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Where the Judiciary Prosecutes in Front of Itself: Missouri's Unconstitutional Juvenile Court Structure

Josh Gupta-Kagan*

I. INTRODUCTION

Missouri law structures juvenile courts in an “unusual” manner.¹ State law grants an individual known as the juvenile officer the exclusive authority to determine which child welfare or delinquency cases to file.² State law also grants juvenile court judges the authority to hire and supervise juvenile officers.³ Those same juvenile court judges then adjudicate the cases filed and prosecuted by the juvenile officer.⁴ That is, in Missouri juvenile courts the judicial branch prosecutes cases in front of itself.

This structure is unusual in multiple ways. Most obviously, it differs from the American norm of executive branch agencies and lawyers filing and prosecuting civil and criminal cases on behalf of the government.⁵ It also differs from typical procedures followed in juvenile delinquency and child welfare proceedings in juvenile courts around the United States, in which executive branch officials determine which cases to prosecute and how.⁶ This structure is particularly unusual in child welfare cases, in which an executive branch agency, the Children’s Division of the Department of Social Services (Children’s Division), operates a comprehensive child welfare system.⁷ Unlike child welfare agencies in most other states, the Missouri Children’s Division lacks the authority to determine which cases should be filed and how to prosecute them.⁸ In addition, juvenile officers perform many of the same tasks as Children’s Division case workers, such as making recommendations

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1. *In re M.C.*, 504 S.W.2d 641, 646 (Mo. App. E.D. 1974) (“The juvenile officer occupies an unusual position in our system of juvenile justice.”).

2. *See infra* Part II.A.

3. MO. REV. STAT. § 211.351 (2000).

4. § 211.459.

5. *See infra* Part II.B.

6. *See infra* Part II.B.

7. *See infra* Part II.B.

8. *See infra* note 51 and accompanying text.

to the judge about where a foster child should live and whether the child should reunify with a parent.⁹

This Article will address several issues raised by Missouri's unusual juvenile court structure, arguing that the structure violates the Missouri Constitution's separation of powers clauses by placing prosecutorial discretion within the judicial branch.¹⁰ By granting juvenile officers, who are subject to judges' supervision, exclusive power to file child abuse and neglect and juvenile delinquency cases, Missouri law concentrates power into the hands of one branch of government. Missouri law thus empowers individual judges to set child welfare and juvenile justice policy by managerial decree. Subordinate judicial branch officials face pressure to file and litigate cases to please their boss, the judge, who hired them, supervises them, and has power to fire them. And the judge faces subtle pressure to rule in favor of his or her own employees, who are treated as first among equals in the courtroom. At the very least, the fact that the prosecuting staff and attorney work for the judge adjudicating the petition leads to an appearance of partiality to litigants.

This Article will also discuss the anachronism that the juvenile officer's role represents.¹¹ In child welfare cases, the juvenile officer's role has not evolved with the modern administrative state. Missouri was one of the first states to adopt a juvenile court, and the state simultaneously established the juvenile officer's role in the early 1900s, before the modern administrative state existed.¹² When the modern administrative state developed in the 1930s, and especially when modern child welfare agencies developed in the 1960s and 1970s, the General Assembly charged the agency now known as the Children's Division with investigating allegations of child abuse and neglect and managing a complicated foster care system for children removed from their parents.¹³ Unlike legislatures in forty-seven other states plus the District of Columbia, the Missouri General Assembly has never given the Children's Division the authority to decide, in collaboration with executive branch attorneys, in which cases to file petitions alleging abuse or neglect or requesting a court order placing a child in foster care.¹⁴ Instead, the General Assembly developed the Children's Division without reforming the now more than a century old role of juvenile officers.¹⁵

In juvenile justice cases, the juvenile officer possesses prosecutorial discretion because of the General Assembly's judgment, first, that juvenile court personnel could best achieve therapeutic aims and, second, that such aims take precedence over proper constitutional procedures, even before a juvenile

9. § 211.455.

10. *See infra* Part III.

11. *See infra* Part IV.A.

12. *See infra* note 142 and accompanying text.

13. *See infra* notes 149-150 and accompanying text.

14. *See infra* Part II.B.

15. *See infra* notes 151-152 and accompanying text.

is found responsible for a delinquent act.¹⁶ Fulfilling therapeutic aims in the exercise of prosecutorial discretion remains appropriate and constitutes a vital element of the juvenile justice system; but doing so at the expense of constitutional protections reflects a worldview that has been untenable at least since the Supreme Court of the United States' watershed juvenile rights decision in 1967, *In re Gault*.¹⁷ *Gault* makes clear that the Constitution requires basic due process protections in cases determining whether a youth should be subject to a juvenile court's dispositional orders.¹⁸ Just as juvenile defendants enjoy the essential due process protections that adult defendants have, juvenile defendants should be tried in a system that respects basic principles of American government, including the separation of powers.

The juvenile officer's role raises several concerns that are unique to child welfare cases. First, the juvenile officer's power limits the executive branch's authority to operate a comprehensive and consistent statewide child welfare system.¹⁹ The General Assembly has charged the Children's Division with operating such a system – from managing a hotline for individuals to report suspected abuse and neglect, to coordinating voluntary services for families without court intervention, to helping find new permanent families for foster children who cannot reunify with their parents.²⁰ By taking away from the Children's Division the essential power to decide which cases need court attention, Missouri law undermines that agency's ability to fulfill its statutory obligations. Other states give their child welfare agencies the authority to decide which cases to file in court and which to address through less coercive means.²¹ As separation of powers cases establish, this result is proper because such agencies have the most knowledge about available alternatives for each family and bear the consequences of filing cases.²²

The second child-welfare-specific concern is that the juvenile officer's role wastes public resources, spending millions of dollars on personnel who duplicate what Children's Division case workers do in child welfare cases, such as filing reports with the juvenile court asserting their understanding of the facts of a case and making recommendations for how the court ought to proceed.²³ The vast majority of other states operate their child welfare systems without spending resources on juvenile officers, in large part because most of what juvenile officers do is already done by child welfare agencies.²⁴ Children and families need many things that cost money – two prominent examples are more and better services to prevent and treat child abuse and

16. See *infra* notes 159-160 and accompanying text.

17. 387 U.S. 1 (1967).

18. See *id.* at 30-31.

19. See *infra* Part IV.D.

20. See *infra* Part IV.D.

21. See *infra* Part II.B.

22. See *infra* Part III.A.

23. See *infra* Part IV.E.

24. See *infra* Part II.B.

neglect and better representation for children and parents in juvenile court – much more than they need extra public officials involved in their cases duplicating work done by other public officials.

These concerns are not merely abstract; one juvenile court judge has described phenomena in his judicial circuit that illustrate the harms predicted by the founders' writings on separation of powers.²⁵ Before he took the bench, he was told that the juvenile court judge “established the criteria for which cases would be pursued” by juvenile officers.²⁶ Juvenile officers would discourage Children's Division case workers from making recommendations that differed from the juvenile officers' recommendations.²⁷ And once he took the bench, juvenile officers sought his direction regarding how to handle different fact patterns.²⁸

Nor is the problem limited to awkward interactions between judges and juvenile officers. The Missouri structure creates an appearance of partiality, and children and families subject to juvenile court jurisdiction observe judges adjudicating petitions filed by their subordinates, possibly pursuant to managerial directions from the very same judge. Juvenile court litigants will reasonably wonder whether they will get a fair hearing on such petitions. As the same juvenile court judge put it, “How could litigants expect to prevail when the judge directed which cases would be prosecuted?”²⁹ Moreover, the juvenile officer's role as a member of the judiciary exacerbates well-documented problems with juvenile courts by creating an even tighter group of insiders operating the system and increasing pressure on individual litigants and attorneys to follow the norms of that system – whether or not they serve their own or their clients' interests.³⁰

To address this problem, the Missouri General Assembly should modernize the juvenile code to correct the separation of powers violation and reform the juvenile officer's role. In child welfare cases, the General Assembly should empower the state administrative agency to file and prosecute cases when necessary, thereby eliminating the need for a juvenile officer. In juvenile justice cases, the General Assembly should separate prosecutorial decisions from judges' control, while maintaining the existing law's commitment to achieving rehabilitative aims in such decisions. A simple solution in juvenile justice cases is to provide non-judicial supervision to juvenile officers and their attorneys. This Article proposes that the General Assembly

25. See Memorandum from Judge Darrell Missey to Representative Rory Ellinger, Josh Gupta-Kagan, and the Mo. Bar Ass'n Family Court Comm., at 6-7 (Oct. 29, 2012) [hereinafter Memorandum from Judge Missey] (on file with author). Judge Missey's discussion of juvenile officers is quoted at length and discussed *infra* Part IV.C.

26. See Memorandum from Judge Missey, *supra* note 25, at 6-7.

27. See *id.*

28. *Id.*

29. *Id.* at 6.

30. See *infra* Part IV.B.

create a state commission of juvenile justice experts from multiple disciplines to appoint and supervise the chief juvenile officers in each judicial circuit. Those officers, and not judges, would have authority to hire and manage juvenile officers and attorneys within their circuit. Absent legislative reforms, the courts should hold that the present system violates the Missouri Constitution's separation of powers clauses.

This Article proceeds in four parts. Part II will describe the juvenile officer's unique role in Missouri law, and explain how this role makes Missouri an outlier within the United States. Part III will argue that the juvenile officer's prosecutorial discretion violates the separation of powers required by the Missouri Constitution and informed by the U.S. Constitution. Part IV will describe the real world harms that flow from this violation, with a particular focus on the harms in child abuse and neglect cases. Part V will outline potential policy solutions to this problem.

II. THE JUVENILE OFFICER'S ROLE

Evaluating the constitutionality and the policy wisdom of Missouri's juvenile court structure requires understanding its features and how the system compares with other states' juvenile legal systems. This Part explains how juvenile officers are judicial branch employees hired and supervised by juvenile court judges. Missouri law empowers them to file and, either directly or through their lawyers (who are also judicial branch employees subject to the supervision of juvenile court judges), prosecute child welfare and juvenile delinquency cases. That is, in juvenile court the judiciary prosecutes in front of itself. Juvenile officers have similar roles in both child welfare and juvenile delinquency cases; while some important differences between these types of cases will be discussed later in this Article,³¹ the core point of this section applies to both categories. This Part also discusses how the role of juvenile officers in Missouri renders this state an outlier compared to the rest of the nation.

A. *The Juvenile Officer's Role in Missouri Law*

The juvenile officer has an "unusual position."³² The juvenile officer and his or her attorneys work for the judicial branch and are supervised by juvenile court judges.³³ Missouri law entrusts this judicial officer with the discretion to choose whether to file juvenile court cases, what charges to file

31. The juvenile officer's role does vary between child welfare and juvenile justice cases; this section will note such areas, and later Parts will explore the more complicated differences from these implications. *See infra* Parts IV.A, D-E, V.A.

32. *In re M.C.*, 504 S.W.2d 641, 646 (Mo. App. E.D. 1974) ("The juvenile officer occupies an unusual position in our system of juvenile justice.")

33. *See* MO. REV. STAT. § 211.351.1 (2000).

against a parent (in child abuse and neglect cases) or against a juvenile (in delinquency cases), and what recommendations to make to the judge throughout the case.³⁴ Thus, the juvenile officer serves both as a party prosecuting petitions and advocating particular positions through the life of a case and as the judge's subordinate official.

Missouri law establishes that the juvenile officer and his or her attorneys are judicial branch officials hired by, supervised by, and subject to termination by circuit or juvenile court judges.³⁵ The statute directs the judges to appoint a juvenile officer who shall "serve under the direction of the court."³⁶ Job notices call for juvenile officer applicants to send resumes directly to judges or to officials who are supervised by judges.³⁷ Once a judge appoints a juvenile officer, the juvenile officer is under the "exclusive control" of the judicial branch³⁸ and the individual deputy juvenile officers are "subject to the direction of the Chief Juvenile Officer, the Circuit Judge, and the Associate Circuit Judges."³⁹ Juvenile officers may be terminated with or without cause "by the judge."⁴⁰ The Missouri juvenile code defines the juvenile officers' authority in reference to the judges who supervise them: the juvenile

34. See *infra* notes 55-64 and accompanying text.

35. Juvenile court judges appoint juvenile officers in larger jurisdictions and circuit judges do so in smaller jurisdictions. See § 211.351.1. Larger jurisdictions have family courts whose jurisdiction includes cases filed under the juvenile code. See MO. REV. STAT. §§ 487.010, 487.080 (2000). Juvenile courts are thus often subdivisions of the family court. See § 487.080. For ease of reference, this article refers to the juvenile court.

36. See § 211.351.1.

37. See, e.g., Juvenile Officer II job posting, 43rd Judicial Circuit (on file with author) (directing applicants to "submit a resume with cover letter and references to the Honorable R. Brent Elliott . . . or the Honorable Tom Chapman"). In larger jurisdictions, a chief juvenile officer – himself appointed and supervised by a judge or judges – hires deputy juvenile officers. See, e.g., Deputy Juvenile Officer job posting, 32nd Judicial Circuit (on file with author).

