

## Notes

# Classroom to Courtroom: How Texas's Unique School-Based Ticketing Practice Turns Students into Criminals, Burdens Courts, and Violates the Eighth Amendment

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## I. INTRODUCTION

In Texas, the courthouse is the new principal's office.<sup>1</sup> Until recently, two Texas students who poured milk on each other in the lunchroom might have found themselves in the principal's office or in detention. But today, these students might receive Class C misdemeanor tickets and find themselves in municipal or justice court, facing high fines and criminal records.<sup>2</sup>

<sup>1</sup> Brian Thevenot, *School District Cops Ticket Thousands of Students*, TEXAS TRIBUNE, June 2, 2010, <http://www.texastribune.org/texas-education/public-education/school-district-cops-ticket-thousands-of-students/>.

<sup>2</sup> This scenario is based on an actual ticketed incident. See Donna St. George, *In Texas Schools, a Criminal Response to Misbehavior*, WASH. POST, Aug. 21, 2011, <http://www.washingtonpost.com/local/education/in-texas-schools-a-criminal-response-to-misbehavior/2011/08/04/gIQA5EG9UJ>

Since the 1990s, school-based policing has rapidly expanded in Texas. Because of the ready availability of school police, Texas school districts are increasingly relying on Class C misdemeanor ticketing to address nonviolent, low-level student misbehavior. Because ticketed students face severe criminal consequences, the increase in ticketing means an increased number of students are fast-tracked into the criminal justice system. Worse, because school districts define their own ticketing practices, students in some school districts and students of minority backgrounds are disproportionately ticketed and pushed into the criminal justice system.

Meanwhile, school districts are not collecting data as they ticket; teachers are not trained in the criminal consequences of ticketing, and school police are not trained to work with youth. And it is not just the students who suffer. Texas municipal and justice courts increasingly find themselves overburdened with criminal cases that probably should have been handled in school.

Other states have similar practices, whereby school police refer misbehaving students to juvenile courts. However, Texas is the only state to issue in-school tickets that require students to appear in criminal court. The fact that Texas administers uniquely severe criminal punishment for low-level, in-school misdemeanors could qualify as an Eighth Amendment violation. For this reason, reduced and fairer ticketing practices are not just possible, but imperative.

Part II of this Note looks back at the historical development of Texas's ticketing problem and examines the scope of the problem. It also discusses the criminal consequences that accompany a ticket; the discretionary manner in which schools and police issue tickets; the fact that tickets are generally issued for low-level misbehavior; ineffectiveness at reducing student misbehavior; and the impact of ever-increasing ticketing on state criminal courts.

Part III looks at similar practices in other states. It examines school-based ticketing practices in Colorado, where tickets generally send students to juvenile (not criminal) court; the state legislative task force designed to address the state's increasing ticketing problem; and a restorative justice solution engineered in Denver. It also examines school-based referrals to juvenile court in Georgia, Alabama, and Indiana, and the graduated sanctions solution engineered in Clayton County, Georgia, and replicated elsewhere.

Part IV looks to the courts and the likely outcome of an Eighth Amendment suit against Texas public schools. The section argues that a federal court is likely to find that Texas's ticketing practice constitutes cruel and unusual punishment.

Part V looks forward to potential legislative, judicial, and school-

based solutions to Texas's ticketing problem. Many of these solutions are modified versions of solutions that are already working in Colorado, Georgia, Alabama, and Indiana.

## II. LOOKING BACK: TEXAS'S TICKETING PROBLEM

### A. The Development of the Ticketing Problem

In the late 1980s, juvenile crime spiked.<sup>3</sup> By the 1990s, national fears about juvenile crime and violence had surged too, fueled by John DiIulio's warnings about an impending explosion of youth crime.<sup>4</sup> According to DiIulio, juveniles raised by poor, drug-addicted, criminal adults were poised to become "superpredators." These juveniles would commit more vicious crimes with higher frequency than past generations of juvenile offenders.<sup>5</sup> Other academics agreed, particularly James Fox and James Wilson.<sup>6</sup>

Today, much of this group's work on juvenile superpredators is regarded as "racist speculation about criminality" employed "to keep the suburbs afraid of young men of color in the inner cities."<sup>7</sup> In fact, contrary to DiIulio's predictions, youth crime began declining in 1992.<sup>8</sup> From 1992 to 2002, the rate of violent crime in American schools dropped by 50%.<sup>9</sup> However, media reports ensured that public fears persisted. For example, in a 1996 column, Susan Estrich warned, "Don't be fooled by the rosy numbers in this week's [juvenile] crime reports . . . . The tsunami is coming."<sup>10</sup> In that same year, more than two-thirds of media violence stories centered on youth, although adults over the age of twenty-five committed 57% of violent crimes.<sup>11</sup> Fears about juvenile violence, and particularly juvenile violence in schools, climaxed with the 1999 Columbine High School massacre.<sup>12</sup>

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<sup>3</sup> Elizabeth A. Angelone, Comment, *The Texas Two Step: The Criminalization of Truancy Under the Texas "Failure to Attend" Statute*, 13 SCHOLAR 433, 445 (2011).

<sup>4</sup> John J. DiIulio, Jr., *The Coming of the Superpredators*, WKLY. STANDARD, Nov. 27, 1995, at 23.

<sup>5</sup> *Id.* at 25-26.

<sup>6</sup> Robin Templeton, *Superscapegoating*, FAIRNESS & ACCURACY IN REPORTING, [http://www.fair.org/index.php?page=1414&printer\\_friendly=1](http://www.fair.org/index.php?page=1414&printer_friendly=1) (last visited Oct. 21, 2011) (quoting Susan Estrich, Op-Ed, USA Today, May 9, 1996).

<sup>7</sup> *Id.*

<sup>8</sup> DEBORAH FOWLER ET AL., TEXAS APPLESEED, *Texas' School-to-Prison Pipeline: Ticketing, Arrest & Use of Force in Public Schools*, 39 (2010), available at [http://www.texasappleseed.net/images/stories/reports/Ticketing\\_Booklet\\_web.pdf](http://www.texasappleseed.net/images/stories/reports/Ticketing_Booklet_web.pdf).

<sup>9</sup> ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 11 (2005), available at [http://b3cdn.net/advancement/5351180e24cb166d02\\_mlbraqxlh.pdf](http://b3cdn.net/advancement/5351180e24cb166d02_mlbraqxlh.pdf).

<sup>10</sup> Templeton, *supra* note 6.

<sup>11</sup> *See id.*

<sup>12</sup> *See* Ryan Turner & Mark Goodner, *Passing the Paddle: Nondisclosure of Children's Criminal*

Though unfounded, the fears about juvenile superpredators and youth crime in schools led Texas (and many other states) to adopt a “get tough” approach with youth crime and school misbehavior.<sup>13</sup> In 1995, Texas legislators adopted Chapter 37 of the Education Code, which mandated a law-and-order approach to school discipline.<sup>14</sup> Among other provisions, Chapter 37 enacted zero-tolerance policies and redefined several types of school misbehavior as Class C misdemeanors.<sup>15</sup> Most significantly, Chapter 37 authorized school districts to employ security personnel, called School Resource Officers (SROs), or to commission their own police forces.<sup>16</sup>

Today, juvenile crime continues to decline, and Texas schools are generally safe.<sup>17</sup> Less than 1% of Texas students were disciplined for conduct that could be punishable as a crime during the 2008–2009 school year.<sup>18</sup> Safe schools are not just a statewide trend, but also a national trend. A recent FBI study concluded that only 3.3% of reported crime occurs at school. Moreover, students are fifty times more likely to be victims of homicide away from school than at school.<sup>19</sup> Some proponents of Texas’s “get tough” approaches argue that crime in schools, and juvenile crime in general, is decreasing *because* of these measures. However, the data show similarly low levels of crime in Texas schools both before and after the implementation of “get tough” approaches, including school policing.<sup>20</sup> Nevertheless, Texas schools continue to take full advantage of Chapter 37’s authorization to employ or commission police officers.

## B. School-Based Policing

School-based policing is the fastest growing area of law enforcement.<sup>21</sup> Today, police patrol the hallways, lunchrooms, and school grounds of most Texas public schools.<sup>22</sup> Generally, small school districts in less populated regions employ SROs, and large independent

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*Cases*, SEC. REP. (Juv. L. Sec., St. B. Tex., Austin, Tex.), Dec. 4, 2010, at 13, 14 (describing the immediate response to Columbine).

<sup>13</sup> *Id.* at 13.

<sup>14</sup> *Id.*

<sup>15</sup> See, e.g., TEX. EDUC. CODE ANN § 37.124 (West 2006 & Supp. 2011) (defining disruption of class as a Class C misdemeanor).

<sup>16</sup> *Id.* § 37.081.

<sup>17</sup> FOWLER, *supra* note 8, at 23–24.

