criminalization of student behavior.[175] In 2002, the Florida legislature created Florida Statute 1006.13, which stated that "[e]ach district school board shall adopt a policy of zero tolerance for crime and substance abuse, including the reporting of delinquent acts and crimes occurring whenever and wherever students are under the jurisdiction of the district school board."[176] The broad language of the statute created a relationship between public schools and police departments in which students were sent to the juvenile justice system rather than attempting in-school forms of discipline.[177] This resulted in students arresting students and thus having permanent criminal records for non-violent misdemeanors such as simple battery or assault, trespass, and disrupting school function.[178]

As a result of Florida Statute 1006.13, Hillsborough County became the leader in the state of Florida in school-related arrests.[179] In the 2004 to 2005 school year there were 2,346 arrests.[180] In the 2005 to 2006 school year, there were 2,173 arrests.[181] Of these arrests, nearly two-thirds were for non-violent misdemeanors.[182] The reason that Florida's Hillsborough

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[173] *Id.*
[174] *Id.*
[175] JUVENILE CITATION FINAL REPORT, HILLSBOROUGH COUNTY JUVENILE JUSTICE TASK FORCE, 15 (May 2011), http://www.hillsboroughcounty.org/juvenilejusticetaskforce/resources/publications/jcFinal052011.pdf.
[176] FLA. STAT. § 1006.13 (2002)
[177] JUVENILE CITATION FINAL REPORT, *supra* note 175, at 15.
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*

County is important is not because, like Texas and Ohio, it has a staggering amount of arrests for nonviolent school related behavior; rather, it is important because it recognized that it had a serious problem, and it did something about it.

Hillsboro Country Florida, through collaboration with the state Attorney General, the Tampa Police Department, the Department of Juvenile Justice, the Hillsborough County School District, and the Public Defenders Office, created and instituted a Civil Citation Program.[183] The Civil Citation Program is an alternative to arrest for non-serious acts occurring during school-related activities.[184] The Civil Citation Program was designed with six strategies in mind: create efficiencies, keep first-time offenders out of the juvenile justice system, reduce crime rate and recidivism, provide immediate consequences, get help for youth at-risk to reoffend, and to avoid a criminal record.[185]

The Civil Citation program gives any law enforcement officer the option of issuing a civil citation rather than arresting the individual when a juvenile age seventeen or under accepts responsibility for having committed a misdemeanor, rather than arresting the individual.[186] The Civil Citation program in Hillsborough differs dramatically from the misdemeanor citation in Texas in that there is no monetary fine and thus there is no chance that a juvenile will end up in jail or with a criminal record for lack of means to make payment. A Hillsborough Country civil citation carries with it fifty hours of community service to be completed within sixty days of issuance of the citation.[187] Further, it allows for a mental health examination, the results of which could lead to mandatory counseling aimed at deterring future misconduct.

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[183] JUVENILE CITATION FINAL REPORT, *supra* note 175, at 16.
[184] *Id.*
[185] *Id.* at 16–17.
[186] JUVENILE CITATION FINAL REPORT, *supra* note 175, at 17.
[187] *Id.*

The civil citation program provided immediate results in Hillsborough County. In the 2006 to 2007 school year, the year in which the civil citation program was launched county wide, there were 1,881 arrests for in-school violations, down from 2,173 in the 2005 to 2006 school year.[188] By the 2009 to 2010 school year the number of arrests dropped to 1,274.[189] It is important to note that during the 2009 to 2010 school year, Florida's legislature amended the language of Florida Statute 1006.13 to encourage the implementation and use of alternative means of punishment.[190] The statute was amended to "encourage schools to use alternatives to expulsion or referral to law enforcement agencies by addressing disruptive behavior through restitution, civil citation, teen court, neighborhood restorative justice, or similar programs."[191]

This is tremendously important because it shows that change will not come from a single legislative amendment. It takes a coordinated group effort, from the local Sheriff's office all the way up to the state legislature. In fact, this program has become so effective that Florida Governor Rick Scott endorsed, and the Florida State Senate and House of Representatives unanimously passed a bill requiring each county to establish a local civil citation or similar diversion program. The Governor signed the bill on June 2, 2011.[192]

There are a variety of means of preventing violence while also maintaining a safe school environment to use in conjunction with a civil citation program. Positive Behavior Support Programs ("PBSP") are one such means. PBSP are successful because, like statutes criminalizing student behavior, they cast a wide net.[193] Different from statutes criminalizing student behavior, however, PBSP focus on prevention, not punishment.[194] PBSP, through the

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[188] *Id.* at 19.
[189] *Id.*
[190] *Id.*
[191] FLA. STAT. § 1006.13 (2009).
[192] JUVENILE CITATION FINAL REPORT, *supra* note 175, at 32.
[193] *Id.*
[194] Russell Skiba and Jeffrey Sprague, *Safety Without Suspensions*, Educational Leadership 38, 40 (2008).