38. Judicial circuits with more than one juvenile officer typically have a chief juvenile officer, and deputy juvenile officers who are supervised by the chief. The statute refers to the court appointing "a juvenile officer." See § 211.351.1. Deputies are appointed via statutory authority to hire "other necessary juvenile court personnel" who also "serve under the direction of the court." *Id.* Chief and deputy juvenile officers are thus both subject to judges' supervision. Accordingly, this Article will refer simply to "juvenile officers," including both chief and deputy officers.

39. *Smith v. Thirty-Seventh Judicial Circuit of Mo.*, 847 S.W.2d 755, 756 (Mo. 1993) (en banc); see also *State ex rel. Weinstein v. St. Louis Cnty.*, 451 S.W.2d 99, 102 (Mo. 1970) (en banc) (holding that the juvenile court has the inherent authority to "select and appoint employees" and that "it is essential that [the juvenile court] control the employees who assist it").

40. *Smith*, 847 S.W.2d at 756-57; see also *id.* at 760 (Price, J., concurring) ("The court has the inherent authority to select, appoint, and control its own staff.").

officer shall act “under direction of the juvenile court[.]”⁴¹ shall “[m]ake such investigations and furnish the court with such information and assistance *as the judge may require*,”⁴² and shall “[t]ake charge of children before and after the hearing *as may be directed by the court*.”⁴³ Finally, the General Assembly enacted a catch-all provision: “The juvenile officer shall, . . . [p]erform such other duties and exercise such powers as the judge of the juvenile court may direct.”⁴⁴

Juvenile officers generally have lawyers representing them. These lawyers are employed by the courts even though they are not explicitly mentioned in the statute, and thus are paid by the court and subject to the court’s supervision.⁴⁵ They represent the juvenile officers,⁴⁶ who are themselves subject to judges’ exclusive control.⁴⁷ Lawyers serve as agents of their clients, so judges’ control over juvenile officers extends to control over juvenile officers’ lawyers.

Juvenile officers hold immensely important powers throughout the life of a juvenile court case; in the words of one court, the juvenile officer is the juvenile court’s “primal instrument” to serve abused, neglected, and delinquent youth.⁴⁸ Juvenile officers’ role is particularly crucial at the beginning of cases, when they determine whether to file any case at all and, if so, what

41. § 211.401.1.

42. § 211.401.1(1) (emphasis added). The statute further provides that the results of all such investigations must be kept and reports submitted to the judge. § 211.401.1(2).

43. § 211.401.1(3) (emphasis added).

44. § 211.401.1(4).

45. *Cf.* MO. SUP. CT. R. 116.03 (directing “counsel for the juvenile officer” to present evidence in support of the petition). These lawyers are employed within the “Legal Department” of particular family courts. *See, e.g.*, FAMILY COURT OF ST. LOUIS CNTY., GUIDE TO THE FAMILY COURT 23 (2010), available at <http://www.stlouisco.com/Portals/8/docs/Document%20Library/circuit%20court/Family%20Court/NewFamilyCourtGuide.pdf> (listing “Legal Department” within its auspices). Section 211.351.1 authorizes the court to appoint “other necessary juvenile court personnel to serve under the direction of the court.” MO. REV. STAT. § 211.351.1 (2000). Juvenile courts hire attorneys for juvenile officers via this authority. Mo. Juvenile Law § 1.12 (MoBar 4th ed. 2011).

46. Job postings for juvenile officers’ lawyers make clear that they are employed by the court and assigned to represent juvenile officers. *See, e.g.*, GREENE CNTY. FAMILY COURT – JUVENILE DIV., EMPLOYMENT VACANCY ANNOUNCEMENT: STAFF ATTORNEY I (2012), available at <http://www.greenecountymo.org/file/PDF/Vacancy.pdf?ID=157> and on file with author (posting that the juvenile court seeks an attorney to “represent the Juvenile Office” and “meet the business needs of the Greene County Family/Juvenile Court”); Employment Opportunity, Seventeenth Judicial Circuit of Missouri (on file with author) (posting for chief legal counsel for the Seventeenth Judicial Circuit – Juvenile Division).

47. *See supra* notes 35-44 and accompanying text.

48. *In re F.C.*, 484 S.W.2d 21, 25 (Mo. App. K.C.D. 1972).

precise offense or offenses to charge and whether to release children or keep them in state custody.⁴⁹ Missouri law authorizes police and other law enforcement officers and physicians to take children into their custody so long as they bring the children directly to a juvenile officer; in both child welfare and juvenile delinquency cases, the juvenile officer must be involved “immediately.”⁵⁰ In child abuse and neglect cases, this step can bypass the executive branch child welfare agency, the Children’s Division, which would otherwise investigate child abuse and neglect allegations.⁵¹ Indeed, in 2011, forty-four percent of all juvenile court child abuse and neglect referrals came from sources other than the Children’s Division.⁵² Once a child is removed from his or her parent or guardian (in a child welfare case) or detained (in a delinquency case), the juvenile officer determines whether to file a child abuse or neglect or juvenile delinquency petition, and, if filing a petition, whether to release the child to a parent or other adult or ask a judge to approve protective custody – placing a child in the Children’s Division’s custody or juvenile detention pre-trial, before any allegations of parental abuse or neglect or juvenile delinquency are proven or disproven.⁵³ This initial custody or release decision is essential and can create a “snowball effect” that shapes the entire litigation.⁵⁴

Deciding whether to release a child or to keep a child in custody requires the juvenile officer to make two determinations that are the essence of prosecutorial discretion – first, whether there is sufficient evidence to prove

49. See *infra* notes 55-64 and accompanying text.

50. See MO. REV. STAT. § 211.061 (2000 & Supp. 2012) (juvenile delinquency); MO. REV. STAT. § 210.125.3 (2000) (child welfare). Any statements made by the child to the juvenile officer may be used to prove the child delinquent and are therefore subject to constitutional protections against self-incrimination. See MO. SUP. CT. R. 126.01; *In re M.C.*, 504 S.W.2d 641, 647 (Mo. App. St. Louis D. 1974).

51. See § 210.125.2; see also *infra* Part IV.D (discussing the Children’s Division’s statutory authorities and responsibilities).

52. See COURT BUS. SERVS. DIV. & RESEARCH & STATISTICS SECTION, SUPREME COURT OF MO., MISSOURI JUVENILE AND FAMILY DIVISION ANNUAL REPORT – CALENDAR 2011 21, available at <http://www.courts.mo.gov/file.jsp?id=4133> (last visited Oct. 7, 2013) [hereinafter MISSOURI JUVENILE AND FAMILY DIVISION ANNUAL REPORT]. Sixty-six percent of all juvenile court child abuse and neglect referrals came from the Children’s Division. *Id.* The remainder came from law enforcement, other juvenile division personnel, school personnel and others. *Id.* Unfortunately, the publicly-reported data does not report how referrals from different sources were handled – that is, whether the Children’s Division reports were more or less likely to lead to court action than, for instance, police or school reports.

53. See § 210.125.3 (child welfare); § 211.081.1 (child welfare); § 211.061.3 (juvenile delinquency).

54. Pamela B. v. Ment, 709 A.2d 1089, 1100 n.14 (Conn. 1998); see also Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protection Proceedings*, 41 FAM. CT. REV. 457, 459 (2003) (explaining how initial removals shape child abuse and neglect proceedings).

facts that amount to child abuse or neglect or juvenile delinquency, and, if so, whether to pursue an “informal adjustment” (a diversion option)⁵⁵ or to file a petition.⁵⁶ Only the juvenile officer has authority to file a petition,⁵⁷ so a petition filed by an executive branch official cannot trigger juvenile court jurisdiction.⁵⁸ Moreover, a juvenile court judge is empowered to order the juvenile officer, the judge’s subordinate, to file a petition.⁵⁹

After filing a petition, the juvenile officer assesses the family and recommends particular actions to the court.⁶⁰ The juvenile officer is a party to all juvenile court cases⁶¹ and is charged with presenting evidence in support of a petition at trial – the traditional role of a prosecutor.⁶² Once a judge decides that a parent abused or neglected a child, the juvenile officer makes recommendations at disposition and later hearings regarding where the child should live, what the permanency plan ought to be, and what services are appropriate for the family.⁶³ Similarly, in juvenile delinquency cases, once a judge decides that a child committed a delinquent act, the juvenile officer makes recommendations regarding the disposition of the child.⁶⁴

In child abuse and neglect cases, a juvenile officer may petition the court to terminate parental rights,⁶⁵ an action that the Supreme Court of Missouri has called the “civil death penalty.”⁶⁶ Even when another party files a termination of parental rights petition, the juvenile officer must be joined as a party to the case,⁶⁷ and the judge may order the juvenile officer to perform an “investigation and social study” to be shared with the court and all parties.⁶⁸ Termination cases also trigger a statutory requirement that “the juvenile officer shall meet with the court” to discuss service issues and the investigation

55. MO. SUP. CT. R. 112. A juvenile officer monitors an informal adjustment and retains the discretion to file a petition at any time. MO. SUP. CT. R. 112.03(b)(6).

56. See MO. SUP. CT. R. 111.01(b).

57. Mo. Juvenile Law § 6.37 (MoBar 4th ed. 2011) (Section 211.081.1, RSMo 2000, vests in the juvenile officer exclusive authority to file petitions alleging child abuse or neglect.).

58. See, e.g., *State v. Taylor*, 323 S.W.2d 534, 537 (Mo. App. Springfield 1959).

59. MO. SUP. CT. R. 111.01(c).

60. See MO. REV. STAT. § 211.141.4 (2000 & Supp. 2012).

61. MO. SUP. CT. R. 110.04(a)(20).

62. MO. SUP. CT. R. 116.03.

63. See MO. SUP. CT. R. 124.07(d)(2)-(3), 124.08(b)(5).

64. See MO. SUP. CT. R. 128.03(c)(1).

65. MO. REV. STAT. § 211.444.1 (2000 & Supp. 2012).

66. *In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. 2004) (en banc) (internal quotation marks omitted).

67. MO. REV. STAT. § 211.447.3 (2000 & Supp. 2012).

68. MO. REV. STAT. § 211.455.3 (2000). The statute provides that the judge may order the juvenile officer, the state child welfare agency, a public or private foster care agency, or “any other competent person” to complete the investigation and social study. *Id.*

and social study;⁶⁹ these meetings exclude other parties to the termination case. During the ensuing trial, the juvenile officer may call witnesses and present evidence in support of the termination petition.⁷⁰

In all juvenile cases, the juvenile officer has the same authority as any other party to seek review of trial court decisions; the juvenile officer may move the juvenile court to modify its dispositional orders,⁷¹ to seek review of commissioners' rulings by a juvenile court judge,⁷² and to appeal from adverse rulings.⁷³

Beyond these formal powers, juvenile court rituals often underscore the juvenile officer's authority in comparison to other parties and lawyers. For instance, in St. Louis County,⁷⁴ where I practiced and co-taught a law school clinic,⁷⁵ the juvenile officer or his attorney enters the appearance of all parties and counsel at any hearing, including opposing parties and counsel. The more egalitarian norm of each attorney standing up to introduce herself and her client is not followed. In post-adjudication hearings, the juvenile officer or his attorney generally collects any reports or evidence filed by any party and provides them to the judge, rather than each party introducing them directly.

Missouri statutes, case law, and practice make several points clear. Juvenile officers, and the lawyers who represent them, are subject to the control of juvenile court judges, who hire, supervise, and can fire them. Juvenile officers hold all prosecutorial discretion – the authority to determine whether to file a juvenile court case, what specifically to file, and what relief to seek – and exercise it in front of the very same judges who hold supervisory authority over them. And this prosecutorial authority, coupled with their judicial branch status, can make juvenile officers first among the purportedly equal parties within the courtroom.

B. The Juvenile Officer Makes Missouri an Outlier

The American Bar Association (ABA) recommended in 1980 that juvenile “intake” authority – the authority to bring a child into custody and deter-

69. § 211.455.1.

70. § 211.459.1.

71. § 211.251.2.

72. § 211.029.

73. § 211.261.1. Consistent with criminal defendants' rights to avoid double jeopardy, a juvenile officer, like an adult criminal prosecutor, may not appeal a judgment acquitting a juvenile of a delinquency charge. *Id.*

74. I base the assertions in this paragraph on my experience in St. Louis County only and acknowledge that the practice may differ in other judicial circuits.