<sup>18</sup> *Id.* at 17.

<sup>19</sup> *Id.* at 27–28.

<sup>20</sup> *Id.* at 67.

<sup>21</sup> Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 281 (2009).

<sup>22</sup> FOWLER, *supra* note 8, at 2.

districts establish their own police departments.<sup>23</sup>

### ***1. School Resource Officers***

The first school-based policing model to develop across the United States was the SRO model. A school district using this model contracts with a local law enforcement agency to assign one or more officers to the district.<sup>24</sup> As the public grew increasingly concerned about juvenile superpredators and school crime in the 1990s, federal funding became available for SRO programs.<sup>25</sup> Federal surveys estimate that by 1996, about 19% of the nation's school districts benefitted from SROs, and by 2005, 47.8% relied on SROs.<sup>26</sup>

Though an SRO's role varies from state to state, and from school district to school district, SROs are generally defined as comprising three roles: law enforcement, mentoring, and teaching.<sup>27</sup> Many school districts in other states employ the SRO model and benefit from armed and uniformed officers with the authority to arrest students for unruly behavior.<sup>28</sup> However, the school police force model tends to be more popular in Texas.<sup>29</sup>

### ***2. School Police Forces***

One hundred sixty-seven Texas school districts, encompassing half of the state's students, use the school police force model.<sup>30</sup> These school districts have commissioned their own police forces, with a chief of police who reports to the superintendent and peace officers who patrol school halls, enforcing "all laws, including municipal ordinances, county ordinances, and state laws."<sup>31</sup> School police forces are not bound by the SRO objectives (law enforcement, mentoring, teaching), and instead follow a more traditional law enforcement model.<sup>32</sup>

The sizes of and budgets for Texas school police forces continue to increase. From the 2001–2002 to the 2006–2007 school years, Houston

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<sup>23</sup> Angelone, *supra* note 3, at 451.

<sup>24</sup> FOWLER, *supra* note 8, at 38.

<sup>25</sup> *Id.* at 40; Nicole Bracy, *Circumventing the Law: Students Rights in Schools with Police*, 26(3) J. CONTEMP. CRIM. JUST. 294, 298 (2010).

<sup>26</sup> FOWLER, *supra* note 8, at 40.

<sup>27</sup> *Id.*

<sup>28</sup> Theriot, *supra* note 21, at 281.

<sup>29</sup> FOWLER, *supra* note 8, at 38.

<sup>30</sup> *Id.* at 43.

<sup>31</sup> TEX. EDUC. CODE ANN. § 37.081 (West 2011).

<sup>32</sup> FOWLER, *supra* note 8, at 44.

Independent School District (Houston ISD)’s police staff grew by 30%, and Houston ISD’s police budget increased by 43%. Similarly, from 2001–02 to 2006–07, Dallas ISD experienced a 24% growth in school police staff and a 70% budget increase. Dallas ISD now allocates \$13,707,231 to its police budget, equal to \$86 per student. These are not even the most astounding numbers. Also from 2001–02 to 2006–07, Humble ISD’s police force grew by 92%, and United ISD’s police force grew by 71%. Edgewood ISD currently spends \$1,708,552 on school police, or \$145 per student.<sup>33</sup> These increases in sizes and budgets of Texas police forces makes little sense in light of the evidence that juvenile crime and school crime rates are already low and continue to decline.

There are a number of problems with the rapid expansion of school policing. One concern is that Texas does not require any specialized training for school police. Instead, school police complete the same basic training as officers assigned to work in more traditional law enforcement settings.<sup>34</sup> Therefore, few school officers have been trained in child development; de-escalation techniques effective with children; and special education issues. The result is that school officers approach student behavior with the traditional policing tools they were trained to use – including ticketing and arrests.<sup>35</sup>

A second concern is that the expansion of school policing may have a negative impact on school culture. Parents and child advocates have raised concerns about police introduction of electronic surveillance, physical restraints, searches, and interrogations. These advocates believe that strict security measures may cause an adversarial relationship between students and school adults, interfering with student learning.<sup>36</sup> Given that strict security is most likely to be used in schools with high numbers of low-income and minority students, advocates worry that these students will believe they are expected to be criminals.<sup>37</sup>

The third and perhaps most significant concern is that the availability of school police increasingly encourages teachers and administrators to rely on officers to handle student misbehavior. Student misbehaviors that used to result in a trip to principal’s office now result in exposure to the criminal justice system, in the form of a ticket or an arrest.<sup>38</sup> The widespread shift from school-handled discipline to police-handled discipline is often called “passing the paddle.”<sup>39</sup> The administration of criminal punishment for school misbehaviors is termed

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<sup>33</sup> *Id.* at 47–49.

<sup>34</sup> FOWLER, *supra* note 8, at 58.

<sup>35</sup> *Id.* at 19.

<sup>36</sup> Theroit, *supra* note 21, at 280.

<sup>37</sup> FOWLER, *supra* note 8, at 54.

<sup>38</sup> *Id.* at 2.

<sup>39</sup> Turner & Goodner, *supra* note 12, at 2.

“the school-to-prison pipeline.”<sup>40</sup> No matter what it is called, the increasing reliance of Texas schools on their police officers to handle school discipline by arresting or issuing tickets is a problem.

### C. School Police Referrals to the Court System: Arrests and Ticketing

In most Texas schools, school police make direct referrals to the court system by arresting students or by or ticketing students for Class C misdemeanors.<sup>41</sup>

#### 1. Arrests

Texas grants its peace officers, including those patrolling schools, wide discretion on whether to arrest.<sup>42</sup> In general, when a school police officer takes a student into custody, the student will be presented or detained in a juvenile detention center. The student’s case will ultimately be handled by the juvenile court system.<sup>43</sup> Thousands of Texas students are arrested in schools. This is problematic for two reasons: (1) the students are often arrested for low-level misbehavior, such as “disorderly conduct,” and (2) the arrests for low-level school misbehavior introduce students to the juvenile justice system.<sup>44</sup> Referral to the juvenile justice system has many negative consequences, including the fact that juvenile justice system involvement increases the odds of dropping out of school, by some estimates by a factor of three.<sup>45</sup> However, many more Texas students are issued tickets than are arrested.<sup>46</sup> Moreover, since students receiving tickets are referred to municipal or justice courts, which are criminal courts, instead of to juvenile courts, which are civil courts, the legal consequences of ticketing are greater than the legal consequences of arrest.<sup>47</sup> Therefore, this Note does not focus on student arrest but instead on the problems associated with student ticketing.

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<sup>40</sup> FOWLER, *supra* note 8, at 2.

<sup>41</sup> *Id.* at 37.

<sup>42</sup> Texas Municipal Courts Education Center, *The Adjudication of Juveniles in Municipal and Justice Courts*, in THE MUNICIPAL JUDGES BOOK, 3 (2010) [hereinafter *Municipal Courts*].

<sup>43</sup> *Id.* at 4.

<sup>44</sup> FOWLER, *supra* note 8, at 99.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Municipal Courts*, *supra* note 42, at 1.



## **2. Class C Misdemeanor Ticketing**

### **a. In General**

More than 275,000 non-traffic tickets are issued to juveniles in Texas each year.<sup>48</sup> The increase in school-based policing coincides with sharp increases in the number of juveniles receiving tickets for school misbehavior. For example, in Austin ISD, a recent 31% growth in police staff coincided with a 50% increase in student ticketing. In Dallas ISD, a recent 24% growth in police staff corresponded to a 95% jump in ticketing. Across the state, the percentage of non-traffic tickets issued to juveniles grew from 2% in 1994 to an astounding 40% in 2008.<sup>49</sup>

When a student commits a Class C misdemeanor, a school officer may issue a ticket instead of making a full arrest.<sup>50</sup> In Texas, a Class C misdemeanor is a misdemeanor of the lowest level of seriousness.<sup>51</sup> Class C misdemeanors are punishable only by fines of up to \$500.<sup>52</sup> The Texas Penal Code defines several Class C misdemeanors, including low-level theft,<sup>53</sup> low-level assault,<sup>54</sup> and disorderly conduct.<sup>55</sup> The Texas Education Code adds a few more Class C misdemeanors, including disruption of class,<sup>56</sup> disruption of transportation,<sup>57</sup> failure to attend school,<sup>58</sup> and gang membership.<sup>59</sup> Texas students are most likely to be ticketed for disruption of class or disorderly conduct.<sup>60</sup> The ticket serves as a written promise to appear in municipal or justice court, as opposed to juvenile court.<sup>61</sup>

### **b. The Criminal Consequences of Receiving a Ticket**

Juvenile courts first emerged across the nation in the early 1900s.

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<sup>48</sup> FOWLER, *supra* note 8, at 1.

<sup>49</sup> *Id.* at 74 (describing increased percentage of all tickets to juveniles issued by school police officers).