two-fold focus of "(1) defining and systematically teaching school wide core behavioral expectations" and "(2) establishing a consistent system to acknowledge and reward appropriate behavior," allow school personnel to help troubled students.[195] The advantage to this system is clear: it helps students avoid destructive outcomes without depriving them from a mainstream education.[196]

Another alternative to the punitive model of justice is the Restorative Justice Program ("RJP"). RJP are successful because they focus on more than merely punishing offenders. There are a variety of different forms of RJP; however, the objectives are similar throughout each form.[197] Its main goals are threefold: (1) hold the offender accountable; (2) repair harm to the victims; and (3) provide support and assistance to offenders encourage their reintegration into society.[198] Because of the threefold approach to RJP, it is a much more comprehensive system than merely punishing offenders.

RJP incorporate practices whereby the victim has the opportunity to confront the offender, thereby aiding the victim in his or her recovery process.[199] Further, it can help reduce many of the problems facing offenders subject to the juvenile or criminal justice system because RJP focus on reintegration of the offender back into the community.[200] It is this multifaceted approach which has lead to RJP success throughout the country.[201]

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[195] *Id.*
[196] *Id.*
[197] Cara Suvall, *Restorative Justice in Schools: Learning from Jena High School*, 44 HARV. C.R.-C.L. L. REV. 547, 558–59 (2009).
[198] *Id.*
[199] *Id.* at 558.
[200] *Id.*
[201] *See* Thalia Gonzalez, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, From the Selected Works of Thalia Gonzalez, Occidental College, (2011) (discussing successful implementation of Restorative Justice Programs in Schools in California, Florida, Illinois, Iowa, Oregon, Maryland, Michigan, Minnesota, Missouri, New Mexico and Pennsylvania).

In order to help maintain PBSP, state and local legislators should pass statutes like Pennsylvania § 13-1302-A, which establishes an "Office for Safe Schools."[202] This statute allows the Office for Safe Schools to make targeted grants to fund programs which address school violence.[203] The statute specifically empowers the Office of Safe Schools to fund programs that focus on "[c]onflict resolution or dispute management, including restorative justice strategies; school wide positive behavioral support that includes primary or universal, secondary and tertiary supports; and district school safety and violence prevention plans."[204]

The success of the Hillsborough County Civil Citation Program is an example of the positives that arise when different levels of government recognize that the "Tough on Crime" philosophy needs to be fundamentally changed and work together in order to create a better, albeit not yet perfect, system in which nonviolent offenders are offered a second chance at an education and a future.

Further legislation, in all regions of the country, needs to pass in order to separate the education system and the punitive justice system. In doing so, it will hold teachers and school faculty accountable for discipline. It will force the creation of alternative means of discipline and rehabilitation. And most importantly, it will stem the flow of the school-to-prison pipeline.

B. Proposed Model School Violence Statute

There is no one school violence statute capable of solving the school-to-prison pipeline. In fact, students may benefit from completely repealing all such a statutes and relying solely on penal code provisions in order to prevent, rehabilitate, and punish those whose actions warrant intervention. In the event that a state or municipality finds it necessary to have a school violence statute, it should combine the pros and cons of the aforementioned Texas, Toledo, and Florida

[202] 24 PA. CONS. STAT. ANN. § 13-1302-A (West 2011).
[203] *Id.*
[204] *Id.*

statutes. Accordingly, this comment suggests that the following proposed statute would serve as a solid starting point:

Proposed Model School Violence Statute

§ 1 School Violence Ordinance

(1) Definitions:

a. "Person" means anyone who commits an offense on school grounds, including students, teachers, faculty, staff, parents, or trespassers.

b. "Disruptive classroom behavior" means disrupting class activities though either acts of misconduct or the use of loud or profane language

(2) Violations: A person commits an offense if the person, on school property or on public property within 500 feet of school property, alone or in concert with others, intentionally engages in acts of violence.

a. Acts of violence include:

i. Aggravated Assault: A person is guilty of aggravated assault in violation of the School Violence Ordinance if he:

1. Attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or

2. Attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.

ii. Weapons possession: A person is guilty of weapons possession in violation of the School Violence Ordinance if he:
1. Knowingly has in his possession any firearm or knife.

b. Acts of violence specifically do not include:

i. Disruptive classroom behavior;

ii. Simple assault: A person is guilty of simple assault but expressly not guilty of the School Violence Ordinance if he:

1. Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or Negligently causes bodily injury to another with a deadly weapon; or Attempts by physical menace to put another in fear of imminent serious bodily injury."[205]

This statute would be used in conjunction with a program similar to Florida's Civil Citation Program, which would give the prosecutor's office the option of foregoing pressing charges and issuing a civil citation. The civil citation would result in community service, not a fine, and would not show up on the individual's juvenile record.