75. From 2011 through 2013, I co-taught the Civil Justice Clinic: Children and Family Defense Project at the Washington University School of Law. The clinic represented children and parents in child abuse and neglect cases. Most clinic cases were heard in the St. Louis County Juvenile Court.

mine whether to file a petition regarding that child – should reside in the executive branch, not the judiciary.⁷⁶ The ABA observed that “constitutional issues” arise if that authority resides in the judiciary, and that the trend among states was to make such decisions “independent of judicial control.”⁷⁷ Other national entities issued similar recommendations decades earlier. As early as 1966, the federal Children’s Bureau recommended that the power to investigate allegations of abuse and neglect and to file and prosecute child abuse and neglect petitions reside in an executive branch agency, not a juvenile court.⁷⁸ The Children’s Bureau wrote, in language evoking separation of powers concerns, 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.”⁷⁹

Nearly all states have adopted this separation of powers. Thirty-seven states plus the District of Columbia have statutes explicitly empowering administrative agencies or executive branch attorneys to file petitions initiating juvenile court cases.⁸⁰ All of these states give the executive such prosecu-

76. INST. OF JUDICIAL ADMIN. & AM. BAR ASS’N, STANDARDS RELATING TO COURT ORGANIZATION AND ADMINISTRATION 15-18 (1980) [hereinafter STANDARDS RELATING TO COURT ORGANIZATION].

77. *Id.* at 17. The ABA’s language seemed to suggest that judicial control would trigger separation of powers concerns, but the ABA did not spell this out explicitly. *Id.*

78. CHILDREN’S BUREAU & U.S. DEP’T OF HEALTH, EDUC., & WELFARE, STANDARDS FOR SPECIALIZED COURTS DEALING WITH CHILDREN 42 (1954) [hereinafter STANDARDS FOR SPECIALIZED COURTS].

79. WILLIAM H. SHERIDAN ET AL., STANDARDS FOR JUVENILE AND FAMILY COURTS 13 (1966) [hereinafter STANDARDS FOR JUVENILE AND FAMILY COURTS]. As early as 1954, the Children’s Bureau had advised against court staff investigating allegations of delinquency or child abuse or neglect: “To do so would mean that the court, through the actions of its own representative, would be placed in the position of petitioner with the result that the court would be sitting in judgment on its own petition.” STANDARDS FOR SPECIALIZED COURTS, *supra* note 78, at 42.

80. See ALASKA STAT. ANN. § 47.10.020(e) (West, Westlaw through 2013 1st Reg. Sess. of the 28th Legis.) (allowing agency to file child abuse and neglect cases without judicial approval); ALASKA STAT. ANN. § 47.12.040(a)(1) (West, Westlaw through 2013 1st Reg. Sess. of the 28th Legis.) (allowing department to investigate delinquency allegations and decide whether to file petition); ARK. CODE ANN. § 9-27-310(b) (West, Westlaw through the 2013 Reg. Sess.) (stating that only prosecutor can file delinquency cases, any adult can file dependency cases but only the agency or prosecutor may file dependency cases seeking ex parte emergency relief); CAL. WELF. & INST. CODE § 325 (West, Westlaw through Ch. 311 of the 2013 Reg. Sess. & the 2013-2014 1st Ex. Sess. laws) (requiring social workers to file petitions); CAL. WELF. & INST. CODE § 650(c) (West, Westlaw through Ch. 311 of the 2013 Reg. Sess. & the 2013-2014 1st Ex. Sess. laws) (mandating that the district attorney file petitions alleging delinquency); COLO. REV. STAT. ANN. § 19-2-512 (West, Westlaw through 1st Reg. Sess. of the 69th Gen. Assemb.) (allowing the district attorney to file delinquency petitions); CONN. GEN. STAT. ANN. § 46b-129(a) (West, Westlaw through Public

Acts of the 2013 Jan. Reg. Sess. of the Conn. Gen. Assemb.) (permitting the Commissioner of Social Services, Commissioner of Children and Families, or others to file child welfare petition); D.C. CODE § 16-2305(a), (c) (2001) (stating that only agency with attorney general may file delinquency and neglect cases); FLA. STAT. § 39.501(1) (2012) (allowing an attorney for the department to file dependency petition); FLA. STAT. § 985.318(1) (2012) (requiring the state's attorney to file delinquency petitions); HAW. REV. STAT. § 587A-11 (West, Westlaw through end of the 2013 Reg. Sess.) (permitting department to file petition when it decides whether to do so); IDAHO CODE ANN. § 16-1610(1)(a) (West, Westlaw through 2013 Chs. 1-354) (requiring child protection petitions to be filed by attorney general or prosecutor); IDAHO CODE ANN. § 20-510 (West, Westlaw through 2013 Chs. 1-354) (allowing prosecuting attorney to file delinquency petitions); 705 ILL. COMP. STAT. ANN. 405/2-13(1) (West 2007 & West Supp. 2013) (stating that any person or agency may file child protection petition); 705 ILL. COMP. STAT. ANN. 405/5-520(1) (West 2007) (permitting state's attorney to file delinquency petition); IND. CODE ANN. §§ 31-34-9-1, 31-34-9-2 (West, Westlaw through 2013) (stating that attorney for the department may file petition that is to be accepted by the court upon a finding of probable cause); IND. CODE ANN. § 31-37-10-1 (West, Westlaw through 2013) (allowing prosecuting attorney to file delinquency petition); IOWA CODE ANN. § 232.87.1-3 (West 2006) (stating that department of human services, juvenile court officer, or county attorney may file child protection petition); IOWA CODE ANN. § 232.35 (West 2006) (requiring the county attorney to file delinquency petitions); KAN. STAT. ANN. § 38-2214 (Supp. 2012) (stating that the county or district attorney will prepare and file child protection petition); KAN. STAT. ANN. § 38-2327 (Supp. 2012) (requiring the county or district attorney to prepare and file delinquency complaints); LA. CHILD. CODE ANN. arts. 731, 746 (West, Westlaw through the 2012 Reg. Sess.) (stating that any caretaker or agency representative may file a complaint, and a district attorney may file a child protection petition); LA. CHILD. CODE ANN. art. 842 (West, Westlaw through the 2012 Reg. Sess.) (permitting district attorney to file delinquency petitions); ME. REV. STAT. ANN. tit. 22, § 4032(1) (2004) (stating that the department, police officer, or three or more people may file child protection petition); ME. REV. STAT. ANN. tit. 22, § 3301(6) (2004 & Supp. 2012) (requiring the state's attorney to make file filing decision regarding delinquency petitions); MD. CODE ANN., CTS. & JUD. PROC. § 3-809(a) (West, Westlaw through 2013 Reg. Sess.) (mandating that the local department will file child protection petition); MASS. GEN. LAWS ANN. ch. 119, § 24 (West, Westlaw through Ch. 76 of the 2013 1st Annual Sess.) (stating that "[a] person" may file child protection petition, and such petition triggers a summons to the department); MASS. GEN. LAWS ANN. ch. 119, § 54 (West, Westlaw through Ch. 76 of the 2013 1st Annual Sess.) (permitting the commonwealth to proceed by complaint or indictment in juvenile delinquency cases); MICH. COMP. LAWS ANN. §§ 712A.11(2), 712A.13a(2) (West, Westlaw through P.A.2013, No. 106, of the 2013 Reg. Sess., 97th Legis.) (requiring the prosecuting attorney or agency to file juvenile delinquency or child protection petition); MINN. STAT. ANN. §§ 260B.141, 260C.141 (West, Westlaw through the 2013 Reg. Sess.) (stating that "[a]ny reputable person, including but not limited to an agent of the commissioner of human services" may file child protection or delinquency petitions); MONT. CODE ANN. § 41-3-422(2) (West, Westlaw through the 2012 general election) (requiring that the county attorney or attorney general will file child protection petitions); MONT. CODE ANN. § 41-5-1401 (West, Westlaw through the 2012 general election) (permitting the county attorney to file delinquency

petition); NEB. REV. STAT. ANN. § 43-274(1) (West, Westlaw through 102d Legis. 2d Reg. Sess.) (allowing the county attorney to file delinquency and child protection petitions); NEV. REV. STAT. ANN. § 62C.110 (West, Westlaw through 2011 76th Reg. Sess.) (mandating that the district attorney prepare and file delinquency petitions); NEV. REV. STAT. ANN. § 432B.490 (West, Westlaw through 2011 76th Reg. Sess.) (requiring agency to file child protection petition); N.J. STAT. ANN. § 2A:4A-30 (West, Westlaw through L.2013, c. 150 and J.R. No. 11) (allowing any person to file delinquency complaints); N.J. STAT. ANN. § 9:6-8.34 (West, Westlaw through L.2013, c. 150 and J.R. No. 11) (stating that the agency, county prosecutor or others, may originate child protection proceeding); N.M. STAT. ANN. § 32A-4-4 (West, Westlaw through end of 1st Reg. Sess. of the 51st Legis.) (requiring agency to file child protection petitions), *cited in* Vescio v. Wolf, 223 P.3d 371, 374 (N.M. Ct. App. 2009) (noting that the agency is the only entity empowered to file petitions); N.Y. FAM. CT. ACT § 1032 (West, Westlaw through L.2013) (stating that the child protection agency or a “person on the court’s direction” may originate proceedings); N.Y. FAM. CT. ACT § 310.1(2) (West, Westlaw through L.2013) (requiring presentment agencies, defined in section 254 as corporation counsel, county counsel, or district attorneys, to file delinquency petitions); N.C. GEN. STAT. ANN. § 7B-403 (West, Westlaw through S.L. 2013-220 of the 2013 Reg. Sess. of the Gen. Assemb.) (directing the director of the department of social services to file petitions); N.D. CENT. CODE ANN. § 27-20-20 (West, Westlaw through the 2013 Reg. Sess. of the 63d Legis. Assemb.) (permitting the state’s attorney to prepare and file child protection and delinquency petitions); OKLA. STAT. ANN. tit. 10A, § 1-4-301(A)(1) (West, Westlaw through 1st Reg. Sess. of the 54th Legis.) (allowing the district attorney to file petitions); OKLA. STAT. ANN. tit. 10A, §§ 2-2-104(A), 2-2-106(D) (West, Westlaw through 1st Reg. Sess. of the 54th Legis.) (requiring the district attorney to approve decision not to file delinquency petitions and allowing the district attorney to file such petitions); R.I. GEN. LAWS ANN. § 40-11-7(c) (West, Westlaw through Ch. 534 of the Reg. Sess.) (mandating that the department file petition); S.C. CODE ANN. § 63-7-1660 (West, Westlaw through end of the 2012 Reg. Sess.) (allowing the department to file child protection petitions); S.C. CODE ANN. § 63-19-1020 (West, Westlaw through end of the 2012 Reg. Sess.) (permitting various public agencies to institute delinquency proceedings); S.D. CODIFIED LAWS § 26-7A-43 (West, Westlaw through the 2013 Reg. Sess.) (allowing the state’s attorney to file child protection or delinquency petitions); TEX. FAM. CODE ANN. §§ 53.012(a), 53.04(a) (West, Westlaw through the 2013 3d Called Sess. of the 83d Legis.) (requiring the prosecuting attorney to review allegations and file delinquency petitions); TEX. FAM. CODE ANN. §§ 262.101, 262.105 (West, Westlaw through the 2013 3d Called Sess. of the 83d Legis.) (stating that a “government entity” or Department of Protective and Regulatory Services may file petition with or without taking custody of the child); UTAH CODE ANN. § 78A-6-304(2)(a)-(b) (West, Westlaw through the 2013 1st Special Sess.) (stating that any person may file child protection petition after first referring cases to the Division of Child and Family Services); VER. STAT. ANN. tit. 33, § 5201(a)(2) (West, Westlaw through law No. 53 of the 1st Sess. of the 2013-2014 Gen Assemb.) (requiring that the state’s attorney file delinquency petitions); VER. STAT. ANN. tit. 33, § 5309(a) (West, Westlaw through law No. 53 of the 1st Sess. of the 2013-2014 Gen Assemb.) (requiring that the state’s attorney file child welfare petitions); VA. CODE ANN. § 16.1-260(A) (West, Westlaw through the 2013 Reg. Sess. and the 2013 Special Sess. 1) (empowering Commonwealth, city, or county attorneys and Department

al authority in child welfare cases and all but six do so in juvenile delinquency cases.⁸¹ Ten other states do not explicitly name an executive branch agen-

of Social Services staff to file child protection and delinquency petitions); W. VA. CODE ANN. §§ 49-5-7, 49-5-12 (West, Westlaw through the 2013 1st Extraordinary Sess.) (allowing any person to file a delinquency petition and the prosecuting attorney shall represent the petitioner); W. VA. CODE ANN. § 49-6-1(a) (West, Westlaw through the 2013 1st Extraordinary Sess.) (permitting the department or a “reputable person” to file child protection petition); WIS. STAT. ANN. § 48.25(1) (West, Westlaw through 2013 Wisc. Act 19) (permitting the district attorney, corporation counsel or other designated official to file child protection petition); WIS. STAT. ANN. § 938.25(1) (West, Westlaw through 2013 Wisc. Act 19) (allowing the district attorney or other executive branch official to file delinquency petitions); WYO. STAT. ANN. § 14-3-411 (West, Westlaw through the 2013 Gen. Sess.) (requiring the district attorney, with department of family services and county sheriff, to decide whether to file child protection petition); WYO. STAT. ANN. § 14-6-211 (West, Westlaw through the 2013 Gen. Sess.) (mandating that the district attorney decide whether to file delinquency petitions); *see also* McCall v. District Court *ex rel.* Cnty. of Montezuma, 651 P.2d 392, 393-94 (Colo. 1982) (holding that only “the People through a state agency may bring actions in neglect and dependency”).