<sup>50</sup> TEX. CRIM. PROC. CODE ANN. art. 45.058(g) (West 2011).

<sup>51</sup> TEX. PENAL CODE ANN. § 12.03 (West 2011).

<sup>52</sup> TEX. CRIM. PROC. CODE ANN. art. 12.23 (West 2009).

<sup>53</sup> TEX. PENAL CODE ANN. § 31.04(c)(1) (West 2009).

<sup>54</sup> *Id.* § 22.01(c).

<sup>55</sup> *Id.* § 42.01(d).

<sup>56</sup> TEX. EDUC. CODE ANN. § 37.124 (West 2011).

<sup>57</sup> *Id.* § 37.126.

<sup>58</sup> *Id.* § 25.094.

<sup>59</sup> *Id.* § 37.121.

<sup>60</sup> FOWLER, *supra* note 8, at 5.

<sup>61</sup> Municipal Courts, *supra* note 42, at 3.

The aim of these courts was to protect children's rights and emphasize treatment and rehabilitation. By the 1960s, the nation's juvenile courts handled all cases involving children under the age of 18.<sup>62</sup> The Texas Family Code grants the state's juvenile courts jurisdiction over two categories of offenses: (1) delinquent conduct, and (2) Conduct Indicating a Need for Supervision (CINS).<sup>63</sup> Delinquent conduct is conduct that if committed by an adult could result in incarceration, such as mid-level to serious assault or theft. CINS include misdemeanors that are punishable by fine only, such as disorderly conduct, as well as behaviors that "are not conducive to the well-being of children," such as running away and truancy from school.<sup>64</sup> Because the CINS category includes fine-only offenses, Class C misdemeanors could be included. However, in the 1990s, fears about juvenile superpredators convinced Texas legislators that rehabilitation should be secondary to punishment.<sup>65</sup> Therefore, Texas transferred "the more common misdeeds of children," including Class C misdemeanors, from juvenile court dockets to criminal court dockets.<sup>66</sup> Today, children's Class C misdemeanor charges are filed in municipal and justice courts, two criminal courts which share jurisdiction over Class C misdemeanors.<sup>67</sup>

The fact that increasing numbers of Texas students are being ticketed in school and therefore must appear in criminal court is problematic for many reasons, including (1) the disciplinary ideology; (2) the lack of prosecutorial review; (3) the absence of court-appointed attorneys; (4) subsequent criminal records; and (5) the possibility of later arrest.

First, students appearing in criminal courts are subject to disciplinary ideology, rather than rehabilitative ideology. The purpose of Texas's juvenile justice laws is to provide "treatment, training, and rehabilitation" for young offenders.<sup>68</sup> At various points in the juvenile justice process, there are opportunities for students to be diverted; to receive probation instead of detention; and to receive various services for mental health, anger management, and substance abuse problems. However, the purpose of the Texas Code of Criminal Procedure is more punitive. Students appearing in municipal and justice courts are likely to receive high fines, with no opportunity for rehabilitation or treatment of issues underlying the offense.<sup>69</sup>

Second, students appearing in criminal courts do not have access to prosecutorial review. In the juvenile court system, a prosecuting attorney

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<sup>62</sup> Angelone, *supra* note 3, at 444.

<sup>63</sup> TEX. FAM. CODE ANN. § 51.04(a) (West 2008).

<sup>64</sup> Municipal Courts, *supra* note 42, at 1.

<sup>65</sup> Angelone, *supra* note 3, at 446.

<sup>66</sup> Turner & Goodner, *supra* note 12, at 1.

<sup>67</sup> Municipal Courts, *supra* note 42, at 1.

<sup>68</sup> TEX. FAM. CODE ANN. § 51.01(2)(C) (West 2008).

<sup>69</sup> See Angelone, *supra* note 3, at 454; Municipal Courts, *supra* note 42, at 1.

will review each case for legal sufficiency and desirability of prosecution, and allow some offenders to be diverted before going to trial.<sup>70</sup> There is no prosecutor review before trial in municipal and justice courts.<sup>71</sup> Therefore, *every* student who receives a Class C ticket in school must stand trial in criminal court.

Third, students appearing in criminal courts are not entitled to a court-appointed attorney. Students facing charges in juvenile courts are entitled to court-appointed attorneys.<sup>72</sup> But a municipal or justice court has no duty to appoint an attorney to represent a defendant (including a student defendant) appearing for a Class C misdemeanor.<sup>73</sup>

Fourth, students appearing in criminal courts may acquire criminal records. Unlike students facing CINS petitions in juvenile courts, students convicted or entering a plea of “guilty or no contest” in municipal and justice courts have criminal records.<sup>74</sup> Juvenile court records are not available to the public, but criminal records generally are publicly available.<sup>75</sup> In 2009, the Texas legislature recognized that public access to children’s criminal records could be problematic, and mandated that criminal courts issue nondisclosure orders when a child<sup>76</sup> is convicted of a Class C misdemeanor. However, because a court can only order nondisclosure upon conviction, nondisclosure is *not* triggered for other outcomes, such as probation or diversion to teen court.<sup>77</sup> Moreover, nondisclosure is not expunction or sealing of records; the clerk will not track down and destroy every reference to a case. Eleven government agencies will still have access to the criminal history record information.<sup>78</sup> Therefore, conviction of a Class C misdemeanor in municipal or justice courts still has criminal record implications for students.

Finally, ticketed students who do not follow the criminal court’s directions may later face arrest. More specifically, when a student fails to pay the court-ordered fine, or fails to appear at all, the court can issue a bench warrant and order the student to be taken into custody.<sup>79</sup> However, because municipal and justice courts cannot order actual *confinement* (detention or jail time) for a child,<sup>80</sup> these bench warrants are rarely

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<sup>70</sup> TEX. FAM. CODE ANN § 53.012 (West 2008).

<sup>71</sup> Turner & Goodner, *supra* note 12, at 6 n.3.

<sup>72</sup> Ryan Turner, *The Oversimplification of the Assistance of Counsel in the Adjudication of Class C Misdemeanors in Texas*, MUN. CT. RECORDER, (Tex. Mun. Cts. Educ. Ctr., Austin, Tex.), Jan. 2009, at 9.

<sup>73</sup> *Barcroft v. State*, 881 S.W.2d 838, 841 (Tex. App.—Tyler 1994, no pet.).

<sup>74</sup> FOWLER, *supra* note 8, at 5; Turner, *supra* note 72, at 9.

<sup>75</sup> Turner & Goodner, *supra* note 12, at 2.

<sup>76</sup> “Child” is defined as a defendant aged 10 or older, and under 17. TEX. FAM. CODE ANN. § 51.02(2)(A) (West 2008 & Supp. 2011).

<sup>77</sup> Turner & Goodner, *supra* note 12, at 2.

<sup>78</sup> *Id.* at 3.

<sup>79</sup> TEX. CRIM. PROC. CODE ANN. § 45.058–9 (West 2011).

<sup>80</sup> *Id.* § 45.050.

enforced.<sup>81</sup> Instead, when the student turns seventeen, the court will issue a Notice of Continuing Obligation to Appear.<sup>82</sup> If the student does not appear in court in response to this notice, he has committed another Class C misdemeanor.<sup>83</sup> This results in issuance of a warrant for the student's arrest.<sup>84</sup> It is not unusual for a ticket received for school misbehavior to result in later arrest. The ACLU of Texas recently sued Hidalgo County for jailing hundreds of teens for unpaid tickets issued years earlier.<sup>85</sup>

Overall, an increase in school-based policing had led to an increased number of students issued Class C misdemeanor tickets. This means that a growing number of Texas schoolchildren are appearing in criminal court, paying high fines, acquiring criminal records, and potentially facing arrest and additional Class C charges years later, all for school-related misbehavior.

#### D. Ticketing for Low-Level Offenses

The criminal consequences of ticketing are amplified by the fact that most tickets are issued for low-level, nonviolent offenses.<sup>86</sup> Only 12% of tickets issued during the 2006–2007 school year were for violent or weapons offenses. The majority (52%) of tickets issued in 2006–2007 were for disorderly conduct and disruption of class.<sup>87</sup>

Disorderly conduct includes using profane language, making offensive gestures, and fighting in a public place.<sup>88</sup> Disruption of class includes emitting noise that hinders classroom instruction; enticing a student away from class; and entering a classroom without consent.<sup>89</sup> With schools increasingly relying on school police to address misbehavior, a scuffle between students becomes disorderly conduct.<sup>90</sup> Using profanity, yelling out answers, and throwing paper airplanes in

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<sup>81</sup> FOWLER, *supra* note 8, at 70.

<sup>82</sup> TEX. CRIM. PROC. CODE § 45.060.

<sup>83</sup> Municipal Courts, *supra* note 42, at 12.

<sup>84</sup> FOWLER, *supra* note 8, at 71.

