

Rethinking Family-Court Prosecutors: Elected and Agency Prosecutors and Prosecutorial Discretion in Juvenile Delinquency and Child Protection Cases

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Like criminal prosecutors, family-court prosecutors have immense power. Determining which cases to prosecute and which to divert or dismiss goes to the heart of the delinquency system's balance between punishment and rehabilitation of children and the child protection system's spectrum of family interventions. For instance, the 1990s shift to prosecute (rather than dismiss or divert) about 10 percent more delinquency cases annually is as significant a development as any other. Yet scholars have not examined the legal structures for these charging decisions or family-court prosecutors' authority in much depth.

This Article shows how family-court prosecutors' roles have never been fully theorized. Family courts historically avoided prosecutors (or lawyers of any kind). When children's and parents' lawyers appeared in the 1960s to 1970s, family-court prosecutors soon followed, but without any consensus about how they should make charging decisions or how their authority intersects with agencies or intake officers. This Article provides the first detailed description and critique of the varying state laws governing family-court prosecutors.

This Article argues that family-court prosecutors should work for and represent juvenile justice or child protection agencies, which should have authority to determine which cases to file. Agencies are best suited to balance the competing interests at stake in family-court cases and to choose specific cases on which to focus their limited resources. Agency control over intake could reduce delinquency prosecutions for relatively low-level offenses, which have particularly large racial disparities. Finally, an agency model should lead to limited judicial review of decisions to prosecute cases—a long-elusive goal in scholarship regarding criminal prosecutors.

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INTRODUCTION

The law and the academy have long recognized criminal prosecutors' immense power, especially the power to determine which cases to prosecute and which not to. Less attention has been focused on related issues in juvenile delinquency and child protection cases litigated in state family courts.¹ There, determining which cases to prosecute and which to divert² or dismiss goes to the heart of the delinquency system's overall balance between punishment and rehabilitation of children, and the child protection system's spectrum of interventions in families.

Family-court prosecutors are lawyers who prosecute delinquency and civil child protection³ cases on behalf of the state in family court. They are worthy of special study because they should operate differently than criminal prosecutors, especially when it comes to their exercise of prosecutorial discretion, and because these differences have tremendous policy implications for

¹ Different states apply different names to the courts that handle juvenile delinquency and civil child protection cases. For ease of reference, I refer to these as family courts unless referring to a source that uses a different term.

² "Diversion" refers to the handling of a case outside of a formal court proceeding. In juvenile delinquency cases, children are typically referred for some kinds of services and are not prosecuted if they comply with the recommended services. In child protection cases, child protection agencies supervise a family and refer family members for services.

³ The term "prosecutor" has been long used in juvenile delinquency cases, but less so in child protection cases, though it is apt in both contexts. As Professor Douglas J. Besharov explained regarding child protection cases (in language equally applicable to delinquency cases):

While the rehabilitative orientation of child protection proceedings should be preserved, it is a mistake to ignore, or deny, the essentially prosecutorial function of the attorneys who assist petitioners. First, the preparation and presentation of child abuse and child neglect cases often require hard nosed prosecutorial methods. Field investigations, in cooperation with the police as well as the child protection agency, may be needed. Recalcitrant witnesses may have to be identified and pressured into telling what they know. Opposing witnesses may have to be cross-examined effectively. . . . Second, the benign purposes of child protective proceedings should not obscure the fact that they may result in a major intrusion into family life. . . . [Such a proceeding] "by its very nature resembles a criminal prosecution. The defendant is charged with conduct—failure to care properly for her children—which may be criminal and which in any event is viewed as reprehensible and morally wrong by a majority of society."

Douglas J. Besharov, *The "Civil" Prosecution of Child Abuse and Neglect*, 6 Vt L Rev 403, 408–09 (1981), quoting *Meltzer v C. Buck LeCraw & Co*, 402 US 954, 959 (1971) (Black dissenting from denial of certiorari).

the juvenile justice and child protection systems. These systems balance protection of individuals and accountability for offenders with an overriding focus on rehabilitation of offenders—so children who have committed crimes do not reoffend and so adults who have abused or neglected their children can safely maintain or regain custody over them. In family court, the state should file and prosecute a case only when *both* (1) the facts necessary to support family-court jurisdiction exist (that a child has committed a delinquent act or that a parent or custodian has abused or neglected a child) *and* (2) family-court jurisdiction—rather than a less coercive intervention—is necessary to achieve the protective or rehabilitative goals. Charging decisions in delinquency and child protection cases thus differ from criminal cases, in which retributive and deterrence goals predominate and rehabilitation is not a large factor.

Reflecting these different goals, both juvenile justice and child protection law have assigned important roles to administrative agencies that do not have an analog in criminal law. These agencies provide for rehabilitative services and supervise children and families. They often manage a spectrum of services—from those offered to children and intact families in diversion programs to custodial placements for children ordered into foster care or secure juvenile facilities.

These different goals and the administrative agencies created to further them lead to structural questions that have been largely ignored in the academic literature. Should family-court prosecutors work for elected prosecutors, for those administrative agencies, or for some other entity? Should the prosecutors or the agencies have authority to make charging decisions—known in family-court parlance as intake? States have reached divergent conclusions on these questions. Some state child protection agencies determine which cases to file and have their agency attorneys prosecute those cases (eight states), some agencies decide which cases to file but are represented by lawyers from local prosecutors' offices or other executive-branch agencies (twenty-five states), and some child protection agencies must instead work with other executive-branch attorneys who represent "the state" or "the people" more broadly and hold the final authority over which cases

to file (eleven states and the District of Columbia).⁴ Juvenile delinquency prosecutors more consistently (though still with exceptions) have formal authority over which cases to file. But states vary in the balance of power between juvenile prosecutors and departments of juvenile justice or probation that employ intake officers to evaluate possible delinquency cases; some states give prosecutors complete control (thirteen states), some require intake officers to make recommendations to prosecutors (nine states), some authorize intake officers to divert cases subject to prosecutors' review (eight states and the District of Columbia), and others authorize intake officers to divert cases regardless of prosecutors' views.⁵

This variability results from a history unique to family courts, which originally provided lawyers to neither the state nor respondent children and parents.⁶ State laws empowered private individuals to file petitions alleging that a child was delinquent, abused, or neglected.⁷ Court-employed intake or probation officers would determine which cases would be diverted and which would be prosecuted.

The regular use of family-court prosecutors developed with the growth of the administrative state and the Supreme Court's decision in *In re Gault*,⁸ which granted juvenile delinquency defendants the right to counsel.⁹ Child protection agencies took on a larger role in intake decisions, determining in many states which cases they believed did not require court intervention. In delinquency cases, family-court prosecutors were initially envisioned as carrying out the original vision of juvenile justice, filing cases only when the facts and the child's circumstances suggested doing so would further the court's rehabilitative purposes. But

⁴ See Part III.B. As described in Part III.B, two states authorize both agencies and elected prosecutors' offices to initiate cases, and three states assign important roles to court intake officers.

⁵ See Part III.A. As described in Part III.A, one state gives authority to both prosecutors and intake officers to divert cases, and two states are outliers.

⁶ Some states permitted family courts to "request" an appearance by the district attorney—language implying the unusual nature of such appearances. See, for example, HB 153 § 63, 1959 Or Laws 719, 739, codified at Or Rev Stat § 8.685(1). Some of these statutes were later expanded to give prosecutors an "entitle[ment]" to appear. See, for example, HB 3449 § 4, 1991 Or Laws 1279, 1280, codified at Or Rev Stat § 8.685(3).

⁷ State laws used various terms, including "dependent" children. For ease of reference, I use "delinquent" to refer to children alleged to have committed acts that would be crimes if done by an adult, and "abuse and neglect" to refer to acts done by parents or custodians in violation of states' civil child protection laws.

⁸ 387 US 1 (1967).

⁹ *Id.* at 41.

when juvenile crime rates increased and states responded with various tough-on-crime reforms, prosecutors took a more punitive approach. This shift, as much as any other reform, shaped the more punitive modern juvenile justice system, increasing the proportion of cases prosecuted rather than diverted or dismissed—an increase that remains to this day.

This Article argues that family-court prosecutors should be attorneys employed by and representing comprehensive juvenile justice or child protection agencies. This structure would empower agencies, counseled by their lawyers, to determine which cases to file. Agencies are best suited to balance the competing interests at stake in family-court cases, especially compared to elected prosecutors, who are more likely to overemphasize punitive responses to juvenile crime and child abuse and neglect. Nonlawyer agency staff are trained in child development and family dynamics and are better positioned than lawyers to distinguish the children and families who need court intervention from those who could benefit from other interventions. Comprehensive agencies are also best situated to understand the various resources available for children and families and how those resources are best deployed.

In juvenile justice, agency control over intake could reduce family-court prosecutions for relatively low-level offenses, especially those arising at school. Such cases form an important part of the school-to-prison pipeline and have particularly large racial disparities. Through a better understanding of adolescent development and available interventions short of family-court prosecutions, a better balancing of punitive and rehabilitative goals, and a desire to focus limited agency resources on more severe offenders, comprehensive juvenile justice agencies are more likely than elected prosecutors to conclude that the juvenile justice system's goals are better served through greater use of diversion.¹⁰

An agency model lends itself to limited judicial review of decisions to prosecute individual cases. The absence of meaningful judicial review is a central challenge to reforming the power of criminal prosecutors—and there is no easy answer to that challenge. But if child protection and juvenile justice agencies are

¹⁰ That shift could also have upstream effects on arrest patterns and family-court referrals. See Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 Cornell L Rev 383, 430 (2013).

charged with exercising prosecutorial discretion, they ought to establish standards to do so consistent with their rehabilitative statutory purposes, and failure to follow such standards should lead a court to dismiss the resulting petition. Such modest judicial checks can ensure that charging decisions at least consider family courts' rehabilitative purposes while still generally deferring to executive-branch charging discretion. That result would help guard against the phenomenon of child protection agencies removing too many children as a way to overcompensate in response to a child's death.¹¹ It would also bring some standards that predate *Gault*—the family court's authority in some states to dismiss a case “for social reasons”¹²—into a more modern administrative-law framework.

This Article proceeds as follows. Part I summarizes the relevant academic literature regarding prosecutorial discretion in family court, the role of criminal prosecutors, and the role of lawyers for government agencies. Part II explores the history of family-court prosecutors and intake decisions, from the origins of the family court through *Gault* and the post-*Gault* evolution of family-court prosecutors, and identifies the absence of consistent theoretical underpinnings of that role. Part III surveys current law and identifies significant variations across jurisdictions, regarding both who employs family-court prosecutors and their power as compared with juvenile justice and child protection agencies. Part IV argues why family-court prosecutors should represent and be employed by agencies rather than prosecutors' offices, explores how an agency model can lead to judicial review of charging decisions, and addresses concerns that may be raised about an agency model.

I. FAMILY-COURT PROSECUTORS AND PROSECUTORIAL DISCRETION

Family-court prosecutors have received remarkably little examination, from the emergence of such prosecutors in the years after *Gault* (a period discussed in detail in Part II) to the variety

¹¹ See, for example, Martin Guggenheim, Book Review, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 Harv L Rev 1716, 1725–26 (2000). See also Jill Lepore, *Baby Doe: A Political History of Tragedy* (New Yorker, Feb 1, 2016), online at <http://www.newyorker.com/magazine/2016/02/01/baby-doe> (visited Dec 15, 2017) (Perma archive unavailable) (describing the “policy pendulum” that swings between family preservation and removal, especially after child deaths).

¹² See text accompanying note 365.

of current statutory structures defining these prosecutors' role (detailed in Part III). This Part explains the topic's importance and places it in a broader context. While there has been little study of family-court prosecutors, there is a significant literature about the specific importance of family-court intake decisions, and more generally about how the government chooses when and how to file litigation.

A. Prosecutorial Discretion in Family Court

Determining which delinquency and child protection cases to prosecute, and which to handle through a variety of other means, is an essential feature of both our delinquency and child protection systems, and is arguably the "most critical stage."¹³ That decision determines which children can be removed from their families and placed in state custody. This Section establishes the tremendous importance of those decisions, known in family-court jargon as "intake."

1. Juvenile delinquency intake decisions.

The juvenile delinquency system has long featured intake decisions intended to review all cases to determine both their legal sufficiency and whether prosecution would serve the juvenile justice system's rehabilitative goals.¹⁴ The decision when to use diversion programs and when to prosecute children has been an essential feature of the juvenile justice system since diversion programs were established soon after its inception.¹⁵ Prosecution, of course, requires a trial or plea, and an adjudication requires a judge to determine that evidence beyond a reasonable doubt proves the child's guilt.¹⁶ Only such a finding can justify committing a child to a juvenile justice agency, requiring a child to comply with probation conditions, or imposing the various collateral

¹³ *Matter of Reis*, 7 Crim L Rptr (BNA) 2151, 2152 (RI Fam 1970). Family-court prosecutors make a range of other crucial decisions. In juvenile delinquency cases, these include whether to seek to detain children pretrial, what specific charges to file, whether to seek waiver of more serious charges, and which dispositions to recommend. In child protection cases, these include whether to seek pretrial removal or foster care of a child, what specific forms of abuse or neglect to allege, and which dispositions to recommend. I focus on the charging decision both for simplicity and for its decisive importance.

¹⁴ See, for example, Wallace Waalkes, *Juvenile Court Intake—a Unique and Valuable Tool*, 10 Crime & Delinq 117, 119–20 (1964), cited in William H. Sheridan, *Standards for Juvenile and Family Courts* 53 (Children's Bureau 1966).

¹⁵ See text accompanying notes 84–90.

¹⁶ See *In re Winship*, 397 US 358, 367–68 (1970).

consequences of a juvenile conviction on a child.¹⁷ Diversion programs, in contrast, provide some kind of intervention short of court action.¹⁸ There is thus no trial, no conviction, no risk of detention, less stigma imposed, and none of the collateral consequences that flow from a conviction, and diversion therefore generally “is considered more desirable for youth.”¹⁹ It is a less expensive intervention than prosecution, and thus also provides benefits to the state.²⁰

Choosing diversion rather than prosecution is a central feature of the juvenile justice system. Nationally, in 2013, authorities prosecuted a slight majority—55 percent—of all delinquency cases referred to family court.²¹ Authorities referred children to some kind of diversion program for 27 percent of cases, while 18 percent were dismissed.²² During the 1990s, when a variety of tough-on-crime reforms occurred, the proportion of prosecutions spiked about 10 percent and then leveled off at its current rate.²³ But scholars have not closely examined how evolving family-court intake decisionmaking structures—especially the increasing authority of prosecutors—have shaped this trend.²⁴

The decision whether to divert a case also has long-term importance to achieving the juvenile delinquency system’s goal of

¹⁷ For a list of common collateral consequences, see South Carolina Commission on Indigent Defense, *The South Carolina Juvenile Collateral Consequences Checklist* *2–3 (Aug 2013), archived at <http://perma.cc/6WLL-DHRE>.

¹⁸ The precise definition of “diversion” remains contested. Professor Daniel P. Mears, for instance, offers four possible definitions. See Daniel P. Mears, *The Front End of Juvenile Court: Intake and Informal versus Formal Processing*, in Donna M. Bishop and Barry C. Feld, eds, *The Oxford Handbook of Juvenile Crime and Juvenile Justice* 573, 594 (Oxford 2011). I use the term consistent with Mears’s third definition, as “any effort aimed at ensuring that less serious cases are turned away from the juvenile justice system to receive services or treatment from some other agency or organization,” which Mears described as “provid[ing] the clearest foothold for describing” diversion. *Id.*

¹⁹ US Department of Justice, Civil Rights Division, *Investigation of the St. Louis County Family Court* *44 (July 31, 2015), archived at <http://perma.cc/QY68-N733>. But see Tamar R. Birckhead, *Closing the Widening Net: The Rights of Juveniles at Intake*, 46 Tex Tech L Rev 157, 163–64 (2013) (listing critiques of diversion).

²⁰ See Birckhead, 46 Tex Tech L Rev at 163 (cited in note 19).

²¹ US Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Delinquency Cases in Juvenile Court, 2013* *3–4 (Oct 2015), archived at <http://perma.cc/C9GX-44GY>.

²² See *id.*

²³ See text accompanying notes 187–91.

²⁴ See Mears, *The Front End of Juvenile Court* at 576 (cited in note 18) (“[F]ew studies have examined whether greater prosecutorial involvement at intake changes how youth are processed.”).

rehabilitating youth and reducing future crime. Although the evidence does not make a definitive case, the National Research Council concluded in 2015 that there is “a small, and somewhat inconsistent, negative effect [on recidivism] from juvenile justice system processing compared with diversion at the point of initial referral.”²⁵ That is, prosecuting rather than diverting a child may lead to increased recidivism over time. A more recent study found that decisions to prosecute children for their first offense are “associated with higher levels of re-offending, particularly for less serious first offenses.”²⁶ Decisions to prosecute children may also impose other significant harms. Professor Gary Sweeten found that “first-time official intervention during high school, *particularly court appearance*, increases the odds of high school dropout by at least a factor of three.”²⁷

Juvenile delinquency intake decisions exacerbate racial disparities in the juvenile justice system. Nationally, black children are more than 2.4 times as likely as white children to be referred to family court.²⁸ That high rate of disproportionality makes arrest and referral “the decision that is most significant to the total level of disproportionality.”²⁹ Racial disparities are particularly evident in lower-level offenses—which are more likely to be on the margins of decisions to prosecute. Professor Kristin Henning has

²⁵ Richard J. Bonnie, et al, eds, *Reforming Juvenile Justice: A Developmental Approach* 150 (National Academies 2013).

²⁶ David E. Barrett and Antonis Katsiyannis, *The Clemson Juvenile Delinquency Project: Major Findings from a Multi-agency Study*, 26 J Child & Fam Stud 2050, 2051 (2017). The study found one exception to this finding: youth who were “diagnosed with an aggression-related mental disorder.” Id at 2051–52.

²⁷ Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 Just Q 462, 463, 474 (2006) (emphasis added). Sweeten found that an arrest—even without a court appearance—reduces the likelihood of high school graduation, and an arrest followed by a decision to prosecute reduces that likelihood significantly more. “Put another way, first-time arrest during high school nearly doubles the odds of high school dropout, while a court appearance nearly quadruples the odds of dropout.” Id at 473. See also id at 463, 466 (noting earlier research reaching similar conclusions).

²⁸ A 2015 DOJ investigation reported that black children nationally are 2.4 times as likely to be referred to family court. *Investigation of the St. Louis County Family Court* at *39–40 (cited in note 19). This racial gap is even larger in some urban areas—black children are 4.8 times as likely to be referred to family court than white children in counties deemed to be peers of St. Louis County (based on population size, poverty levels, population density, and other factors). Id.

²⁹ Sarah E. Redfield and Jason P. Nance, *School-to-Prison Pipeline Preliminary Report* *43 (ABA, Feb 2016), archived at <http://perma.cc/K8WF-PFEA>. Professors Sarah E. Redfield and Jason P. Nance add that the relative arrest rate by race has remained fairly stable since 1990. Id at *44.

shown how children of color are particularly vulnerable to prosecution for low-level offenses.³⁰ South Carolina statistics for one such offense illustrate the point. Black children account for 33 percent of all South Carolina children³¹ but nearly 60 percent of all children referred to South Carolina family court in delinquency cases.³² The disparities are even more stark for the misdemeanor charge of disturbing schools—the crime of “interfer[ing] with or [] disturb[ing] in any way or in any place the students or teachers of any school”³³—which consistently ranks among the top two or three most frequent family-court referrals;³⁴ 76 percent of all children referred to South Carolina family court between 2006 and 2009 (the most recent years for which public data are available) were black.³⁵ Other research has demonstrated that these stark disparities cannot be explained by different school behaviors by different groups,³⁶ nor can disparities throughout the system be explained by different patterns of offending by children of different races.³⁷ Although racial disparities are nothing new, some evidence suggests they have grown larger as prosecutors have diverted a smaller proportion of cases. Between 1980 and 2000—during which prosecution became more common than diversion—the likelihood of facing an arrest and charge rose by a particularly large amount for black boys.³⁸

³⁰ See generally Henning, 98 Cornell L Rev 383 (cited in note 10). National data for arrests and court referrals often do not track Latino children separately. Racial disparities, especially in detention and waiver decisions, have been well documented for Latino and American Indian children. See, for example, id at 409–10.

³¹ *Children under 18 Years of Age by Race/Ethnicity* (KidsCount Data Center), archived at <http://perma.cc/ER39-8TM8>.

³² In 2014–2015, the figure was 59 percent. South Carolina Department of Juvenile Justice, *2015 County Datasheets*, archived at <http://perma.cc/VA69-FH34>.

³³ SC Code Ann § 16-17-420(A)–(B).

³⁴ For instance, in 2014–2015, disturbing schools was the second most frequent charge referred to family court, accounting for 1,222 cases. See South Carolina Department of Juvenile Justice, *2014–2015 Annual Statistical Report* *13–14 (2015), archived at <http://perma.cc/BA8Q-MBGK>.

³⁵ South Carolina Department of Juvenile Justice, *Disturbing Schools Data: FY 2008–2009*, online at http://www.state.sc.us/djj/2010%20disturbing%20schools%20presentation_files/frame.htm (visited Dec 15, 2017) (Perma archive unavailable) (Slide 3).

³⁶ See Redfield and Nance, *School-to-Prison Pipeline Preliminary Report* at *15, 20–21 (cited in note 29).

³⁷ See Henning, 98 Cornell L Rev at 411–15 (cited in note 10).

³⁸ See Tia Stevens and Merry Morash, *Racial/Ethnic Disparities in Boys’ Probability of Arrest and Court Actions in 1980 and 2000: The Disproportionate Impact of “Getting Tough” on Crime*, 13 Youth Violence & Juv Just 77, 88 (2015).

The decision about how to handle those referrals—dismiss, divert, or prosecute—could provide an important mechanism for reducing disparities within the juvenile justice system. However, this decision *increases* racial disparities—black children are 0.7 times as likely to have their cases diverted as white children.³⁹ The US Department of Justice (DOJ) has investigated several jurisdictions for a pattern and practice of racial discrimination and found that, even controlling for variables like the specific charges and criminal history, authorities were significantly more likely to prosecute black children than white children.⁴⁰ And the DOJ has made the expansion of diversion programs⁴¹ and the assessment and remedy of racial disparities in the decision to divert or prosecute into essential pieces of proposed remedies for such discrimination.⁴² Short of federal investigations, however, academic commentators have bemoaned how race-neutral procedural rights provided to juvenile defendants “imposed no real check on the discriminatory exercise of prosecutorial discretion.”⁴³

2. Child protection intake decisions.

Child protection cases similarly feature important discretion at their early stages. Such cases typically begin with a report to a child protection agency alleging that a parent or caregiver has abused or neglected a child. Child protection agencies investigate allegations of abuse or neglect, but an agency determination that

³⁹ Redfield and Nance, *School-to-Prison Pipeline Preliminary Report* at *43 (cited in note 29). See also Donna M. Bishop and Michael J. Leiber, *Racial and Ethnic Differences in Delinquency and Justice System Responses*, in Bishop and Feld, eds, *The Oxford Handbook of Juvenile Crime and Juvenile Justice* 445, 447–51 (cited in note 18) (noting that 62 percent of black youth referred to family court are prosecuted, compared with 58 percent of nonblack youth and 53 percent of white youth). The size of that disparity decreased slightly between 1990 and 2010. National Center for Juvenile Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Offenders and Victims: 2014 National Report* *178 (Dec 2014), archived at <http://perma.cc/XA3T-U372>.

⁴⁰ See *Investigation of the St. Louis County Family Court* at *43 (cited in note 19) (finding in St. Louis County that “formal case handling [prosecution] occurs almost one-and-a-half times more often for Black youth, after introducing the control variables”). See also US Department of Justice, Civil Rights Division, *Investigation of the Shelby County Juvenile Court* *32–35 (2012), archived at <http://perma.cc/3YX2-2KJD> (finding that in Shelby County, Tennessee, which contains Memphis, “the odds of Black children receiving a warning was one third less than the odds of White child[ren] receiving a warning even after accounting for other variables”).

⁴¹ See *Investigation of the Shelby County Juvenile Court* at *63–64 (cited in note 40).