A small number of these states give courts some limited authority over the decision whether to file a petition. For instance, individuals may seek judicial review in California of a social worker’s decision to not file a petition, and the court may order the worker to file such a petition. CAL. WELF. & INST. CODE § 331 (West, Westlaw through Ch. 311 of the 2013 Reg. Sess. & the 2013-2014 1st Ex. Sess. laws). Other states permit judicial branch officials or courts on their own motion to file petitions. IOWA CODE ANN. § 232.87 (West 2006); 705 ILL. COMP. STAT ANN. 405/2-13(1) (West 2007 & West Supp. 2013). Whatever separation of powers questions might be raised by these provisions, it is not clear how often they are actually used, and they still offer the executive branch prosecutorial discretion in most instances, and does not make the judiciary the arbiter of which cases to file in all situations.

81. *See* sources cited *supra* note 80 and accompanying text. The six that do not are Connecticut, Maryland, New Mexico, North Carolina, Rhode Island, and Utah. *See* CONN. GEN. STAT. ANN. § 46b-128(a) (West, Westlaw through Public Acts of the 2013 Jan. Reg. Sess. of the Conn. Gen. Assemb.); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-03 (West, Westlaw through 2013 Reg. Sess.); N.M. STAT. ANN. § 32A-2-7 (West, Westlaw through end of 1st Reg. Sess. of the 51st Legis.); N.C. GEN. STAT. ANN. § 7B-1703 (West, Westlaw through S.L. 2013-220 of the 2013 Reg. Sess. of the Gen. Assemb.); R.I. GEN. LAWS ANN. § 14-1-11(a) (West, Westlaw through Ch. 534 of the Reg. Sess.) (empowering juvenile intake officers to authorize petitions); UTAH CODE ANN. § 78A-6-602 (West, Westlaw through the 2013 1st Special Sess.) (requiring the probation department and court to determine whether to act on a referral). Several of those six states involve the executive branch to some degree in juvenile charging decisions. Two of these states give executive branch attorneys some limited authority to review prosecutorial discretion decisions. *See* MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-03(d); N.C. GEN. STAT. ANN. § 7B-1705 (West, Westlaw through S.L. 2013-220 of the 2013 Reg. Sess. of the Gen. Assemb.). And at least one requires the judiciary to “request” an executive branch attorney to file a delinquency petition. *See* UTAH CODE ANN. § 78A-6-602(2)(c).

cy or lawyer who can file juvenile court cases, but provide that any person can file child protection cases without limiting the authority to file to judicial branch officials;⁸² several of these states also provide that executive branch officials can file delinquency cases.⁸³ Case law in these states suggests that the executive branch often takes on the role of filing and prosecuting petitions.⁸⁴ Beyond Missouri, only two states, Alabama and Mississippi, have statutes providing that only juvenile court officials may file both child protection and juvenile delinquency petitions.⁸⁵ Concerns discussed in Parts III and IV may similarly apply to cases in these states, or in any situation in which

82. See ARIZ. REV. STAT. ANN. § 8-841(A) (West, Westlaw through the 1st Reg. Sess. and 1st Special Sess. of the 51st Legis.) (“any interested party” may file); DEL. CODE ANN. tit. 10, § 1003 (1999) (permitting any person to file child protection or delinquency petition); GA. CODE ANN. § 15-11-38 (West, Westlaw through the 2013 Reg. Sess.) (allowing any person to file delinquency or child protection petitions); KY. REV. STAT. ANN. § 620.070(1) (West, Westlaw through the 2013 Reg. Sess.) (permitting any interested person to file child protection petition); N.H. REV. STAT. ANN. § 169-C:7(I) (West, Westlaw through Ch. 279 of the 2013 Reg. Sess.) (allowing any person to file child protection or delinquency petitions); OHIO REV. CODE ANN. § 2151.27(A) (West, Westlaw through 2013 Files 24 & 26-38 of the 130th Gen. Assemb.) (permitting any person to file a delinquency or child protection complaint); OR. REV. STAT. ANN. § 419B.809 (West, Westlaw through Ch. 787 of the 2013 Reg. Sess.) (allowing any person to file a child protection petition); 42 PENN. CONS. STAT. ANN. § 6334 (West, Westlaw through Reg. Sess. Act 2013-72) (allowing any person to file a child protection or delinquency petition); TENN. CODE ANN. § 37-1-119 (West, Westlaw through the 2013 1st Reg. Sess.) (permitting any person to file a child protection or delinquency petition); WASH. REV. CODE ANN. § 13.34.040(1) (West, Westlaw through Aug. 1, 2013) (allowing any person to file a child protection petition).

83. See ARIZ. REV. STAT. ANN. § 8-301(2) (West, Westlaw through the 1st Reg. Sess. and 1st Special Sess. of the 51st Legis.) (permitting county attorney to file delinquency petition); OR. REV. STAT. ANN. § 419C.250 (West, Westlaw through Ch. 787 of the 2013 Reg. Sess.) (allowing the state through a district attorney to file delinquency petitions); WASH. REV. CODE § 13.40.070(1) (West, Westlaw through Aug. 1, 2013) (requiring delinquency complaints to be referred to the prosecutor to determine whether to press charges). One of these states gives delinquency petitioning authority to a “court-designated worker.” See KY. REV. STAT. ANN. § 610.030 (West, Westlaw through the 2013 Reg. Sess.).

84. *E.g.*, *State v. Wilson*, 545 A.2d 1178, 1183 (Del. 1988) (holding that the attorney general’s decision to file a delinquency petition may trigger the requirement that the attorney general prosecute that petition).

85. See ALA. CODE § 12-15-120 (West, Westlaw through the 2013 Reg. Sess.) (requiring the juvenile court intake officer to file delinquency and child protection cases); MISS. CODE ANN. § 43-21-451 (West, Westlaw through the 2013 Reg. Sess. & the 1st & 2d Ex. Sess.) (mandating that the youth court prosecutor or another individual designated by the court shall draft and file delinquency and child protection petitions).

the judiciary takes on a particularly significant role in exercising prosecutorial discretion in either juvenile delinquency or child welfare cases.

Missouri law grants the judicial branch more control over juvenile petitions than even Alabama and Mississippi. Alabama case law describes child protection petitions as those filed by the Department of Human Resources and “*endorsed* by the juvenile-court intake officer,”⁸⁶ terminology suggesting executive branch control and a more ministerial role for juvenile court intake officers. The Mississippi Supreme Court has approved delinquency petitions filed by a county attorney with the verbal approval of a juvenile court judge⁸⁷ – a significant difference from Missouri’s procedure of juvenile officers through their lawyers, all employed within the judicial branch and subject to judges’ supervision, filing such petitions.⁸⁸

Despite slight variations from state to state indicated in the above text and footnotes, the bottom line may be stated succinctly: by giving juvenile officers and their attorneys, both judicial branch employees hired and supervised by judges, the authority to determine what cases to file and how to file them, Missouri has become an outlier within the United States. Missouri law and practice concentrate more authority within the judicial branch than even the other outlier states, Alabama and Mississippi.

III. THE JUVENILE OFFICER’S PROSECUTORIAL DISCRETION VIOLATES SEPARATION OF POWERS

The juvenile officer’s prosecutorial discretion is not merely “unusual,”⁸⁹ it also violates the Missouri Constitution’s separation of powers clauses. The effects of those clauses, and their federal analogs, are evident in the familiar division of powers cases filed by the state to limit an individual’s rights, such as criminal prosecutions or civil cases to enforce a regulatory regime. A state legislature defines what conduct is permissible and impermissible – delineating, for instance, what conduct by adults would constitute a crime or what conduct by juveniles would constitute a delinquent act. Executive branch agencies investigate alleged breaches of these statutes and decide whether to file court cases alleging violations and seeking specified remedies. In adult criminal cases and juvenile delinquency cases in the vast majority of states, an executive branch attorney files a pleading alleging that the adult criminal defendant (or the juvenile respondent) committed acts that fall within legislatively-defined prohibited conduct. These allegations are then adjudicated within the judicial branch – a judge (in most juvenile delinquency cases) or

86. *G.H. v. Cleburne Cnty. Dep’t of Human Res.*, 62 So.3d 540, 544 (Ala. Civ. App. 2010) (emphasis added).

87. See *In re Evans*, 350 So. 2d 52, 54 (Miss. 1977).

88. See *supra* Part II.A.

89. *In re M.C.*, 504 S.W.2d 641, 646 (Mo. App. E.D. 1974).

jury (in most adult criminal cases) rules whether the executive branch has met its burden of proof that the individual committed the acts alleged.

Separating executive, judicial, and legislative powers in this manner has a venerable history that traces to the nation's founders and to enlightenment thinkers who inspired them. James Madison wrote in Federalist No. 47, "judges can exercise no executive prerogative, though they are shoots from the executive stock."⁹⁰ Quoting Montesquieu, Madison explained that "[w]ere the power of judging . . . joined to the executive power, *the judge* might behave with all the violence of *an oppressor*."⁹¹ The founders established a tripartite system of government "to divide and arrange the several offices in such a manner as that each may be a check on the other."⁹² Interpreting the Constitution that Madison helped write and explain, the Supreme Court of the United States has consistently held that executive power includes prosecutorial discretion – the discretion to determine whether to initiate a court case to enforce a statute and what claims to make and relief to seek in such cases are the quintessential means of executing the law.⁹³

The Missouri Constitution establishes a similar tripartite system with, if anything, stronger provisions separating one branch of government from another.⁹⁴ Although the Supreme Court of Missouri has not expounded on the topic as extensively as the Supreme Court of the United States, the state constitutional text and constitutional case law lead to an analogous conclusion – prosecutorial discretion resides with the executive branch. The juvenile officer's role therefore violates the Missouri Constitution. This section will explain that conclusion, first by reviewing federal constitutional case law holding that prosecutorial discretion resides squarely in the executive branch. This section then argues that analyzing the Missouri Constitution leads to the same conclusion.

A. Federal Separation of Powers

As a matter of federal constitutional law, prosecutorial discretion belongs to the executive branch. The U.S. Constitution vests the "executive

90. THE FEDERALIST NO. 47 (James Madison). Madison was responding to criticism that the Constitution eroded separation of powers by giving the President authority to nominate judges or to make judges "shoots from the executive stock." *Id.*

91. *Id.* (emphasis in original). Madison's language illustrates how separating powers can prevent "oppress[ion]," or the infringement of individual liberties by state authorities. *Id.* In modern times, one could frame the issue in due process terms – that adequate checks between branches of government are necessary to avoid unlawful invasions of constitutionally-protected liberties, such as the family integrity or juvenile liberty rights at stake in juvenile court. *See, e.g., infra* note 206 and accompanying text.

92. THE FEDERALIST NO. 51 (James Madison).

93. *See infra* Part III.A.

94. *See infra* Part III.B.1.

Power” in the President and directs the President to “take Care that the Laws be faithfully executed.”⁹⁵ The Supreme Court of the United States has repeatedly held that the federal executive power includes the power to choose whether to file a court case to enforce the law, what to allege in any such court case, and how to prosecute such a case. For instance, in *Buckley v. Valeo*, the Court wrote, “A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to ‘take Care that the Laws be faithfully executed.’”⁹⁶ In *Heckler v. Chaney*, the Court described the decision whether “to institute proceedings” as “a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’”⁹⁷ This principle is well established with an extensive citation list.⁹⁸ The only exceptions to this rule involve unique situations, such as the appointment of independent prosecutors to investigate executive branch officials, when no other branch of government has supervisory authority over the prosecutor.⁹⁹ No such unique situation applies to the juvenile court.

The Supreme Court applies these rules to both civil enforcement actions filed by the government and criminal prosecutions. *Heckler* explained that federal agencies have “absolute discretion” to decide whether to file a legal action to enforce the law “whether through civil or criminal process.”¹⁰⁰ Similarly, *Buckley* applied the strong language quoted above to a civil enforcement action by the Federal Election Commission.¹⁰¹ Indeed, *Buckley* held unconstitutional a statute granting a Congressionally-appointed body authority to institute civil actions to enforce a civil regulatory scheme because such enforcement authority belongs solely to the executive branch.¹⁰²

95. U.S. CONST. art. II, §§ 1, 3.

96. *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (quoting article II, section 3 of the Constitution).

97. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (quoting article II, section 3 of the Constitution).

98. See, e.g., *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (determining when and how to enforce federal criminal laws is a “special province” of executive authority with great “latitude”) (citations omitted); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”); *United States v. Nixon*, 418 U.S. 683, 693 (1974) (“[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.”).

99. See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988). Even these circumstances triggered a compelling dissent explaining which prosecutorial discretion “is a quintessentially executive function.” *Id.* at 706 (Scalia, J., dissenting).

100. 470 U.S. at 831.

101. 424 U.S. at 112-13.

102. *Id.* at 113.