The most important difference between the Proposed Model School Violence Statute ("PMSVS") and Texas § 37.123 and § 37.124 and Toledo's Safe School Ordinance is that PMSVS does provide for punishment of nonviolent offenses. Further, it expressly states that simple assault does not qualify as a violent offense. Simple assault, for the purposes of PMSVS, adopts its meaning from the New Jersey definition: The distinguishing factor between simple assault and aggravated assault is that aggravated assault involves "circumstances manifesting extreme indifference to the value of human life."[206]

Under PMSVS, school faculty and administration are given discretion in determining whether they believed the incident surpassed mere simple assault and was indeed aggravated assault. Because school faculty and administration often witness some of, if not the entire incident, they are in a unique position to determine the tone of the incident and serve as a first buffer between the students involved and the juvenile justice system. But, if out of fear of civil lawsuits by one of the parties involved in a particular incident, school faculty and administrators leaned more toward police involvement, the police itself, in conjunction with the narrow scope of the PMSVS, would serve as a second buffer between students and the juvenile justice system.

[205] N.J. STAT. ANN. § 2C:12-1 (West 2011); N.J. STAT. ANN. § 2C:39-5 (West 2009);
[206] *Id.*

In the event that a teacher reports to the police an incident regarding nonviolent behavior or simple assault, the police would have the responsibility of performing an investigation and determining whether or not the incident included violence. If it was merely nonviolent behavior, then the police should end the investigation and refer the matter back to the school district which could then determine a punishment in accordance with the severity of the incident while harnessing PBSP or RJP. If violence was involved, the police would then be required to examine the extent of the violence and determine whether it amounted to simple assault or aggravated assault. If the police believed that sufficient evidence existed to constitute either simple assault or aggravated assault then it could refer the matter to the prosecutor's office, which would then serve as a third buffer.[207]

At this point, the prosecutor's office could determine the manner in which it should proceed. If it amounted to aggravated assault, the prosecutor's office should go forward with charges. In that instance, the student clearly poses a threat to students and faculty alike and needs to be punished accordingly. If the incident amounted merely to simple assault, the prosecutor should recommend a civil citation to first time offenders. The student would be forced to complete community service. Further, in some cases the student could be forced to undergo a psychological evaluation, the results of which may require mandatory counseling. This would keep the student in school, mandate prompt punishment through community service, and identify and help rehabilitate students who require psychological counseling.

It is not my contention that the PMSVS be used to preclude punishment under other penal statutes or to create less harsh punishments for violent offenders. If fact, the PMSVS would serve as an additional deterrence to violence as it could be charged in addition to the underlying

[207] The PMSVS expressly excludes from its purview simple assault; however, the applicable jurisdiction will likely have a law pertaining to simple assault which could be used to punish the student offender. It is not the intent of PMSVS to create a zone whereby children would be immune from punishment for committing simple assaults.

offense: for example, if student A severely injured student B in a fight, then student A could be charged with both aggravated assault and violation of the PMSVS. This would add, not remove, punitive measures for serious violent offenders.

Further, as mentioned above, the mere fact that PMSVS does not deal with nonviolent student behavior does not mean that local authorities will be precluded from prosecuting certain behavior under its penal code. For example, if students A and B engage in a fight in school, and student A wants to press charges against student B, he would be free to do so under a simple assault statute. This would allow recourse to the injured party, but would require him or her to take the affirmative steps of going to the local authorities and filing a complaint. It would prevent, however, the school from circumventing all available rehabilitative and school-related discipline sanctions and simply arresting the student or issuing to him or her a misdemeanor.

V. CONCLUSION

The violence that gave rise to the "tough on crime" legislation of the 1990s has come to an end. Even in the absence of this high rate of violence there remains a need for legislation designed to criminalize school violence. Piggybacking on society's unsubstantiated fear of youth violence and the so-called superpredator in order to criminalize nonviolent student behavior needs to change. The criminalization of nonviolent student behavior has caused some school districts to become dependent upon the juvenile and criminal justice systems in disciplining its students and thereby making the court system an extension of the school.

Numerous problems occur when courts instead of schools handle student discipline. Children are removed from schools, forced to pay fines, and sometimes sentenced to juvenile detention centers. After being removed from mainstream schools, children face a series of obstacles preventing them from returning to schools and finishing their high school education. If

a student cannot overcome these obstacles, he is forced to go through life facing the challenges of not having a high school degree. If he does manage to reenter mainstream schools, he may face challenges in obtaining a higher education.

Rather than merely punishing behavior deemed unfavorable or annoying under the guise of "safety," schools should look to the root cause of such behavior, and implement means of alternative dispute resolutions designed at preventing unfavorable behavior. Further, these programs need to focus on rehabilitating the offender and reassimilating him or her into mainstream schooling. The trend of punishing and removing children with nonviolent behavioral issues needs to change.