⁴² See *Investigation of the St. Louis County Family Court* at *55–56 (cited in note 19).

⁴³ Sara Sun Beale, *You’ve Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms as Seen from Jena, Louisiana*, 44 Harv CR–CL L Rev 511, 515 (2009).

maltreatment occurred only begins the analysis. Agencies can then file a case, work with families without initiating court action,⁴⁴ or do nothing at all.⁴⁵ The second option is akin to diversion in delinquency cases—officials work with a family on a technically voluntary basis, but with the threat (implied or otherwise) of filing court action if the family does not cooperate.

This type of child protection diversion happens in a large majority of cases. In fiscal year 2014, state child protection agencies deemed 702,208 children to be abuse and neglect victims.⁴⁶ But only 26 percent of children deemed victims by state child protection agencies were the subject of court action, and only 23 percent of children deemed victims were placed in foster care.⁴⁷ States provided services to 63.7 percent of children deemed victims, essentially diverting those families, and did nothing with the remainder.⁴⁸ As with juvenile delinquency, significant racial disparities exist; state child protection agencies deemed 15.3 out of every 1,000 black children to be abused or maltreated, compared to rates of 8.8 for Hispanic, 8.4 for white, and 1.7 for Asian children.⁴⁹

Expanding such diversion decisions has been a hallmark of child protection reforms in the twenty-first century, with the intention of reducing the number of children removed from families and placed in state custody. New York City's experience is illustrative. From 2002 to 2013, New York City cut its foster care population by about half,⁵⁰ a drop driven significantly by a decrease

⁴⁴ This observation is simplified. Working with a family without initiating a court case can include referring the family for some kind of service, more intensive supervision by a child protection agency, or even requesting—with an implied threat of court action if the parent refuses—that the parent agrees to a “safety plan,” which can include changing the child's physical custody.

⁴⁵ An agency may do nothing if the risk of future maltreatment is removed. If, for instance, one adult abuses a child and a parent obtains a restraining order against that adult, no further agency action is necessary to protect the child from future abuse.

⁴⁶ US Department of Health and Human Services, Children's Bureau, *Child Maltreatment 2014* *21 (2016), archived at <http://perma.cc/Q6D4-9BPE>.

⁴⁷ *Id.* at *84–85.

⁴⁸ *Id.* at *80, 83.

⁴⁹ *Id.* at *41. For a summary of recent racial disproportionality data and debates in child protection law, see generally Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 Marq L Rev 215 (2013).

⁵⁰ See Allon Yaroni, et al, *Innovations in NYC Health and Human Services Policy: Child Welfare Policy* *1 (Vera Institute of Justice 2014), archived at <http://perma.cc/VCW7-RTV8>.

in new placements in foster care.⁵¹ That drop roughly coincided with a 25 percent increase in the number of children receiving “preventive services” in their homes from 2000 to 2010.⁵² A less dramatic, but similar, trend has occurred nationally, with removals of children from their families and placement into foster care dropping approximately 13 percent from 2005 to 2014,⁵³ although removals have increased slightly in recent years,⁵⁴ perhaps in response to the opioid epidemic.⁵⁵

As the difference between New York City’s experience and the national average suggests, national statistics mask tremendous state-by-state variation in the results of child protection prosecutorial discretion. The percentage of child victims to whom jurisdictions provide services ranges from 23.3 to 100 percent.⁵⁶ The percentage for whom court cases are filed ranges from the single digits to nearly two-thirds.⁵⁷ Plainly, diversion is a prominent feature in most, if not all, state child protection systems, but states differ significantly in how they determine which cases to divert and which to prosecute.

⁵¹ New foster care placements in New York City dropped from 6,560 in 2003 to 4,179 in 2013. Compare *Foster Care Placements: Number; 2003* (Citizens’ Committee for Children), archived at <http://perma.cc/N49Z-EWNA>, with *Foster Care Placements, Number; 2013* (Citizens’ Committee for Children), archived at <http://perma.cc/HX6X-XEUP>.

⁵² Yaroni, et al, *Innovations in NYC Health and Human Services Policy* at *4 (cited in note 50).

⁵³ US Department of Health and Human Services, Children’s Bureau, *Trends in Foster Care and Adoption: FY 2005–FY 2014* *1–2 (July 9, 2015), archived at <http://perma.cc/GTT4-W39C>.

⁵⁴ Annual removals hit a low of 251,354 in fiscal year 2012, and have increased to 269,509 in FY 2015. See US Department of Health and Human Services, Children’s Bureau, *The AFCARS Report: Preliminary FY 2015 Estimates as of June 2016* *1 (June 30, 2016), archived at <http://perma.cc/M6PC-2B4H>. The most recent removal numbers remain below those of the early 2000s; for instance, 307,000 children were removed into foster care in 2005. See *Trends in Foster Care and Adoption, FY 2005–FY 2014* at *1 (cited in note 53).

⁵⁵ See Teresa Wiltz, *Drug-Addiction Epidemic Creates Crisis in Foster Care* (Pew Charitable Trusts, Oct 7, 2016), archived at <http://perma.cc/F72P-BG2M>.

⁵⁶ See *Child Maltreatment 2014* at *83 (cited in note 46) (reporting that in the District of Columbia, 23.3 percent of victims received postresponse services in 2014, while 100 percent of victims in Tennessee received postresponse services).

⁵⁷ See *id.* at *85 (reflecting that court action was initiated in 2014 in Maine for 2.9 percent of victims while 64.6 percent of Montana victims had a corresponding court action).

B. Criminal Prosecutors' Power

Academics widely view criminal prosecutors' power as an essential point of study for understanding the criminal justice system, focusing especially on prosecutors' charging discretion. Prosecutors are the "Leviathan" in our criminal justice system—effectively investigating individuals and determining their guilt and punishment by exercising their charging discretion and leveraging guilty pleas through the threat of harsh sentences for defendants who do not so plead.⁵⁸ Criminal prosecutors' power is "a glaring and dangerous exception" to normal separation-of-powers principles because they largely exercise this power without significant checks from other branches of government.⁵⁹ As a result, prosecutors' power is viewed as a contributing factor, if not a prime cause, of mass incarceration.⁶⁰ Relatedly, prosecutors' power is viewed as "a major cause of racial inequality in the criminal justice system," and reforming how prosecutors use that power may be an important tool to addressing those inequalities.⁶¹

Much less focus has been placed on family-court prosecutors. The role of juvenile delinquency prosecutors has gained some attention in studies evaluating which cases ought to be prosecuted at all⁶² and, among those cases, which ought to be waived⁶³ for criminal prosecution as adults. But the role, structure, and checks and balances on family-court prosecutors have largely escaped academic attention in both delinquency and child protection cases. In particular, there has not been significant exploration of how

⁵⁸ See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 Stan L Rev 869, 874–87 (2009). Professor Rachel E. Barkow also aptly summarizes generations of critiques of prosecutorial power and the absence of checks on it. See, for example, *id.* at 874 n 16 (collecting sources critiquing the "expansion of federal criminal law"). See also John F. Pfaff, *Locked In: The True Causes of Mass Incarceration—and How to Achieve Real Reform* 127 (Basic Books 2017) ("Few people in the criminal justice system are as powerful, or as central to prison growth, as the prosecutor."); Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor* 8 n 16 (Oxford 2007) (collecting sources critiquing prosecutorial power).

⁵⁹ Barkow, 61 Stan L Rev at 871 (cited in note 58).

⁶⁰ Pfaff, *Locked In* at 127–59 (cited in note 58).

⁶¹ See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 Fordham L Rev 13, 17–19, 50–53 (1998).

⁶² See generally, for example, Henning, 98 Cornell L Rev 383 (cited in note 10); Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 Wash & Lee L Rev 173 (2017); Mary Willis, *Utilizing Prosecutorial Discretion to Reduce the Number of Juveniles with Disabilities in the Juvenile Justice System*, 2016 BYU Educ & L J 191.

⁶³ See generally, for example, Donna M. Bishop and Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 Notre Dame J L, Ethics & Pub Pol 281 (1991).

delinquency or child protection prosecutors determine which cases to file and which to divert or dismiss, whether their power should be checked, and if so, how.

This Article thus fills a critical gap in the literature. Placing juvenile delinquency and child protection prosecutorial authority in elected prosecutors' offices has not been thoroughly examined or challenged. Nor has the role of administrative agencies in exercising family-court prosecutorial discretion been scrutinized.

This gap is particularly striking in light of literature bemoaning the absence of sufficient checks on criminal prosecutors' authority and articulating how administrative-law principles might play a helpful role. Professor Rachel Barkow has argued that some administrative-law principles regarding the internal structure of government offices can help check prosecutorial power.⁶⁴ Even that suggestion is premised on the conclusion that courts and policymakers will not impose meaningful external checks on prosecutorial power.⁶⁵ This Article argues that this pessimistic conclusion need not apply to family-court prosecutors if the law recognizes the essential role of agencies and empowers judges to review agency balancing of the competing goals of our juvenile justice and child protection system.⁶⁶

C. Agency Counsel versus Centralized Prosecutorial Control

Administrative agencies' central role in both the juvenile justice and child protection systems makes another body of literature important—scholarship exploring the role of executive-branch lawyers in exercising prosecutorial discretion in a wide range of civil and criminal areas of law. Most of this literature has focused on the federal government, addressing the DOJ's widespread (though not universal) control over federal agency litigation and analyzing the role of both agency and DOJ attorneys.⁶⁷ Scholars

⁶⁴ See Barkow, 61 Stan L Rev at 887–906 (cited in note 58).

⁶⁵ See *id.* at 908 (“[Judicial oversight] is too costly, too inefficient, and not sufficiently deferential to what are perceived to be experts in the field.”). Professor Angela J. Davis has worked from a similar premise, proposing the collection and publication of detailed data on prosecutors' decisions by race of defendants and crime victims as a means to “help prosecutors make informed decisions about the formulation of policies and establish standards to guide the exercise of discretion in specific cases.” See Davis, 67 Fordham L Rev at 19 (cited in note 61).

⁶⁶ See Part IV.C.

⁶⁷ See generally, for example, Neal Devins and Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U Pa J Const L 558 (2002); David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 Yale L J 616 (2013).

have noted that “we seem hardly to have considered” questions of how to hold government agencies accountable in determining when and how to use their enforcement authority.⁶⁸ Some recent literature has explored these themes at the state level, exploring the role of state attorneys general in high-profile cases,⁶⁹ and of state agency general counsels.⁷⁰

Both sets of literature note that most agency lawyers do not litigate on behalf of their agency clients—especially because the litigation role is taken by lawyers from DOJ or a state attorney general’s office—but that, nonetheless, many carveouts for agency litigation authority exist in both state and federal governments.⁷¹ And, relatedly, some scholarship has criticized grants of litigation authority to the DOJ and argued for shifting that authority to agencies.⁷²

I am aware of no study that has connected these themes to state family-court litigation—even though the litigation carveouts for some states’ child protection agencies account for thousands of cases annually. Moreover, no study has connected these themes to the role of local prosecutors in juvenile cases.⁷³

⁶⁸ Margaret H. Lemos, *Accountability and Independence in Public Enforcement* *3 (Duke Law School Public Law & Legal Theory Series No 2016-23, Mar 2016), archived at <http://perma.cc/8X88-JLFG>.

⁶⁹ See generally, for example, Neal Devins and Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 Yale L J 2100 (2015); Margaret H. Lemos and Kevin M. Quinn, *Litigating State Interests: Attorneys General as Amici*, 90 NYU L Rev 1229 (2015); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 Harv L Rev 486 (2012).

⁷⁰ See generally, for example, Elizabeth Chambliss and Dana Remus, *Nothing Could Be Finer?: The Role of Agency General Counsel in North and South Carolina*, 84 Fordham L Rev 2039 (2016).

⁷¹ See id at 2049 (“[S]pecialized carve-outs grant some agencies and commissions authority to litigate some types of matters on their own behalf.”); Devins and Herz, 5 U Pa J Const L at 561 (cited in note 67) (noting “approximately three-dozen” federal agency litigation carveouts that have “significantly eroded” DOJ’s control over federal litigation); Neal Devins, *Toward an Understanding of Legal Policy-Making at Independent Agencies*, in Cornell W. Clayton, ed, *Government Lawyers: The Federal Legal Bureaucracy and Presidential Politics* 181, 184–89 (Kansas 1995) (providing a primer on federal agency litigation control).

⁷² See, for example, Devins and Herz, 5 U Pa J Const L at 570–94 (cited in note 67).

⁷³ Some studies have discussed the importance of DOJ control over federal criminal prosecutions. See id at 561–62. The grounds for this centralized DOJ control differ significantly when applied to state juvenile delinquency prosecutions. See text accompanying notes 398–403.

II. HISTORY OF FAMILY-COURT PROSECUTORS: IGNORED AT THE ORIGINS, REQUIRED BY POST-*GAULT* REFORMS

At its origins, all functions of the family court—including charging discretion in both delinquency and child protection cases—rested in the court itself. The present role of family-court prosecutors evolved following the family court’s “constitutional domestication” that the Supreme Court required in *Gault*.⁷⁴ Those reforms shifted charging decisions away from the family court, but did so without a cohesive or consistent structure for the entities that took over this authority. In juvenile delinquency cases, elected prosecutors took on this essential authority without much critical consideration of whether they were best suited for the job or how their power should interact with intake officers. In child protection cases, jurisdictions split over whether state agencies or elected prosecutors should have this essential power, also without much critical consideration. In neither field did reforms lead to a consistent set of structures or, more importantly, to structures justified by delinquency and child protection law’s rehabilitative mission.

This Part traces the evolution of the modern family-court prosecutor in both child protection and juvenile delinquency cases, which involved shifts along four planes. First, the family court evolved from a relatively lawyerless system at its origins to one with lawyers representing both the state and individuals. Second, charging authority largely shifted away from court staff and to executive-branch officials. Here, child protection cases and delinquency cases followed different paths—child protection agencies obtained a relatively greater degree of control over intake decisions, while prosecutors, without agency clients, became the dominant players in delinquency cases. Neither field developed consistent structures across jurisdictions, and problematic vestiges of the original structure remain, as Part III.C documents. Third, the growth of the administrative state shaped prosecutorial discretion. Comprehensive child protection agencies became common by the 1970s, and these agencies became obvious candidates in which prosecutorial authority ought to reside. The juvenile justice administrative state was more varied; in some states, juvenile justice agencies were involved from the beginnings to the ends of cases and thus had a role in charging decisions (even if it was secondary to the role of prosecutors). In other

⁷⁴ *Gault*, 387 US at 22.

states, juvenile justice agencies' roles were limited to supervising children only after they were found guilty, with intake staff (often employed by courts) continuing to play a role at the beginning of cases.

The fourth, and perhaps most dramatic, shift is the evolution of prosecutors—at least in delinquency cases—into a tool of tough-on-crime reforms. Intake decisions were historically viewed as essential elements of family courts' rehabilitative purpose, with “judicious nonintervention” a hallmark of the system.⁷⁵ The system historically avoided prosecutors for fear they would apply a more punitive purpose, and even in the years following *Gault*, leading commentators saw prosecutors as inheritors of family courts' rehabilitative goals. Delinquency prosecutors' role shifted, however, in the 1980s and 1990s, as they used their relatively new intake authority to increase the proportion of cases prosecuted.

A. Pre-*Gault* Procedure

The problematic structure of the early family court frames the development of family-court prosecutors through the present. Intake decisions were essential to family courts from an early point in their history. Family courts, however, were wary of elected prosecutors as unlikely to follow the court's rehabilitative purpose, so court staff would decide what cases to prosecute and prosecute them. In avoiding prosecutors (and many other due process protections, including lawyers for children or parents), this system created a range of constitutional problems.

1. No prosecutors and not much due process.

From family courts' origin at the turn of the twentieth century to the Supreme Court's 1967 decision in *Gault*, family courts had developed a unique system for making charging decisions in both child protection and juvenile delinquency cases, which placed court staff in decisive roles and excluded prosecutors and other executive-branch officials.

The very early family court permitted private citizens to file petitions alleging that a child was neglected or delinquent, and held hearings regarding any child who was the subject of any citizen's complaint. The first juvenile-court statute—enacted by

⁷⁵ See text accompanying note 86.

Illinois in 1899—provided that “[a]ny reputable person, . . . having knowledge of a child in his county who appears to be either neglected, dependent or delinquent, may file . . . a petition,” which would automatically trigger a summons and a hearing.⁷⁶ The statute contained neither references to any role for prosecutors nor any procedure to screen out petitions that did not warrant prosecution. Publications from the 1920s—after nearly every state had established some kind of juvenile court—illustrate similar procedures around the country.⁷⁷ There was no role for any executive-branch entity until cases reached disposition, when the juvenile court could, as in Illinois, send neglected children to “some suitable State institution” or delinquent children to “training schools” or “industrial schools” (these various institutions would be subject to some state oversight).⁷⁸

Early family-court leaders were clear that prosecutors ought not have a role because that would threaten the court’s rehabilitative purpose. Assigning to district attorneys the responsibility of filing petitions, “of course, savors too much of a prosecution and is practised as an expedient only in small or rural communities” without family-court staff.⁷⁹ The federal Children’s Bureau opined that referring cases to local district attorneys’ offices was “[c]ontrary to generally approved practice in juvenile-court work.”⁸⁰ The best procedure, it was thought, was for members of the community, such as parents, to file juvenile charges.⁸¹ In practice, the source of court complaints varied—with police complaints dominating in some cities, and parent, school, or other referrals being a larger force in others.⁸²

⁷⁶ Illinois Juvenile Court Act of 1899 §§ 4–5, reprinted in 49 Juv & Fam Ct J 1, 2 (Fall 1998). Notably, cases involving children who were allegedly “neglected, dependent [and] delinquent” were addressed in the same statute.

⁷⁷ See, for example, Herbert H. Lou, 5 *Juvenile Courts in the United States* 99 (North Carolina 1927).

⁷⁸ See Illinois Juvenile Court Act of 1899 §§ 7, 9, 13, reprinted in 49 Juv & Fam Ct J at 2–4 (cited in note 76).

⁷⁹ Lou, 5 *Juvenile Courts in the United States* at 100 (cited in note 77). A study of ten urban court systems found only one with any prosecutorial involvement. See Katharine F. Lenroot and Emma O. Lundberg, *Juvenile Courts at Work: A Study of the Organization and Methods of Ten Courts* 39–51 (Government Printing Office 1925) (reporting that, in Los Angeles, “[c]ontrary to generally approved practice in juvenile-court work, those cases in which the juvenile bureau deemed court action necessary were reported by that bureau not to the juvenile court but to the office of the district attorney”).

⁸⁰ Lenroot and Lundberg, *Juvenile Courts at Work* at 47 (cited in note 79).

⁸¹ See id. at 51.

⁸² See id. at 40.

Relatively quickly, the number of complaints required court-employed probation or intake officers to determine which to prosecute and which to divert or dismiss. The 1899 Illinois statute charged the court with appointing juvenile probation officers who would investigate cases, “represent the interests of the child,” and otherwise “furnish to the court such information and assistance as the judge may require.”⁸³ Faced with growing delinquency dockets and recognizing that not all children subject to private individuals’ petitions needed court intervention, by the 1920s, court staff began deciding which cases could be dismissed and which prosecuted.⁸⁴

Frequent use of diversion was essential. Authorities recommended that family-court probation officers not pursue formal charges and instead seek diversion—then called informal adjustment—“whenever feasible.”⁸⁵ As a later federal commission wrote, hearing delinquency cases in a separate court from criminal cases depended on a more rehabilitative emphasis at intake: “If there is a defensible philosophy for the juvenile court it is one of judicious nonintervention.”⁸⁶ Juvenile probation or intake officers soon exercised that authority around the country, investigating complaints that a child was delinquent or neglected and determining if they would file a petition.⁸⁷ Actual practices varied substantially—both in the number of cases informally adjusted and in the procedures used for such adjustments.⁸⁸

These changes left the family-court probation officers operating as a “quasi-social welfare agency” decades before the modern

⁸³ Illinois Juvenile Court Act of 1899 § 6, reprinted in 49 Juv & Fam Ct J at 2 (cited in note 76).

⁸⁴ See H. Ted Rubin, *The Emerging Prosecutor Dominance of the Juvenile Court Intake Process*, 26 Crime & Delinq 299, 301 (1980). See also Lou, *Juvenile Courts in the United States* at 223 (cited in note 77). Lou reported on the Juvenile Court Standards adopted in 1923 by a committee appointed by the US Children’s Bureau. Id at 221.

⁸⁵ Lou, *Juvenile Courts in the United States* at 224 (cited in note 77). Legislative reforms calling for “informal adjustments” noted their “great[] significance” to improved intake decisions. Noah Weinstein, *The Juvenile Court Concept in Missouri: Its Historical Development—the Need for New Legislation*, 1957 Wash U L Q 17, 38.

⁸⁶ Edwin M. Lemert, *The Juvenile Court—Quest and Realities*, in President’s Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* 91, 96 (Government Printing Office 1967).

⁸⁷ See *The Administration of Juvenile Justice—the Juvenile Court and Related Methods of Delinquency Control*, in *Task Force Report* 1, 5 (cited in note 86).

⁸⁸ See Lenroot and Lundberg, *Juvenile Courts at Work* at 109–14 (cited in note 79). In some cities, court staff declined to file formal charges in three-quarters of complaints, while in others court staff informally adjusted only around two-fifths of complaints. Id at 111.

administrative state developed.⁸⁹ Court staff would identify individuals and families who they believed would benefit from the court's services and provide them—either by court order, if they prosecuted a case, or without one, if they diverted it. The procedure in child protection cases was contemporaneously described in agency terms: “The probation department is an agency of the court. It is thus the court’s agent who works with the family after the initial complaint. Most often, it is the court’s agent who files the neglect petition.”⁹⁰

Similarly, family-court leaders believed that emphasizing diversion in delinquency cases required keeping elected prosecutors away from family court. Family-court observers explicitly distinguished court-staff control from elected-prosecutor control in the criminal system.⁹¹ Excluding prosecutors from charging decisions remained essential to ensure charging authority rested with these officials who would promote rehabilitative goals.⁹²

The unique nature and importance of this rehabilitation-focused intake structure filtered up to the Supreme Court’s later decisions about juvenile law. Justice Byron White noted it as one ground for denying children the right to a jury trial in *McKeiver v Pennsylvania*.⁹³ In adult cases, juries serve as “a buffer to the corrupt or overzealous prosecutor.”⁹⁴ But “the distinctive intake

⁸⁹ Douglas E. Abrams, *A Very Special Place in Life: The History of Juvenile Justice in Missouri* 138 (Missouri Juvenile Justice Association 2003). See also Leslie J. Harris, *Rethinking the Relationship between Juvenile Courts and Treatment Agencies—an Administrative Law Approach*, 28 J Fam L 217, 257–58 (1989).

⁹⁰ Patrick T. Murphy, *NLADA Juvenile Court Project*, 27 Legal Aid Briefcase 224, 225–26 (1969).

⁹¹ See Margaret K. Rosenheim and Daniel L. Skoler, *The Lawyer’s Role at Intake and Detention Stages of Juvenile Court Proceedings*, 11 Crime & Delinq 167, 168–69 (1965) (“[I]ntake in the juvenile court is, for the most part, conducted by social work staff as opposed to the participation of lawyers or judicial officers in criminal cases.”). See also *The Administration of Juvenile Justice* at 15 (cited in note 87) (explaining that “[n]either defense attorney nor prosecutor regularly appears” in any intake meeting or hearing, and that during “the juvenile court intake process there is nothing comparable to the key role played by the prosecutor in criminal cases during bargaining for dismissal or lesser charges”).

⁹² For instance, 1957 Missouri legislation prevented prosecutors from initiating charges to keep a “vestige of criminal procedure” out of family court. Weinstein, 1957 Wash U L Q at 38 (cited in note 85).

⁹³ 403 US 528 (1971). The Supreme Court decided *McKeiver* four years after *Gault*, but the role of prosecutors had not yet evolved fully and White appears to have had a traditional family-court intake officer role in mind.