The Supreme Court's application of separation of powers principles to civil cases is important because child protection cases are civil in nature.¹⁰³ Even juvenile delinquency cases are denominated as civil cases, although the Supreme Court has deemed them criminal proceedings for certain purposes and criticized "the feeble enticement of the 'civil' label-of-convenience."¹⁰⁴ Following *Buckley* and *Heckler*, one need not determine if juvenile court proceedings are civil or criminal; in either category, the separation of powers concern is the same. Moreover, the Court explained in *Heckler* that there are particularly strong reasons to respect an administrative agency's prosecutorial discretion when litigation is one tool in a complicated civil 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.¹⁰⁵

All of these factors apply to child abuse and neglect proceedings.¹⁰⁶ The executive branch child protection agency investigates allegations of child abuse and neglect and determines whether such allegations are true, considers the strength of the evidence in individual cases, and assesses how harmful such abuse or neglect is.¹⁰⁷ The child protection agency can consider both the resources necessary to prosecute a juvenile court case and the resources necessary to handle the results of such a case – including the availability of foster homes, personnel to manage foster care cases, and services provided to foster children and their families. In light of all of these factors, the agency then has all the information necessary to determine whether filing legal action in this particular case would serve the agency's overall goals and whether it would effectively apply the agency's limited resources – or whether some alternative to filing a juvenile court case would be better.

103. See MO. REV. STAT. § 211.271.1 (2000 & Supp. 2012) (providing that no juvenile court adjudication amounts to a conviction).

104. *In re Gault*, 387 U.S. 1, 49-50 (1967).

105. 470 U.S. at 831.

106. Absent a juvenile delinquency agency analogous to the Children's Division, this same argument does not apply to juvenile delinquency cases.

107. See *supra* notes 76-79 and accompanying text.

B. Missouri Constitutional Text and Case Law

Federal case law is more explicit on the subject of prosecutorial discretion and separation of powers than Missouri case law, and the Supreme Court of Missouri has not explicitly ruled on the question of whether a civil child abuse or neglect case or juvenile delinquency case may be filed and prosecuted by a member of the judicial branch. Nonetheless, an analysis of Supreme Court of Missouri decisions and the Missouri Constitution's text and history shows that the conclusions reached by the Supreme Court of the United States should apply to Missouri law.

1. Missouri Case Law Leads to the Same Conclusion as Federal Law

Missouri case law exploring both the executive and judicial powers shows that the former includes and the latter excludes the power to determine which cases and which charges to file and prosecute. Missouri courts have already endorsed the executive branch's authority to exercise prosecutorial discretion in the criminal context, explaining that a "prosecutor has broad discretion on the decision to prosecute and this decision is seldom subject to judicial review."¹⁰⁸ Although this quotation is from a criminal context, the Supreme Court of Missouri has held more generally that "the power to administer and enforce the law lies solely with the executive branch."¹⁰⁹ Moreover, as *Heckler* and *Buckley* demonstrate for the federal Constitution, the same rule applies to civil prosecutions. That is especially true given that the Supreme Court of the United States relied on language – the Take Care Clause – that appears in substantively identical form in the Missouri Constitution.¹¹⁰ As *Buckley* and *Heckler* explain, executive power to enforce the law includes the power to determine whether filing a court action is justified and effective.¹¹¹

The Supreme Court of Missouri has issued several decisions elucidating the judicial power granted to the circuit courts (of which juvenile courts are a part¹¹²) by the Missouri Constitution.¹¹³ These decisions gave no hint that the

108. *State v. Massey*, 763 S.W.2d 181, 183 (Mo. App. W.D. 1988). *Massey* addressed the narrow grounds for judicial review of vindictively-filed charges. *Id.*; see also *State v. Gardner*, 8 S.W.3d 66, 70 (Mo. 1999) ("A prosecutor has broad discretion whether to prosecute – a decision seldom subject to judicial review.")

109. *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 231 (Mo. 1997) (citing MO. CONST. art. IV, § 1).

110. See *infra* Part III.B.2.

111. See *supra* Part III.A.

112. See MO. REV. STAT. § 211.021.1(3) (2000).

113. See MO. CONST. art V, § 1 ("The judicial power of the state shall be vested in a supreme court, a court of appeals consisting of districts as prescribed by law, and circuit courts.").

judicial power includes deciding whether to file child abuse or neglect petitions, determining what to allege against a parent or a juvenile, or prosecuting such petitions. Rather, the court espoused the standard view that the judiciary's power is to determine factual and legal issues brought before it in cases filed by private parties or the executive branch. The constitution grants the judiciary two "exclusive" powers: "judicial review and the power of courts to decide issues and pronounce and enforce judgments."¹¹⁴

Finally, the Supreme Court of Missouri has recognized that the purpose of separating powers is "to prevent the concentration of unchecked power in the hands of one branch of government."¹¹⁵ It should be evident that under present law and practice, the judiciary holds power unchecked by another branch. Subordinate judicial branch officials (juvenile officers) determine which juvenile court cases to file, decide what charges to bring and against whom, and prosecute such charges.¹¹⁶ Then superior judicial branch officials (judges) adjudicate the factual and legal issues raised in the case.¹¹⁷ That is, the judicial branch files and prosecutes petitions in front of itself. In light of the federal and state authorities discussed in this section, it is inescapable that this status quo violates the Missouri Constitution's separation of powers provisions.

2. The Missouri Constitution's Text and History Reveal That the Judiciary Branch Cannot Constitutionally File and Prosecute Cases

To the extent the above Missouri case law leaves any ambiguity, the Missouri Constitution resolves the question similarly. The Missouri Constitution includes language that parallels the U.S. Constitution's assignment of prosecutorial discretion to the executive branch; if anything, Missouri's constitution includes stronger language. Further, the history of the Missouri Constitution suggests that its separation of powers protections are at least as strong as their federal analogs. Two provisions are particularly important.

First, Article II establishes three distinct branches of government.¹¹⁸ It creates no "impenetrable wall of separation," but it does "proscribe the exercise of powers or duties constitutionally assigned to one department by either

114. *Chastain v. Chastain*, 932 S.W.2d 396, 399 (Mo. 1996); *see also* *Percy Kent Bag Co. v. Mo. Comm'n on Human Rights*, 632 S.W.2d 480, 484 (Mo. 1982) ("true judicial power vested in the courts by our constitution is the power to decide and pronounce a judgment and carry it into effect") (internal quotation marks and citations omitted).

115. *Asbury v. Lombardi*, 846 S.W.2d 196, 200 (Mo. 1993) (en banc); *see also* *Rhodes v. Bell*, 130 S.W. 465, 467-68 (Mo. 1910) (citing the Founders and an early New Hampshire opinion explaining the overarching purpose of the separation of powers doctrine).

116. *See supra* notes 57-59 and accompanying text.

117. *See supra* Part II.A.

118. *See* MO. CONST. art II, § 1.

of the other two,”¹¹⁹ using language suggesting relatively tight boundaries between those branches:

The powers of government shall be divided into three distinct departments – the legislative, executive and judicial – each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.¹²⁰

Second, Missouri’s constitution includes a “take care” clause that is nearly identical to the federal Constitution’s take care clause cited repeatedly by the Supreme Court of the United States as assigning prosecutorial decisions to the executive branch.¹²¹ Article IV of the Missouri Constitution provides that “[t]he governor shall take care that the laws are distributed and faithfully executed”¹²²

The text of these two provisions leads to the conclusion that Missouri separates powers similarly to the federal government and, if any differences exist, that the Missouri provisions separate powers more strictly. Crucially, the framers of Missouri’s constitution added strong separation of powers language absent from the federal Constitution. Article II of the Missouri Constitution prohibits one branch of government from exercising power assigned to another “except in the instances in this constitution expressly directed or permitted.”¹²³ Missouri’s constitution, like most state constitutions, is far more detailed than the federal Constitution, and it does contain several explicit textual exceptions on which the Supreme Court of Missouri has relied.¹²⁴ When a particular statutory scheme does not satisfy the provisions of such textual exceptions, then the Supreme Court of Missouri has found a separation of powers violation.¹²⁵ No explicit constitutional provision exists that would permit the judiciary to exercise executive branch authority in juvenile

119. *Chastain*, 932 S.W.2d at 398.

120. MO. CONST. art II, § 1.

121. *See supra* notes 95-99 and accompanying text.

122. MO. CONST. art. IV, § 2.

123. MO. CONST. art II, § 1.

124. *See, e.g.*, *Percy Kent Bag Co. v. Mo. Comm’n on Human Rights*, 632 S.W.3d 480, 484 (Mo. 1982) (en banc) (relying on article V, section 18 of the Missouri Constitution to uphold an administrative agency’s authority to issue case-specific findings).

125. *See, e.g.*, *Asbury v. Lombardi*, 846 S.W.2d 196, 199 (Mo. 1993) (en banc).

matters. Moreover, Missouri's take care clause includes the same language as the federal take care clause, adding only the term "distributed."¹²⁶

History also suggests that the Missouri Constitution's separation of powers clauses were intended to be at least as strong as their federal counterparts.¹²⁷ Missouri's separation of powers and "take care" clauses date to Missouri's original 1820 constitution; that language was not changed substantively by subsequent constitutional revisions.¹²⁸ The 1820 constitutional convention's records are silent regarding these two provisions.¹²⁹ That silence continued through the convention that drafted Missouri's current constitution, adopted in 1945.¹³⁰ The nearly identical language of the take care clause, the

126. Compare MO. CONST. art. IV, § 2, with U.S. CONST. art. II, § 3. It is not clear what difference Missouri's constitutional framers intended with that added term – or even if any difference was intended. Textually, the term does not appear to add any substantive considerations to the argument that the take care clause places prosecutorial discretion within the executive branch. The Supreme Court of Missouri has quoted the phrase, but not offered any explanation as to what the term "distributed" might mean. See, e.g., *Kinder v. Holden*, 92 S.W.3d 793, 808 (Mo. App. W.D. 2002) (quoting the take care clause). Without any textual or historical clues to the contrary, we ought not place weight on this small difference. See Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Garner's Failed Discourse*, 24 RUTGERS L.J. 927, 935 (1993) ("Without evidence that distinct wording was deliberately chosen for a known purpose, identical or different working is immaterial to independent state interpretation."). For the same reasons, the textual similarities alone do not require Missouri courts to interpret the state constitution as the Supreme Court of the United States has interpreted the federal one, at least as a matter of state constitutional theory. See *id.* (arguing for the possibility of independent interpretation of state constitutional clauses that parallel federal clauses); Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathub?*, 64 WASH. L. REV. 19, 34-35 (1989) (same).

127. See, e.g., *Rhodes v. Bell*, 130 S.W. 465, 467 (Mo. 1910) (referencing the common goals of the separation of powers clauses in both the Missouri and federal Constitutions).

128. Compare MO. CONST. art. II (1820) ("of the distribution of powers"), and MO. CONST. art. IV, § 8 (1820) ("take care" clause), with MO. CONST. art. II, § 1, and MO. CONST. art. IV, § 2.

129. For instance, the journal of the convention records that draft language "embracing the distribution of power and legislative department" was discussed on June 30, 1820. MO. J. OF STATE CONVENTION 15 (1820). The journal then notes discussions regarding the legislative power, but nothing regarding the "distribution of powers" clause. *Id.* at 15-19. The journal notes that the convention "took up" this clause on one other date but records no substantive discussion other than the fact that it was agreed to. *Id.* at 33. Similarly, the executive branch powers – including the take care clause – were discussed without specific reference to the take care clause (section 8) other than to note that it was agreed to. *Id.* at 20-22, 38-39.

130. Debates of the 1943-1944 Constitutional Convention of Missouri, 1932 (reporting the reading and adoption of Article II without objection or discussion, other

stronger language of the separation of powers clause, the historical commitment to separation of powers, and the absence of contrary historical evidence creates a strong circumstantial case that Missouri's separation of powers clauses impose the same or stronger divisions between the three branches of government as the federal Constitution does.

Two other factors suggest that Missouri's separation of powers clauses, like their federal counterparts, require the executive branch and not juvenile officers to exercise prosecutorial discretion. The first is that Missouri's separation of powers clauses should be understood in the "discursive context" in which they were framed¹³¹ – a national polity with a commitment to separation of powers so strong that framers of the federal Constitution felt compelled to explain how strongly that constitution protected the separation of powers principle. James Madison framed his exposition of the separation of powers in Federalist No. 47 as a defense of the Constitution's robust enforcement of the separation of powers.¹³² That essay thus illustrates how both proponents and opponents of the U.S. Constitution – adopted just one generation prior to the Missouri Constitution – shared a commitment to the separation of powers.

The second factor is precedential. The Supreme Court of Missouri has repeatedly relied upon federal separation of powers authorities in elucidating the Missouri Constitution's separation of powers clauses.¹³³ The court should

than noting that it was identical to the then-existing Constitution), 3980 (reporting the reading and adoption of Article IV section 2 without any discussion or objection).

131. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1153 (1993).