<sup>85</sup> *Id.* The lawsuit, *De Luna v. Hidalgo County et. al.*, was filed with the United States District Court for the Southern District of Texas in July of 2010. Plaintiffs are teens aged seventeen and older who have been jailed due to inability to pay fines associated with Class C misdemeanor tickets issued years earlier for failure to attend school. Plaintiffs alleged that the ticket-to-later-jailtime model violates both the equal protection and due process guarantees of the Fourteenth Amendment. In December of 2011, the court will hold a hearing to rule on defendant's motion for summary judgment (filed in June of 2011), and whether plaintiffs qualify as a class. The case will likely proceed to trial in January of 2012. Telephone Interview with Lisa Graybill, Attorney-in-Charge for Plaintiffs & Legal Director, ACLU Foundation of Texas (Nov. 17, 2011).

<sup>86</sup> FOWLER, *supra* note 8, at 5.

<sup>87</sup> *Id.* at 82.

<sup>88</sup> TEX. PENAL CODE ANN. § 42.01(a) (West 2011 & Supp. 2011).

<sup>89</sup> TEX. EDUC. CODE ANN. § 37.124(c)(1) (West 2006 & Supp. 2011).

<sup>90</sup> Theriot, *supra* note 21, at 280.

class become disruption of class.<sup>91</sup>

## **E. Discretionary Ticketing**

Ticketing is not just problematic because it sends students to court for low-level school misbehavior. Ticketing is also problematic because it tends to send only *certain* students to court for low-level school misbehavior.

### **1. Discretionary by School District**

The greatest predictor of whether a student will be ticketed is not the nature of the offense. Instead, the greatest predictor is where the student attends school.<sup>92</sup> In 2006-07, Humble ISD issued 431 tickets to its student body of 31,144, yielding a ticketing rate of 1%. Compare that to nearby Galveston ISD, which issued 921 tickets to its student body of 8,430, yielding a ticketing rate of 11%. Other Texas school districts span the difference: Houston ISD has a ticketing rate of 2%; nearby Alief ISD has a ticketing rate of 4%; and San Antonio ISD has a ticketing rate of 7%.<sup>93</sup>

Galveston ISD's students likely do not commit a greater number of offenses than, say, Alief ISD's students. The disparate ticketing rates occur because different schools prefer different disciplinary methods. Alief ISD disciplines students in a variety of ways (in 2006–07 it referred 1,664 students to Disciplinary Alternative Education Programs (“DAEPs”) and issued 1,900 tickets), but Galveston ISD prefers ticketing to other disciplinary measures (it referred 365 students to DAEPs and issued 900 tickets).<sup>94</sup> Moreover, different schools punish the exact same offense differently. As an example, Austin ISD police issue tickets for fighting only when one student assaults another, whereas Houston ISD police issue tickets for various types of fighting, including “mutual combat” between two students.<sup>95</sup>

It is troubling enough that students in certain Texas school districts are ticketed at a higher rate than students in other Texas school districts – but it gets worse. A 2009 study revealed that schools with economically disadvantaged and minority students are the most likely to employ SROs

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<sup>91</sup> FOWLER, *supra* note 8, at 84.

<sup>92</sup> *Id.* at 5.

<sup>93</sup> *Id.* at 77–78.

<sup>94</sup> *Id.* at 78–79.

<sup>95</sup> Thevenot, *supra* note 1, at 2–3.

and police officers.<sup>96</sup> Because increased school policing correlates with increased numbers of tickets issued,<sup>97</sup> students in low-income, high-minority Texas schools districts are likely ticketed and sent to criminal court at a higher rate than students in more privileged districts.

## 2. *Discretionary by Race and Ethnicity*

Moreover, within individual school districts, minority students are overrepresented in ticketing.<sup>98</sup> Of the 15 school districts able to disaggregate their Class C ticketing data by race and ethnicity, 11 found that African-American students were overrepresented. For example, in 2006–2007, Humble ISD issued 42% of its tickets to black students. Yet black students comprised only 17% of total enrollment. Similarly, Dallas ISD issued 62% of its tickets to black students, who comprised only 30% of total enrollment. And Huntsville ISD issued 51% of its tickets to black students, who comprised only 27% of total enrollment.<sup>99</sup>

Black and Hispanic students also disproportionately received Class C tickets for two specific offenses: (1) disorderly conduct; and (2) gang membership. First, both groups are overrepresented in tickets issued for disorderly conduct.<sup>100</sup> There is no evidence that minority students misbehave more than white peers. However, evidence does show that minority students receive harsher punishments for less severe behavior.<sup>101</sup> Therefore, this disparity likely results when school staff and officers handle white students' offenses as simple classroom misbehavior, but minority students' offenses as disorderly conduct.

Second, Hispanics are overrepresented in tickets issued for gang membership. In fact, in 2006–2007, they received 93% of all gang membership tickets issued, despite comprising only 58% of Texas public school enrollment.<sup>102</sup> This may be the result of racial profiling for gang membership on the basis of clothing and other signs.<sup>103</sup>

Ticketing is discretionary. Where a student goes to school and the student's ethnic or racial background are better predictors of whether the student will be ticketed than the student's actual offense. Students in certain school districts and minority students across the state are disproportionately fast-tracked into the criminal justice system.

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<sup>96</sup> Theriot, *supra* note 21, at 284.

<sup>97</sup> FOWLER, *supra* note 8, at 74.

<sup>98</sup> *Id.* at 68.

<sup>99</sup> *Id.* at 88–89.

<sup>100</sup> FOWLER, *supra* note 8, at 90.

<sup>101</sup> ADVANCEMENT PROJECT, *supra* note 9, at 18.

<sup>102</sup> FOWLER, *supra* note 8, at 90.

<sup>103</sup> *Id.* at 68.

## F. The Effectiveness of Ticketing

If ticketing, and the corresponding brush with criminal court, convinces students to cease misbehaving, then the criminalization of school misbehavior is arguably worthwhile. However, a Texas Appleseed study discovered that students tend to receive multiple tickets at school. One municipal court in particular reported 350 students with multiple tickets, and one student with as many as eleven tickets. These numbers indicate that ticketing does not effectively deter future school misbehavior.<sup>104</sup>

Anecdotal evidence agrees. Deborah Fowler, stresses that tickets “are not really a meaningful punishment” for students who do not understand the corresponding criminal consequences. According to Assistant Police Chief Victor Mitchell of Houston ISD, for many students, tickets are “just a piece of paper.”<sup>105</sup> Ticketing is not necessary for, or even effective at, preventing school misbehavior.

## G. Lack of Data

Compounding the other problems associated with ticketing is a lack of organized data. When Texas Appleseed conducted its study, it asked all Texas school districts with police forces to provide information about their ticketing practices. Only twenty-six school districts could provide any information about the numbers and types of tickets issued in recent years. Only fifteen of those school districts could disaggregate ticketing data based on age, race, and special education status.<sup>106</sup> Houston ISD, the largest school district in the state and one of the largest in the nation, could not provide information about the race and ethnicity of students issued tickets in recent years.<sup>107</sup>

Ticketing data is instrumental in helping school police officers identify where and when crime is occurring. Ticketing data also helps school districts remain informed and poised to act regarding overrepresentation of minority students, and evaluate whether ticketing is an effective tool in preventing future student misbehavior.<sup>108</sup> Above all, ticketing data is essential to school districts wishing to study and reduce the severe criminal consequences suffered by ticketed students.

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<sup>104</sup> *Id.* at 69

<sup>105</sup> Thevenot, *supra* note 1, at 2–3.

<sup>106</sup> FOWLER, *supra* note 8, at 4.

<sup>107</sup> *Id.* at 89.

<sup>108</sup> FOWLER, *supra* note 8, at 4.

## H. Impact of Ticketing on Municipal and Justice Courts

As school police continue to increase the frequency with which they issue tickets for low-level misbehaviors, municipal and justice courts struggle with growing caseloads. Of all tickets issued to juveniles, the percentage issued by school police grew from 2% in 1994 to 40% in 2008.<sup>109</sup> Municipal and justice courts' caseloads grew by a proportional percentage. Today, the number of student cases processed by state municipal and justice courts far exceeds the number of student cases processed by both state juvenile courts and adult criminal courts. Specifically, in 2009, municipal and justice courts processed 420,667 Class C misdemeanor cases, compared to the 43,230 delinquent conduct and 1,027 CINS cases processed in juvenile courts, and the 202 cases of juveniles certified as adults processed in adult courts.<sup>110</sup> Ticketed students are not alone in crying out for a solution. Overburdened courts need one too.

## III. LOOKING SIDEWAYS: TICKETING IN OTHER STATES

Is Texas alone in punishing school misbehavior with discretionary ticketing and corresponding criminal consequences? Are Texas courts alone in finding their dockets increasingly laden with low-level, school-based "crimes"?