⁹⁴ Id at 552 (White concurring).

policies and procedures of the juvenile court system to a great extent obviate this important function of the jury.”⁹⁵

2. Structural problems.

However insightful the insistence on separating criminal prosecutors may have been from a rehabilitative process, the early family-court intake structure had severe separation-of-powers and due process problems. The officials determining which cases to prosecute were judicial-branch staff answerable to the family-court judges who would rule on their petitions.⁹⁶ In the years preceding *Gault*, various authorities criticized this structure, arguing that a “court through the use of its own staff should not be placed in the position of investigator and petitioner and also act as the tribunal deciding the validity of the allegations in the petition.”⁹⁷ Compounding these problems, the same judicial-branch officials who “made investigations and filed petitions” would attempt to “represent[] children and their interests in court,”⁹⁸ thus depriving children and parents of advocates who would subject petitions against them to adversarial testing.

⁹⁵ Id (White concurring). See also *In re Winship*, 397 US 358, 366–67 (1970) (noting “procedures distinctive to juvenile proceedings that are employed prior to the adjudicatory hearing”). A split Court decided *McKeiver*, and White’s opinion, not the plurality’s, was decisive. Core features relied on by White—including the prosecutorial dominance of intake—have changed, but the Supreme Court has not revisited *McKeiver*. State supreme courts have considered more recent arguments that children should have a jury trial right, but they have largely followed *McKeiver*. See, for example, *In re Stephen W.*, 761 SE2d 231, 232 (SC 2014). But see *In re L.M.*, 186 P3d 164, 170–71 (Kan 2008) (finding a state constitutional right to a juvenile jury trial but recognizing that most states have ruled otherwise).

⁹⁶ See Rubin, 26 Crime & Delinq at 299 (cited in note 84) (“The values of the juvenile court judge, often the employer of probation personnel, have influenced these [charging] decisions.”).

⁹⁷ Sheridan, *Standards for Juvenile and Family Courts* at 13 (cited in note 14). One court tried to justify this structure by arguing that “the juvenile court merely supervises the operation of court employees,” and those employees make decisions about whether to file charges in individual cases. *In re Appeal in Pima County Anonymous, Juvenile Action*, 515 P2d 600, 604 (Ariz 1973). This distinction between “mere supervision” and individual case decisionmaking is weak, as supervision generally shaped how court staff make those individual decisions. See *Matter of Reis*, 7 Crim L Rptr (BNA) 2151, 2152 (RI Fam 1970); *The Administration of Juvenile Justice* at 9 n 31 (cited in note 87) (“[M]any discretionary judgments are made by court staff within explicit guidelines evolved by or with the juvenile court judge.”).

⁹⁸ *In the Matter of the Appeal in Maricopa County, Juvenile Action*, 594 P2d 506, 508 (Ariz 1979).

The Supreme Court's watershed decision in *Gault* denounced the absence of due process in family-court trials and required dramatic reforms—"constitutional domestication."⁹⁹ Following a neighbor's complaint about an alleged sexual prank call, a deputy probation officer filed a petition alleging that Gerald Gault was delinquent, but not alleging any specific facts.¹⁰⁰ The probation officer then prosecuted Gault in Gila County, Arizona, family court, with no prosecutor present.¹⁰¹ Gault was not given notice of the specific charges against him, had no opportunity to confront or question the witness against him, was denied the ability to stay quiet in the face of government questioning, and was denied a lawyer to help him fight the charges against him.¹⁰² The Supreme Court famously decried these procedures, writing that "the condition of being a boy does not justify a kangaroo court."¹⁰³ The Court held that the Constitution provided basic due process protections to children alleged to be delinquents—the right to notice, to confront witnesses, protection against self-incrimination, and, essentially, counsel.¹⁰⁴

The prosecutorial discretion exercised in *Gault* illustrates that the family-court structure provided children with "the worst of both worlds: . . . neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."¹⁰⁵ That "solicitous care" would seem to suggest that an individual exercising prosecutorial discretion would dismiss or divert a case about a lewd prank phone call. Instead, the probation officer charged Gault, and the court committed him to the state industrial school.¹⁰⁶

Reflecting the family court's historical linkage of delinquency and child protection jurisdiction, some of *Gault*'s dicta suggested that analogous due process concerns applied to child protection cases. The Court suggested concern both for Gault's loss of physical liberty and for his separation from his parents—the core

⁹⁹ *Gault*, 387 US at 22.

¹⁰⁰ *Id.* at 4–5.

¹⁰¹ *See id.* at 5–6.

¹⁰² *See id.* at 5–10. The charges were ripe for a challenge. Gault was charged with making a lewd telephone call to his neighbor, but the record was not clear whether Gault or a friend made any of the allegedly lewd statements. *See id.* at 5–7.

¹⁰³ *Gault*, 387 US at 28.

¹⁰⁴ *See id.* at 31–57.

¹⁰⁵ *Id.* at 18 n 23, quoting *Kent v United States*, 383 US 541, 556 (1966).

¹⁰⁶ *See Gault*, 387 US at 4–5.

constitutional right at issue in child protection cases.¹⁰⁷ When discussing the specific importance of notice, the Court stated that the Due Process Clause “does not allow a hearing to be held in which a youth’s freedom and his parents’ right to his custody are at stake” without adequate notice of the state’s specific allegations.¹⁰⁸ The absence of a clearer ruling on parental rights may have resulted from a litigation choice; Gault had argued to the Arizona courts that the juvenile court should not have “remove[d] Gerald from the custody of his parents without a showing and finding of their unsuitability,”¹⁰⁹ but Gault’s lawyer did not raise this argument to the Supreme Court.¹¹⁰ Thus, *Gault* reflected the need for a family-court system that provided basic due process rights both to children in delinquency cases and, implicitly, to families in child protection cases, and *Gault* soon became a key impetus for reform of family-court procedures in both fields.

B. Post-*Gault* Pressure to Reform

Although Gault’s specific holdings addressed neither juvenile court intake¹¹¹ nor child protection cases, its “constitutional domestication”¹¹² of the juvenile court nonetheless catalyzed reforms in both fields. Part II.B.1 discusses reform efforts in juvenile delinquency law, while Part II.B.2 details legal developments in child protection law.

1. Pressures for reform in juvenile delinquency law.

Gault indirectly¹¹³ caused reforms to family-court intake procedure. *Gault* suggested that basic constitutional protections would apply to family court, making the separation-of-powers

¹⁰⁷ See *id.* at 10 (noting Gault’s argument that he should not be removed from his parents without proof of their “unsuitability” and that he was “taken from the custody of his parents” unconstitutionally); *id.* at 17 (describing family courts’ delinquency jurisdiction as being triggered by “parent[al] default in effectively performing their custodial functions”).

¹⁰⁸ *Id.* at 33–34.

¹⁰⁹ *Id.* at 10.

¹¹⁰ See Martin Guggenheim, *Barry Feld: An Intellectual History of a Juvenile Court Reformer*, 17 Nev L J 371, 375 (2017).

¹¹¹ *Gault*, 387 US at 13.

¹¹² *Id.* at 22.

¹¹³ The Court did not explicitly address “the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process.” *Id.* at 13. The Court recognized that such procedures were “unique to the juvenile process” and disclaimed any intent to change or even address them, thus enabling the Court to rebut criticism that *Gault* jeopardized what was different about family court. *Id.* at 31 n 48.

problems in its intake structure hard to ignore. More practically, *Gault*'s requirement that states provide defense counsel for children in delinquency cases¹¹⁴ resulted in an unsustainable situation. Court intake officers would now face defense attorneys without having attorneys themselves—putting them “at a severe disadvantage.”¹¹⁵ When probation officers could engage effectively in an adversarial trial, their efforts would damage their efforts to build a relationship with the child and family necessary to providing rehabilitative services in the event of a conviction.¹¹⁶

This uneven playing field pressured family-court judges to intervene. Many appeared to take on the role of a prosecutor, including examining both prosecution and defense witnesses.¹¹⁷ Such events created obvious problems of judicial bias, contrary to the constitutional domestication that *Gault* directed.¹¹⁸ Judges confronted this problem,¹¹⁹ and complained about it. One prominent New York City family-court judge, Justine Wise Polier, described it this way:

As a result of this situation, the Court is all too often required to question the complaining witnesses. . . . Such a procedure . . . places the Court in the untenable position of having to seek the facts on which a petition of delinquency is based, hear the defense, and then undertake to evaluate and pass on the evidence as a Judge.¹²⁰

The problem, Polier concluded, “calls for corrective legislation.”¹²¹

¹¹⁴ See *id.* at 34–42.

¹¹⁵ Douglas J. Besharov, *Juvenile Justice Advocacy: Practice in a Unique Court* 39 (Practising Law Institute 1974).

¹¹⁶ See Edwin M. Lemert, *Legislating Change in the Juvenile Court*, 1967 Wis L Rev 421, 434.

¹¹⁷ See *id.*

¹¹⁸ See *Gault*, 387 US at 40–41. See also M. Marvin Finkelstein, et al, *Prosecution in the Juvenile Courts: Guidelines for the Future* 10 (DOJ 1973) (“[T]he assumption of prosecutorial roles by the probation staff or the juvenile court judge creates undesirable role conflicts.”).

¹¹⁹ See, for example, Lemert, 1967 Wis L Rev at 436 (cited in note 116) (quoting one judge who acknowledged the problematic role of helping to prosecute a child).

¹²⁰ *Matter of Lang*, 255 NYS2d 987, 992 (Fam 1965). Polier addressed the situation created by New York's pre-*Gault* statutory provision of counsel to juvenile defendants—a situation that *Gault* created nationally. See Note, *The Juvenile Offender's Procedural Rights in the New York Family Court*, 41 St John's L Rev 386, 392 (1967) (“[T]he judge may be thrown into a prosecutor's state of mind by the presence of an advocate for the child, but none against him.”).

¹²¹ See *Lang*, 255 NYS2d at 991.

Judicial calls for reform were insufficiently granular, as they left to legislatures the task of defining the precise structure that new legislation should create. The challenge was illustrated in a 1971 case in which the Rhode Island Family Court ruled that its intake structure—which had not been changed since *Gault*—violated due process for many of the reasons discussed in Part II.A.1. It held that the court “must be entirely independent of the investigative and accusatory process.”¹²² The court mused that intake authority “belongs somewhere else”—but did not define where that “somewhere else” should be or how it should accommodate the increasing role both of lawyers for all parties and for administrative agencies.¹²³

2. Pressures for reform in child protection law.

Gault implied concern with the rights of parents to maintain custody of their children,¹²⁴ but it did not directly address child protection cases. There is no case equivalent to *Gault* in the child protection pantheon. Nonetheless, several legal developments contemporaneously created pressure for reform to family-court prosecutorial discretion in child protection cases. First, attorneys for parents and some kind of advocate for children became far more prevalent in child protection cases in the years after *Gault*. The Child Abuse Prevention and Treatment Act¹²⁵ (CAPTA) required states to provide guardians ad litem for children as a condition of receiving federal funding.¹²⁶ The Supreme Court noted in 1981 that “[i]nformed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but in dependency and neglect proceedings as well.”¹²⁷

¹²² See *Reis*, 7 Crim L Rptr (BNA) at 2152.

¹²³ See *id.*

¹²⁴ See note 107 and accompanying text.

¹²⁵ Pub L No 93-247, 88 Stat 4 (1974), codified as amended at 42 USC § 5101 et seq.

¹²⁶ CAPTA § 4(b)(2)(G), 88 Stat at 7, 42 USC § 5106a(b)(2)(B)(xiii).

¹²⁷ *Lassiter v Department of Social Services*, 452 US 18, 33–34 (1981). By 1981, twenty-five states provided parents with a right to counsel throughout child protection cases, as opposed to only in termination cases. See Besharov, 6 Vt L Rev at 404–05 n 16 (cited in note 3). This progress came through statutory rather than constitutional law. The Supreme Court established some due process baselines for child protection cases. See generally, for example, *Stanley v Illinois*, 405 US 645 (1972); *Smith v Organization of Foster Families for Equality and Reform*, 431 US 816 (1977); *Santosky v Kramer*, 455 US 745 (1982). But, unlike in *Gault*, the Court did not find a constitutional right to counsel. See *Lassiter*, 452 US at 31.

Second, the number of child abuse and neglect reports increased eightfold between 1963 and 1980, and the number of resulting family-court cases increased as well.¹²⁸ Taken together, these trends meant that in a large and increasing number of cases, parents would have lawyers and children would have advocates, creating similar pressures in child protection cases to what Polier observed in delinquency cases.¹²⁹

Third, the child protection administrative state grew increasingly complex in the years after *Gault* and presented an alternative to court staff for making intake decisions. The Social Security Act¹³⁰ had triggered the development of some state welfare agencies to administer federal welfare payments, including in some states a foster care agency.¹³¹ These agencies (and federal and state statutes affecting them) grew more complicated in the 1960s and 1970s—establishing child abuse and neglect hotlines, adopting mandatory reporting statutes to require certain individuals to report suspected abuse or neglect, and charging child protection agencies with investigating these reports.¹³² Congress made such reporting and investigation regimes a requirement for states to receive federal child welfare funding when it enacted CAPTA in 1974.¹³³ By that point, child protection agencies were closely involved with child abuse and neglect cases from their earliest stages—and thus could present a strong claim that they should control which of those cases to prosecute.

C. Delinquency Prosecutors Reform

After *Gault*, delinquency intake structures required reform, but it was not obvious that reforms would empower elected prosecutors. If a “fundamentally fair juvenile justice proceeding might well look very different from a fundamentally fair criminal justice proceeding,”¹³⁴ then creating a juvenile analog to adult criminal prosecutors might not be the best solution.

¹²⁸ Besharov, 6 Vt L Rev at 403 (cited in note 3).

¹²⁹ See id at 405–06.

¹³⁰ 49 Stat 620 (1935), codified as amended at 42 USC § 301 et seq.

¹³¹ See, for example, Abrams, *A Very Special Place in Life* at 138–39 (cited in note 89) (describing the creation of the Missouri Social Security Commission and a subagency, the Department of Foster Care, in response to the Social Security Act).

¹³² See Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society's Response*, 36 Ohio N U L Rev 819, 840–42 (2010).

¹³³ See CAPTA § 4(b)(2)(B)–(D), 88 Stat at 6.

¹³⁴ Emily Buss, *The Missed Opportunity in Gault*, 70 U Chi L Rev 39, 42 (2003).

This Section outlines initial post-*Gault* debates over this issue and explains how elected prosecutors gradually took on greater power. In particular, this Section describes how family-court leaders initially intended delinquency prosecutors to exercise intake authority consistent with the family court's rehabilitative purposes, but that perspective changed in the 1980s and 1990s. By then, prosecutors were seen as tools of tough-on-crime reforms and used their authority to prosecute a higher proportion of cases, but without establishing a consensus about intake structures.

1. No immediate consensus.

Even before *Gault*, scholars and government agencies were aware of the need for government lawyers in juvenile justice proceedings, yet there was no consensus as to who that lawyer should be or how that lawyer should exercise prosecutorial discretion. While *Gault* was pending before the Supreme Court, the President's Commission on Law Enforcement and Administration of Justice Task Force on Juvenile Delinquency called for more formal and systematic intake decisions,¹³⁵ and for agencies outside of the court to play a role in those decisions. Angst about elected prosecutors remained—"[u]sing the public prosecutor may be too great a departure from the spirit of the juvenile court"¹³⁶—but the commission declined to identify an agency it believed ought to be in charge of intake or which lawyers ought to represent the state.¹³⁷

Soon after *Gault*, two academics argued about the value of assigning that role to regular prosecutors. Sanford Fox—a Boston College law professor, consultant to the President's Commission on Law Enforcement and Administration of Justice, and member of the Board of Governors of the American Bar Association's (ABA) Committee on the Rights of Children¹³⁸—argued that assigning that role to an office "whose overriding concern is the

¹³⁵ See *The Administration of Juvenile Justice* at 21 (cited in note 87).

¹³⁶ Id at 34. In a footnote, the Commission described this as a "controversial question" and did not take a position beyond noting that the prosecutor could work for the district attorney's office, a city's corporation counsel's office, the police, or some "other" unidentified agency. Id at 15 n 81.

¹³⁷ See id at 18–19.

¹³⁸ Jack Dunn, Sean Smith, and Nathaniel Kenyon, *Sanford Fox Recalled as Children's Rights Advocate* (Boston College Chron, July 20, 2000), archived at <http://perma.cc/ZLN6-7BX4>.

vindication of the penal law by conviction and punishment of violators” would “defeat[] the welfare and rehabilitative functions of juvenile court process.”¹³⁹ Fox proposed the creation of a new executive-branch agency—the Office of Community Advocates—that would determine which cases to prosecute “based on a thoroughly investigated report concerning the social and psychological needs of the child.”¹⁴⁰

Professor Douglas Besharov—who then taught at New York University School of Law and went on to an influential policy and academic career—took a competing view.¹⁴¹ Besharov acknowledged that “hardnosed” prosecutorial methods could undermine the family court’s purpose,¹⁴² but offered several counterpoints. First, proving that an individual, even (or especially) a child, has committed a crime is “not for the faint of heart.”¹⁴³ Second, Besharov articulated a faith that, with the right training, juvenile prosecutors could also accept and promote the juvenile justice system’s rehabilitative goals,¹⁴⁴ and that, with experience, juvenile prosecutors “can be helped to understand and appreciate” the value of diverting many cases.¹⁴⁵ Besharov was less clear about how the training and supervision necessary to ensure this balance would be provided, as is evident in his passive-voice construction of his assertion.

Neither Fox nor Besharov recommended that an agency specifically charged with rehabilitating children who commit crimes have the authority to determine which children required

¹³⁹ Sanford J. Fox, *Prosecutors in the Juvenile Court: A Statutory Proposal*, 8 Harv J Legis 33, 42–43 (1970).

¹⁴⁰ Id at 41–42. See also Sheridan, *Standards for Juvenile and Family Courts* at 13 (cited in note 14) (suggesting shifting charging discretion from family-court staff “to the police, to the school, or to other administrative agencies providing protective services for children”). The DOJ recommended that Boston authorities form a juvenile prosecutors’ office that would “be distinct in personnel and organization from any other state or local prosecution apparatus.” Finkelstein, et al, *Prosecution in the Juvenile Courts* at 90 (cited in note 118). That jurisdiction did not follow the recommendation; prosecutorial authority in Boston is now held by the Suffolk County District Attorney’s office, which has a Juvenile Unit. See *About the Office* (Suffolk County District Attorney), archived at <http://perma.cc/76CM-6BNK>.

¹⁴¹ Besharov is now a professor at the University of Maryland School of Public Policy. See *Douglas Besharov* (UM School of Public Policy), archived at <http://perma.cc/83UP-93PR>. When he published his book in 1974, Besharov taught at the NYU School of Law. Besharov, *Juvenile Justice Advocacy: Practice in a Unique Court* at 558 (cited in note 115).

¹⁴² Besharov, *Juvenile Justice Advocacy: Practice in a Unique Court* at 43–44 (cited in note 115).

¹⁴³ Id at 44.

¹⁴⁴ Id at 44–45.

¹⁴⁵ Id.

prosecution—a stark contrast to contemporaneous developments in child protection law. The notion of a juvenile justice agency that determined which cases to divert and prosecute, operated diversion programs, supervised children on probation postadjudication, and provided services to children committed to its custody was thus not explored.

Many reform efforts recognized that executive-branch prosecuting attorneys were necessary, but failed to consider in much depth who those attorneys ought to be, thus skirting over Fox and Besharov's debate. An illustrative book published the year after *Gault* recognized that the new requirement of defense counsel would necessitate counsel for the state and that probation or intake officers should no longer prosecute cases.¹⁴⁶ But it listed options for who that prosecuting attorney might be—someone from the local prosecutor's office or "special counsel to the police department or attorney for the court-related services"—without further discussion of which option might be best or how these new family-court prosecutors would interact with (or supplant) existing intake decisionmakers.¹⁴⁷ The ABA adopted standards for family-court organization in 1980 and made clear that an executive-branch agency should make charging decisions,¹⁴⁸ but said nothing about which agency or attorneys should be involved in those decisions.¹⁴⁹

2. A gradual shift to elected prosecutors' control and prosecutors as a tool of tough-on-crime reforms.

Eventually, prosecutors exerted power at the intake stage, with varying roles for intake officers.¹⁵⁰ By 1979, the ABA observed that charging decisions were "increasingly vested through

¹⁴⁶ B. James George Jr, *Gault and the Juvenile Court Revolution* 52 (Institute of Continuing Legal Education 1968).

¹⁴⁷ *Id.* at 52–53. See also *id.* at 73–74 (noting two state statutes calling for attorneys general, district attorneys, or county prosecutors to represent the state in delinquency cases).

¹⁴⁸ IJA-ABA Joint Commission on Juvenile Justice Standards, *Standards Relating to Court Organization and Administration* 5–6, 15 (Ballinger 1980).

¹⁴⁹ See *id.* at 15–18.

¹⁵⁰ See Mears, *The Front End of Juvenile Court* at 576 (cited in note 18); Joseph B. Tulman, *The Role of the Probation Officer in Intake: Stories from before, during, and after the Delinquency Initial Hearing*, 3 DC L Rev 235, 244 (1995) (describing 1970 statutory change in DC law).

statute in the office of the prosecutor.”¹⁵¹ But prosecutors appeared through a variety of mechanisms—many state statutes were silent on the question and others were involved only through a family-court order.¹⁵² Some systems even hung on to the old, prosecutor-less, court-intake-staff-driven procedure.¹⁵³ But by a decade after *Gault*, the pressure imposed by that case had resulted in significant changes. As the Arizona Supreme Court explained in that year, *Gault* had found that state’s juvenile procedures unconstitutional, and recent legislation “recognized that the adversary system had been introduced [by *Gault*].”¹⁵⁴ The Arizona legislature eventually responded by both codifying juveniles’ right to counsel “and the role of the prosecutor”¹⁵⁵ and shifting charging authority from court intake officers to county attorneys.¹⁵⁶

Intake officers continued to play an essential role in determining which cases to prosecute, and it took time for prosecutors to exercise their intake authority. Prosecutors’ role often centered on litigating cases that someone else had chosen to file. The DOJ studied sixty-eight jurisdictions and found only fifteen in which prosecutors prepared petitions.¹⁵⁷ As Besharov described the situation in 1974, juvenile prosecutors lacked the power of their colleagues that prosecute adults to initiate—or to not initiate—charges because intake officers continued in practice to make those determinations.¹⁵⁸ Prosecutors exercised their discretion at a later point—deciding whether to continue prosecuting a case that someone else had filed.¹⁵⁹

In these early years, a split developed regarding the offices in which juvenile prosecutors would work. The DOJ reported in 1973 that nearly two-thirds of juvenile prosecutors came from local district attorneys’ offices, with the remainder coming from special juvenile prosecutor offices (19 percent) or city solicitor or

¹⁵¹ *Standards Relating to Court Organization and Administration* at 17 (cited in note 148).

¹⁵² See Finkelstein, et al, *Prosecution in the Juvenile Courts* at 12 (cited in note 118).

¹⁵³ For instance, in 1973, a group of nine police officers in Boston, Massachusetts, continued to prosecute juvenile delinquency cases. *Id.* at 42.

¹⁵⁴ *Maricopa County*, 594 P2d at 508.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Finkelstein, et al, *Prosecution in the Juvenile Courts* at 19 (cited in note 118).

¹⁵⁸ See Besharov, *Juvenile Justice Advocacy: Practice in a Unique Court* at 194 (cited in note 115). See also *id.* at 157–72 (describing court intake and adjustment procedures without referencing prosecutors).

¹⁵⁹ See *id.* at 194–95.

corporation counsel offices (9 percent).¹⁶⁰ Municipal law offices are civil and thus may have a different office culture. But they operate differently than an agency attorney—they represent the public or the municipality as a whole and not the agency tasked with the job.