132. Madison began Federalist No. 47 by summarizing an argument made by the U.S. Constitution's opponents: "One of the principal objections inculcated by the more respectable adversaries to the Constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct. In the structure of the federal government, no regard, it is said, seems to have been paid to this essential precaution in favor of liberty." THE FEDERALIST NO. 47 (James Madison). Madison's rebuttal is not to diminish the importance of the separation of powers, but to explain how the U.S. Constitution does, in fact, separate powers effectively.

133. See, e.g., *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 231 (Mo. 1997) (quoting and applying *INS v. Chadha*, 462 U.S. 919, 963 (1983) (Powell, J., concurring)); *Mo. Coal. for the Env't v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 134 (Mo. 1997) (quoting *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986)) (regarding the extent of legislative powers); *State v. Massey*, 763 S.W.2d 181, 183 (Mo. 1988) (citing *Wayte v. United States*, 470 U.S. 598, 607 (1982) and *United States v. Goodwin*, 457 U.S. 368, 381-82 (1982)) (regarding prosecutorial discretion); *State v. Watts*, 601 S.W.2d 617, 620 (Mo. 1980) (citing *United States v. Batchelder*, 442 U.S. 114, 123-25 (1979) and *United States v. Nixon*, 418 U.S. 683, 693 (1974)) (regarding the executive branch prosecutor's authority to choose on which of several possible statutory provisions to base charges).

similarly rely on Supreme Court of the United States decisions recognizing prosecutorial discretion as a fundamental executive branch power.

IV. WHY WE SHOULD CARE

The separation of powers problem in Missouri's existing juvenile court structure has existed for decades and has been noted by judges,¹³⁴ the Missouri Bar,¹³⁵ the National Juvenile Defender Center,¹³⁶ and the ABA.¹³⁷ The existing structure may persist because of a perceived aversion to change¹³⁸ or because it is hard to see the harms from violating the abstract separation of powers principle.

This section will identify some of the various harms that can flow from the existing system, especially in child abuse and neglect cases. First, the juvenile officer's role ignores key elements of modern juvenile law. In child welfare cases, it ignores the existence of an executive branch agency charged with managing a comprehensive child welfare system. In juvenile delinquency cases, it ignores the core principle that, even with the law's therapeutic goals, juveniles have a right to be adjudicated in a system that follows constitutional principles. Second, the juvenile officer's role exacerbates structural problems within family courts nationwide, leading to overly cozy relationships that weaken decision making quality, limit judges' ability to stop unnecessary litigation, and reduce litigants' sense of procedural justice. Third, by granting juvenile officers authority to decide which cases are filed in juvenile court, the existing system places too much power in the hands of judges. Fourth, in child welfare cases, disempowering the executive branch limits the ability of the Children's Division to fulfill its statutory mandates as effectively as possible and to lead a highly functioning child welfare system. Finally,

134. See *infra* note 214 and accompanying text (quoting Judge Darrell Missey).

135. The Bar's Juvenile Law deskbook identifies "potential conflicts" that flow from the absence of juvenile officers' independence from judges. Mo. Juvenile Law § 1.14 (MoBar 4th ed. 2011).

136. "The structure of Missouri's juvenile court, by its very nature, creates conflicting roles. The role of the deputy juvenile officer (Missouri's equivalent of probation officer) and legal officer (Missouri's equivalent of prosecutor), as designed and implemented, presents challenges to the judiciary regarding the fair implementation of due process, supervision, and the requirement of impartiality." MARY ANN SCALI ET AL., NAT'L JUVENILE DEFENDER CTR., MISSOURI: JUSTICE RATIONED, AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF JUVENILE DEFENSE REPRESENTATION IN DELINQUENCY PROCEEDINGS 7 (2013), available at http://www.njdc.info/pdf/Missouri_Assessment.pdf (last visited Oct. 14, 2013).

137. See STANDARDS RELATING TO COURT ORGANIZATION, *supra* note 76, at 17 ("[C]onstitutional issues still remain when intake decisions are made by employees selected by a judge to carry out his or her policies.").

138. The Missouri Bar's juvenile law hornbook, for instance, asserts without citation that placing prosecutorial discretion in the executive branch "is highly unlikely." Mo. Juvenile Law § 1.14 (MoBar 4th ed. 2011).

in child welfare cases, the existing structure wastes public resources on staff whose powers and obligations should be subsumed – at no cost – by the executive branch agency.

A. The Juvenile Officer's Role Is an Anachronism

The juvenile officer's role is anachronistic – and thus an outlier across the country – because it rests on two ideas that have changed dramatically since the juvenile court's origins. First, Missouri law ignores the executive branch agency that has existed for a generation and that could logically exercise prosecutorial discretion, at least in child welfare cases. The juvenile court and the juvenile officer predate the modern administrative state; the first juvenile court was created in 1899 in Chicago.¹³⁹ The juvenile court became the focal point for society's growing awareness of the need to protect children from abuse, in part because no executive branch agency could administer child protection programs¹⁴⁰ and very few services for children existed beyond the courts.¹⁴¹ The Missouri General Assembly created a juvenile court in St. Louis in 1903, before the Children's Division existed, and adopted nearly identical legislation to that which created the Chicago juvenile court.¹⁴² The legislation empowered probation officers (whose titles were later changed to juvenile officers) to investigate, file, and prosecute juvenile court cases.¹⁴³ At the time of the juvenile court's creation, the only alternatives to a juvenile court official filing and prosecuting cases were criminal prosecutors – seen as overly punitive – or private entities, like children's aid societies, filing cases.¹⁴⁴

The modern administrative state – complete with various executive branch agencies with authority to enforce laws through their own lawsuits – developed decades later, especially during the New Deal era in the 1930s.¹⁴⁵

139. See COMM. ON LAW & JUSTICE ET AL., *JUVENILE CRIME, JUVENILE JUSTICE* 157 (2001).

140. DOUGLAS ABRAMS, *A VERY SPECIAL PLACE IN LIFE: A HISTORY OF JUVENILE JUSTICE IN MISSOURI* 44-45 (2003) (“The court's overt social welfare role won wide support because the state had begun creating child protective programs, but without a network of executive agencies to administer them.”).

141. STANDARDS FOR SPECIALIZED COURTS, *supra* note 78, at 43.

142. See *id.* at 45-47.

143. See Noah Weinstein, *The Juvenile Court Concept in Missouri: Its Historical Development – the Need for New Legislation*, 1957 WASH. U. L.Q. 17, 24-29 (1957).

144. *Id.* at 38 (describing how any resident or circuit prosecutor could file a juvenile petition in the early years of the juvenile court); see also *id.* at 20 (describing the power of private “societies” in the 1800s to file petitions seeking custody of children based on allegations of neglect).

145. See Marshall J. Berger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1116-17 (2000).

During that era, Congress enacted the Social Security Act, which included provisions for federal funding to state welfare agencies.¹⁴⁶ Missouri needed an executive branch agency to access these federal funds, so the state created a Social Security Commission to administer welfare benefits to needy children and families.¹⁴⁷ The modern child welfare administrative state did not come of age until decades later; Congress enacted a series of federal funding statutes in the 1970s that established criteria for state child welfare agencies to tap federal funds.¹⁴⁸ In 1974, the Missouri General Assembly created the Division of Family Services (subsequently renamed the Children's Division¹⁴⁹) within the Department of Social Services to operate a comprehensive child welfare system and to access the widening stream of federal child welfare funds.¹⁵⁰ The juvenile officers' role in Missouri began in 1903, before the New Deal and the modern administrative state,¹⁵¹ and was strengthened through 1957 legislation that gave juvenile officers exclusive authority to exercise prosecutorial discretion;¹⁵² both steps came decades before establishment of the modern child welfare administrative structure. The Missouri General Assembly has not adjusted the juvenile officers' role at all to accommodate the creation of the Children's Division and its predecessor agencies.

The second anachronism in Missouri's juvenile court structure is the notion that the juvenile court's inherently therapeutic purpose renders formal protections for individual rights, such as the separation of powers, unnecessary. The creators of the Missouri juvenile courts thought that the same individual who chose to file a delinquency or child abuse case could represent the child or family whenever they lacked their own lawyer.¹⁵³ As Judge Noah Weinstein, a prominent Missouri juvenile court judge, wrote in 1957, the juvenile court had two core animating ideas – first, that therapeutic and rehabilitative goals were most appropriate for juvenile offenders, and second, that these goals rendered constitutional protections unnecessary.¹⁵⁴ That same

146. See 42 U.S.C. § 301 (2006).

147. ABRAMS, *supra* note 140, at 138.

148. See, e.g., 42 U.S.C. §§ 671-679c (2006 & Supp. 2011). Notably, the conventional wisdom that juvenile court prosecutorial discretion should reside with executive branch agencies was published in this era. See *supra* notes 76-79 and accompanying text.

149. See H.B. 1453, 92d Gen. Assemb., Reg. Sess. (Mo. 2004) (separating the Division of Family Services into the Family Support Division and the Children's Division).

150. ABRAMS, *supra* note 140, at 139.

151. See *supra* notes 142-145 and accompanying text.

152. See *infra* notes 155-157 and accompanying text.

153. ABRAMS, *supra* note 140, at 76.

154. Weinstein, *supra* note 143, at 33.

year, and at Judge Weinstein's urging,¹⁵⁵ the General Assembly amended the juvenile code to limit the ability to file a delinquency or abuse or neglect petition to the juvenile officer, thereby preventing an administrative agency, represented by an executive branch attorney, from doing so.¹⁵⁶ The legislation justified granting more power to juvenile officers because doing so would reduce the stigma of being charged with a delinquent act and being committed to a juvenile detention facility.¹⁵⁷

In granting the juvenile officer the crucial and exclusive power of prosecutorial discretion, the General Assembly did not anticipate the application of core due process protections to juvenile court proceedings. In the juvenile delinquency context, the Supreme Court of the United States' 1967 decision *In re Gault* repudiated the notion that rehabilitation trumps rights in juvenile court and insisted that juvenile courts be "constitutional[ly] domesticat[ed]."¹⁵⁸ In the child abuse and neglect context, the General Assembly did not anticipate the widespread recognition that any child abuse and neglect case imposes an enormous stigma on both parents and children involved in such cases, regardless of who files child abuse and neglect allegations.¹⁵⁹ The General Assembly also failed to anticipate the various Supreme Court decisions that applied due process protections to respect the right to family integrity at stake in child abuse and neglect

155. Abrams identifies the judge, Noah Weinstein, as one of four "primary drafters" of the act. ABRAMS, *supra* note 140 at 146.

156. *See* State v. Taylor, 323 S.W.2d 534 (Mo. App. Springfield D. 1959); Weinstein, *supra* note 143, at 38.

157. Weinstein, *supra* note 143, at 38. The legislation included a number of provisions designed to provide effective services to juvenile offenders. ABRAMS, *supra* note 140, at 147-49. For purposes of this Article, however, I focus on the legislation's decision to grant exclusive prosecutorial discretion to juvenile officers.

158. *In re Gault*, 387 U.S. 1, 22 (1967). The legislature also failed to anticipate the powerful critique which animated the Supreme Court's ruling – that in juvenile court "there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." Kent v. United States, 383 U.S. 541, 556 (1966).

159. Child protection system involvement is enormously stigmatizing – especially to parents, and especially the poor, black mothers disproportionately labeled as bad parents through the child protection system. *See* Marie Ashe, "Bad Mothers," "Good Lawyers," and "Legal Ethics", 81 GEO. L.J. 2533, 2547 (1993) (describing the "gendered focus of child dependency law" as imposing a "stigma of 'badness'" on women); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 28 (2002). And that stigma can pass down a generation to children. *See, e.g.*, ALEX HALEY & MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 21 (1999) (describing stigma of being a "state child"). Dorothy Roberts has described how the view of legal institutions and society towards many black women as "degenera[te] stigmatizes not only mothers but their children as well." DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 21 (1997).

cases¹⁶⁰ – protections that would be unnecessary in a purely informal model. Following these decisions, juvenile courts could still order children and families to receive rehabilitative services instead of only punishment, but they had to recognize that such orders infringed on fundamental constitutional rights that require proper procedures – including procedures that respect the constitutionally-mandated separation of powers.