No. The school-to-prison pipeline is not just a Texas problem. In the 1990s, Dilulio's warnings and Columbine inspired many states to turn to school-based policing. In some states, local police departments assign officers to schools. In other states, schools employ their own security officers or SROs. In fact, in 2004, the US Department of Justice doled out sixty million dollars to help school districts hire SROs. And as is permitted in Texas, large districts, such as Los Angeles, Baltimore, and Miami, commission their own police forces.<sup>111</sup> Across the nation, school teachers and administrators turn to the ever-present officers to assist in school disciplinary matters.<sup>112</sup> The result is that students everywhere are arrested or referred to court for low-level school misbehaviors.<sup>113</sup>

In most states, arrested students are brought to juvenile court. If the officers choose not to arrest the student, the officers will *not* issue a

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<sup>109</sup> *Id.* at 74.

<sup>110</sup> *Id.* at 76.

<sup>111</sup> ADVANCEMENT PROJECT, *supra* note 9, at 17.

<sup>112</sup> *Id.* at 13.

<sup>113</sup> *Id.* at 18.



ticket requiring appearance in criminal court, but instead make a referral to juvenile court. For example, in Connecticut, when students commit an act the state defines as “delinquent,”<sup>114</sup> school officers can issue a “juvenile summons,” which requires the student and a parent to appear in juvenile court.<sup>115</sup> And in North Carolina, school officers file “delinquency complaints” with a juvenile court when students misbehave.<sup>116</sup>

A few urban regions, including Los Angeles, ticket for truancy, but not for in-school misdemeanors.<sup>117</sup> Generally these tickets are processed by the juvenile court system. Colorado is the only other state permitting school officers to ticket students for a variety of in-school misdemeanors.<sup>118</sup> In Colorado, most ticketed students must appear in juvenile court, but a small number of ticketed students appear in criminal court.<sup>119</sup>

Therefore, Texas is not unique in issuing severe consequences for school misbehavior, but it is unique in its practice of allowing officers to issue tickets for in-school misdemeanors and requiring ticketed students to appear in criminal court. In other words, in a nation that severely punishes school misbehavior, generally by referring students to juvenile court, Texas is the most severe punisher of all, in that it asks misbehaving students to face criminal consequences.

However, some of these other states have begun to recognize that handling student misbehavior in court is problematic, and have instituted creative solutions. Texas can better evaluate how to reduce its own ticketing problem by examining (1) Colorado’s ticketing problem, and restorative justice solution; and (2) the juvenile court referral problems, and “graduated sanctions” solution of Georgia, Alabama, and Indiana.

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<sup>114</sup> CONN. GEN. STAT. ANN. § 46b-120(9) (West 2009 & Supp. 2012).

<sup>115</sup> *Connecticut Scores School-to-Prison Pipeline Victory*, NAT’L JUV. JUST. NETWORK NEWSL., Aug. 2, 2011, at 2, available at <http://www.njjn.org>.

<sup>116</sup> Jason Landberg, Barbara Fedders & Drew Kukorowski, *Law Enforcement Officers in Wake County Schools: The Human, Educational, and Financial Costs*, ADVOC. FOR CHILD. SERVICES, Feb. 2011, at 4.

<sup>117</sup> E-mail from Jim Freeman, Project Director for Ending the Schoolhouse to Jailhouse Track Project, Advancement Project, to author (Nov. 16, 2011, 20:39 CST) (on file with author).

<sup>118</sup> The claim that Colorado and Texas are the only states currently issuing school-based tickets for a variety of misdemeanors is supported by the author’s comprehensive research of as many states as possible, and by Jim Freeman’s statements so indicating. See Freeman, *supra* note 117. However, it is always possible that another state (or region) does ticket in a manner similar to Texas and Colorado, and the author did not discover this state in her research.

<sup>119</sup> ADVANCEMENT PROJECT, *supra* note 9, at 28.

## A. Colorado: The Ticketing Problem and Two Solutions

### 1. Colorado's Ticketing Problem

Most Colorado schools have police patrolling the hallways. For example, every elementary, middle, and high school in the Denver Public Schools houses at least one school district security officer or Denver Police Department officer.<sup>120</sup> Student misbehaviors “that would have been handled internally a generation ago are now referred to [school] police.”<sup>121</sup> Over the past decade, nearly 100,000 Colorado students have been “referred to law enforcement.”<sup>122</sup> That means 100,000 students were sent to see a school officer or a city police officer, who then decided whether to issue a ticket.<sup>123</sup> Colorado law requires schools to report the number of students referred to law enforcement,<sup>124</sup> but does not require schools to keep track of how many of those referrals result in a ticket. Colorado knows it has a ticketing problem but cannot say for certain exactly how many tickets its school officers are handing out.<sup>125</sup>

Just as in Texas, Colorado students are increasingly referred to law enforcement and ticketed; the referrals and tickets are for low-level offenses; and minority students are disproportionately impacted. More specifically, the rate at which Colorado students are referred to law enforcement continues to increase. For example, from 2000 to 2004, the rate of referrals of Denver students shot up by 71%, though the student population grew by only 2% during that same time period.<sup>126</sup> Many of these referrals (and therefore any corresponding tickets issued) are for low-level school misbehavior.<sup>127</sup> In Denver, students are referred for use of obscenities and minor fights. Only 7% of Denver's referrals result from more serious conduct, like carrying dangerous weapons.<sup>128</sup> The numbers and reasons for referrals and corresponding tickets vary widely from district to district.<sup>129</sup> Statewide, minority students are

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<sup>120</sup> ADVANCEMENT PROJECT, *supra* note 9, at 25.

<sup>121</sup> Todd Engdahl, *State Panel Targets School Discipline*, EDNEWSCOLORADO, July 27, 2011, at 2 (quoting Colo. legislative analyst Jonathan Senft).

<sup>122</sup> *Id.* at 1.

<sup>123</sup> KELLI KELTY ET AL., COLO. LEGIS. COUNCIL, A STATEWIDE COMPARISON OF DATA ON REFERRALS TO LAW ENFORCEMENT, JUVENILE DELINQUENCY FILINGS, AND DROP-OUT RATES 1 (2011) [hereinafter *Statewide Comparison*], available at <http://www.colorado.gov/LCS/SchoolDisciplineTF>.

<sup>124</sup> STATEWIDE COMPARISON, *supra* note 123, at 1.

<sup>125</sup> Engdahl, *supra* note 121, at 2.

<sup>126</sup> ADVANCEMENT PROJECT, *supra* note 9, at 23.

<sup>127</sup> COLORADO LEGISLATIVE TASK FORCE TO STUDY SCHOOL DISCIPLINE, COLO. LEGIS. COUNCIL, COMPILATION OF PROBLEMS AND SOLUTIONS IDENTIFIED BY MEMBERS 1, 12 (2011) [hereinafter *Compilation of Problems*], available at <http://www.colorado.gov/LCS/SchoolDisciplineTF>.

<sup>128</sup> ADVANCEMENT PROJECT, *supra* note 9, at 24.

<sup>129</sup> Engdahl, *supra* note 121, at 2.

overrepresented in referrals and ticketing.<sup>130</sup> In Denver, 2003–04, black students were twice as likely, and Hispanic students were seven times as likely, to receive tickets as were their white peers.<sup>131</sup>

Though the two states have similar ticketing trends, Texas and Colorado have different procedural requirements for ticketed students. In Texas, *all* ticketed students must appear in criminal court, acquire criminal records, and pay fines (instead of being placed on probation or diverted to community service or counseling). In Colorado, most ticketed students appear in juvenile court, but some appear in the local county (criminal) court.<sup>132</sup> At least in Denver, more serious offenses, such as assault or weapons possession, are handled by juvenile courts.<sup>133</sup> Students appearing in juvenile court are entitled to an attorney<sup>134</sup> and may be diverted, placed on probation, or sentenced to a juvenile detention facility.<sup>135</sup> Less serious offenses, such as trespassing and minor fights, are handled by county courts. For Denver's ticketed students, this means appearing before the Denver County Court's Juvenile Division, which usually diverts students to a community service or counseling program or places students on probation.<sup>136</sup> Though the punishments (community service and counseling) are not unlike those issued in juvenile court, the county court's juvenile division is still a criminal court, and all students appearing there will have criminal records.<sup>137</sup>

## 2. *Colorado's Two Solutions*

### a. **Legislative Task Force**

In recent years, Colorado advocacy groups called legislators' attention to the fact that, for low-level school misbehaviors, Colorado students were being referred to law enforcement, receiving tickets, and suffering juvenile court or criminal court consequences. In 2011, the legislature created the Legislative Task Force to Study School Discipline, consisting of three state senators, three state representatives, and ten individuals who represent groups, such as teachers, school administrators, school officers, criminal defense attorneys, and child advocates. The task force is required to discuss and hear public testimony

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<sup>130</sup> COMPILATION OF PROBLEMS, *supra* note 127, at 7.