The purpose of these early post-*Gault* roles for prosecutors was not to prosecute more children, but to apply the family court's rehabilitative philosophy more effectively. The DOJ, for instance, highlighted the need for *fewer* children to be prosecuted in some jurisdictions and identified greater prosecutorial participation as an “essential” step to imposing a check on court intake officers and expanding diversion.¹⁶¹ Entities like DOJ that pushed for more prosecutorial involvement articulated a commitment to the historical goals of intake—balancing community protection from juvenile crime with “promotion of the best interests of juveniles,” and with the former outweighing the latter only when a child presents a “substantial threat to public safety.”¹⁶²

California's post-*Gault* statutory reforms codified DOJ's recommended approach. California's prior statute had charged probation officers with the duty of filing juvenile petitions.¹⁶³ California amended its statute in 1976 to provide that prosecutors—and not probation officers—would file delinquency cases.¹⁶⁴ This amendment also explained how probation officers and prosecutors would interact. Anyone could file a complaint about alleged delinquency, and the probation officer was still charged with investigating such complaints to determine whether to prosecute; when probation officers wanted to prosecute, they

¹⁶⁰ See Finkelstein, et al, *Prosecution in the Juvenile Courts* at 17 (cited in note 118); Besharov, *Juvenile Justice Advocacy: Practice in a Unique Court* at 44–46 (cited in note 115).

¹⁶¹ See Finkelstein, et al, *Prosecution in the Juvenile Courts* at xiv–xvi, 71–74 (cited in note 118). In some jurisdictions, prosecutorial involvement appeared intended to fill the absence of “any developed system of intake screening and diversion.” *Id.* at 92.

¹⁶² *Id.* at 28, 89.

¹⁶³ See Cal Welf & Inst Code § 650 (West 1972).

¹⁶⁴ Shifting charging authority from probation officers to prosecutors was an explicit purpose of the statute. Summary Digest for AB 3121, 4 *Statutes of California, and Digests and Measures: 1975–76 Regular Session* 283, 285 (1976):

Existing law provides that a proceeding in juvenile court . . . is commenced by . . . the probation officer filing a petition with the court. This bill . . . would require the probation officer . . . to take a prescribed affidavit to the prosecuting attorney who is authorized in his discretion to institute proceedings by filing a petition with the juvenile court.

would refer cases to prosecutors, who would make a final decision.¹⁶⁵ Consistent with a continued rehabilitative purpose, the statute called for probation officers to do nothing or work with the family without a court order for up to six months before referring the case to a prosecutor.¹⁶⁶

But soon other states' reforms illustrated how prosecutorial control could serve as a tool toward a more punitive juvenile justice system. When Washington state finally codified the prosecutor's role one decade after *Gault*, it also amended the purpose statement of its juvenile code so that it included protecting the public and holding children "accountable for their offenses," in addition to the historical focus on rehabilitation of children who commit crimes.¹⁶⁷ With that shift as context, the legislature also established the role of the prosecuting attorney in juvenile-court cases.¹⁶⁸ The statute established new standards for intake decisions—requiring more serious charges to be prosecuted and less serious first-time charges to be diverted, and providing discretion to prosecutors regarding middle-ground charges.¹⁶⁹ This statutory guidance is far more specific than in other states, but still left prosecutors with discretion to determine what particular charges to file (and thus, in many cases, to require or permit prosecution under the diversion statute).¹⁷⁰

Washington's reforms had an immediate and significant impact on charging decisions: total court referrals in King County (which includes Seattle) increased 60 percent, and felony charges

¹⁶⁵ See id. ("This bill . . . would require the probation officer, if he determines that law-violating wardship proceedings should be commenced, to take a prescribed affidavit to the prosecuting attorney who is authorized in his discretion to institute proceedings by filing a petition with the juvenile court.").

¹⁶⁶ See id. ("Existing law authorizes a probation officer to undertake a program of supervision of a minor for not to exceed 6 months, in lieu of filing a petition or subsequent to a dismissal of a petition and with parental consent.").

¹⁶⁷ Juvenile Justice Act of 1977 § 55(2), 1977 Wash Laws 1023, 1023–24, codified at Wash Rev Code § 13.40.010(2). The addition of "accountability" as a core goal led one scholar to write that the 1977 act "has essentially transformed the former 'benevolent' juvenile court into a traditional criminal court system." Jay A. Reich, *The Juvenile Justice Act of 1977: A Prosecutor's Perspective*, 14 Gonzaga L Rev 337, 341 (1979). Given the continued focus on rehabilitation in the purpose clause, that view perhaps exaggerates the impact.

¹⁶⁸ Juvenile Justice Act of 1977 § 63, 1977 Wash Laws at 1032, Wash Rev Code § 13.40.090 ("The county prosecuting attorney shall be a party to all juvenile court proceedings involving juvenile offenders or alleged juvenile offenders.").

¹⁶⁹ Juvenile Justice Act of 1977 § 61(3)–(6), 1977 Wash Laws at 1029–30, Wash Rev Code § 13.40.070(b)(5)–(8).

¹⁷⁰ See Reich, 14 Gonzaga L Rev at 346–48 (cited in note 167).

more than doubled.¹⁷¹ Some prosecutors expressed concern that they were not well equipped to determine which teenagers required prosecution,¹⁷² but those sharp increases suggest that, at least in the aggregate, prosecutors resolved any such angst in favor of more frequent prosecution.

Over the 1980s and 1990s, the role of prosecutors changed, resembling Washington's post-*Gault* statutory reforms more than California's. Increasing juvenile crime rates, racialized fear of increasing crime, and decreasing faith in rehabilitation triggered "tough-on-crime" reforms.¹⁷³ These reforms were remarkable in their speed and scope—forty-seven states and the District of Columbia enacted legislation imposing more severe sentences on juveniles between 1992 and 1996.¹⁷⁴ These reforms included two key categories. First, they expanded the number of children who states could try in criminal court—by lowering the ages, expanding the list of crimes that could trigger a waiver to criminal court, permitting repeat offenders to be waived, and in some states, granting prosecutors authority to directly file cases in criminal court.¹⁷⁵ Second, legislatures tied more juvenile dispositions to the specific offense(s) adjudicated.¹⁷⁶

These reforms indicated an essential shift in the role of the prosecutor; they also leveraged that shift, coupled with prosecutors' increased intake authority, to effect a broader change in the juvenile justice system. Juvenile prosecutors were no longer the inheritors of the family court's historical role of balancing community protection with juvenile offenders' rehabilitation and other needs. Now, prosecutors were the instruments of reforms that followed a more punitive and less rehabilitative approach. These reforms shifted authority to juvenile prosecutors through exercise of their relatively new charging authority.¹⁷⁷ By determining what charges to file, prosecutors could determine whether

¹⁷¹ Total referrals in July and August 1977 were 1,906, and total referrals in July and August 1978 were 3,046, a 60 percent increase. Total felony charges increased from 425 in those two months in 1977 to 855 in 1978, a 101 percent increase. *Id.* at 351.

¹⁷² See *id.* at 348–49.

¹⁷³ See generally Barry Feld, *The Transformation of the Juvenile Court—Part II: Race and the "Crack Down" on Youth Crime*, 84 Minn L Rev 327 (1999).

¹⁷⁴ See Patricia Torbet, et al, *State Responses to Serious and Violent Juvenile Crime* *59 (OJJDP, 1996), archived at <http://perma.cc/39Y9-JHAU>.

¹⁷⁵ See *id.* at *3–9.

¹⁷⁶ The precise method varied—including blended sentencing, mandatory minimum commitments, and extended family-court jurisdiction. See *id.* at *11–15.

¹⁷⁷ See Beale, 44 Harv CR-CL L Rev at 522 (cited in note 43).

to trigger any of the new offense-based provisions. Contemporaneous observers readily concluded that the reforms' aggregate effect was to shift power from judges to prosecutors¹⁷⁸ and to do so because the "prevailing sentiment [was] that juvenile court judges are too 'soft' on juvenile crime; . . . and that nonjudicial [prosecutorial] decisions are more likely" to take a tougher approach.¹⁷⁹

Indeed, while prosecutors are not monolithic, empirical evidence soon emerged to show that they effectuated more punitive decisions following these reforms. Professors Donna Bishop and Charles Frazier surveyed a set of Florida prosecutors soon after waiver reforms were enacted and found that "nearly half" espoused a punitive philosophy "completely antithetical to the basic precepts traditionally associated with juvenile justice."¹⁸⁰ Prosecutors increased their use of waiver,¹⁸¹ even in cases involving children who were not "serious and chronic offenders."¹⁸² And studies of other jurisdictions revealed that granting prosecutors the authority to trigger more severe sentences led to prosecutors doing precisely that.¹⁸³ Some recent legislative and judicial developments that limit prosecutorial waiver reflect the concern that prosecutors would have an overly punitive perspective. Most prominently, California voters in 2016 enacted Proposition 57, which ended prosecutorial direct file and restored judicial waiver as the norm. One of the proposition's explicit purposes was

¹⁷⁸ See Torbet, et al, *State Responses to Serious and Violent Juvenile Crime* at *60 (cited in note 174).

¹⁷⁹ Id. Critics of these developments put the concern more bluntly—echoing Fox's argument from the immediate post-*Gault* period. Prosecutors, the critics argued, "historically have been more concerned with retribution than with rehabilitation." Bishop and Frazier, 5 *Notre Dame J L, Ethics & Pub Pol* at 285 (cited in note 63) (summarizing criticisms).

¹⁸⁰ Bishop and Frazier, 5 *Notre Dame J L, Ethics & Pub Pol* at 291 (cited in note 63). Bishop and Frazier categorized prosecutors' philosophies as "pure just deserts," "modified just deserts," and those who endorsed a more traditional, rehabilitation-focused view. See id at 290–91.

¹⁸¹ See id at 292.

¹⁸² Id at 297.

¹⁸³ See, for example, Marcy R. Podkopacz and Barry C. Feld, *The Back-Door to Prison: Waiver Reform, "Blended Sentencing," and the Law of Unintended Consequences*, 91 *J Crim L & Crimin* 997, 1009, 1023–24 (2001) (finding significant expansion of more severe sentencing following a law granting prosecutors greater authority to seek waiver and "extended jurisdiction juvenile prosecution"—which provided for longer sentences within family court).

“[s]topping the revolving door of crime by emphasizing rehabilitation, especially for juveniles,” implying that prosecutors were not adequately “emphasizing rehabilitation.”¹⁸⁴

Scholars have tended to focus on more frequent waivers of family-court jurisdiction and the growing prevalence of tough dispositions in delinquency cases,¹⁸⁵ but prosecutors’ increasing power and their increasingly punitive approach had important effects throughout the juvenile justice system. Studies of the organizational culture of family court found that these trends increased those courts’ adversarial tone and “punitive climate.”¹⁸⁶

Crucially, prosecutors’ increasing authority had an essential impact on intake decisions. At the same time as those other reforms occurred, prosecutors began using their charging discretion to prosecute a greater percentage of children referred to family court, thus diverting fewer. Prior to the tough-on-crime reforms, more cases were diverted or dismissed than formally processed; 45.7 percent of cases were formally prosecuted in 1985.¹⁸⁷ Although older data are less reliable, earlier surveys suggested similar numbers.¹⁸⁸ The percentage of cases prosecuted shifted up, peaking at 57.3 percent in 1998 and 1999.¹⁸⁹ Juvenile crime and the total number of juvenile delinquency cases has dropped dramatically since the 1990s, but the percentage of cases prosecuted remains in the mid-fifties, close to its peak reached during the era of tough-on-crime reforms.¹⁹⁰ That is, the shift to prosecutorial

¹⁸⁴ *People v Superior Court*, 2018 WL 652425, *5 (Cal) (quoting the Proposition 57 voter information guide). In 2018, the California Supreme Court held that Proposition 57 applied retroactively, which took power away from district attorneys, who would not be “neutral” arbiters; reducing prosecutors’ power served as a means to reduce sentences and provide an “ameliorating benefit” to defendants. *Id.*

¹⁸⁵ See Feld, 84 Minn L Rev at 327 (cited in note 173).

¹⁸⁶ Alexes Harris, *Diverting and Abdicating Judicial Discretion: Cultural, Political, and Procedural Dynamics in California Juvenile Justice*, 41 L & Society Rev 387, 421–23 (2007).

¹⁸⁷ *Statistical Briefing Book: Juveniles in Court—Manner of Handling* (OJJDP), archived at <http://perma.cc/NC7Q-ZU6E> (reflecting that the Office of Juvenile Justice and Delinquency Prevention formally handled 530,300 cases out of 1,159,400 cases in 1985). This website links to data that provide specific numbers for each year.

¹⁸⁸ One national study found that 52 percent of all family-court referrals made in 1957 were handled “pre-judicially”—that is, without prosecution. The figure was “substantially the same” in 1964. *The Administration of Juvenile Justice* at 14 (cited in note 87). Another study comparing national longitudinal survey of youth data similarly finds a significant increase in the likelihood that authorities would prosecute rather than divert a child. See Stevens and Morash, 13 Youth Violence & Juv Just at 89 (cited in note 38).

¹⁸⁹ *Statistical Briefing Book: Juveniles in Court* (cited in note 187) (memorializing the 3,538,600 cases total in 1998 and 1999, with 2,027,900 formally pursued).

¹⁹⁰ From 2004–2013, the figure ranged from a low of 53.4 percent in 2010 to 55.6 percent in 2006. In the most recent year available, 2014, the rate was 55.6 percent. *Id.* The

control coincides with a lasting 10 percent increase in the proportion of cases prosecuted, and a concomitant decrease in the number of cases diverted. Although it is difficult to prove causation empirically, it seems likely that the shift to prosecutorial control contributed to this shift.¹⁹¹ This shift has a tremendous effect—a 10 percent increase in the number of cases prosecuted amounts to more than 100,000 more cases prosecuted every year.¹⁹²

In practice in many jurisdictions, prosecutors' offices took on decisive roles in making charging decisions even when intake officers had a statutory role. In 1995, Professor Joseph Tulman described how intake officers frequently failed to comply with their statutory mandate to determine which children truly needed family-court attention.¹⁹³ In multiple cases, Tulman and his students in a law school juvenile defense clinic observed the social factors inquiry entirely absent or overruled by prosecutors considering other factors.¹⁹⁴ In some cases, prosecutors' office staff even completed forms that intake officers were supposed to complete.¹⁹⁵ In others, intake officers recommended charging particular children to accommodate prosecutors, even without doing a required investigation.¹⁹⁶ The bottom line in practice was that "the prosecutor had usurped the function of the intake probation officer," de-emphasizing, if not erasing, the statutorily mandated consideration of social factors.¹⁹⁷

One result of de-emphasizing social factors in intake was to weaken what ought to be a powerful check on what became known as the school-to-prison pipeline. Normal adolescent behavior¹⁹⁸—such as minor fights or disobedience to school authorities—calls

DOJ has reported this trend elsewhere. See *Delinquency Cases in Juvenile Court, 2013* at *3 (cited in note 21) ("The proportion of delinquency cases petitioned for formal handling rose from 46% in 1985 to 57% in the late 1990s and then declined slightly to 55% in 2013.").

¹⁹¹ See Charles Lindner, *Probation Intake: Gatekeeper to the Family Court*, 72 Fed Probation 48, 52 (June 2008) ("The increase in the number of petitioned cases may be due, at least in part, to greater prosecutorial control in many courts.").

¹⁹² There are more than one million delinquency cases every year. See *Delinquency Cases in Juvenile Court, 2013* at *2 (cited in note 21).

¹⁹³ See Tulman, 3 DC L Rev at 235–36 (cited in note 150).

¹⁹⁴ See id at 238, 244.

¹⁹⁵ See id at 237–44.

¹⁹⁶ See id at 244.

¹⁹⁷ Tulman, 3 DC L Rev at 244 (cited in note 150).

¹⁹⁸ See Henning, 98 Cornell L Rev at 397–401 (cited in note 10) ("Reckless behavior, including the delinquent activity described here, is so common among adolescents that it has been described as virtually a normative characteristic of adolescent development.") (quotation marks omitted).

for school discipline but generally not prosecution. Intake procedure should screen out such cases; absent more severe facts or repeat incidents, these cases represent behavior that teenagers are very likely to simply grow out of, rendering any court rehabilitation unnecessary.¹⁹⁹ For relatively less severe charges, prosecuting children can impose lasting harms, such as reduced high school graduation²⁰⁰ and increased reoffending rates.²⁰¹ Moreover, children with disabilities whose behavior may be a manifestation of their disability, or who may not have received adequate special education services, generally do not need rehabilitation in family court—they need good special education services.²⁰² Similarly, children who have mental health conditions or family problems that trigger behavioral difficulties at school deserve interventions tailored to those problems before the state prosecutes them.

This prosecutorial, rather than rehabilitative, mindset is illustrated by South Carolina's experience with charges for "disturbing schools."²⁰³ One recent high-profile case involved a student at Spring Valley High School in Columbia, South Carolina, charged with disturbing schools for refusing a teacher's and assistant principal's instruction to put her cell phone away. The teacher called a school administrator, who called the school resource officer—a deputy sheriff assigned to the school—who pulled the child out of her desk and dragged her across the classroom floor. Other students recorded the incident on their cell phones, leading to significant critical attention, both of the officer's use of force and his ability to charge the student with the crime of "disturbing schools" for the student's relatively minor misbehavior.²⁰⁴ Faced with public calls to dismiss the charge, the prosecutor said he would make charging decisions "based only on evidence and in accordance with the law"—without any reference to the historical social factors that are supposed to guide intake

¹⁹⁹ See *id.* at 400 ("As youth grow and mature, their cognitive and psychological capacities improve.").

²⁰⁰ See note 27 and accompanying text.

²⁰¹ See text accompanying note 26.

²⁰² Willis, 2016 *BYU Educ & L J* at 192–95, 204–06 (cited in note 62).

²⁰³ SC Code Ann § 16-17-420.

²⁰⁴ The case received much attention following the release of video showing the officer pulling the child out of her desk and dragging her across the classroom floor. The chief local elected prosecutor issued a public investigative summary making clear that the officer arrested the student solely for her classroom behavior. See Letter from Fifth Judicial Circuit Solicitor Dan Johnson to Captain John Bishop *1–2 (Sept 2, 2016), archived at <http://perma.cc/NLZ8-RX9G> ("Johnson Letter").

decisions, and without articulating why charging a student for refusing a teacher's command would serve any rehabilitative purpose.²⁰⁵ When the prosecutor eventually dismissed the charge, he said he believed the student was guilty but that he likely could not convict her.²⁰⁶ The prosecutor again engaged in no analysis of whether prosecuting the child served any rehabilitative purpose.²⁰⁷ That prosecutorial mindset extends beyond a single case. Aggregate statistics regarding disturbing-schools charges²⁰⁸ illustrate how prosecutors choose to prosecute more cases than juvenile justice agency staff or court intake officers would. Data released by the state Department of Juvenile Justice reveal that over a five-and-a-half-year period, South Carolina prosecutors overruled department recommendations for diversion and prosecuted 1,564 cases, about 20 percent of all cases the department recommended for diversion.²⁰⁹

D. Child Protection Prosecutors Reform

As with delinquency law, the evolution of child protection family-court prosecutors began with ambiguous post-*Gault* commentary. Many child protection authorities recommended placing prosecutorial discretion in the executive branch, but were not clear whether they should reside with prosecutors, child protection agencies, or some other entity. The ABA's 1980 standards, for instance, recommended placing prosecutorial authority in the executive branch, but declined to explain who specifically should determine which child protection cases to file.²¹⁰

²⁰⁵ See *Statement of Fifth Judicial Circuit Solicitor Dan Johnson* (Dec 17, 2015), archived at <http://perma.cc/8T6M-3XBF>. See also *Solicitor: No Involvement in Charges against Spring Valley HS Teens until FBI Investigation Over* (WSMV-TV Nashville, Dec 16, 2015), online at <http://www.wsmv.com/story/30763259/black-parents-association-wants-charges-against-teens-dropped> (visited Nov 13, 2017) (Perma archive unavailable) (describing advocates' efforts and the solicitor's response).

²⁰⁶ See Johnson Letter at *11 (cited in note 204).

²⁰⁷ See *id.*

²⁰⁸ There were 1,222 disturbing-schools referrals in 2014–2015, making disturbing schools the second most frequent charge in the state. See *2014–2015 Annual Statistical Report* at *13–14 (cited in note 34).

²⁰⁹ See Declaration of Megan French Marcelin in Support of Plaintiffs' Motions for Class Certification and Preliminary Injunction, *Kenny v Wilson*, Civil Action No 16-2794, *5 (D SC filed Aug 16, 2016).

²¹⁰ See *Standards Relating to Court Organization and Administration* at 5–6 (cited in note 148).

Family-court prosecutors in child protection law developed in a manner that more strongly emphasized the role of administrative agencies than in delinquency cases. Comprehensive child protection agencies developed that operated central child protection intake hotlines, conducted child protection investigations, managed child abuse and neglect registries, and operated foster care systems. These agencies soon supplanted court intake officers and often effectively determined which cases to file in family court. Some states granted child protection agencies the authority to file cases directly, while others granted elected prosecutors' offices that power. Between those two options, no national norm developed, and "great[] variation" has existed between states.²¹¹

Even without a national norm, child protection agencies could wield great influence over intake decisions. These agencies conduct their own investigations and bring cases to the executive-branch lawyer who could proceed with the case or not. The lawyer is not likely to file a case that the agency did not want to file—absent a nonagency actor bringing such a case to a prosecutor's attention (which, as discussed in Part III.C, remains possible in many states), the prosecutor would simply not know about it. Justice William Brennan recognized the "Department's control over the decision whether to take steps to protect a particular child from suspected abuse" regardless of whether formal authority to take such steps rested with the agency or an elected prosecutor.²¹²

The interaction between child protection agencies and their executive-branch lawyers remained fraught, especially when those lawyers worked for local prosecutor's offices. Professor David Herring reported the observations of such attorneys in Michigan in the 1980s. In many counties, child protection cases were typically assigned to junior attorneys in the prosecutor's

²¹¹ Mark Hardin, *Role of the Legal and Judicial System for Children, Youth, and Families in Foster Care*, in Gerald P. Mallon and Peg McCartt Hess, eds, *Child Welfare for the Twenty-First Century: A Handbook of Practices, Policies, and Programs* 687, 692–93 (Columbia 2d ed 2005). Compare also, for example, 10A Okla Stat Ann §§ 1-4-301, 1-4-901 (granting the district attorney rights to file all child protection cases), with, for example, SC Code Ann § 63-7-1660(A) (authorizing the Department of Social Services to petition the family court).

²¹² *DeShaney v Winnebago County Department of Social Services*, 489 US 189, 209 (1989) (Brennan dissenting). Even when the agency lacked its own lawyer, Brennan concluded that the agency's discretion was only "subject to the approval of the local government's corporation counsel," and so "the buck effectively stopped with the Department." *Id.* (Brennan dissenting).

offices and, “where this occurs, the juvenile court becomes a training arena for inexperienced assistant prosecutors.”²¹³ Prosecutors would often cause delays in cases by failing to appear at preliminary and dispositional hearings.²¹⁴ Prosecutors would not offer “active legal consultation” to agency staff during the life of cases.²¹⁵ And prosecutors would exercise their authority to override the agency’s wishes regarding whether and how to proceed in cases.²¹⁶

Such critiques lead to something close to a majority view within the child protection literature—though with one notable exception and, as we shall see in Part III.A, without achieving a consensus in state laws. That majority favors representation of child protection agencies by agency attorneys, with agencies empowered to make intake decisions. By 1999, the Department of Health and Human Services endorsed the view that lawyers should represent child protection agencies—not the state more broadly—and that agency lawyers should counsel agency staff from early points in a case.²¹⁷ The ABA made similar recommendations in its 2004 “Standards of Practice for Lawyers Representing Child Welfare Agencies,” whose title aptly referred to lawyers for agencies, not states. Agency representation would respect agencies’ knowledge of specific families and the child protection field, the ABA argued, while a prosecutorial model would risk the substitution of “political agendas” and lawyers’ “personal beliefs” for agency knowledge.²¹⁸

The child protection literature focuses strongly on the question of who a lawyer represents—the agency, the state, or people more broadly.²¹⁹ If the agency is the client, the lawyer can advise agency staff about the legal basis for a potential court action, or how a particular decision can support broader agency goals, but

²¹³ David J. Herring, *Legal Representation for the State Child Welfare Agency in Civil Child Protection Proceedings: A Comparative Study*, 24 U Toledo L Rev 603, 608 (1993).

²¹⁴ See id at 609.

²¹⁵ Id.

²¹⁶ See id at 609–10.

²¹⁷ See Donald N. Duquette and Mark Hardin, *Guidelines for Public Policy and State Legislation Governing Permanence for Children* VII-8 to -11 (Children’s Bureau 1999).