Courts have grappled with how to comport Missouri's system with *Gault*. One appellate decision regarding juvenile officers, issued five years after *Gault*, demonstrates the difficult place that the purely therapeutic vision of the juvenile court holds now that the Supreme Court of the United States requires formal due process protections for youth. *In re F.C.* involved a juvenile who was adjudicated delinquent and committed to the State Training School for Boys – a juvenile detention center – and who challenged his adjudication because the same individual served as both juvenile officer and county prosecuting attorney.¹⁶¹ The court ruled in the juvenile's favor, describing the juvenile officer's role consistent with the pre-*Gault* therapeutic mindset: "The juvenile officer is seen there not as an adversary but in an attitude of helpfulness [T]he Juvenile Act contemplate[s] a relationship of trust and confidence between the child and juvenile officer as the first indispensable step to rehabilitation."¹⁶² In contrast, a prosecuting attorney seeks to prosecute individuals for crimes.¹⁶³ The court held that the two roles are incompatible because a juvenile officer cannot create a *parens patriae* relationship with a juvenile if he is also a prosecutor.¹⁶⁴ If that were so, then the juvenile would have to be warned "that the juvenile officer also may have the duty to prosecute him, and is a potential adversary."¹⁶⁵

The *In re F.C.* court neglected to add that, in fact, the juvenile officer *does* have the duty to prosecute juveniles and *is* a potential adversary; it is the juvenile officer, after all, who asks his attorney to file a petition and, through that attorney, presents evidence to support that petition. The federal govern-

160. See, e.g., *Santoksy v. Kramer*, 455 U.S. 745, 769-70 (1982) (requiring proof by clear and convincing evidence before a state may terminate parental rights); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (requiring states to provide parents with hearings on their fitness before removing children).

161. 484 S.W.2d 21, 22 (Mo. App. W.D. 1972). The case originated in Pulaski County, a rural county that straddles Interstate 44 between St. Louis and Springfield. *Id.* Presumably, the same individual served as prosecuting attorney and juvenile officer for efficiency purposes in a low population area. This case did not raise a separation of powers challenge to a judicial branch officer exercising prosecutorial discretion and only challenged the merger of a juvenile officer and his lawyer. *Id.*

162. *Id.* at 25. Indeed, one lawyer for juvenile officers has described the juvenile officer role as "basically a pre-*Gault* role." SCALI ET AL., *supra* note 136, at 37.

163. *F.C.*, 484 S.W.2d at 25.

164. *Id.* at 26.

165. *Id.*

ment recognized this role as adversarial more than a decade before *Gault*.¹⁶⁶ These acts threaten to trigger juvenile court authority to detain a juvenile or issue other orders that significantly invade the juvenile's liberty. After *Gault*, it is impossible to see how a court could find anything different. *In re F.C.* did not address this issue, other than through a coy "Cf." cite to *Gault*.¹⁶⁷ As the court's citation suggests, there is no intellectually coherent way to consider the individual who chooses to file petitions alleging a juvenile committed a delinquent act as anything other than an adversary. Similarly, in child welfare cases, the individual who chooses to file a petition seeking to remove a child from the child's parents, and thus invade the parents' and the child's fundamental constitutional rights to family integrity, must be viewed as an adversary to the parents and, in certain cases, to the child.

A later court decision recognized the juvenile officer's uneasy post-*Gault* status. Applying *Gault*, *In re M.C.* held that a juvenile officer must warn a juvenile about his right to avoid self-incrimination before interviewing the child.¹⁶⁸ This language contradicted *In re F.C.*, which suggested that advising juveniles of their privilege against self-incrimination would "advance to the very earliest stage of the juvenile process the need for constitutional due process" contrary to the juvenile court's therapeutic goal.¹⁶⁹ The decision in *In re M.C.* thus rejected the court's view in *In re F.C.* that the juvenile officer's therapeutic role could, after *Gault*, take precedence over juveniles' due process rights. *In re M.C.* illustrates how Missouri courts began following the letter of the Supreme Court of the United States' decision. But it did not explain how the law should balance the juvenile officer's allegedly therapeutic role in light of the legal recognition that filing a petition to invade a juvenile's or a parent's fundamental liberty interest is inherently adversarial. Nor, in the nearly forty years since *In re M.C.*, have the Missouri General Assembly or courts directly addressed that issue.

In re Gault's repudiation of the idea that therapeutic goals could render juveniles' constitutional rights unimportant did not suggest that the therapeu-

166. See STANDARDS FOR SPECIALIZED COURTS, *supra* note 78, at 42 (describing how filing and prosecuting a petition often places court staff "in an adversary position in the eyes of the child and family").

167. 484 S.W.2d at 26. Doug Abrams has written in another context that "*Gault* did not produce change overnight." ABRAMS, *supra* note 140, at 156. The *In re F.C.* "cf." cite illustrates the point. The Bluebook describes "Cf." as appropriate for authority that "supports a proposition different from the main proposition but sufficiently analogous to lend support." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at 55 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010). To make the cited authority's relevance clear, the Bluebook "strongly recommend[s]" parenthetical explanations. *Id.* *In re F.C.* offers no explanation, parenthetical or otherwise, for how *Gault* supported its proposition that due process protections are inappropriate early in a case.

168. 504 S.W.2d 641, 647 (Mo. App. E.D. 1972).

169. *In re F.C.*, 484 S.W.2d at 26.

tic aims of juvenile delinquency law – the idea that the state should seek to rehabilitate and not merely punish juvenile offenders – are invalid, nor did the decision convey that such goals should not guide prosecutorial discretion. That element of Missouri’s statute remains well-supported. The element that lacks support is the suggestion, dating to the juvenile court’s origins and continuing through the 1957 statutory reforms, that these therapeutic goals can render unnecessary the legal rules that protect individuals from unwarranted state invasion of rights.¹⁷⁰ How to respect those rules while achieving those therapeutic aims is a topic deserving careful legislative attention.¹⁷¹

B. Violating Separation of Powers Is Particularly Harmful in Juvenile Court

Placing juvenile officers in the judiciary and rendering them subject to judges’ supervisory control is particularly harmful in the juvenile court context. The high stakes in juvenile court cases – whether the state legally severs family relationships and whether children are placed in detention or other forms of state custody – make it incumbent upon juvenile courts to reach fair and accurate decisions. Yet, in child welfare cases especially, commentators have roundly criticized juvenile courts around the nation for practicing “groupthink,”¹⁷² making decisions based on cognitive short cuts (also known as heuristics),¹⁷³ and exerting coercive authority in a therapeutic guise to pressure parties – especially mothers – to go along with state-created plans to break up families pending parental rehabilitation.¹⁷⁴ In these critiques, juvenile courts are places where cozy in-groups of repeat players – the judges, lawyers, and case workers who routinely practice in juvenile court – subtly and often unintentionally create an institutional culture. That culture dissuades individuals from challenging decisions and further disempowers the disproportionately poor, minority, and female-headed families subject to ju-

170. See, e.g., STANDARDS FOR JUVENILE AND FAMILY COURTS, *supra* note 79, at 4-5 (describing how juvenile and family courts evolved from initially failing to recognize their actions as limiting individual freedom to adopting procedures designed to protect individual rights against unwarranted state intrusion). The federal Children’s Bureau also concluded that the juvenile court’s goal of “individualized justice [for children and families] is not hampered but rather strengthened by being placed within the traditional framework of American constitutional rights and judicial practice.” *Id.* at 8.

171. See *infra* Part V.A (discussing legislative possibilities).

172. Melissa L. Breger, *Making Waves or Keeping the Calm?: Analyzing the Institutional Culture of Family Courts Through the Lens of Social Psychology Groupthink Theory*, 34 LAW & PSYCHOL. REV. 55, 61-62 (2010).

173. See Matthew I. Fraidin, *Decision-Making in Dependency Court: Heuristics, Cognitive Biases, and Accountability*, 60 CLEV. ST. L. REV. 913, 938-39 (2013).

174. See Amy Sinden, “Why Won’t Mom Cooperate?”: A Critique of Informality in Child Welfare Proceedings, 11 YALE J.L. & FEMINISM 339, 343-44 (1999).

venile court child abuse and neglect jurisdiction. These features lead to negative outcomes in multiple ways: courts reach inaccurate decisions because these features hide disputed factual issues,¹⁷⁵ the features trigger reliance on mental short cuts,¹⁷⁶ and they create an institutional culture in which multiple players avoid challenging what the culture teaches them to expect.¹⁷⁷ These elements erode courts' abilities to give all parties a voice in judicial processes; a voice that social scientists have found to be essential to developing a sense of procedural justice among litigants.¹⁷⁸

The foregoing critiques apply to juvenile and family courts nationwide, but the juvenile officer's role in the Missouri system exacerbates these core problems in at least four ways. First, Missouri's juvenile court structure takes a step towards an inquisitorial model in which a judicial branch employee determines which cases to prosecute and how. Social scientists have found an inquisitorial system less preferable to litigants than an adversarial system, largely because litigants feel they have a greater voice in an adversarial system.¹⁷⁹ When litigants – children, who are by virtue of their age generally considered legally disabled, and their disproportionately poor and minority parents, who generally lack power due to their low socioeconomic status – see a judicial branch employee arguing to their supervisor, the judge, that the parent neglected the child or that the child committed a delinquent act and must be removed from his parent and placed in state custody, it is not hard to imagine why they might feel their voice is not heard quite as clearly. Litigants may even question the judge's neutrality when the judge is asked to adjudicate a petition filed by a member of the judge's own team.¹⁸⁰ In child welfare cases, litigants' voices are further diminished by adding another individual to speak with the voice of state authority: the Children's Division worker. In other states, the child welfare agency prosecutes child protection petitions.¹⁸¹ In Missouri, child protection cases have two officials – the Children's Division worker and the juvenile officer – typically arguing for state invasions of family integrity.¹⁸² A litigant's voice, or the litigant's perception of having a sufficiently strong voice, is further diminished by the first among equals role that juvenile officers take in hearings; by introducing all the par-

175. *See id.* at 340.

176. *See* Fraidin, *supra* note 173, at 935.

177. *See* Breger, *supra* note 172, at 56.

178. *See* Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 152 (2011) (citing JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 121 (1975)).

179. *See* THIBAUT & WALKER, *supra* note 178, at 118; Hollander-Blumoff, *supra* note 178, at 152; *see also* TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 163 (2006) (describing the importance of litigants' voice in creating procedural justice).

180. Belief in a judge's neutrality is an essential element of procedural justice, and in litigants' perceptions of fairness. *See* TYLER, *supra* note 179, at 163-64.

181. *See supra* Part II.B.

182. *See supra* Part II.A.

ties and presenting all parties' reports to the judge,¹⁸³ the juvenile officers act out the families' relative lack of power and voice in the proceeding.

Missouri law also exacerbates a second core problem: the juvenile officer's role within the judicial branch increases the cohesion of the decision-making group. One pillar of juvenile court critiques is that the professionals who staff juvenile courts create a cohesive decision-making group in which repeat players become unlikely to challenge dominant thinking and the institution makes decisions through group think.¹⁸⁴ In juvenile courts outside of Missouri, this concern is partly balanced by some of the repeat players' professional duty to serve as checks on each other. Lawyers advocate for their clients and an executive branch agency asserts its own values, policy priorities, and institutional culture through its prosecutorial choices, which are checked by judicial decisions.¹⁸⁵ Juvenile officers cannot be expected to exercise independent discretion in the way a separate agency would; as the Supreme Court of the United States said, "[I]t is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will."¹⁸⁶ Placing juvenile officers and their prosecutorial discretion in the judicial branch erodes the executive branch's check on group think. In Missouri juvenile courts, the Children's Division is unrepresented and the most important legal decisions are turned over to the juvenile officer, who presents his recommendations to his supervisor, not an independent arbiter.¹⁸⁷ Eroding this check limits judges' ability to evaluate effectively competing perspectives that are presented. The ABA has explained that judges are best able to render truly independent decisions when they are evaluating recommendations presented by various parties, not those from the court's own employees.¹⁸⁸

There is also evidence that the juvenile officer's role erodes the check on group think provided by counsel for children and their parents in delin-

183. See *supra* text following note 74.

184. See Breger, *supra* note 172, at 60-61, 72-77.

185. See *id.* at 75-77 (conceding that counsel advocates on behalf of clients, but arguing that counsel choose "very risk averse" strategies to preserve their role in a "clubby" atmosphere).

186. *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935); see also *id.* at 630 (describing the threat of termination as a "coercive influence"). *Humphrey's Executor's* focus on strict separation between different branches of government has fallen from favor. See, e.g., *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 442-43 (1977) (adopting a "more pragmatic, flexible approach" than *Humphrey's Executor*). Still, *Humphrey's Executor's* observation on the impact of supervisory authority on an employee's independence (or lack thereof) from that authority is not seriously questioned.

187. See *supra* Part II.A.

188. See STANDARDS RELATING TO COURT ORGANIZATION, *supra* note 76, at 16 ("Judicial independence is increased when reviewing the individual case reports and recommendations of executive agency officials as contrasted with those of the court's own employees.").

quency and abuse and neglect cases. In both categories of cases, juvenile officers meet with individuals at the initial stages of litigation and advise them of their right to counsel.¹⁸⁹ The National Juvenile Defender Center's 2013 evaluation of Missouri's juvenile justice practice found that "[y]outh are also encouraged to wind up their cases and plead out without counsel by *DJOs* [*deputy juvenile officers*]."¹⁹⁰ This phenomenon is exacerbated by juvenile officers who believe that no defense lawyers are necessary, even at detention hearings, because the juvenile officers "ha[ve] it covered."¹⁹¹ Furthermore, many juvenile officers incorrectly advise youth that the juvenile officer advocates for, rather than charges and prosecutes, the youth.¹⁹² Such beliefs could easily lead a juvenile officer to suggest – implicitly or explicitly – to children and parents that they should waive their right to counsel,¹⁹³ thus depriving judges of the ability to render decisions based on an adversarial hearing of the evidence.