<sup>131</sup> ADVANCEMENT PROJECT, *supra* note 9, at 24.

<sup>132</sup> *Id.* at 27.

<sup>133</sup> *Id.* at 28.

<sup>134</sup> *Id.* at 30.

<sup>135</sup> *Id.* at 29.

<sup>136</sup> ADVANCEMENT PROJECT, *supra* note 9, at 28.

<sup>137</sup> *Id.* at 29.

on the use of law enforcement, tickets, and arrests in schools.<sup>138</sup>

After six meetings, the task force released a proposed bill addressing several of the state's referral and ticketing problems. The bill (1) requires school discipline codes to explicitly define when violations will result in referral to law enforcement; (2) requires school boards to train teachers in conflict resolution and restorative justice; and (3) requires police officers who will be assigned to schools to receive special training.<sup>139</sup> Members of the task force have also suggested that the state (1) require schools to track the number of referrals resulting in tickets;<sup>140</sup> and (2) strengthen its support of charter schools that do not have ticketing and dropout problems.<sup>141</sup>

### b. Denver's Restorative Justice Project

In 2005, a few northeast Denver schools sought to address the referral and ticketing problems independently of legislative mandates. The schools initiated the Restorative Justice Project, which expanded to six middle schools and one high school by 2009.<sup>142</sup> Each participating school has a full-time restorative justice coordinator. Teachers and school staff refer students engaging in certain misbehaviors, including "interpersonal conflict" (arguments and gossip), physical altercation, and horseplay, to the coordinator rather than the school police.<sup>143</sup> If the coordinator determines that restorative justice is appropriate to the situation, the coordinator meets with the students involved, and possibly with parents and teachers.<sup>144</sup> These parties work to come to a "restorative agreement" outlining steps for reparation.<sup>145</sup>

The results of the Restorative Justice Project are remarkable. During the 2009–10 school year, 30% of participating students halved their numbers of failing grades. Participating students attended school more often after intervention; their absences dropped by 64%.<sup>146</sup> Most significantly, participating students were also less likely to be referred to

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<sup>138</sup> COLORADO LEGISLATIVE TASK FORCE TO STUDY SCHOOL DISCIPLINE, COLO. LEGIS. COUNCIL, OVERVIEW OF THE LEGISLATIVE TASK FORCE TO STUDY SCHOOL DISCIPLINE 1-2 (2011), available at <http://www.colorado.gov/LCS/SchoolDisciplineTF>.

<sup>139</sup> *Id.* at 2–3.

<sup>140</sup> COMPILATION OF PROBLEMS, *supra* note 127, at 6, 10.

<sup>141</sup> STATEWIDE COMPARISON, *supra* note 123, at 23.

<sup>142</sup> COLORADO LEGISLATIVE TASK FORCE TO STUDY SCHOOL DISCIPLINE, COLO. LEGIS. COUNCIL, RESTORATIVE JUSTICE PROGRAMS IN DENVER PUBLIC SCHOOLS (2011) [hereinafter Restorative Justice Programs], available at <http://www.colorado.gov/LCS/SchoolDisciplineTF>.

<sup>143</sup> MYRIAM L. BAKER, DPS RESTORATIVE JUSTICE PROJECT: YEAR THREE 5 (2009) [hereinafter DPS], available at <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251736451155&ssbinary=true>.

<sup>144</sup> RESTORATIVE JUSTICE PROGRAMS, *supra* note 142, at 1.

<sup>145</sup> DPS, *supra* note 143, at 8.

<sup>146</sup> *Id.* at 2.

police, or suspended after intervention: referrals to school police for this group decreased by 88%, and suspensions decreased by 89%.<sup>147</sup>

## **B. Georgia, Alabama, and Indiana: Increasing Referrals to Juvenile Court and the Solution**

Colorado may be the only state besides Texas that allows school officers to ticket students for misbehaviors other than truancy. In many other states, though, school police refer students to local juvenile courts for various in-school misdemeanors. Some of these states – Georgia and Alabama in particular – have recognized that sending students to juvenile court for low-level school offenses is a problem, and have initiated effective solutions.

### ***1. Clayton County, Georgia: Referral Problem and Graduated Sanctions Solution***

In the 1990s, Clayton County juvenile court judge Steven Teske noticed that after SROs began patrolling local schools, the numbers of students charged with crimes increased. Specifically, in 1995, SROs referred 46 school incidents to Teske's juvenile court. By 2003, SROs referred 1,200 school incidents. Minority students were disproportionately referred. Teske thought, "This is ridiculous. They weren't delinquent kids."<sup>148</sup>

In the summer of 2004, Teske resolved to address the increasing numbers of referrals. He gathered together school officials, law enforcement, prosecutors, parents, and child advocates. He proposed giving students warnings before referring them to court.<sup>149</sup> The result was a cooperative agreement among Clayton County's juvenile courts, public schools, and police departments. The agreement acknowledged that referring students to court, especially for low-level school misbehaviors, should not be taken lightly.

The agreement mandated a graduated sanctions model, whereby a student committing a "focused act" (a Georgia misdemeanor like disrupting public school, disorderly conduct, and truancy) for the first time would receive a warning. A student committing a second focused

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<sup>147</sup> *Id.* at 3.

<sup>148</sup> Donna St. George, *Judge Steve Teske Seeks to Keep Kids with Minor Problems out of Court*, WASH. POST, Oct. 17, 2011, [http://www.washingtonpost.com/lifestyle/style/judge-steve-teske-seeks-to-keep-kids-with-minor-problems-out-of-court/2011/09/21/gIQA1y8ZsL\\_story.html](http://www.washingtonpost.com/lifestyle/style/judge-steve-teske-seeks-to-keep-kids-with-minor-problems-out-of-court/2011/09/21/gIQA1y8ZsL_story.html).

<sup>149</sup> Amy Bach, *New Rules for Schools*, THE NATION, Oct. 14, 2009, <http://www.thenation.com/article/new-rules-schools>.

act would be diverted to a court-sponsored School Conflict or Mediation program. Only a student committing a third focused act could be referred to the juvenile court, and even then, school administrators and police still had the discretion to issue another warning or to divert to one of the programs.<sup>150</sup>

The cooperative agreement worked. By 2008, the number of school incidents referred to the juvenile court had decreased by 68%.<sup>151</sup> The number of black students referred to juvenile court for fighting dropped by 86% and for disruption of school dropped by 64%. Moreover, county schools experienced an 87% decrease in fighting offenses and a 36% decrease in other focused acts.<sup>152</sup> Teske attributes this to a change in police focus from referring misbehaving students to educating and counseling them.<sup>153</sup>

## **2. *Birmingham, Alabama: Referral Problem and Graduated Sanctions Solution***

Other judges experiencing the problem of increased school-based referrals are also beginning to turn to Clayton County's model. For example, Franklin County, Ohio juvenile judge Kim Browne heads the Juvenile Justice Community Planning Initiative. It has a stated goal of reaching a Clayton County-like cooperative agreement among Columbus city schools, police, and courts to reduce the numbers of low-level student misbehaviors referred to court.<sup>154</sup> Teske cites several other judges across the country who are also working to replicate the Clayton County model.<sup>155</sup> The most successful replication of the Clayton County model is occurring at the hands of juvenile judge Brian Huff in Jefferson County, Alabama.

Huff was concerned about the ever-increasing numbers of referrals

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<sup>150</sup> Cooperative Agreement, <http://www.jdaihelpdesk.org/collmodagree/Clayton%20County%20GA%20School%20Referral%20Cooperative%20Agreement.pdf>.

<sup>151</sup> Bach, *supra* note 149.

<sup>152</sup> ADVANCEMENT PROJECT, STOP THE SCHOOLHOUSE TO JAILHOUSE TRACK, CLAYTON COUNTY, GEORGIA, <http://www.stopschoolstojails.org/content/clayton-county-georgia.html> (last visited Nov. 11, 2011).

<sup>153</sup> Bach, *supra* note 149. See also *As Suspensions, Expulsions and Juvenile Arrests Grow, JDAI Sites Push Back*, JUVENILE DET. ALT. INITIATIVE NEWS (Annie E. Casey Foun.), Spring 2010, <http://aefc.org/majorityinitiatives/JuvenileDetentionAlternativesInitiative/Resources/May10newsletter/FeatureStory.aspx> (last visited Nov. 6, 2011).

<sup>154</sup> Rita Price, *Lockup's Racial Disparity Glaring: City Schools, Police Seek Alternatives to Youth Detention*, THE COLUMBUS DISPATCH, Mar. 15, 2010, available at <http://www.burnsinstitute.org/article.php?id=201>.