²¹⁸ American Bar Association, *Standards of Practice for Lawyers Representing Child Welfare Agencies* *3–4 (2004), available at <http://perma.cc/W4HM-QN5C>. See also Mimi Laver, *Foundations for Success: Strengthening Your Agency Attorney Office* 112–14 (ABA 1999) (contrasting an agency model with prosecutors who “get the final word” and disregard agency staff views).

²¹⁹ See, for example, *Standards of Practice for Lawyers Representing Child Welfare Agencies* at *3–4 (cited in note 218).

must ultimately abide by the agency's decisions regarding case objectives and let the agency make core decisions, such as whether to file a case. If a lawyer disagrees with a caseworker's opinion on a case, the lawyer could consult more senior agency staff but would be bound by the client's ultimate direction.²²⁰ But if the lawyer represents the amorphous "state" or "the people," then the lawyer has freer rein to determine what the client wants.²²¹ And the lawyer also then "abdicates" the job of counseling the agency—because the agency is not a client to be advised.²²² More general agency principles weigh strongly against attorneys for agencies using their own views to overrule an agency's wishes about litigation.²²³

In contrast, Besharov suggested granting child protection prosecutors the authority to determine whether a case that the agency wished to file ought to have been diverted, and whether a case that the agency does not wish to file nonetheless needs court attention.²²⁴ Besharov wrote in 1981, before the commentators discussed above, and so did not respond to them and did not, in particular, explain why counseling the agency client about the filing decision would not suffice. Besharov did acknowledge that his proposal would cause conflicts between child protection prosecutors and agencies, but he suggested that "if such conflicts are handled with tact and mutual respect, then a resolution, or at least a *modus vivendi*, will be reached—in much the same way that the police and district attorneys have accommodated themselves to their frequently conflicting perspectives."²²⁵

The debate between Besharov's position and the more recent arguments for agency control remains unresolved in the law. When a lawyer working for a local prosecutor's office handles child protection cases, disputes have arisen about who such a lawyer represents—and there is no uniform answer. In West Virginia, the child protection agency won a ruling requiring local prosecutors to treat it as the client and thus defer to its wishes on

²²⁰ Some boundaries would remain—a lawyer could not, for instance, file a petition without an adequate legal or factual basis.

²²¹ See Laver, *Foundations for Success* at 112–14 (cited in note 218); Herring, 24 U Toledo L Rev at 623 (cited in note 213).

²²² See Herring, 24 U Toledo L Rev at 624 (cited in note 213).

²²³ See Beth Nolan, *Removing Conflicts from the Administration of Justice: Conflicts of Interest and Independent Counsels under the Ethics in Government Act*, 79 Georgetown L J 1, 36–43 (1990).

²²⁴ See Besharov, 6 Vt L Rev at 412 (cited in note 3).

²²⁵ *Id.* at 412–13.

core case decisions.²²⁶ The Supreme Judicial Court of Maine ruled instead that prosecutors represented the “public interest,” leaving the agency as something other than the prosecutor’s client and subject to the prosecutor’s view of a case.²²⁷ This distinction is evident in state agencies’ responses to an ABA survey regarding their representation models in 2009. Agencies split evenly—twenty-one reported that lawyers were agency staff or contractors and twenty-one reported that they were prosecutors or county attorneys.²²⁸ But a stronger majority reported that the agency was seen as the client; thirty-six jurisdictions reported that lawyers represented the agency (even if the lawyers worked at the local prosecutor’s office), while nine states reported that they represent the people.²²⁹

III. THE CURRENT INCONSISTENT LANDSCAPE

Descriptively, states have not consistently resolved key questions about family-court prosecutors in either juvenile delinquency or child protection cases. Inconsistencies across states reflect the absence of a settled structural understanding of who should make essential intake decisions and how they should make them. This Part offers the first accounting of how varying state laws govern delinquency and child protection prosecutors.

Differences range across two related questions. First, who is the government lawyer—an agency lawyer, a lawyer in an elected prosecutor’s office, or some other kind of lawyer? Embedded in this question is who that lawyer represents—a specific agency, or the state or people writ large? Second, what role do administrative agencies play in deciding which cases to prosecute and which to dismiss or divert? When the lawyer involved works for and represents a specific agency, that agency has authority to exercise this prosecutorial discretion. But in the majority of other cases—

²²⁶ See *In re Jonathan G.*, 482 SE2d 893, 908–10 (W Va 1996).

²²⁷ See *Superintendent of Insurance v Attorney General*, 558 A2d 1197, 1199–1200 (Me 1989).

²²⁸ The survey reported agencies’ understanding of their states’ representation models, not actual statutes. Seventeen jurisdictions reported a statewide agency lawyer model and four reported a county-based agency lawyer model. Twelve reported a county-based prosecutorial model, while nine reported a statewide prosecutorial model. Six states reported some other system, often a hybrid. Ramon Ruiz and Scott Trowbridge, *National Survey of Child Welfare Legal Representation Models* 3 (ABA Center on Children and the Law 2009). The data were based on responses from forty-six states, the District of Columbia, Puerto Rico, and the Navajo Nation. *Id.* at 2.

²²⁹ *Id.* at 6.

in many states for child protection cases, and in almost all states for delinquency cases—the precise balance of power between prosecutor and agency and the role of each is essential to understanding intake decisions.

Complicating matters further, many states' laws maintain vestiges of family courts' pre-*Gault* structures—especially the ability of private individuals to file child protection or delinquency cases and the significant role that court-employed intake officers exercise in charging decisions. This Part surveys state laws regarding family-court prosecutors in juvenile delinquency, then child protection cases, and then explores these pre-*Gault* vestiges.

A. Juvenile Delinquency Prosecutors

In juvenile delinquency cases, the biggest variety in state law and practice is the interaction between an agency with some intake role—a state department of juvenile justice, or an executive- or judicial-branch probation department—and prosecutors. Prosecutors more uniformly work for an independent executive-branch office—a division of the local elected prosecutor in most states, or for the local municipality's corporation counsel (or city or county attorney, or the like) in other states.

The relative power and role of intake officers and prosecutors “var[ies] widely.”²³⁰ Earlier authors have placed the relationship between intake officers and prosecutors along a spectrum. At one end, intake officers hold most of the power, determining which cases to divert or dismiss and which to file; prosecutors review only those cases that intake officers wish to file, and review them only for legal sufficiency. At the other end, prosecutors review all delinquency referrals and determine whether to prosecute them, with various gradations between the two poles.²³¹

Yet in the existing literature, “[n]o national inventory exists to document which arrangement is most common or how intake

²³⁰ See Lindner, 72 Fed Probation at 48 (cited in note 191).

²³¹ See Carrie J. Petrucci and H. Ted Rubin, *Juvenile Court, Bridging the Past and the Future*, in Albert R. Roberts, ed., *Juvenile Justice Sourcebook: Past, Present, and Future* 248, 264 (Oxford 2004). Professor Carrie J. Petrucci and Judge H. Ted Rubin identify three points in between: intake officers have intake authority for specific charges, with limits for more serious charges; intake officers may recommend decisions to prosecutors, who can both prosecute a case recommended for diversion and divert a case recommended for prosecution; and intake officers may make recommendations regarding less serious charges, but prosecutors make all intake decisions for more serious charges. *Id.*

practices actually work in practice.”²³² This Section provides an inventory of current statutory structures. Variation exists along two planes in these statutes. First is the question of which offices employ juvenile prosecutors. In most states, elected prosecutors (district attorneys, county attorneys, or states attorneys) prosecute children in family court, but a minority of states assign that task to a different office or permit different practices in different parts of the state. The second plane is the precise balance of power between family-court prosecutors and nonlawyer intake officials. Both planes are reflected in Figure 1. Categorizing state statutes along this spectrum involves some classification questions, which are explored in the footnotes.

At the latter end of the spectrum, thirteen states grant prosecutors complete or near-complete authority over intake decisions. These states’ statutes charge prosecutors with evaluating complaints filed against children and determining whether to dismiss, divert, or prosecute those cases. Eleven of these states assign such power to elected prosecutors,²³³ while two assign this power to other executive-branch attorneys or permit varying practices around the state.²³⁴

Ten more states give prosecutors authority to make these intake decisions, but require probation officers or juvenile justice agency staff to give prosecutors intake recommendations first. Nine of these states give elected prosecutors this authority,²³⁵ while a tenth state permits either elected prosecutors or other executive-branch attorneys to do so.²³⁶

²³² See Mears, *The Front End of Juvenile Court* at 576 (cited in note 18).

²³³ See Ariz Rev Stat §§ 8-301(2), 8-326; Colo Rev Stat §§ 19-2-106, 19-2-512; La Children’s Code Ann Arts 839, 842; Mass Gen Laws Ann ch 119, § 54; Minn Stat Ann § 260B.141(4); Minn Rule Juv Delinq Proc 6.02(2); SD Cod Laws §§ 26-7A-9 to -10; Tex Fam Code Ann §§ 51.02(11), 53.012; 33 Vt Stat Ann § 5201; 3 Vt Stat Ann § 163; Wash Rev Code § 13.40.070; W Va Code §§ 49-4-503 to -504; Wyo Stat Ann § 14-6-211. Several variations exist within these states. Arizona family-court judges retain discretion to divert cases involving first-time misdemeanants. Ariz Rev Stat § 8-307(A). Washington prosecutors may delegate intake decisions regarding misdemeanors to probation counselors. Wash Rev Code § 13.40.070(10).

²³⁴ See Del Fam Ct Rule Crim Proc 7; Neb Rev Stat § 43-274 (granting the county attorney—the regular county prosecutor—or the city attorney power to offer diversion or file charges).

²³⁵ See Ark Code Ann §§ 9-27-310(b)(1), (d), 9-27-323(a); Idaho Code §§ 20-510 to -511; 705 ILCS Stat §§ 405/5-305, 405/5-330; Ind Code §§ 31-37-8-5 to -6; Kan Stat Ann §§ 38-2230, 38-2233, 38-2327; Ky Rev Stat Ann §§ 610.030, 635.010; NM Stat Ann §§ 32A-1-6(A), 32A-2-7, 32A-2-8; 10A Okla Stat Ann § 2-2-104(A); SC Code Ann § 63-19-1010.

²³⁶ See NY Fam Ct Law §§ 254, 308.1.

In the middle of the spectrum, one state's statute assigns shared intake authority to elected prosecutors and intake staff.²³⁷

Further down the spectrum are states that give greater authority to intake officers employed by probation departments or the family court itself. Eight states and the District of Columbia grant intake officers or agency staff power to decide whether to divert a child, subject to review by prosecutors only when the complainant or law enforcement appeals a diversion decision. Eight of these jurisdictions assign elected prosecutors to this role,²³⁸ and one assigns other executive-branch attorneys.²³⁹

At the far end of the spectrum, sixteen states empower intake officers, agency staff, or the family court itself to make intake decisions. Ten of these assign elected prosecutors to represent the state when intake officers recommend prosecution,²⁴⁰ and five either assign to other executive-branch attorneys the role of prosecuting children or permit varying practices around the state.²⁴¹

Two states are outliers: Alaska is unique because it grants its juvenile justice agency complete charging authority, and grants that agency its own lawyers.²⁴² Missouri is an outlier

²³⁷ See NH Rev Stat Ann § 169-B:10 (authorizing the prosecutor, police, or probation officer to refer children to diversion programs).

²³⁸ See Cal Welf & Inst Code §§ 653, 653.5, 653.7, 655; Fla Stat Ann §§ 985.15, 985.145; Iowa Code §§ 232.12, 232.28, 232.35; 15 Me Rev Stat Ann § 3301; Mont Code Ann §§ 41-5-1202, 41-5-1204 to -1205, 41-5-1401; Nev Rev Stat § 62C.100; NC Gen Stat §§ 7B-1702 to -1705; Va Code §§ 16.1-232, 16.1-260(B), (E)–(F).

²³⁹ See DC Code §§ 16-2305, 16-2305.02.

²⁴⁰ See Ala Code Ann §§ 12-15-105, 12-15-118, 12-15-119, 12-15-120; Ala Rules Juv Proc 12, 15; Ga Code Ann §§ 15-11-68, 15-11-520, 15-18-6.1, 15-11-515; Md Ct & Jud Proceedings Code Ann § 3-8A-10 (giving intake officers authority to make diversion decisions in misdemeanor cases but state attorneys' power in felony cases); Mich Comp Laws §§ 712A.11, 722.823; Miss Code §§ 43-21-117, 43-21-357, 43-21-451; NJ Stat Ann §§ 2A:4A-71, 2A:4A-72; ND Cent Code §§ 27-20-10, 27-20-19, 27-20-20; Ohio Rev Code Ann § 2151.14; Ohio Rule Juv Proc 9; *In re N.K.*, 2003 WL 23009113, *3 (Ohio App) ("[T]he pursuit of a delinquency complaint under Juv. R. 9 remains a matter for judicial discretion."); 42 Pa Cons Stat Ann §§ 6304, 6323(a)(2), 6336(b); Utah Code Ann § 78A-6-602(2)(c); Wis Stat §§ 938.06, 938.067, 938.09, 938.24(5). This category also includes some variation. Both Mississippi and New Jersey subject intake officer decisions to court review but do not permit prosecutors to reject an intake officer's decision to divert a case unilaterally. See Miss Code §§ 43-21-117, 43-21-357, 43-21-451; NJ Stat Ann § 2A:4A-71, 2A:4A-72.

²⁴¹ See Conn Gen Stat §§ 46b-121b, 46b-128; Haw Rev Stat §§ 571-21, 571-31.2, 571-62; Or Rev Stat §§ 419C.225, 419C.250; RI Gen Laws § 14-1-11; Tenn Code Ann §§ 37-1-110, 37-1-124(b).

²⁴² See Alaska Stat Ann §§ 47.12.040, 47.12.060, 47.12.065, 47.12.110 (giving the Department of Health and Social Services authority to determine which to divert and which to prosecute, and giving district attorneys authority to prosecute only more serious cases that are referred by the department).

because it does not provide any executive-branch lawyer; it follows a pre-*Gault* model of court staff and court staff attorneys making all charging decisions.²⁴³

FIGURE 1. THE SPECTRUM OF PROSECUTORIAL AND INTAKE OFFICER CONTROL UNDER STATE STATUTES

	← More Prosecutorial Control			More Intake Officer Control →	
	<i>Prosecutors make intake decisions</i>	<i>Intake officers recommend, prosecutors make final decisions</i>	<i>Shared authority</i>	<i>Intake officers make intake decisions, prosecutors review</i>	<i>Intake officers or family court make intake decisions</i>
<i>Elected prosecutors</i>	AZ, CO, LA, MA, MN, SD, TX, VT, WA, WV, WY	AR, ID, IL, IN, KS, KY, NM, OK, SC	NH	CA, FL, IA, ME, MT, NV, NC, VA	AL, GA, MD, MI, MS, NJ, ND, OH, PA, UT, WI
<i>Other Executive-Branch Prosecutors</i>	DE, NE	NY	—	DC	CT, HI, OR, RI, TN
<i>Outliers</i>			AK, MO		

This spectrum describes each state's governing statutes. It does not explore varying practices that may occur within states whose statutes place them at different points of the spectrum.²⁴⁴ For instance, states that give prosecutors ultimate authority to make intake decisions but require intake officers or juvenile justice agencies to provide recommendations may have varying practices. Some local prosecutors may take those recommendations in nearly every case—effectively delegating intake authority to intake officers—while others may more actively assert their intake authority. Some intake officers with the authority to make intake decisions may exercise it fully, while others may defer in practice

²⁴³ See Mo Rev Stat §§ 211.081, 211.401; Mo S Ct Rule 116.03. At least one court-employed prosecutor has described Missouri's system as "pre-*Gault*," a description endorsed by the National Juvenile Defender Center. Mary Ann Scali, et al, *Missouri: Justice Rationed—an Assessment of Access to Counsel and Quality of Juvenile Defense Representation in Delinquency Proceedings* 37–38 (National Juvenile Defender Center 2013).

²⁴⁴ See Birkhead, 46 Tex Tech L Rev at 164 (cited in note 19) (describing varying practices).

to the expressed or perceived wishes of prosecutors or face significant pressures to do so.²⁴⁵

B. Child Protection Prosecutors

In child protection cases, some states assign lawyers to work directly for and represent child protection agencies, and empower these agencies to determine which cases to file.²⁴⁶ Other states, however, assign other legal offices—especially local district attorney offices or state attorney general offices.²⁴⁷ Some of these lawyers are assigned by state law to represent child protection agencies, while others operate like elected criminal prosecutors—representing “the people” and relying on their own judgment or prosecutor office policies regarding that client’s interests rather than direction from an agency client.²⁴⁸

Although no trend has yet emerged, several states have recently wrestled with whether to assign child protection agencies or elected prosecutors with charging discretion and with the identity and role of executive-branch lawyers.²⁴⁹ The Oregon legislature created a task force to develop a representation model for the state in child protection cases,²⁵⁰ which recommended that the child protection agency use its funds to pay the state department of justice to represent the agency²⁵¹—a change from Oregon’s current prosecutorial model.²⁵² This shift would address concerns that the child protection agency frequently lacks representation

²⁴⁵ See Tulman, 3 DC L Rev at 235–44 (cited in note 150) (describing the latter scenario).

²⁴⁶ See note 264 and accompanying text.

²⁴⁷ See note 265 and accompanying text.

²⁴⁸ See notes 259–62 and accompanying text.

²⁴⁹ The issue has also arisen in at least one local jurisdiction. One rural Wisconsin county district attorney, citing a lack of resources, announced that his office would no longer represent the state in child protection cases, leading to a temporary appointment of a special prosecutor to handle both child protection and delinquency cases. See Tim Greenwood, *State to Pay for Special Prosecutor* (Eagle Herald, July 27, 2016), archived at <http://perma.cc/2THH-CJAQ>.

²⁵⁰ See Governor Kate Brown, *Task Force on Legal Representation in Childhood Dependency* (Oregon.gov), archived at <http://perma.cc/RM57-34NH>, citing SB 222, 2015 Or Laws 2108.

²⁵¹ See Oregon Task Force on Dependency Representation, *Report July 2016* *5–6 (2016), archived at <http://perma.cc/B2XV-FCBJ> (“Oregon Task Force Final Report”). The report made clear that local district attorneys could continue to represent “‘the people’ as opposed to the agency,” but at their own expense—“limited DHS funds should be allocated to provide full representation for the agency.” Id at *28.

²⁵² See Ruiz and Trowbridge, *National Survey of Child Welfare Legal Representation Models* at 10 (cited in note 228) (reporting Oregon’s description of its prosecutorial model, in which the local district attorney would represent the state, not the agency, and “need not take the same position as” the agency).

when a case begins.²⁵³ Florida has engaged in controversial shifts, moving first to agency lawyers and then to a prosecutorial model, which has been criticized recently.²⁵⁴ In 2013, Iowa moved toward a prosecutorial model, amending its statutes to require county attorneys to represent the state, not the child protection agency as it had previously done.²⁵⁵ In 2015, following academic²⁵⁶ and DOJ²⁵⁷ criticism of Missouri's "juvenile officer" mode of selecting which cases to file, the Missouri Supreme Court ordered modest changes to that structure.²⁵⁸

The landscape remains varied across the country. One state surveyed its peers in 2015 and found a variety of employers of state attorneys and a variety of roles for those attorneys.²⁵⁹ Only seven states reported having in-house agency counsel, three states reported representation by local prosecutors' offices, and nine states reported representation by the attorney general.²⁶⁰

²⁵³ See *id.* at 14.

²⁵⁴ Through the 1980s, caseworkers often appeared unrepresented, until the Florida Supreme Court declared that to be the unauthorized practice of law and required the agency to prevent such practice by 1990. *The Florida Bar in re Advisory Opinion HRS Nonlawyer Counselor*, 547 S2d 909, 909 (Fla 1989). The state responded by creating agency lawyers—the statewide Child Welfare Legal Services Department, housed within the agency and understood to represent the agency. Florida Department of Children and Families, *Report: Dependency Roles Workgroup* *14 (2016), online at <http://floridapolitics.com/archives/tag/dependency-roles-workgroup> (visited Dec 26, 2017) (Perma archive unavailable). In 2008, however, “the Department began implementing . . . the ‘prosecutorial model,’ in which ‘attorneys have described their allegiance primarily to ‘the State of Florida,’ rather than to [the agency].” *Id.* at *8. No legislation accompanied this shift, so it is not clear how the department justified it. By 2016, a state-sponsored report criticized this shift for resulting in lawyers making “decisions that more properly belong” to the agency. *Id.*

²⁵⁵ See HF 119 §§ 2–3, 2013 Iowa Acts 386, 386–87, codified at Iowa Code §§ 232.90, 232.114. The legislation explicitly distinguishes representing the agency from representing the state, and followed lobbying by county attorneys to “restore the CA’s role as the independent voice of ‘the People’ in [Child in Need of Assistance] and [termination of parental rights] prosecutions.” Iowa Department of Human Services, *Summary of Charge from House File 608* *3 (2011), archived at <http://perma.cc/KN5Q-L2AG>. The statute permits the agency to seek intervention by the attorney general in case of “disagreement between the department and the county attorney.” Iowa Code § 232.90(3).

²⁵⁶ See generally Josh Gupta-Kagan, *Where the Judiciary Prosecutes in Front of Itself: Missouri’s Unconstitutional Juvenile Court Structure*, 78 Mo L Rev 1245 (2013).

²⁵⁷ See *Investigation of the St. Louis County Family Court* at *33 (cited in note 19).

²⁵⁸ Supreme Court of Missouri, *Re: Rule 14.01 Assignment of Judicial Personnel* ¶ 1(b) (Dec 16, 2015), archived at <http://perma.cc/5ZQE-JZ5B>. The amended version of the Missouri Supreme Court Operating Rules requires the separation of “the appointing authority” for juvenile officers from juvenile judges who hear cases that those juvenile officers file. See Mo S Ct Operating Rule 14.01(b).

²⁵⁹ See Oregon Task Force Final Report at *24 (cited in note 251).

²⁶⁰ See *id.*

Five states reported some kind of hybrid system.²⁶¹ (Not every state responded.) Most of these states reported that attorney general or district attorney office lawyers represented the agency rather than the state. But several states reported that these attorneys had a “dual mandate”—to simultaneously represent the agency and the state as a whole.²⁶²

A review of state statutes reveals divergent statutory structures. Eight states assign child protection agencies the authority to determine which cases to file (or at least permit anyone to file cases, including child protection agency staff),²⁶³ and those states give those agencies their own lawyers.²⁶⁴ Twenty-five states assign child protection agencies the authority to determine which cases to file, but assign lawyers from other executive-branch agencies to prosecute child protection cases.²⁶⁵ In such a structure,

²⁶¹ See *id.* (relaying that 80 percent of jurisdictions surveyed reported that the agency attorney represents the agency).

²⁶² *Id.* (“[Eight jurisdictions] reported either that the state was the agency (that these roles could not be bifurcated) or interpreted their state’s authorizing statute for government representation to include a dual mandate.”).

²⁶³ See Ariz Rev Stat § 8-841 (permitting anyone, including the agency, to file petition); Ark Code Ann §§ 9-27-310(b)(2), 9-27-311(e)(2)(D); Fla Stat Ann § 39.501(1); Mass Gen Laws Ann ch 119, § 51B; NH Rev Stat Ann §§ 169-C:8-a, 169-C:18; 23 Pa Cons Stat Ann § 6370; RI Gen Laws § 40-11-7; SC Code Ann §§ 63-7-920, 63-7-1620(4), 63-7-1660.

²⁶⁴ Some of these states’ statutes specify that child protection agencies have their own lawyers. See, for example, Fla Stat Ann § 39.501(1); RI Gen Laws § 40-11-14. The other states listed in note 263 have reported that attorneys represent either state or county agencies. See Ruiz and Trowbridge, *National Survey of Child Welfare Legal Representation Models* at 9–10 (cited in note 228).

²⁶⁵ See Alaska Stat Ann § 47.10.020 (authorizing the department to file petitions); State of Alaska Department of Law, *Civil Division* (State of Alaska 2017), archived at <http://perma.cc/5WPC-3WNW> (describing the Civil Division as providing legal services to the Department of Health and Social Services in child protection cases); Cal Welf & Inst Code §§ 325, 328; Colo Rev Stat Ann §§ 19-3-206, 19-3-501 (assigning the county attorney to represent the petitioner, and describing the investigation by the county department of social services as leading to a request to the court to “[a]uthorize a petition”); Conn Gen Stat Ann §§ 46b-121b(b), 46b-129(a); 10 Del Code Ann § 1003 (granting anyone, including agency staff, power to initiate cases); 29 Del Code Ann § 2505(b) (assigning to the attorney general the responsibility to appoint a state solicitor, who is responsible for cases involving state agencies); Ga Code Ann § 15-11-150 (granting Division of Family and Children Services employees or any person with actual knowledge of child abuse power to file petitions); Georgia Department of Human Services, *FAQ* (State of Georgia), archived at <http://perma.cc/XMJ8-KFPE> (identifying special assistant attorneys general as legal representatives in child protection cases); Haw Rev Stat § 571-62 (assigning the attorney general to represent the agency); 705 ILCS Stat §§ 405/1-6, 405/2-13; Iowa Code Ann §§ 232.87(2), 232.90(2); 22 Me Rev Stat Ann, §§ 4004(2)(F), 4032; 5 Me Rev Stat Ann § 191; Md Family Law Code Ann § 5-710; Md Ct and Jud Proceedings Code Ann § 3-809; Mich Comp Laws Ann § 722.638; Minn Stat Ann §§ 260C.141(1), 260C.163(4); NJ Stat Ann § 9:6-8.34 (giving the agency, the county prosecutor, and others power to file petitions); *Department of Children and Families Practice Group (DCF)* (State of New Jersey, Office

the agency is sometimes the client and thus has the authority to determine which cases to file, but representation through another elected official's office could put that official's imprint on intake decisions. Attorneys employed beyond the agency could further shape agency decisions when they are charged with representing the state generally or the public interest rather than the agency.²⁶⁶ In such cases, case workers will continue their work throughout a case, but the state's attorney will not be obliged to represent only them or their agency's position. Eleven states and the District of Columbia give an elected prosecutor or some other executive-branch lawyer authority to determine which cases to file.²⁶⁷ In such a model, the agency may still wield significant influence by choosing which cases to refer to the prosecuting attorney and thus practically determining that many cases will not be

of the Attorney General), archived at <http://perma.cc/9YNS-VVQJ> (explaining that the attorney general represents the New Jersey child protection agency); NY Fam Ct Law §§ 1032, 1038, 1048 (granting the child protection agency power to file petitions and referencing "corporation counsel, county attorney or district attorney" as lawyers for the state); Ohio Rev Code Ann § 2151.27 (anyone, including the child protection agency, can file); Or Rev Stat § 419B.809 (permitting anyone, including the agency, to file petitions); Oregon Task Force Final Report at *26–27 (cited in note 251); SD Cod Laws §§ 26-7A-9 to 26-7A-10; Tenn Code Ann §§ 37-1-119, 37-1-124 (permitting anyone with direct knowledge, who will typically be agency staff, to file petitions and assigning district attorneys or county attorneys to represent agency petitioners); Utah Code Ann §§ 62A-4a-113, 78A-6-304; 33 Vt Stat Ann § 5309 (providing that the state's attorney "shall prepare and file a petition" upon agency request); Va Code Ann § 16.1-260(A); Wash Rev Code §§ 13.04.093, 26.44.195; W Va Code §§ 49-4-501, 49-4-601; Wyo Stat Ann § 14-3-204(a)(viii). Not every state statute specifies which attorneys represent the agency or state. California, Hawaii, Maryland, Michigan, Ohio, Oklahoma, Vermont, Virginia, Washington, West Virginia, and Wyoming have all reported via survey that executive-branch attorneys outside of their child protection agencies provide representation. See Ruiz and Trowbridge, *National Survey of Child Welfare Legal Representation Models* at 9–10 (cited in note 228).

²⁶⁶ See, for example, Iowa Code Ann §§ 232.87(2), 232.90(1)–(2) (granting the agency authority to file petitions but directing that the county attorney "shall represent the state," defined as "the general interest held by the people in the health, safety, welfare, and protection of all children living in this state"); Minn Stat § 260C.163(4) (providing that county attorneys represent both the agency and "the public interest in the welfare of the child"). Charging lawyers with representing dual clients—an agency and "the public interest"—could raise ethical issues when those clients' goals conflict. A full exploration of those ethical issues is beyond the scope of this Article.

²⁶⁷ See DC Code § 16-2305(c)(1); Idaho Code §§ 16-1610, 16-1631; Kan Stat Ann §§ 38-2214, 38-2230, 38-2233; Ky Rev Stat Ann §§ 610.030, 620.040 ("For a public offense complaint, the matter shall be referred to the county attorney."); Mont Code Ann § 41-3-422(2); Neb Rev Stat § 43-261; Nev Rev Stat § 432B.510(2); NM Stat Ann §§ 32A-1-6, 32A-4-15; NC Gen Stat Ann §§ 7B-401.1(a), 7B-302, 7B-305, 7B-306; ND Cent Code §§ 27-20-20, 27-20-24(3); 10A Okla Stat Ann §§ 1-4-301(A), 1-4-501; Wis Stat § 48.25.

prosecuted.²⁶⁸ Some states vary by county or judicial circuit.²⁶⁹ Three states give court-employed intake officers authority to initiate cases,²⁷⁰ but in one of those, case law suggests a greater role for child protection agencies,²⁷¹ and the other notes a statutory role for the child protection agency and prosecutor.²⁷² Several states' statutes give both the child protection agency and prosecutors simultaneous authority to initiate cases.²⁷³

As with juvenile delinquency cases,²⁷⁴ these statutes permit varying practices. It is likely in many jurisdictions that prosecutors largely follow caseworker recommendations. In others, it is likely that agency authority is circumvented by bringing cases directly to prosecutors.²⁷⁵ A more precise accounting of practices across different jurisdictions remains a task for future research.

C. Pre-*Gault* Vestiges

Not only do states vary significantly in how their statutes structure family-court prosecutorial discretion, but vestiges of the pre-*Gault* era remain in the law and practice of many states. Missouri provides the most dramatic example: It has maintained its system of family-court-employed juvenile officers who determine which child protection and delinquency cases to file. Moreover, Missouri assigns attorneys (who were also employed by the family court) to those juvenile officers to prosecute cases; no

²⁶⁸ See, for example, Idaho Code § 16-1631.

²⁶⁹ Texas is the most prominent example. It permits a "governmental entity"—usually the child protection agency—to file child protection petitions. Tex Fam Code Ann § 262.101. In more populated areas, the district or county attorney represents the agency, while in less populated areas, an agency employee represents the agency. See Ruiz and Trowbridge, *National Survey of Child Welfare Legal Representation Models* at 10 (cited in note 228). See also, for example, Wash Rev Code § 13.04.093 (providing that the attorney general represents the agency but may contract with county prosecuting attorneys in smaller counties).

²⁷⁰ See Ala Code Ann § 12-15-120; Miss Code Ann § 43-21-357; Mo Rev Stat § 211.081(1).

²⁷¹ See *G.H. v Cleburne County Department of Human Resources*, 62 S3d 540, 541, 544 (Ala Civ App 2010) (reporting that the child protection agency "filed petitions," which were "endorsed by" the juvenile-court officer).

²⁷² See Miss Code Ann §§ 43-21-357, 43-21-451.

²⁷³ See Ind Code §§ 31-37-8-5, 31-37-8-6, 31-34-9-1; La Children's Code Ann Art 631.

²⁷⁴ See text accompanying notes 244–45.

²⁷⁵ See Gupta-Kagan, 78 Mo L Rev at 1286 (cited in note 256) (describing how individual child abuse and neglect reporters in Missouri may "circumvent" the child protection agency by referring cases directly to those with authority to file cases).

executive-branch agency or attorney has that role in either delinquency or child protection cases.²⁷⁶

Two other vestiges exist in many more states. First, many states give *anyone* the right to initiate family-court proceedings in child protection cases,²⁷⁷ delinquency cases,²⁷⁸ or both.²⁷⁹ Such provisions go beyond individuals' right to report a suspected crime to the police or suspected abuse or neglect to a child protection agency—it permits individuals to trigger the state's coercive authority over other individuals in a public-law case, without a government official first determining that it serves the public interest to do so. That is even broader than unlimited standing to bring private child-visitation cases, which the US Supreme Court has described as “breathhtakingly broad.”²⁸⁰ Even if this historical feature of family courts has faded over time,²⁸¹ such provisions are still sometimes used. In 2015, my clinic handled a case in which a teacher accused a student of an assault. A school resource officer had investigated, and neither she nor the school principal saw fit to refer the child to family court. The teacher went ahead and filed a petition, leading to several court dates—and risking the harms that come with haling a child into court²⁸²—before the prosecutor agreed to dismiss the case several days before trial.²⁸³

Second, many states' juvenile delinquency intake procedures continue to feature “court officers.”²⁸⁴ These individuals work for the same family-court judges who hear petitions; the court officers are thus placed in the wrong branch of government (the judiciary rather than the executive branch), and they are not

²⁷⁶ See *id.* at 1245. The DOJ's report on its investigation into the St. Louis County family court concluded that these juvenile officers created a “constitutionally flawed family court structure.” See *Investigation of the St. Louis County Family Court* at *31–34 (cited in note 19).

²⁷⁷ See, for example, Ark Code Ann § 9-27-310(b)(3)(A); Fla Stat Ann § 39.501(1); 705 ILCS Stat 405/2-13(1); Kan Stat Ann § 38-2233; Ky Rev Stat Ann § 620.070(1); Or Rev Stat § 419B.809; W Va Code § 49-4-601(a).

²⁷⁸ See, for example, SC Code Ann § 63-19-1020.

²⁷⁹ See, for example, Ala Rule Juv Proc 12(A); 10 Del Code Ann § 1003; Minn Stat Ann §§ 260B.141(1), 260C.141(1); NH Rev Stat Ann §§ 169-B:6, 169-C:7; Ohio Rev Code § 2151.27(A)(1); 23 Pa Cons Stat Ann § 6334(a); RI Gen Laws § 14-1-11(b); Tenn Code Ann § 37-1-119.

²⁸⁰ *Troxel v Granville*, 530 US 57, 67 (2000).

²⁸¹ See Mears, *The Front End of Juvenile Court* at 575 (cited in note 18).

²⁸² See, for example, note 27 and accompanying text (discussing the association between court appearances and reduced high school graduation).

²⁸³ The child in this case became a client of the University of South Carolina Juvenile Justice Clinic, which I teach, and the Richland County Public Defender.

²⁸⁴ See Mears, *The Front End of Juvenile Court* at 576–77 (cited in note 18).

placed alongside an executive-branch agency and thus are not governed by state administrative law. The continued use of these court intake officers is troubling for several reasons. First, their placement in the judicial branch raises separation-of-powers concerns; the independence of both the intake officer's decision and the judge's adjudication can reasonably be questioned when intake officers are employed by the family court.²⁸⁵ Second, separating the intake function from the postadjudication work of juvenile justice agencies prevents the creation of comprehensive juvenile justice agencies. The intake officers contributing to intake decisions do not have responsibility for the consequences of those decisions, a topic discussed in more depth in Part IV.B.

D. A Need for Empirical Study

The variety of statutory intake structures suggests the value of empirical research to investigate whether different intake structures lead to different results and, if so, what differences might result. There is currently a dearth of empirical studies exploring the impact of prosecutors' role in intake decisions or how that role impacts racial disparities.²⁸⁶ Several colleagues and I are now comparing delinquency intake decisions in counties in which elected prosecutors' offices make all intake decisions with decisions in other counties in the same state²⁸⁷ in which state juvenile justice agency intake officers make recommendations to elected prosecutors. Our goal is to determine what effect, if any, such different intake practices have. Similar studies in both delinquency and child protection cases could empirically establish the importance of intake structures and help policymakers reform or refine existing structures.

²⁸⁵ For a fuller articulation of this argument, see generally Gupta-Kagan, 78 Mo L Rev 1245 (cited in note 256).

²⁸⁶ See James C. Howell, et al, *Bulletin 5: Young Offenders and an Effective Response in the Juvenile and Adult Justice Systems—What Happens, What Should Happen, and What We Need to Know* *6 (July 2013), archived at <http://perma.cc/D98V-KDJN> (“[W]e know very little about how race and ethnicity affect formal charging practices and plea negotiations.”); Mears, *The Front End of Juvenile Court* at 576 (cited in note 18).

²⁸⁷ While the state laws surveyed in Part III.A apply throughout a state, practice under such laws may vary within a state. See notes 244–45, 275 and accompanying text. Our study will control for between-county differences and child-specific differences to isolate any effects of different intake structures.

IV. AN AGENCY MODEL FOR FAMILY-COURT PROSECUTORS

Determining who should hold prosecutorial discretion in child protection and juvenile delinquency cases is an essential piece of a complete “constitutional domestication” of family courts.²⁸⁸ This domestication is not complete—vestigial officials remain in many states, as Part III.C shows. And where domestication has occurred, Parts III.A and III.B show that the field has not reached a consistent answer as to how to best structure prosecutorial discretion. This Part argues that granting authority to child protection and juvenile justice agencies is the best means to structure family-court prosecutorial discretion.

Assigning family-court prosecutors to represent agencies, and granting those agencies power to exercise prosecutorial discretion, would help the juvenile justice and child protection systems operate more consistently with their historical and statutory purposes. Child protection and delinquency law continue their historical focus on rehabilitation of offenders and emphasis on keeping children at home with their families. Agency control would avoid the likelihood that elected prosecutors’ offices—especially in delinquency cases—impose an overly punitive view on intake decisions, and perhaps reverse the tough-on-crime era spike in the proportion of cases prosecuted rather than dismissed or diverted.²⁸⁹ Both the structure and culture of elected prosecutors’ offices and those offices’ electoral incentives to appear tough on crime create tension with rehabilitative goals. Juvenile justice and child protection agencies have more information about available resources and staff better trained in the fundamentals of child development, and thus they are better suited to decide when court intervention is beneficial and when some alternative course is preferred.

An agency model can also lead to meaningful judicial review of charging decisions—a core and elusive goal of those studying criminal prosecutors—and achieve other systemic benefits. Under current law, granting elected prosecutors charging discretion creates many of the same challenges with prosecutorial authority discussed in Part I.B. Such judicial review is an important check on prosecutors’ authority—one that is difficult to impose on criminal cases but can more easily be lodged with family courts that review the agencies’ exercise of prosecutorial discretion.

²⁸⁸ *Gault*, 387 US at 22.

²⁸⁹ See text accompanying notes 22–23.

Finally, an agency model can help ensure greater democratic accountability, provide better counseling to these essential agencies, and attain more consistent practice throughout a state.

A. More Consistent with Statutory Purposes

Family-court prosecutions are essential elements of juvenile justice and child protection systems that, by statute, emphasize rehabilitation. As commentators through family-court history have noted, this emphasis fundamentally differs from the criminal justice system. An agency charged with administering such a statute is better situated than elected prosecutors to apply such an emphasis.

1. Different purposes from criminal prosecutions.

Family-court prosecutorial discretion should vary from criminal prosecutorial discretion because family-court cases have fundamentally different purposes. Criminal prosecutions vindicate the public's interest in retribution for crimes and the deterrence of other crimes, while family courts continue to focus more on rehabilitating children and their families. This difference is illustrated in case-naming conventions; while criminal cases are named as the state versus the defendant, both child protection and juvenile delinquency cases are captioned "In the matter of" or "In re" the child.²⁹⁰

Child protection cases have no retributive purposes; the goal is to protect individual children, rehabilitate children and their caregivers, prevent the need for removing children even when parents have abused or neglected them, and reunify children with parents when they are separated. Federal law requires states to make efforts to achieve these goals as a condition of receiving federal funds.²⁹¹

Even in delinquency cases, punishing youth remains a lesser function when compared to rehabilitation, and, as a result, delinquency intake "contrasts markedly with criminal justice."²⁹² Detering youth is a much reduced if not eliminated goal due to developmental psychology that makes it difficult to deter

²⁹⁰ See generally, for example, *Gault*, 387 US at 1 (delinquency); *In re Stanley*, 256 NE2d 814 (Ill 1970), revd and remd, *Stanley v Illinois*, 405 US 645 (1972) (child protection).

²⁹¹ See 42 USC § 671(a)(15)(B).

²⁹² Mears, *The Front End of Juvenile Court* at 575 (cited in note 18).

teenagers.²⁹³ Much has been written about delinquency law's shift away from rehabilitative and toward more punitive purposes through "tough-on-crime" reforms of the 1980s and 1990s,²⁹⁴ but the family court has largely retained rehabilitative goals in most cases it handles, especially for low-level offenses. Most tough-on-crime reforms changed the boundaries of family court—expanding situations in which authorities could waive children to be tried in adult court and subject to adult penalties—or otherwise toughened sanctions for relatively serious offenses. Such reforms do not affect allegations that a child committed a misdemeanor offense at school or committed any of the other relatively minor charges that are the most common delinquency charges.²⁹⁵ Regarding those charges, as discussed above,²⁹⁶ juvenile prosecutors increased the ratio of cases that they prosecuted as compared with those that were diverted—using prosecutorial discretion to create significant reform.

Despite this increased likelihood to prosecute rather than divert cases, states' juvenile justice codes make clear that rehabilitation and accountability must be balanced. State laws describe children who commit crimes as those "in need of treatment or rehabilitation"²⁹⁷ and describe the purpose of juvenile justice systems as to hold a child "accountable" for crimes, to focus on rehabilitation, and to apply justice based on an understanding of children's development and various other social factors.²⁹⁸ Analyzing the purpose clauses of states juvenile codes, the DOJ found only six states that it categorized as emphasizing public protection and accountability for children over rehabilitation.²⁹⁹ The

²⁹³ As the Supreme Court wrote in *Roper v Simmons*, 543 US 551 (2005), "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Id.* at 571, cited in *Graham v Florida*, 560 US 48, 72 (2010), and *Miller v Alabama*, 567 US 460, 472 (2012).

²⁹⁴ See generally, for example, Feld, 84 Minn L Rev 327 (cited in note 173).

²⁹⁵ For instance, the most frequent charges in South Carolina family-court referrals in 2013–2014 were (in decreasing order) assault and battery third degree, disturbing schools, shoplifting, public disorderly conduct, simple possession of marijuana, truancy, probation violation, and contempt of court. See *2014–2015 Annual Statistical Report* at *13 (cited in note 34).

²⁹⁶ See notes 187–90 and accompanying text.

²⁹⁷ See, for example, SC Code Ann § 63-1-20(B).

²⁹⁸ See, for example, DC Code § 16-2301.02.

²⁹⁹ The six states are Connecticut, Hawaii, North Carolina, Texas, Utah, and Wyoming. See *Juvenile Justice System Structure & Process, Organization and Administration of Delinquency Services* (OJJDP), archived at <http://perma.cc/CPR5-VUNF>.

vast majority emphasized a balance between those goals and rehabilitation—if not a tilt toward the latter.³⁰⁰

If anything, the pendulum is swinging back toward rehabilitation as the juvenile justice system's central purpose, informed by a deeper understanding of adolescent development.³⁰¹ The Supreme Court's string of "children are different" cases has defined twenty-first-century juvenile justice reform trends.³⁰² Through five cases, the Court emphasized what adolescent psychology has taught us about teenagers' mental and emotional development. That children differ significantly from adults, and that legal rules applied to children must therefore differ, is now a "commonsense reality."³⁰³ In particular, children are less culpable than adults, less likely to be deterred, and more likely to be rehabilitated.³⁰⁴ While the Court's discussion was in the context of Eighth Amendment cases challenging the most severe criminal sentences imposed on children convicted of the most serious crimes, there is no logical principle that distinguishes minor offenses in family court. And policy reforms consistent with the Supreme Court's "children are different" cases have covered minor offenses. For instance, states have expanded family-court jurisdiction in recent years, primarily by raising the maximum age at which a child can be tried in family court.³⁰⁵

³⁰⁰ See *id.* The National Juvenile Defender Center reached the same conclusion and provided statutory excerpts. National Juvenile Defender Center, *Comparative & Multi-jurisdiction Data: Juvenile Justice Purpose Clauses—Multi-jurisdiction Survey* (Jan 2014), online at <http://njdc.info/practice-policy-resources/state-profiles/multi-jurisdiction-data/> (visited Dec 27, 2017) (Perma archive unavailable).

³⁰¹ See, for example, Sayali Himanshu Bapat and Barbara Bennett Woodhouse, *Is There Justice for Juveniles in the United States, India, and Italy?: Towards a Framework for Transnational Comparisons*, in Tamar R. Birckhead and Solange Mouthaan, eds., *The Future of Juvenile Justice: Procedure and Practice from a Comparative Perspective* 37, 45–46 (Carolina 2016).

³⁰² The "children are different" quote comes from *Miller*, 567 US at 480. The other cases are *Roper*, 543 US 551; *Graham*, 560 US 48; *J.D.B. v North Carolina*, 564 US 261 (2011); and *Montgomery v Louisiana*, 136 S Ct 718 (2016).

³⁰³ See *J.D.B.*, 564 US at 265. *J.D.B.* made a point to emphasize that the law has long treated children differently, that these differences apply across a wide range of legal areas, and that such differences are a "settled understanding." *Id.* at 262.

³⁰⁴ See, for example, *Miller*, 567 US at 571.

³⁰⁵ This trend is illustrated at *Jurisdictional Boundaries* (Juvenile Justice GPS), online at <http://www.jjgps.org/jurisdictional-boundaries> (visited Nov 13, 2017) (Perma archive unavailable). This website excludes two states that recently expanded family-court jurisdiction. See SB 324, 2016 La Sess Law Serv 521, codified at La Children's Code Art 804(1); Act No 268 § 2, 2016 SC Acts & Resol 1751, 1752–53 (including a statutory provision to take effect, per § 12, in 2019).

A related difference between adult criminal court and family-court delinquency and child protection cases are that the latter are confidential while criminal cases explicitly seek to blame criminals publicly as one tool to punish, shame, and deter crime. While juvenile delinquency proceedings are less confidential than they used to be,³⁰⁶ they are still generally closed proceedings,³⁰⁷ and juveniles' names are still mostly shielded from public view. Confidentiality's historical purpose has been to promote the family court's rehabilitative purposes and to shield children and families from the stigma of public disclosure,³⁰⁸ a purpose *Gault* explicitly recognized.³⁰⁹

2. Elected prosecutors' offices are not structured to apply a rehabilitative statute.

For a child who is repeatedly unruly, when is a school intervention, the provision of services from other agencies, or a diversion program more effective than prosecution in court? For parents who abuse substances and are abused by a partner and neglect their children as a result, when is court intervention necessary and when can less invasive steps work? There is little inherent in an elected prosecutor's role or training that helps answer these questions. Worse, granting this power to elected prosecutors can undermine the juvenile justice and child protection law's rehabilitative purposes.

Locating charging decisions in elected prosecutors' offices likely leads to the overvaluation of punitive or deterrence goals and the subordination of rehabilitative goals in both delinquency and child protection systems, though it arises more frequently in the juvenile delinquency context. There, the status quo's empowerment of elected prosecutors' offices—and disempowerment of juvenile justice agencies—threatens what Justice White called

³⁰⁶ Many have criticized policy reforms that have edged away from confidentiality. See generally, for example, Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 NYU L Rev 520 (2004).

³⁰⁷ See *id.* at 536 (noting that, while increasing exceptions exist, “almost every state still has some statutory provision for the confidentiality of juvenile hearings and records”); Henning, 98 Cornell L Rev at 394 (cited in note 10) (noting that most juvenile delinquency cases remain closed, with exceptions often limited to more serious charges).

³⁰⁸ See Henning, 79 NYU L Rev at 527–30 (cited in note 306).

³⁰⁹ See *Gault*, 387 US at 25. *Gault* did recognize that delinquency adjudications stigmatize youth, *id.* at 22–24, and child protection cases similarly stigmatize families, but that stigma is a consequence, not a purpose of family-court cases.

the juvenile system's unique ability to check "overzealous prosecutor[s]." ³¹⁰ White wrote in an era before prosecutors gained charging authority—and his concern is particularly strong now that they have largely done so.