<sup>155</sup> See Steve Teske, *The Blame Game: The Winner Loses and the Kids are Hurt*, JUV. JUST. INFO. EXCHANGE, 4 (Dec. 9, 2010), <http://jjie.org/judge-steve-teske-blame-game-winner-loses-kids-hurt/7660> (discussing Judge Jay Blitzman in Middlesex County, Massachusetts; Judge James Burgess in Wichita, Kansas; Judge Anglala Roberts of Richmond, Virginia; and Judge Jimmie Edwards of St. Louis, Missouri).

from the Birmingham City Schools. In 2008, 90% of Birmingham student referrals to his court were for low-level misdemeanors. Even worse, 99% of all Birmingham student referrals were for black students. Following Teske's example, Huff and the Southern Poverty Law Center brought together the Birmingham City Schools Collaborative, consisting of the school superintendent, police chief, and the county district attorney. The collaborative instituted a Clayton County-style agreement mandating a graduated sanctions model.<sup>156</sup> For "minor school-based offenses," including misdemeanors disorderly conduct and low-level assault, students are warned the first time, sent to a school-run conflict workshop the second time, and potentially referred to juvenile court only after the third time.<sup>157</sup>

Prior to the formation of the collaborative, Birmingham City Schools accounted for 80% of school incident referrals to Huff's court.<sup>158</sup> The collaborative negotiations were so impactful that, even before the agreement was officially signed, Birmingham's court referrals began to drop.<sup>159</sup> After the implementation of the agreement in 2009–2010, Birmingham City Schools accounted for 66% of the referrals received by Huff's court.<sup>160</sup> In Jefferson County, the agreement is beginning to achieve its goal of reducing referrals to court for low-level student misbehavior.

### 3. *Indiana: Referral Problem and Legislative Solution*

The Clayton County model has also inspired state-wide efforts. After hearing Teske speak at a juvenile justice conference hosted by the Indiana State Bar, Indiana legislators were so inspired that they passed House Enrolled Act 1193.<sup>161</sup> This bill established a "youth work group"<sup>162</sup> of twenty-six members, including the state superintendent of public education; the executive directors of the state criminal justice

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<sup>156</sup> ACHIEVEMENT PROJECT, STOP THE SCHOOLHOUSE TO JAILHOUSE TRACK, JEFFERSON COUNTY, ALABAMA, <http://www.stopschoolstojails.org/content/jefferson-county-alabama> (last visited Nov. 11, 2011).

<sup>157</sup> Birmingham City Schools Collaborative, Collaborative Agreement 2–5, available at <http://media.al.com/spotnews/other/Agreement%20to%20cut%20arrests.pdf>.

<sup>158</sup> ACHIEVEMENT PROJECT, *supra* note 156.

<sup>159</sup> *Id.*

<sup>160</sup> Brian Huff, *Safe Schools, Fair Schools: A Community Dialogue About School Suspensions in North Carolina*, N.C. PARTNERSHIP FOR EDUC. OPPORTUNITY (2010), available at <http://ncpeo.org/wp-content/uploads/2010/11/Judge-Huff-North-Carolina-Nov-2010.ppt>.

<sup>161</sup> See Rebecca Berfanger, *Indiana Juvenile Justice Bill First in the Nation*, IND. BUS. J., Mar. 31, 2010, available at <http://trinity.ibj.com/Repository/ml.asp?Ref=SUwvMjAxMC8wMy8zMSNBcjAwNDEx> (describing Teske's presentation at the bar conference and the judge's relationship with the state legislators' creation of H.B. 1193); 2010 Ind. Legis. Serv. P.L. 74-2010 (West) (enacting H.B. 1193).

<sup>162</sup> 2010 Ind. Legis. Serv. P.L. 74-2010, sec. 1 § 3(22) (West).

institute and the state law enforcement academy; juvenile court judges; school police officers; students; school teachers; principals; parents; and law and college professors.<sup>163</sup> The youth work group will study alternatives to arrest and referral to juvenile court for school misbehavior, and recommend corresponding legislation.<sup>164</sup>

#### IV. LOOKING TO THE COURTS: TICKETING AS AN EIGHTH AMENDMENT VIOLATION

Part II defined Texas's ticketing problem, noting that school police continue to ticket students for low-level misdemeanors, though severe criminal consequences accompany each ticket. Part III reviewed similar practices in other states, noting that Texas is the only state to refer all misbehaving students to criminal court. Taken together, it is likely that in punishing low-level student offenses with such uniquely severe criminal penalties, Texas is in violation of the Eighth Amendment.

##### A. The Law: Proportional Crime and Punishment

The Supreme Court has previously considered whether school disciplinary methods violate students' Eighth Amendment rights. For example, in the 1970s, the Court decided that corporal punishment in schools was not unconstitutional under the Eighth Amendment.<sup>165</sup> Today, Texas schools use a much more serious form of discipline: ticketing and exposure to the criminal justice system. It is possible that if students and parents sued Texas and its school districts, a federal court would find that ticketing is so disproportionate a punishment for low-level school misbehaviors that it constitutes an Eighth Amendment violation.

The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>166</sup> The Cruel and Unusual Clause applies to the states through the Fourteenth Amendment.<sup>167</sup> The Cruel and Unusual Clause not only prohibits inhumane punishment; it also prohibits

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<sup>163</sup> *Id.* at sec. 2, § 3.

<sup>164</sup> IND. CODE ANN. § 5-2-6.9-10(a)(5) (West Supp. 2011).

<sup>165</sup> *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). *See also* Elizabeth E. Hall, *Criminalizing Our Youth: The School-to-Prison Pipeline v. the Constitution*, 4 S. REGIONAL BLACK L. STUDENTS ASS'N L.J. 75, 87-88 (2010) (discussing *Ingraham* in the context of whether school-to-prison pipeline practices violate the Eighth Amendment).

<sup>166</sup> U.S. CONST. amend. VIII.

<sup>167</sup> *Robinson v. California*, 370 U.S. 660, 667 (1962).



“sentences that are disproportionate to the crime committed.”<sup>168</sup> Courts reviewing sentences for proportionality to the antecedent crime are guided by objective factors, including (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions.<sup>169</sup>

For example, in *Solem v. Helm*, South Dakota convicted the defendant, Helm, of writing a “no account” check for \$100. Because he had been previously convicted of six other nonviolent felonies, Helm’s sentence was enhanced to life imprisonment without parole.<sup>170</sup> Using the three-factor analysis, the Court decided that the sentence was significantly out of proportion with the crime. Thus, the sentence violated the Cruel and Unusual Clause.<sup>171</sup> First, in comparing the gravity of the offense with the harshness of the penalty, the Court noted that in contrast to the harsh sentence, Helm’s check fraud was “passive . . . involv[ing] neither violence nor threat of violence to any person.” All of Helm’s prior crimes were also “minor.”<sup>172</sup> Second, in considering other sentences in the same jurisdiction, the Court noted that the other crimes that warrant life imprisonment in South Dakota were more serious than check fraud. These other crimes included murder, treason, manslaughter, and kidnapping.<sup>173</sup> Third, in comparing sentences imposed by other jurisdictions, the Court noted that Helm could have received life imprisonment for check fraud in only one other state besides South Dakota. Helm’s sentence was more severe than it would have been in 48 out of the 50 states. The sentence was significantly, and therefore unconstitutionally, disproportionate to the crime.<sup>174</sup>

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<sup>168</sup> *Solem v. Helm*, 463 U.S. 277, 284 (1983).

<sup>169</sup> *Id.* at 292. In 1991, the Supreme Court revisited the question of whether there is a proportionality principle inherent in the cruel and unusual clause. *Harmelin v. Michigan*, 501 U.S. 957 (1991). The only part of the opinion to attain a majority was the narrow holding, written by Justice Scalia, that petitioner’s sentence (life with the possibility of parole) was not cruel and unusual. *Id.* at 996. The remainder of Justice Scalia’s opinion, which was joined by Chief Justice Rehnquist, argued that the cruel and unusual clause does not contain a proportionality requirement except in death penalty cases, that *Solem*’s three factor analysis fails, and that *Solem* itself should be overturned. *Id.* at 965, 985-90, 994. However, in four separate opinions, the other seven justices upheld the proportionality requirement, *Solem*, and the three-factor analysis. (Specifically, Justice Kennedy’s concurrence argued in favor of a narrow proportionality principle, and suggested that the *Solem* factors are helpful but not mandatory. *Id.* at 997, 1004-05. Justice White’s dissent argued that there is no doubt the Eighth Amendment embodies a proportionality requirement, and that the *Solem* three-factor analysis “work[s] well” and should not be abandoned. *Id.* at 1012, 1015-16. Both Justice Marshall’s dissent and Justice Steven’s dissent agreed with Justice White’s take on proportionality and *Solem*. *Id.* at 1027-28.) Therefore, despite Justice Scalia’s opinion to the contrary, the existence of a proportionality requirement, and *Solem*’s three-factor analysis for determining whether this requirement is met, remain good law.

<sup>170</sup> *Solem*, 463 U.S. at 281.

<sup>171</sup> *Id.* at 303.