Elected prosecutors generally work to prosecute and convict individuals for criminal offenses. The National District Attorneys Association described elected prosecutors' "primary responsibility" as serving as "an independent administrator of justice"—focusing on "accountab[ility]" for the guilty and "protect[ion]" for the innocent. ³¹¹ Their guidelines for juvenile prosecutors' charging decisions differ only modestly from adult guidelines. ³¹² The guidelines acknowledge the value of "the special interests and needs of the juvenile," but make clear that juvenile prosecutors' "primary duty . . . is to seek justice," and rehabilitating children exists only as a secondary goal, and only so long as it does not "unduly compromise[e]" their primary duty. ³¹³

Prosecutors' close relationships with police departments often furthers this punitive orientation. Police officers are trained to investigate and enforce the law; they are not trained to determine which children can be served through school interventions and which through juvenile justice interventions. Several studies have documented in the child protection context that "police have a more punitive attitude" than other categories of professionals. ³¹⁴ Vesting control in elected prosecutors risks overreliance on the views of law enforcement officers in charging decisions, and too little reliance on individuals with a statutorily mandated rehabilitation orientation.

³¹⁰ See text accompanying note 94.

³¹¹ National District Attorneys Association, *National Prosecution Standards* 1-1.1 at *2 (3d ed 2009), archived at <http://perma.cc/MZ4S-RHPD>.

³¹² See Henning, 98 Cornell L Rev at 438 (cited in note 10).

³¹³ See *National Prosecution Standards* 4-11.1 at *64 (cited in note 311). See also id 4-11.8 at *65 ("[T]he primary concern of the prosecutor should be protection of the public interest."); id 4-11.10 at *66 (providing that disposition recommendations should serve children's needs only to the extent that "they are consistent with community safety and welfare").

³¹⁴ Theodore P. Cross, David Finkelhor, and Richard Ormrod, *Police Involvement in Child Protective Services Investigations: Literature Review and Secondary Data Analysis*, 10 Child Maltreatment 224, 231 (2005) (discussing prior studies). Professors Theodore P. Cross, David Finkelhor, and Richard Ormrod largely studied police involvement in child protection investigations rather than their less frequent involvement in deciding whether to remove children. See id at 237 (reporting rates of police involvement in investigation and the "[p]lan/placement decision").

Some elected prosecutors' offices further that punitive orientation through various management practices. Some offices determine promotions and salaries in part based on the convictions won by line prosecutors—leaving little career benefit for an individual prosecutor who declines to prosecute children for petty offenses that could be addressed through means other than the family court.³¹⁵ Some prosecutors who espoused a less punitive approach to their jobs have expressed concern that such views would impair their career trajectories.³¹⁶ Some offices use the number of dismissals as a means to measure attorneys' performance³¹⁷—a measure that discourages dismissals, even when supported by a reasoned conclusion that diversion would better rehabilitate the child than prosecution. Such measures are particularly inappropriate in states in which any individual can make referrals³¹⁸ because the different pool of referrals may have a different proportion of meritorious cases than the adult criminal system. Many offices lack attorneys devoted to juvenile cases, instead filling these positions with new attorneys seeking promotion to an adult criminal docket³¹⁹—which they earn through high conviction numbers rather than exercising charging discretion.³²⁰

In addition to different office cultures, prosecutors are not professionally trained to analyze the various social factors that should drive family-court charging decisions. Determining whether prosecution is warranted in any given case requires identification of the root causes of concerning behavior and evaluation of alternative interventions, a determination that benefits from a strong understanding of adolescent development, mental health

³¹⁵ See Henning, 98 Cornell L Rev at 434 (cited in note 10); Bishop and Frazier, 5 Notre Dame J L, Ethics & Pub Pol at 301 (cited in note 63) ("All too frequently juvenile divisions are places of first assignment for newly hired assistant state attorneys who eventually move on to the more prestigious criminal divisions.").

³¹⁶ See Bishop and Frazier, 5 Notre Dame J L, Ethics & Pub Pol at 298 n 51 (cited in note 63).

³¹⁷ See, for example, National District Attorneys Association, American Prosecutors Research Institute, *Performance Measures for Prosecutors, Findings from the Application of Performance Measures in Two Prosecutors' Offices* *2 (2007), archived at <http://perma.cc/D3MP-Z9PR>. This report called for further study of measurements related to dismissals, such as the ratio of convictions to cases charged. *Id.* at *14.

³¹⁸ See text accompanying notes 277–79.

³¹⁹ This practice is disfavored by the National District Attorneys Association. See *National Prosecution Standards* 4-11.3 at *64 (cited in note 311).

³²⁰ See Anna VanCleave, Brady and the Juvenile Courts, 38 NYU Rev L & Soc Change 551, 557 (2014).

conditions,³²¹ and family functioning. Assessing such factors is “far more fitting for a probation officer than for prosecutor inquiry.”³²² Some prosecutors have acknowledged that they are “ill prepared” for the task of determining which teenagers require prosecution, which may need diversion, and which require no court intervention at all.³²³ These points are even more true in child protection cases, in which determining which cases to prosecute requires distinguishing children who are so in danger that they require removal from children whose families can safely care for them with some less coercive intervention, and attorneys lack training in the relevant principles of child development or family dynamics.³²⁴

Locating prosecutorial discretion with agencies provides contrasts on all points. Agency attorneys are “likely to be committed to the agency’s particular substantive mission,”³²⁵ which prominently features rehabilitation. Juvenile justice agencies are more likely to be focused on rehabilitation. A juvenile justice agency lawyer’s career should not depend on a simple win–loss record or number of cases filed or dismissed. For agencies, success (and therefore good lawyering and a lawyer’s promotion) should look different. Professors Neal Devins and Michael Herz suggest that success for a lawyer representing an agency should be measured by success of the agency’s overall mission and any relevant policy agenda.³²⁶ Defining precise metrics for juvenile justice and child protection agency lawyers is beyond the scope of this Article. It suffices to point out that such metrics should include measures, such as recidivism rates of individual defendants (both among children diverted and prosecuted), that are central to agencies’ rehabilitative missions.

³²¹ For example, one recent study found that the prosecution of first-time offenders is associated with higher rates of reoffending, except for children “diagnosed with an aggression-related mental disorder.” See Barrett and Katsiyannis, 26 *J Child & Fam Stud* at 2051–52 (cited in note 26).

³²² Rubin, 26 *Crime & Delinq* at 304 (cited in note 84).

³²³ Reich, 14 *Gonzaga L Rev* at 349 (cited in note 167).

³²⁴ See Herring, 24 *U Toledo L Rev* at 624 (cited in note 213). See also Brooke N. Silverthorn, *Agency Representation in Child Welfare Proceedings*, in Donald N. Duquette, Ann M. Haralambie, and Vivek S. Sankaran, eds, *Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases* 751, 754 (National Association of Counsel for Children 3d ed 2016) (cautioning that prosecutors “with little or no training or specialized knowledge in child welfare” should not make decisions about which children to remove or cases to file).

³²⁵ Michael Herz, *The Attorney Particular: Governmental Role of the Agency General Counsel*, in Clayton, ed, *Government Lawyers* 143, 143 (cited in note 71).

³²⁶ Devins and Herz, 5 *U Pa J Const L* at 588 (cited in note 67).

B. Structured to Coordinate Intake Decisions and Systemic Goals

Administrative agencies perform essential work in the child protection and juvenile justice systems, and are best situated to consider legal and nonlegal factors to determine if a court case serves particular children's interests. Most importantly, agencies have the capacity to connect intake decisions with services available for particular children and families and thus are best situated to apply the system's goals in a coherent and pragmatic manner.

Relatedly, an agency model aligns the costs of bringing a case—supervising a child on probation or taking care of a child committed to a child protection or juvenile justice agency's custody—with the authority to initiate these cases. Professor John Pfaff has argued that the ability of elected criminal prosecutors to send individuals to prison without paying the costs of housing prisoners creates problems with prosecutors' decisions in the criminal justice system, and he recommends making elected prosecutors pay some of those costs.³²⁷ Because child protection and juvenile justice agencies have such large roles in family-court cases—comparatively larger than departments of correction—assigning them intake authority represents a simpler reform than Pfaff's proposal to split costs between prosecutors and prison agencies.

1. Child protection agencies.

Child protection agencies should exercise prosecutorial discretion because they have comparatively greater ability to determine which children and families would most benefit from court involvement. Modern child protection agencies operate comprehensive systems. They manage child protection hotlines and determine which reports of child maltreatment can lead immediately to provision of services on a voluntary basis (known as differential response) and which need investigation. These agencies' investigations substantiate some allegations of maltreatment, and then these agencies determine which families with such substantiations would benefit from voluntary services and which need court involvement. The child protection agencies themselves also operate foster care systems—so they know what

³²⁷ Pfaff, *Locked In* at 142–43, 213–14 (cited in note 58).

placements and services are available if they seek a court order transferring custody to them. They thus have a unique ability to determine which cases would most benefit from court intervention—and which families the agency is not likely able to help.

An agency's specialized knowledge of its own services reflects one purpose of separation of powers articulated by the Supreme Court in *Heckler v Chaney*,³²⁸ especially when litigation is one tool in a complicated regulatory system:

[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.³²⁹

Applying the *Heckler* principle to child protection cases is straightforward. State child protection agencies operate comprehensive child protection systems and are in the best position to determine “whether agency resources are best spent on this violation or another,” and whether a family-court prosecution or some other agency action is most effective. Prosecutors working in such agencies must soon learn how to help counsel their agency clients to balance their competing goals and make intake decisions consistent with their policy priorities.

2. Juvenile justice agencies.

Similar arguments support granting juvenile justice agencies charging authority and assigning family-court prosecutors to represent them. Juvenile justice agencies have a strong understanding of child development. Agencies employ social workers and psychologists, whose professional training includes adolescent development. These agencies are thus more likely to follow developmental psychology that suggests that some petty misbehavior does not require rehabilitative services at all—if it is normal teenage behavior—or requires some intervention other than coercive

³²⁸ 470 US 821 (1985).

³²⁹ Id at 831. *Heckler* involved an effort to force the Food and Drug Administration to regulate drugs used by states in lethal injections. The Supreme Court unanimously upheld the agency's ability to decline to regulate those drugs. Id at 837–38.

court-imposed services. Professor Henning has compellingly called on prosecutors to “collaborate with developmental experts and community representatives to draft intake and charging standards” that can provide a check on implicit bias and resulting racial disparities and “are informed by research in adolescent development.”³³⁰ The DOJ has recommended applying trauma screens during juvenile delinquency intake to identify children whose offenses may result from a trauma disorder.³³¹ Performing these interdisciplinary functions within an agency charged with understanding and following the state of the field knowledge in adolescent development will help socialize prosecutors to balance all of the agency’s competing goals. That would contrast positively with many elected prosecutors’ offices that, as discussed above, are institutionally primed to give disproportionate consideration to factors weighing in favor of prosecution and are not generally trained in relevant social science knowledge.

An agency model must overcome two obstacles unique to juvenile justice law. First, most states lack a comprehensive agency to handle juvenile justice cases from charging decisions through postdisposition sentences. Some states, such as South Carolina, grant their departments a specific role during intake.³³² In most states, however, they are juvenile probation staffers who are not affiliated with the agency that would take custody of children after an adjudication.³³³ As discussed in Part III.A, many states maintain a role for probation or intake officers, including those employed in the judicial branch. These pre-*Gault* relics often take on roles in juvenile delinquency cases that have largely been assigned to child protection agencies.

This split between intake departments and postadjudication service agencies makes little sense, and those functions should be merged into a more comprehensive juvenile justice agency. Comprehensive juvenile justice agencies would likely bring a more balanced perspective to charging decisions and thus better fulfill the juvenile justice system’s purposes. Those agencies are charged with providing rehabilitative services to children who are adjudicated delinquent, and so have a unique ability to determine

³³⁰ Henning, 98 Cornell L Rev at 387, 457 (cited in note 10).

³³¹ See Robert L. Listenbee Jr, et al, *Report of the Attorney General’s National Task Force on Children Exposed to Violence* *176–77 (OJJDP, 2012), archived at <http://perma.cc/LP45-JM99>.

³³² See SC Code Ann § 63-19-1010.

³³³ See, for example, 10A Okla Stat Ann § 2-2-104.

which children are most in need of such services and which children are better served by other entities.

Such unified juvenile justice agencies would finally correct the historical treatment of family courts as judicial-branch agencies. Early family courts sought to provide services to juvenile delinquents—consistent with the court’s assumption of executive-branch charging authority, the court assumed executive-branch authority to provide services to children under its jurisdiction.³³⁴ A sociologist studying the family court in the mid-1960s (before *Gault*) described it as an administrative agency whose role was shifting to become a more traditional court.³³⁵ Others described the family court’s intake function as “[r]eflecting the sociolegal character of the court” and as a mix of “case screening and acceptance procedures of welfare agencies” and adult-criminal-court charging procedures.³³⁶ By the time of *Gault*, however, observers recognized that the job of providing services had shifted away from courts to growing executive-branch agencies, such as juvenile justice, mental health, and child welfare agencies.³³⁷ Soon after *Gault*, authorities advocated for more formally placing such authority in the executive branch. In 1979, the ABA recommended shifting all juvenile delinquency intake efforts to the executive branch, in part to locate intake decisions in the same branch of government that was providing services.³³⁸ The ABA recognized that judges were not well suited to administer social services³³⁹ and that concentrating these services in the executive branch would improve the variety and coordination of services offered.³⁴⁰ Moreover, judges should be independent of the agencies—especially when those agencies must comply with judges’ orders

³³⁴ See Sheridan, *Standards for Juvenile and Family Courts* at 9–10 (cited in note 14).

³³⁵ See Lemert, 1967 Wis L Rev at 423 (cited in note 116).

³³⁶ Rosenheim and Skoler, 11 Crime & Delinq at 168–69 (cited in note 91).

³³⁷ See, for example, Robert D. Vinter, *The Constitutional Responsibilities of Court-Related Personnel*, in Virginia Davis Nordin, ed, *GAULT: What Now for the Juvenile Court* 119, 122 (Institute of Continuing Legal Education 1968) (“There has been an expansion of welfare service programs apart from the court Except in certain states the court is no longer a major source of public services available to youth in trouble.”); Robert D. Vinter, *The Juvenile Court as an Institution*, in *Task Force Report* 84, 84–85 (cited in note 86) (noting the family court’s dependence on various local agencies and organizations); Sheridan, *Standards for Juvenile and Family Courts* at 11 (cited in note 14) (recommending against court administration of social services for children).

³³⁸ See *Standards Relating to Court Organization and Administration* at 15 (cited in note 148).

³³⁹ See *id.* at 15. The ABA approved the standards in 1979. *Id.* at v.

³⁴⁰ *Id.* at 1, 16–17.

about services provided to children.³⁴¹ Subsequently, state departments of juvenile justice were responsible for children's cases postdisposition, but intake services followed a different path, often remaining in the judicial branch while much authority shifted to local prosecutors' offices.

Intake and postadjudication services should be unified in one agency. Intake decisions require determining which children are most appropriate for the specific rehabilitative services offered by juvenile justice agencies and which can be served through other programs. As *Heckler* suggested, answering that question as accurately as possible should involve considering the full range of interventions available, and whether charging specific children would lead to an efficient allocation of scarce agency resources. Unified juvenile justice agencies would be the entities best suited to determine whether a child's case should be dismissed, referred to a diversion program (which the agency may operate, directly or through a contractor), or prosecuted (and thus subject to an agency placement or agency probation supervision if convicted).

A second challenge is that police departments, and not juvenile justice agencies, investigate children suspected of committing crimes and refer suspects to the juvenile justice system—in contrast to child protection agencies, which investigate child abuse and neglect allegations. Still, this difference does not justify denying prosecutorial discretion to juvenile justice agencies. The purposes of family-court prosecutions remain focused on rehabilitation. So long as that is true, the agency providing rehabilitation services is best positioned to determine which cases to file.

3. Elected prosecutors' control risks inhibiting agency coordination.

Elected prosecutors' authority over charging decisions can harm juvenile justice and child protection agencies' ability to provide rehabilitative services effectively. Granting prosecutorial discretion to elected prosecutors, or even to judicial-branch intake officers, gives those entities control over how many children departments of juvenile justice must serve after adjudication. Those agencies do not control their "front door,"³⁴² which could lead to overcrowded juvenile facilities and probation dockets. An agency that has reached its capacity for effective services to children in

³⁴¹ *Id.* at 15–16.

³⁴² *Alexander S. v. Boyd*, 876 F Supp 773, 781–82 (D SC 1995).

custody or on probation cannot adjust intake decisions accordingly; they must take whatever children are ordered into their custody or supervision. The result can be overcrowded juvenile facilities or overburdened foster care systems, and their many correlated problems.³⁴³ Depriving agencies of charging authority empowers others to effectively make policy decisions about the allocation of agency resources.³⁴⁴ That is precisely what occurs when nonagency attorneys decide to prosecute a child protection or delinquency case without bearing responsibility for the consequences in terms of agency resources.

4. Agency interests will more likely coincide with statutory mandates.

One risk in giving agencies control over which cases to prosecute is that they may make decisions based on their own interests—trying to shift cases for which they should take responsibility onto other agencies or prosecuting cases as a means to use (and not lose) available resources. While both concerns are legitimate, the incentives created by an agency model would correct problems in the existing system. An agency that would be responsible for a child adjudicated delinquent can push back against efforts by other agencies to lead to an adjudication. And legislative decisions on resource allocation to particular agencies would be tied to agency decisions about when to use them.

Agencies may attempt to pin responsibility for responding to particular cases on other agencies, and thus they would allow some children and families to escape warranted interventions. A juvenile justice agency, for instance, might decline to prosecute a child by insisting that a mental health agency or school provide some sort of intervention first. While such action in individual cases will surely sometimes be inappropriate, empowering a juvenile justice agency to engage in such efforts will pressure other agencies to more effectively assist such children. Indeed, there is a striking inequity under present law—schools, as well as mental health (and other) agencies, can disclaim responsibility for difficult teenagers and ask elected prosecutors to seek delinquency

³⁴³ Indeed, the *Alexander S.* reference to the South Carolina Department of Juvenile Justice not controlling its front door explained that the Department of Juvenile Justice was not entirely at fault for the gross overcrowding and related troubles documented in that case. *Id.*

³⁴⁴ See Devins, *Toward an Understanding of Legal Policy-Making at Independent Agencies* at 185 (cited in note 71).

charges. Research into the school-to-prison pipeline has identified this phenomenon.³⁴⁵ If juvenile justice agencies are not included in the prosecutors' decisions, or have only a weak voice in those decisions, they cannot effectively argue that schools or other agencies should do more before invoking the juvenile justice system. The juvenile justice system thus becomes too easy of a system to enter—and erodes the family court's historical place as “an agency of last resort” for children whose behavior cannot be managed elsewhere.³⁴⁶ As Judge David Bazelon wrote regarding status offenders a generation ago, “[B]ecause you [family courts] act, no one else does. Schools and public agencies refer their problem cases to you because you have jurisdiction, because you exercise it, and because you hold out promises that you can provide solutions.”³⁴⁷

The flip side of this concern is that if an agency has a budget for a particular amount of services—such as placements in group homes for foster or delinquent children—it may feel pressured to prosecute enough cases to utilize all of those services lest the agency lose budget allocations for such services. Such concerns are relatively unlikely to play out in practice, at least so long as child protection and juvenile justice agencies face meager budget allocations. More broadly, the resource constraints imposed on agency decisionmaking come with important benefits. These considerations force agencies to prioritize cases for available resources, consistent with *Heckler*, and thus the legislature's budget allocations can be treated as judgments about the scope of necessary intervention. It is better for agencies to exercise prosecutorial discretion in explicit consideration of those judgments than for elected prosecutors to do so at a significant distance from those budgetary realities.

C. More Effective Judicial Review of Prosecutorial Discretion

A primary benefit of administrative exercise of prosecutorial discretion is that agency decisions can be subject to some forms of

³⁴⁵ For instance, an ABA report on the school-to-prison pipeline outlines pervasive beliefs that many children will not succeed in school and details a series of discretionary decisions that build from academic failures to school discipline to juvenile justice system involvement. See Redfield and Nance, *School-to-Prison Pipeline Preliminary Report* at *18–22 (cited in note 29).

³⁴⁶ Lemert, *The Juvenile Court—Quest and Realities* at 96 (cited in note 86).

³⁴⁷ David L. Bazelon, *Beyond Control of the Juvenile Court*, 21 Juv Ct Judges J 42, 44 (1970).

judicial review. Some commentators have called recently for judges, rather than prosecutors, to have power to determine which cases to prosecute and which to divert, but without explaining why a return to judicial control is best or identifying a legal structure for judges to make such decisions.³⁴⁸ This Section spells out how an agency model can support a clearer structure for judicial review of charging decisions. Such review would be generally deferential yet more meaningful than the limited tools available to check the discretion of elected prosecutors.

1. Arbitrary-and-capricious review of an agency decision to charge rather than divert.

Prosecutorial discretion should not be boundless. Criminal justice reform efforts have struggled to identify meaningful checks on prosecutorial discretion, a difficulty that has largely extended into family court, because the law is extremely hesitant to question the charging decisions of elected criminal prosecutors.³⁴⁹ Scholars have called for judicial review of criminal prosecutors' decisions for generations,³⁵⁰ and some describe it as an "ideal" reform idea that has nonetheless failed to gain traction in criminal court.³⁵¹ Family court, however, should be different. If family-court prosecutors represent agencies charged with multiple goals, including both public safety and rehabilitation of children who have committed crimes and parents who have abused or neglected their children, judicial review could ensure some consideration of those goals.

The basic administrative structure would begin with a child protection or juvenile justice agency promulgating standards for intake decisions. At least three states and the District of Columbia have already done so for delinquency cases by statute or court rule.³⁵² These factors include various details about the child's alleged offense—whether it includes violence or a weapon

³⁴⁸ David R. Katner, *Delinquency, Due Process, and Mental Health: Presuming Youth Incompetency*, in Nancy E. Dowd, ed., *A New Juvenile Justice System: Total Reform for a Broken System* 104, 117 (NYU 2015).

³⁴⁹ See Barkow, 61 Stan L Rev at 869, 874–87 (cited in note 58).

³⁵⁰ See, for example, Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* 207–14 (LSU 1969).

³⁵¹ See Barkow, 61 Stan L Rev at 908 (cited in note 58).

³⁵² See DC Code § 16-2305.02(c) (listing factors to consider); Cal Ct Rule 5.516 (same); Neb Rev Stat § 43-276(1) (same); NH Rev Stat Ann § 169-B:10 (requiring delinquency petitions to "identify why diversion was not an appropriate disposition prior to seeking court involvement," but not providing standards for rejecting diversion).

and “the ages and circumstances of any others involved in the offense”—and whether the child has committed any prior offenses.³⁵³ More severe charges and allegations that a child is a repeat offender should increase the likelihood of prosecution. Similar factors should apply in child protection cases—agencies should more frequently prosecute cases involving more severe and repeated instances of abuse or neglect, and cases that present immediate safety risks to children. Agencies could also use risk assessments to identify children who pose particularly high risks of future offenses or who are at particularly high risk of harm if left at home, although a full examination of the benefits and risks of such tools is beyond the scope of this Article.³⁵⁴

Agencies should also consider specific factors relating to whether prosecuting a particular child or parent serves family courts’ purposes. In juvenile delinquency cases, agencies should consider a child’s family circumstances, any mental health or substance abuse history related to the alleged offense, and any disabilities that would trigger special education protections related to the alleged offense³⁵⁵—and whether other agencies have provided appropriate services for such needs. For instance, if a child’s mental health condition or other disability leads to behavior at school that is the root of a delinquency charge, then the agency should consider if the school has provided appropriate special education services, and whether the child has had an opportunity to access mental health services. Negative answers weigh in favor of dismissing or diverting such charges. Analogous standards should

³⁵³ Neb Rev Stat § 43-276(1)(b), (d), (l). See also, for example, DC Code § 16-2305.02(c)(2).

³⁵⁴ For instance, Professor Edward P. Mulvey and Anne-Marie R. Iselin report that actuarial risk assessments more accurately predict risk of future crimes than clinical methods but that such tools are also designed to overidentify risks, requiring “structured clinical judgment” to screen out those false positives. Edward P. Mulvey and Anne-Marie R. Iselin, *Improving Professional Judgments of Risk and Amenability in Juvenile Justice*, 18 *Future of Children* 35, 40–41 (Fall 2008). See also Christopher E. Church and Amanda J. Fairchild, *In Search of a Silver Bullet: Child Welfare’s Embrace of Predictive Analytics*, 68 *Juv & Fam Ct J* 67, 68 (Mar 2017) (discussing how “[predictive analytics] have the capacity to use data to help professionals make decisions more accurately, objectively and quickly,” but recognizing concerns about “discriminatory practices or consequences”). Skeptics have criticized how specific agencies have crafted risk assessments in a manner that validates existing practices. See Marsha Garrison, *Taking the Risks out of Child Protection Risk Analysis*, 21 *J L & Pol* 5, 26–27 (2012). See also Tamar R. Birkhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 *BC L Rev* 379, 416–18 (2017) (summarizing the debate over risk assessments in juvenile and criminal justice).

³⁵⁵ See Willis, 2016 *BYU Educ & L J* at 202–07 (cited in note 62).

apply in child protection cases—if a parent’s mental health condition leads to abuse or neglect, agencies should consider whether offering such services to the parent without going to court could adequately rehabilitate the parent and protect the child. In both delinquency and child protection cases, agencies should also consider the likelihood that a child or parent will participate in rehabilitative services without a court order.³⁵⁶ Agencies may also consider standards that distinguish different populations or types of child maltreatment or delinquency. In child protection law, for instance, Professor Michael Wald has discussed different standards for when removal and court action are required, distinguishing very young children at risk of significant harm from cases of family conflict involving older children.³⁵⁷ In delinquency, agencies could analogously treat twelve-year-olds (relatively young for the delinquency system) differently from seventeen-year-olds, as well as differentiate among children committing property, drug, or other offenses.

Applying such standards in individual cases, agency staff and attorneys would determine whether particular cases are (a) legally sufficient and (b) worth filing because, under those agency standards, court intervention rather than another step serves the mix of rehabilitative and other goals of child protection and juvenile justice law. Establishing such clear standards would itself provide a significant benefit by reducing some of the wide discretion that would otherwise exist³⁵⁸ and by eliminating practices that, for instance, automatically prosecute felony charges without considering legal sufficiency or other rehabilitative options.³⁵⁹

Litigants in an ensuing case could seek dismissal of the case if the agency arbitrarily and capriciously applied its standards. Such review would provide significant deference to the agency’s charging decision while still helping to ensure that agencies are actually reviewing each case and considering all appropriate factors. An agency failing to consider specified standards adequately should justify dismissal. Consider two examples: In juvenile justice, a particularly important example involves school-based offenses committed by children with disabilities; when provision of special education services—either any services when schools have

³⁵⁶ See, for example, DC Code § 16-2305.02(c)(4).

³⁵⁷ See Michael S. Wald, *New Directions for Foster Care Reform*, 68 Juv & Fam Ct J 7, 25–28 (Mar 2017).

³⁵⁸ See Birkhead, 46 Tex Tech L Rev at 181–83 (cited in note 19).

³⁵⁹ See id at 183 (describing such an automatic prosecution policy).

failed to provide any³⁶⁰ or improved services when schools have failed to provide adequate services³⁶¹—is at issue, defendants should be able to request the opportunity to address their disability at school rather than in court by showing that the administrative agency failed to consider fully whether court intervention was necessary. In child protection, a common phenomenon involves authorities significantly increasing their removal and charging rates in response to a tragedy.³⁶² If an agency did so without sufficiently considering alternatives to removal, then children's and parents' attorneys could seek dismissal of the resulting petitions.

Several jurisdictions have partial models for this type of review. In Washington state, when an intake officer determines that a child otherwise eligible for diversion should be prosecuted, it must provide a "detailed statement of its reasons."³⁶³ Washington cases have recognized a child defendant's right to ensure that this decisionmaking is not arbitrary or capricious.³⁶⁴ A small number of other jurisdictions have explicitly permitted children to file motions to "dismiss for social reasons"—that is, move to dismiss a case not because the government's allegations are false, but because court intervention is not necessary to achieve the family court's rehabilitative goal.³⁶⁵ The language of these motions harkens back to the family court's historical oversight of charging discretion, asking the judge to overrule a subordinate's decision to prosecute rather than divert a child's case. Other states permit family courts to dismiss cases at their own discretion but do not provide a meaningful standard for such review.³⁶⁶ Arbitrary-and-capricious review brings such review into the modern era by placing it

³⁶⁰ Public schools have a legal obligation to identify all children with disabilities—known as "child find"—and provide appropriate special education services. 20 USC § 1412(a)(3). If a child commits a crime that is a manifestation of a disability, it is reasonable to consider whether remedying any child-find violation, rather than a family-court prosecution, is the best way to prevent a repeat offense. Willis, 2016 BYU Educ & L J at 202–03 (cited in note 62).

³⁶¹ Public schools have a legal obligation to provide a "free appropriate public education" (FAPE) to children with disabilities. 20 USC § 1412(a)(1). As with child-find violations, charging decisions should consider whether remedying a FAPE violation or prosecution is most appropriate.

³⁶² See text accompanying note 11.

³⁶³ Wash Rev Code § 13.40.080(13).

³⁶⁴ See, for example, *State v Chatham*, 624 P2d 1180, 1182 (Wash App 1981).

³⁶⁵ See DC Super Ct Rule Juv Proceedings 47-I(d); NH Rev Stat Ann § 169-B:10 (authorizing the family court to, sua sponte or on a party's motion, refer children to diversion programs); NY Fam Ct Law § 315.2 (motion to dismiss in furtherance of justice).

³⁶⁶ See, for example, SC Code Ann § 63-19-1410(A)(7).

within familiar administrative-law principles and supplying more meaningful standards for determining when cases ought to be dismissed.

2. Judicial review as a tool to check racial and other disparities.

A judicial check can help reduce the racial, gender, and other disparities that research has consistently documented in intake decisions. Previous research has found that intake officers asked girls more frequently than boys about past abuse or neglect, and that intake officers noted the “physical appearance, maturity, and sexuality of girls” with more frequency than with boys.³⁶⁷ Studies have reached similar findings regarding race at intake. Nationally, black children referred to family courts are less likely to be diverted and more likely to be charged than white children,³⁶⁸ and these disparities have existed for years.³⁶⁹ Multiple studies have found that legal differences—like more severe offenses or a longer record of prior offenses—cannot fully explain these disparities, leading to the inference that authorities treat children differently based on their race.³⁷⁰ A recent study of one state’s intake data concluded that “being Black significantly increased the odds of receiving a referral at intake by 54%.”³⁷¹ Older studies showed

³⁶⁷ Kimberly Kempf-Leonard, *The Conundrum of Girls and Juvenile Justice Processing*, in Bishop and Feld, eds., *The Oxford Handbook of Juvenile Crime and Juvenile Justice* 485, 496 (cited in note 18).

³⁶⁸ See *Investigation of the St. Louis County Family Court* at *40 (cited in note 19) (showing a relative rate index of 0.7 for diversion—meaning that seven black children are diverted for every ten white children—and 1.2 for charging—meaning that twelve black children are prosecuted for every ten white children). See also C. Puzzanchera and S. Hockenberry, *National Disproportionate Minority Contact Databook* (OJJDP, 2017), online at http://www.ojjdp.gov/ojstatbb/dmcdmcd/asp/display.asp?year=2014&offense=1&display_in=1&displaytype=counts (visited Nov 13, 2017) (Perma archive unavailable) (reporting that 31.9 out of 100 referred cases were diverted for white youth, while 23.0 out of 100 referred cases were diverted for minority youth in 2014).

³⁶⁹ See Puzzanchera and Hockenberry, *National Disproportionate Minority Contact Databook* (cited in note 368) (finding similar gaps for every year reported, from 1990 to 2013).

³⁷⁰ See Bishop and Leiber, *Racial and Ethnic Differences in Delinquency and Justice System Responses* at 463 (cited in note 39).

³⁷¹ Jennifer H. Peck and Wesley G. Jennings, *A Criminal Examination of “Being Black” in the Juvenile Justice System*, 40 L & Hum Behav 219, 226 (2016). These findings are particularly noteworthy because the authors used propensity score matching to compare cases, a more sophisticated statistical technique than the regression analysis used in earlier studies. *Id.* at 227.

similar biases.³⁷² Problematic intake concerns about girls were especially prevalent for black girls.³⁷³ In one experiment, identifying children as black led probation officers to view children as “less immature and more violent, . . . more culpable, more likely to reoffend, and more deserving of punishment” than children with identical facts but no racial identification.³⁷⁴

Judicial review of agency charging decisions could address some of these concerns. Deviating from agency protocol—by commenting on a child’s physical appearance or failing to ask about an abuse or neglect history—would be an important factor in determining if the agency arbitrarily and capriciously determined that the child was in need of family-court intervention. More systematically, agencies should be required to report aggregate statistics regarding disparities. If those statistics show that race or gender rather than individual child or family factors shaped intake decisions, that should also affect a determination whether the agency has acted arbitrarily and capriciously.

Nonetheless, an agency model cannot itself address all disparities. As Professor Tamar Birckhead has pointed out, consideration of social factors could likely be a recipe for creating socioeconomic disparities because poor and black children are likely to have disproportionate amounts of social needs and thus be more likely to be seen by officials as in need of more intervention.³⁷⁵ But looking only at whether a crime occurred, and not whether a particular child needs court intervention, would both undermine the family court’s rehabilitative purpose and allow disparities in identifying and referring crimes to create disparities in family-court involvement. And evaluating whether a prosecution is necessary to serve a child’s needs—and thus evaluating whether other agencies can more effectively intervene—could help reduce the large disparities present in overall referrals to family court.³⁷⁶

³⁷² See generally George S. Bridges and Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 *Am Sociological Rev* 554 (1998).

³⁷³ Kempf-Leonard, *The Conundrum of Girls and Juvenile Justice Processing* at 501 (cited in note 367).

³⁷⁴ Sandra Graham and Brian S. Lowery, *Priming Unconscious Racial Stereotypes about Adolescent Offenders*, 28 *L & Hum Behav* 483, 496 (2004).

³⁷⁵ See generally Tamar Birckhead, *Delinquent by Reason of Poverty*, 38 *Wash U J L & Pol* 53 (2012).

³⁷⁶ Nationally, authorities refer black children to family court at a relative rate 2.4 times greater than they refer white children. See *Investigation of the St. Louis County Family Court* at *40 (cited in note 19).

D. More Democratic Accountability

Perhaps counterintuitively, state agencies can be more democratically accountable than locally elected prosecutors' offices. State agencies' power is granted by statute—which state legislatures can amend to reform agencies. State agencies also depend on the legislature for budget appropriations and are subject to legislative oversight procedures.³⁷⁷ State agencies are subject to state administrative-procedure laws and public reporting requirements.³⁷⁸ State agencies are generally supervised by governors,³⁷⁹ who can be held responsible for their successes or failures.

Agency oversight mechanisms may be imperfect—juvenile justice and child protection rarely rises to the top of legislative or gubernatorial agendas—but they are superior to existing mechanisms for local prosecutors. Even if voters are unlikely to elect legislators or governors based on their handling of juvenile justice and child protection issues, the various inter- and intrabranched accountability mechanisms just listed can provide meaningful paths to democratic accountability. Those mechanisms are lacking for local elected prosecutors' offices. While state departments of juvenile justice can be subject to detailed legislative oversight,³⁸⁰ local elections provide prosecutors' offices with their own independent power base and thus insulate them from legislative or gubernatorial oversight.³⁸¹ In addition, both judicial intake officers and elected prosecutors are generally exempt from state administrative-procedure laws—the former because they are part of the judicial branch and the latter because they are not regular state administrative agencies. Absent such procedures, there are

³⁷⁷ Professor David Freeman Engstrom has made a similar point comparing agency enforcement to private enforcement actions: “[P]ublic enforcers are politically accountable actors. Private enforcers are not.” Engstrom, 123 Yale L J at 638 (cited in note 67).

³⁷⁸ See, for example, DC Code § 4-1303.03(b)(10) (requiring detailed annual reporting from the District of Columbia's child protection agency).

³⁷⁹ See, for example, SC Code Ann § 63-19-320 (empowering the governor to appoint the director of the Department of Juvenile Justice, with the advice and consent of the state senate, and to fire the director).

³⁸⁰ See, for example, *House Legislative Oversight Committee, Department of Juvenile Justice* (South Carolina Legislature), archived at <http://perma.cc/AJ3F-BVYK> (listing meetings, public input, and committee investigations).

³⁸¹ See Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 Iowa L Rev 393, 451 (2001).

few mechanisms to hold them accountable for or provide public input into the procedures used to recommend prosecution or not.³⁸²

Local prosecutors' elections are weak substitutes for accountability mechanisms regarding state agencies. Local democratic accountability for family-court cases is particularly weak because family-court cases are often seen as less important than adult cases³⁸³ and are less likely to gain local media or voters' attention than more severe crimes. Those cases are also confidential, reducing the ability of the public to hold prosecutors accountable.³⁸⁴ Moreover, local prosecutors are more likely to be elected on a "tough-on-crime" platform³⁸⁵ that fails to give equal weight to the juvenile justice system's rehabilitative goals, and many county elections may give greater weight to voters in richer and whiter areas than the neighborhoods in which a disproportionate number of people affected by cases filed by prosecutors live.³⁸⁶

In addition, recent law-and-political-science scholarship has shown that local prosecutors are not as democratically accountable as their local elections might suggest. Residential political polarization renders many local elections noncompetitive.³⁸⁷ Preliminary empirical research suggests that local crime and conviction rates do not actually affect district attorney elections.³⁸⁸ Another study found that the "overwhelming majority" of elected prosecutors run unopposed³⁸⁹ and that turnout rates are particularly

³⁸² See Pfaff, *Locked In* at 70 (cited in note 58) (describing how the "mishmash" of authority between local elected prosecutors, local jails, and state prisons diminishes oversight of local prosecutors' decisions).

³⁸³ See Mears, *The Front End of Juvenile Court* at 581 (cited in note 18) (explaining that juvenile crimes have traditionally been seen as less important than crimes committed by adults, but that in recent decades "juvenile crime has garnered greater attention from the public and policy makers")

³⁸⁴ See Davis, 86 Iowa L Rev at 443 (cited in note 381) ("[T]he electoral process for state and local prosecutors is an effective accountability measure only in the unlikely event that the electorate becomes aware of the abuse.").

³⁸⁵ See Davis, *Arbitrary Justice: The Power of the American Prosecutor* at 166 (cited in note 58).

³⁸⁶ See Pfaff, *Locked In* at 7 (cited in note 58).

³⁸⁷ See generally David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J L & Polit 419 (2007).

³⁸⁸ See Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform? Given Their Autonomy—Only If They Want to Be* (The Atlantic, May 18, 2016), archived at <http://perma.cc/V7NL-NA9X>.

³⁸⁹ American Civil Liberties Union of Oregon, *Roadblocks to Reform: District Attorneys, Elections, and the Criminal Justice Status Quo* *4 (2016), archived at <http://perma.cc/MU6U-RPRC>.

low.³⁹⁰ As a result, local prosecutor elections can be determined by a closed group of political party insiders or powerful interest groups like police unions. That is not a system that generally will provide democratic accountability. In particular, that is not a system likely to hold prosecutors accountable to the competing goals of the juvenile justice or child protection systems, which are not likely to figure prominently in election campaigns.

E. Better Agency Counseling

Counseling is particularly important in agencies, as it can help ensure fidelity in individual cases to agency policy, and the literature regarding government attorneys has consistently concluded that agency attorneys are best suited to fulfill that function. Accordingly, counseling functions have historically always resided in federal agencies,³⁹¹ even when the DOJ centralized much of the federal government's litigation authority.³⁹² There is, of course, overlap between litigation and counseling functions.³⁹³ Professors Elizabeth Chambliss and Dana Remus have found that, recognizing this overlap, some states grant some agencies the ability to litigate some matters on their own behalf.³⁹⁴ Such grants of agency litigation authority make particular sense when an agency's overall programs and goals closely relate to its litigation activity.³⁹⁵ In such cases, the overlap between counseling and litigation is so significant that dividing it would risk harming the quality of either function.

Juvenile justice and child protection law are fields in which counseling and prosecution functions significantly overlap—determining which cases to file and which cases to handle outside of court relates to the agencies' core missions. Litigating those cases becomes a significant amount of the work of such agencies—

³⁹⁰ Pfaff, *Locked In* at 141–42 (cited in note 58) (noting low turnout rates and connecting “voter apathy” to elected prosecutors’ longevity in office).

³⁹¹ See Chambliss and Remus, 84 *Fordham L Rev* at 2049 (cited in note 70) (“The core function of the agency general counsel is to advise the agency.”); Devins and Herz, 5 *U Pa J Const L* at 568–69 (cited in note 67); Herz, *The Attorney Particular* at 143 (cited in note 325).

³⁹² See Devins and Herz, 5 *U Pa J Const L* at 568–69 (cited in note 67).

³⁹³ See Chambliss and Remus, 84 *Fordham L Rev* at 2049 (cited in note 70) (“Naturally, there is some overlap between the two functions.”).

³⁹⁴ *Id.*

³⁹⁵ Devins has made this point in reference to independent federal agencies: “Since court action is a critical component of an agency’s regulatory agenda, litigation authority would seem to constitute an essential attribute of agency independence.” Devins, *Toward an Understanding of Legal Policy-Making at Independent Agencies* at 185 (cited in note 71).

measured both by the amount of resources such litigation requires and how such litigation serves as the decision point for resource-intensive agency action (such as placing a child into a juvenile justice facility or a foster home). And an essential piece of the agency's work is to match the children and families entering the agencies' front door (through child protection or delinquency litigation) with the various services the agencies offer those families. Once litigation is chosen, the agency must address various questions that arise after adjudication, such as the appropriate placement for a child committed to a juvenile justice agency, whether a foster child can reunify with a parent or requires a new family, and, if a new family is necessary, what legal arrangements for such families are most appropriate.³⁹⁶

F. More Equality across Geographical Boundaries

Agency authority also better achieves goals of equal treatment within states because agencies work across states while prosecutors are elected on a local level. Even when child protection or juvenile justice agencies have county offices, those offices sit within a statewide administrative structure, providing some tools for statewide accountability³⁹⁷—while locally elected prosecutors do not encounter such tools. But even in those states, agency authority will be no less consistent across the state than elected prosecutor authority, as the latter is based on each local prosecutor's office.

A perennial concern in juvenile justice has been “justice by geography,”³⁹⁸ and inconsistent treatment by jurisdiction is particularly problematic when a “sanction is so severe and the stakes so high.”³⁹⁹ The sanction at issue in delinquency cases—the possibility of being incarcerated in a state institution indefinitely, up

³⁹⁶ See Josh Gupta-Kagan, *The New Permanency*, 19 UC Davis J Juv L & Pol 1, 11–26 (2015) (describing a continuum of permanency options); Herring, 24 U Toledo L Rev at 673 (cited in note 213) (describing the need for attorneys to counsel child protection agencies regarding permanency); Silverthorn, *Agency Representation in Child Welfare Proceedings* at 757–58 (cited in note 324) (describing counseling as “one of the agency attorney's biggest roles”).

³⁹⁷ The precise types of such accountability and the variations of state agency oversight over county agencies are beyond the scope of this Article.

³⁹⁸ See, for example, US Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Disproportionate Minority Contact Technical Assistance Manual* 2-7 to -8 (4th ed July 2009), archived at <http://perma.cc/R46J-FLN5>. See also generally Barry C. Feld, *Justice by Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration*, 82 J Crim L & Crimin 156 (1991).

³⁹⁹ Devins and Herz, 5 U Pa J Const L at 600 (cited in note 67).

to one's twenty-first birthday, with a stigma analogous to that imposed by a criminal conviction⁴⁰⁰—makes this same concern apply to juvenile delinquency cases. A similar point can be made regarding the sanctions and stigma of child protection cases.⁴⁰¹ Devins and Herz have argued that agency litigation control is “likely to *increase* [consistency of government legal positions], if anything, because the litigating position will be the agency's alone, without mediation or massaging by DOJ.”⁴⁰² Lawyers represent agencies, not individual agency employees, and so the lawyer can take on a particularly important role in ensuring that the caseworker's actions comport with agency policy.⁴⁰³

The case is even stronger when applied to the state delinquency and child protection system and the choice is between an agency model and a different elected prosecutor's office in every county. The latter creates a “mishmash of independent, often competitive” power centers, with the effect of limiting oversight of charging decisions.⁴⁰⁴ The former provides a structure with a greater ability to impose oversight and regularity on intake decisions.

CONCLUSION

Family-court prosecutors have a different history and function than their criminal analogs, and prosecutorial discretion is as important in delinquency and child protection cases as in criminal cases. Thus, family-court prosecutors deserve close study. They differ from criminal prosecutors in their purposes, which mix protecting individuals and the public from crime and child abuse and neglect with juvenile law's historical focus on rehabilitating child and parent offenders. And they differ in the role of administrative agencies that are charged with pursuing those mixed goals.

Those administrative agencies indicate the promise for a more coherent administrative structure. Those agencies have relative expertise regarding the cases they see and regarding the

⁴⁰⁰ *Gault* recognized that delinquency cases impose “only slightly less stigma” than criminal cases. *Gault*, 387 US at 23–24.

⁴⁰¹ See Josh Gupta-Kagan, *Beyond Law Enforcement: Camreta v. Greene, Child Protection Investigations, and the Need to Reform the Fourth Amendment Special Needs Doctrine*, 87 Tulane L Rev 353, 418–20 (2012) (discussing the stigma of child protection cases).

⁴⁰² Devins and Herz, 5 U Pa J Const L at 574 (cited in note 67).

⁴⁰³ See Laver, *Foundations for Success* at 112–14 (cited in note 218).

⁴⁰⁴ Pfaff, *Locked In* at 70 (cited in note 58).

services available, depending on the case. They are thus best positioned to exercise prosecutorial discretion.

Enacting a reform agenda involves several core steps. First, states should eliminate the vestiges of their pre-*Gault* intake structure. States should prevent private individuals from initiating court cases. Judicial-branch employees should have no role in determining which cases are filed and which are diverted.

Second, states should create comprehensive agencies with an understanding of how cases proceed through a full range of options—and with the responsibility for administering those options. Most child protection agencies already are structured in this way, so the biggest change would be in juvenile justice, and would mean shifting intake and probation services to departments of juvenile justice.⁴⁰⁵

Third, states should grant these comprehensive agencies prosecutorial authority—including the authority to determine whether to file and prosecute, divert, or dismiss a case. Especially once these agencies have the ability to see the full range of options available to respond to delinquency or child protection cases, they are best positioned to determine which cases need court intervention and which do not. As a corollary, elected prosecutors should not have a role in these matters.⁴⁰⁶

Fourth, agencies' exercise of prosecutorial decisionmaking should be treated like other administrative decisions—and subject to judicial review. Agencies should have discretion, of course, but they should exercise that discretion within boundaries. They should be free, for instance, to evaluate the different interventions provided to a fifteen-year-old who has committed a string of petty nonviolent offenses and determine that the child's continued misconduct warrants court intervention. But they should not be free to avoid analysis of whether the child had the opportunity to receive appropriate special education services, for instance.

⁴⁰⁵ This structure would not address other important questions that are beyond the scope of this Article. For example, children's Fifth Amendment rights would need protection, so juvenile justice agencies engaging in intake interviews should be prohibited from using any disclosures by a child in prosecuting that child. Such a rule echoes statutory protections already in place in many states. See, for example, SC Code Ann § 63-19-1010(A). See also Birkhead, 46 Tex Tech L Rev at 167–68 (cited in note 19). In addition, a strong argument exists that children should have the right to counsel for some intake proceedings. *Id.* at 166–71.

⁴⁰⁶ An exception should exist in determining when to seek waiver of family-court jurisdiction to prosecute a child in criminal court. Such decisions police the border between juvenile and adult court and, in my structure, between agencies and elected prosecutors exercising prosecutorial discretion.

These reforms would achieve multiple important goals. They would modernize family-court procedures. They would provide important and meaningful limits on prosecutorial discretion—limits that have been difficult to identify for criminal prosecutors. And it would create a structure that is more likely to further juvenile justice and child protection systems' policy goals.