<sup>172</sup> *Solem*, 463 U.S. at 296-97.

<sup>173</sup> *Id.* at 298.

<sup>174</sup> *Id.* at 299-300.

## **B. Application of Eighth Amendment Law to Texas and Its Ticketing Practice**

Similar to life imprisonment for writing a “no account” check, ticketing for low-level school misbehavior represents disproportionate crime and punishment. A court using the *Solem* three-factor analysis is likely to conclude that ticketing is significantly disproportionate to school misbehavior, in violation of the Cruel and Unusual Clause of the Eighth Amendment.

First, a court will look to the gravity of the school offense and the harshness of the ticketing penalty. As previously discussed, tickets are often issued for low-level offenses, such as scuffles between students; yelling out answers in class; and using profanity. Only 1% of tickets issued during 2006–2007 were for violent or weapons offenses. Like Helm’s offense, these school misbehaviors are nonviolent and minor. Yet the ticketing punishment carries severe criminal consequences. Ticketed students must appear in municipal or justice courts, which are criminal courts. The students are not entitled to court-appointed attorneys, diversion, or treatment for underlying issues, as they would be if appearing in juvenile court. Instead, students receive high fines and will have criminal records. Students who fail to pay fines, or fail to appear in court, may be arrested after they turn seventeen. Just as imprisonment is significantly disproportionate to a nonviolent check fraud offense, these criminal consequences are significantly disproportionate to simple school misbehaviors.

Second, a court will compare the sentences imposed on other criminals in the same jurisdiction. Just as the other South Dakota crimes resulting in life imprisonment were more serious than Helm’s check fraud, the other Texas Class C misdemeanors resulting in the same criminal consequences are more serious than school misbehavior. Other Class C misdemeanors for which offenders must appear in municipal and justice courts and will receive fines include: criminal mischief (the destruction of another’s property),<sup>175</sup> theft,<sup>176</sup> public intoxication,<sup>177</sup> and leaving a child in a vehicle.<sup>178</sup> These offenses all involve actual or possible harm to a person or property—yet an adult committing these offenses receives the same sentence as a child ticketed for chewing gum or throwing paper airplanes in school.

Third, a court will compare the sentences imposed for commission of the same crime in other jurisdictions. Though misbehaving Texas students receive tickets and criminal consequences, similarly

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<sup>175</sup> TEX. PENAL CODE ANN. § 28.03(b)(1) (West 2011).

<sup>176</sup> *Id.* § 31.03 (e)(1) (West 2011 & Supp. 2011).

<sup>177</sup> *Id.* § 49.02(c) (West 2011).

<sup>178</sup> *Id.* § 22.10(b) (West 2011).

misbehaving students in other states are generally referred to juvenile court instead. Only in one other state, Colorado, does school misbehavior land some students in criminal court, and even in Colorado, the majority of ticketed students appear in juvenile court. In *Solem*, the Court was convinced of disproportionality because Helm's crime would warrant less severe punishment in 48 other states. Similarly, misbehaving students are punished less severely in the 48 states that refer to juvenile rather than criminal court.

Overall, though the school misbehavior is generally nonviolent and low-level, it warrants criminal consequences, such as court appearances, criminal records, and fines. Though similar criminal punishment is generally reserved for offenders committing theft, public intoxication, etc., misbehaving students suffer the same treatment. And while 48 other states do not impose criminal consequences for school misbehavior, in Texas, tickets and criminal consequences are routinely administered for school misbehavior. Taken together, the three factors indicate that ticketing is a severely disproportionate punishment to school misbehavior. Therefore, Texas's method of ticketing for school misbehavior likely violates the Eighth Amendment's ban on cruel and unusual punishment.

## **V. LOOKING FORWARD: PROPOSED SOLUTIONS FOR TEXAS LEGISLATORS, COURTS, AND SCHOOL DISTRICTS**

Texans should be motivated to reduce the number of tickets issued in schools for low-level misbehavior for at least three reasons. First, to protect Texas students: the increasing use of tickets to address student misbehavior sends increasing numbers of students—particularly students from certain school districts and minority students—to criminal court, where the students face fines, criminal records, and the possibility of later arrest. Second, to assist Texas criminal courts: municipal and justice courts are increasingly bearing the burden of hearing and resolving low-level, school-related issues. Third, to protect Texas school districts and the state from federal lawsuits: criminal punishment is so out of proportion with low-level student misbehavior that Texas is vulnerable to an Eighth Amendment suit unless it takes substantial steps to reduce ticketing.

Texas legislators, judges, and schools wishing to reduce ticketing can begin with the proposals outlined here.

### A. Recommendations for Texas Legislators

**Task Force:** Establish a “ticketing task force” that consists of representatives from the Texas Education Agency, state legislators, municipal and justice court judges, juvenile court judges, school police force chiefs, SROs, students, parents, school teachers and administrators, and child advocates from groups like Texas Appleseed and the Children’s Defense Fund. The task force should study how ticketing and the criminal consequences impact students and courts, and should report back to the legislature and the governor with recommended legislative solutions.

**Data Collection:** Require each school district to report to the Texas Education Agency the number of tickets issued, including offense and race information, each year. Require schools that disproportionately ticket minorities to develop and implement a remediation plan.

**Eliminating Criminal Consequences:** Transfer jurisdiction of ticketing cases back to juvenile court. Provide corresponding staffing and funding increases for the juvenile court system, perhaps by redirecting the funding municipal and justice courts currently receive for handling ticketing cases.

**Reducing the Possibility for Discretion:** Eliminate ticketing for disorderly conduct and disruption of class.

**Training for Police:** Require police officers who will be assigned to schools to dedicate some of their existing training hours to school-related training on child development, de-escalation techniques effective with students, and special education issues.

**Training for Teachers:** Require training for teachers and administrators about the severe criminal consequences of ticketing. Require training in Positive Behavioral Interventions and Supports (PBIS) or other classroom management techniques, emphasizing that sending a student to a school officer is a last resort.

**School Choice:** Increase support of Texas charter schools by increasing funding and/or lifting the statutory cap on the number of charters that can exist in the state. Charter schools are not permitted by state law to employ school officers and therefore do not have ticketing problems.<sup>179</sup>

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<sup>179</sup> See TEX. EDUC. CODE ANN. § 37.081(a) (West 2006). The provision authorizes “any school district” to employ SROs or commission their own police forces. Generally, in the Education Code, “school district” refers to traditional public school districts only, while “public school” refers to all public schools, including both traditional public school districts and charter schools.

## **B. Recommendations for Texas Municipal and Justice Judges**

***Take the Lead:*** Take leadership roles in advocating for changes to the state's ticketing practice. Consider Teske's words:

[M]any judges remain uncomfortable stepping into a role off the bench . . . . Notwithstanding . . . there is something to be said about the moral implications of participating in a system that threatens the well-being of children . . . . [I]t makes sense for judges to take the lead in bringing about local system change . . . . The judge is in a strategic position to bring stakeholders together when others cannot. The role of the judge in system reform is simple – ask and they will come.<sup>180</sup>

***Graduated Sanctions:*** Bring together local child advocacy groups, the local school district, and its police force or SROs. Look to the Clayton County model and establish a similar cooperative agreement mandating graduated sanctions, whereby tickets may be issued only on or after the third offense. The agreement must be adapted for use in criminal (rather than juvenile) court. One possible adaptation: If the criminal court caseload is simply too great for the judge himself to lead such a cooperative, the judge could appoint a staff member to act on his behalf.

## **C. Recommendations for Texas School Districts**

***Data Collection:*** Maintain a database of all tickets issued, which can be disaggregated by offense and race. Monitor the database to see whether minority students are disproportionately ticketed and to decide whether and when ticketing is effective.

***Police as Mentors:*** In the written agreement to employ SROs or commission a police force, delineate officers' primary roles as mentors and teachers, with traditional law enforcement being secondary.

***Reducing the Possibility for Discretion:*** In the student behavior code, specify exactly which kinds of offenses are ticketable.

***Restorative Justice Project:*** Emulate Denver's Restorative Justice Project by appointing school restorative justice coordinators to meet with misbehaving students and establish reparations agreements. Teachers and administrators will refer students to the coordinator instead of referring to school police.

***Graduated Sanctions:*** Develop a graduated sanctions model,

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<sup>180</sup> Teske, *supra* note 155, at 3–4.

whereby students can only receive a ticket after the third consecutive offense.

***Teacher Training:*** Devote some existing staff training time to informing teachers and administrators about the criminal consequences faced by ticketed students. Emphasize that sending students to officers to be ticketed should be a last resort.

***Police Training:*** Establish training for school-based police officers in school culture, special education issues, and working with students.

Until legislators, judges, and school districts act to address the problem, Texas's practice of ticketing for low-level school misbehaviors will continue to victimize students and courts, and place school districts at risk of lawsuits.