Moreover, judges are often shaped by the organizational culture in which they find themselves. Judges' reputations within juvenile court will be influenced by the repeat players who appear before them regularly, and so one would expect judges to respond, at least partially, to the expectations of those repeat players.¹⁹⁴ When judges arrive in juvenile court, they find an existing courthouse culture – that is, a set of norms that are shared, even if unspoken, by the group of professionals who handle cases within the court.¹⁹⁵ When beginning a new set of job responsibilities and encountering such an organizational culture, judges, like other individuals, undergo a socialization

189. See *supra* note 50 and accompanying text.

190. SCALI ET AL., *supra* note 136, at 40.

191. *Id.* at 44.

192. See *id.* at 38.

193. One parent's attorney reported observing juvenile officers implicitly suggesting that parents waive counsel. Memorandum from Kathleen C. Dubois to Josh Gupta-Kagan 2 (Feb. 15, 2013) (on file with author). "I have been present when a DJO asked a parent if she thought she still needed a lawyer if her child was going to be placed with the grandmother. Another DJO told a parent that if he received an attorney he would probably be taxed by the county for the cost of representation." *Id.*

194. See Breger, *supra* note 172, at 74. This phenomenon may be particularly powerful in "less visible" forums like juvenile courts. See LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 99-100 (2006). In Missouri, the lawyers who appear regularly in front of judges literally shape their evaluations by rating judges in surveys published by the Missouri Bar. Mo. Bar, *Missouri Judicial Performance Evaluations Available to the Public at www.ShowMeCourts.org*, MOBAR.ORG, <http://www.mobar.org/news/2012/missouri-judicial-performance-evaluations-available-to-the-public-at-www.showmecourts.org.htm> (last visited Oct. 14, 2013). These ratings inform the Bar's recommendation to voters regarding judicial retention elections. *Id.*

195. See Breger, *supra* note 172, at 63-64 (discussing the notion of organizational or institutional culture within family court).

process.¹⁹⁶ It stands to reason that new juvenile court judges, especially those unfamiliar with juvenile law, are at the greatest risk of deferring to this organizational culture. Making the judge's own staff, both juvenile officers and their attorneys, leading figures in that culture increases the social and psychological pressure on new judges to defer to that culture's norms and issue orders that comport with juvenile officers' litigation positions.¹⁹⁷ Further, new judges relatively unfamiliar with the specialized subject matter are particularly prevalent in juvenile court because judges frequently rotate in for four-year assignments to the juvenile court.¹⁹⁸

Third, Missouri law exacerbates critics' general concern that the juvenile officer's role increases the pressure felt by professional repeat players to conform their decision-making to an individual judge's wishes. The juvenile court judge has long been viewed as the "leader[] of the court 'team'"¹⁹⁹ who, rather than passively and neutrally deciding disputes brought by parties with whom they have no formal relationship, operates as a "charismatic leader, problem solver, team manager, and judicial leader."²⁰⁰ According to this view, judges are more likely to give directions, implicitly or explicitly, to members of their team, and those members are likely to feel pressure to achieve some consensus consistent with judges' wishes.²⁰¹ For example, judges' power to appoint lawyers – and thus to give lawyers business – can create pressure on such lawyers "to alter their behavior or demeanor before a particular judge in an attempt to secure future appointments."²⁰² As with group think concerns, this pressure should be counterbalanced by professionals' obligations to their own clients²⁰³ – a principle which should include the

196. See, e.g., Andreas Broschild, *Comparing Circuits: Are Some U.S. Courts of Appeals More Liberal or Conservative Than Others?*, 45 L. & SOC'Y REV. 171, 177 (2011) (describing how "new judges are socialized" upon arriving in the federal circuit courts of appeals).

197. See SCALI ET AL., *supra* note 1366, at 37 (questioning judges' neutrality and independence when adjudicating petitions filed by their subordinates).

198. The statute governing the family court – of which the juvenile court is one division – provides that family court judges "shall serve in such capacity for a term of four years unless such judge's term is either extended such family court judge's option or shortened with the agreement of the family court judge and the presiding judge." MO. REV. STAT. § 487.050.1 (2000).

199. ALFRED KAHN, *A COURT FOR CHILDREN: A STUDY OF THE NEW YORK CITY CHILDREN'S COURT* 98 (1953).

200. Jane M. Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258, 270 (2008); see also Fraidin, *supra* note 173, at 936-38.

201. See Breger, *supra* note 172, at 81-83.

202. *Id.* at 74.

203. Lawyers' obligations to their clients are weakened in child welfare cases by Missouri's use of guardians *ad litem* to represent what they believe is in a child's best interests. See MO. SUP. CT. R. 129.04, STANDARDS 3.0, 4.0. In juvenile delinquency cases, lawyers represent children's wishes, and the ABA has recommended states provide stated interests lawyers in child welfare cases. AM. BAR ASS'N, ABA MODEL

priorities of an executive branch agency. And lawyers should have other sources of business – full-time employment with executive branch agencies, appointments from other judges, or other sources of clients (especially for many of the solo practitioner and small firm attorneys who practice in Missouri’s juvenile courts). Missouri law erodes those protections because juvenile officers depend on judges for their jobs and are subject to both the judges’ legal rulings and managerial authority. Moreover, the juvenile officers’ role weakens the voice given to executive branch agency concerns because the executive branch agency rarely appears with a lawyer, while the juvenile officer generally does appear with a lawyer.

Fourth, informality in juvenile court can lead to both inappropriate ex parte contacts and the appearance, if not the reality, of a skewed playing field; the Missouri system worsens this problem. In family courts, generally, judges, attorneys, and other repeat players have frequent ex parte conversations.²⁰⁴ As the ABA noted, this phenomenon is especially likely when the repeat players that judges see include “*their* intake officers.”²⁰⁵ This risk both jeopardizes due process²⁰⁶ and creates the appearance of impropriety, especially among parties to juvenile court cases who see juvenile officers walking in and out of courtrooms and remaining in courtrooms in between hearings before the parties have any opportunity to see a judge.²⁰⁷ At least one outside group studying one Missouri jurisdiction found that “informal communication between court practitioners may be viewed as having undue influence over formal processes,”²⁰⁸ and one experienced juvenile court lawyer documented multiple illustrations of ex parte contacts.²⁰⁹

C. Specific Missouri Examples Illustrate the Harm of Placing Too Much Power in the Judiciary

As a Missouri Bar publication gently put it, “Because the juvenile officer and staff serve under the direction of and at the pleasure of the juvenile court judge, questions may legitimately be raised regarding their ability to

ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS (2011), available at <http://www.isc.idaho.gov/cp/docs/ABA%20Model%20Act%20rep%20of%20child%20in%20cp%20case.pdf>.

204. See Breger, *supra* note 172, at 69.

205. STANDARDS RELATING TO COURT ORGANIZATION, *supra* note 76, at 16 (emphasis added).

206. See *id.*

207. See Breger, *supra* note 172, at 69.

208. ST. LOUIS CNTY. GREENBOOK INITIATIVE, SAFETY & ACCOUNTABILITY AUDIT SUMMARY REPORT 5 (2006) (on file with author) [hereinafter GREENBOOK INITIATIVE].

209. See Memorandum from Kathleen C. Dubois to Josh Gupta-Kagan, *supra* note 193, at 1-2.

render professional judgments independent of the judge's influence."²¹⁰ Theoretical critiques of juvenile and family court practice suggest that placing juvenile officers in the judiciary risks exacerbating bad practices in juvenile courts nationally.²¹¹ Specific experiences within Missouri bring such concerns into stark relief and aptly illustrate the potential and actual harms of the separation of powers violation.

Judge Darrell Missey is the chief administrative judge of the Juvenile Court of the 23rd Judicial Circuit of Missouri, which includes Jefferson County, just south of St. Louis County.²¹² Judge Missey took the bench in 2003, after defeating his predecessor, Judge Carol Bader, in an election in the fall of 2002.²¹³ Judge Missey has described how the court system he encountered both before and after his election illustrated the harms of the separation of powers violation: juvenile officers filed petitions that the judge wanted them to file and looked to the judge for supervisory guidance, and the judge granted juvenile officers' petitions regardless of what other litigants would say or do.²¹⁴ There was both a real and perceived absence of fairness to litigants other than the juvenile officer. Judge Missey wrote:

Our history in the Twenty-Third Circuit is demonstrative of the possibility that even very good people could allow the combination of the prosecutorial and judicial roles to run amok. As a practicing attorney, I observed the great difficulties which can arise when the Juvenile Judge supervises the Juvenile Office that prosecutes juvenile cases. In those days, *Deputy Juvenile Officers [DJOs] told me that the Judge established the criteria for which cases would be pursued.* When I would try to reason with Deputy Juvenile Officers about exercising some level of discretion, compassion, or restraint, they would often tell me that the Judge expected them to take their hard-line stance.

210. Mo. Juvenile Law § 1.14 (MoBar 4th ed. 2011).

211. See *supra* Part IV.B.

212. See Mo. Supreme Court, *Jefferson, Judicial Circuit 23*, YOUR MO. CTS., <http://www.courts.mo.gov/page.jsp?id=1620> (last visited Sept. 22, 2013).

213. Judge Missey has cited his concern for juvenile court practices under Judge Bader as the reason for his candidacy, stating in March 2012: "It was 10 years ago today that I was thinking about filing to run and it was this month, March of 2002, that I filed and ran. The reason I did it was because as a private practicing attorney I was concerned about our local juvenile system and what was happening there." Judge Darrell Missey, *Remarks at the 12th Annual Access to Equal Justice Colloquium – Evolving Standards in Juvenile Justice: From Gault to Graham and Beyond*, WASH. U. (Mar. 23, 2012), <http://mediasite.law.wustl.edu/Mediasite/Viewer/?peid=461e586a89cf41a9aac9b3097e23c48> [hereinafter Missey, *Remarks*].

214. See Memorandum from Judge Darrell Missey to Representative Rory Ellinger, Josh Gupta-Kagan, and the Mo. Bar Ass'n Family Court Comm., *supra* note 25, at 6-7.

Workers from the Division of Family Services (now known as Children's Division) would complain to me that the DJOs discouraged them from recommending placements of children with relatives because the Judge had given the directive that such placements were not to be favored. In ten years of practicing in that Court, I never saw the Juvenile Office lose a case, hearing, motion, or even an objection.^[215] How could litigants expect to prevail when the judge directed which cases would be prosecuted? I continue to believe that the Judge and DJOs were good people acting in good faith. The problem arose from a system in which the Judge actively supervises DJOs regarding their executive functions, such as the exercise of prosecutorial discretion. . . . After I took the bench, my belief about the awesome power of the Juvenile Judge was confirmed. Almost instantly, the juvenile system in Jefferson County began to take on my personality. Juvenile Office personnel regularly inquired about what policies I would like to see followed. Though I told them to do what they thought just, I still believed they were trying to please me as their supervisor. Across the system, people seemed to change how they exercised their executive functions based on what they perceived I expected from them. Such power over executive functions should not reside with the person who will determine whether those actions comply with the law. As I hear people talk about the differences in juvenile courts from circuit to circuit, it occurs to me that those juvenile courts take on the personality and philosophy of their judges, too.²¹⁶

Judge Missey describes a scenario in which juvenile officers took a “hard-line” position – filing more cases, removing more children, and avoiding recommendations to place those children with extended family members – because that is what their supervisor, the judge, wanted.²¹⁷ It is

215. Judge Missey is not alone in reporting extreme levels of deference to juvenile officers. One juvenile defense attorney reported one instance in seven years of practice of a judge ruling against a juvenile officer. See SCALI ET AL., *supra* note 136, at 52.

216. Memorandum from Judge Darrell Missey to Representative Rory Ellinger, Josh Gupta-Kagan, and the Mo. Bar Ass'n Family Court Comm., *supra* note 25, at 6-7 (emphasis added).

217. *Id.* at 6. Some family preservation advocates saw things the same way. When Judge Missey won the election, one organization celebrated the “change and hope in Jefferson County” from Judge Bader’s “heavy hand and unwavering lack of respect and due process for natural families” to Judge Missey, who they expected would be different. Brenda Browning, *Change and Hope in Jefferson County*, THE

not hard to envision how a similar result could occur as juvenile officers seek to please a supervising judge from the opposite side of the child welfare political spectrum. Consider, for instance, a judge who is well known for his support of children staying with their biological families, such as Judge Jimmie Edwards of St. Louis City.²¹⁸ Press reports suggest that under Judge Edwards' leadership, particular fact patterns were handled differently in St. Louis City than in neighboring counties. For instance, in St. Louis County, in utero drug exposure without more is often enough to trigger a removal,²¹⁹ whereas in the City such children were not removed without more evidence of abuse or neglect.²²⁰

The point here is not that a juvenile court in a particular judicial circuit removes too many or too few children. Rather, these illustrations suggest that an important and difficult legal issue – whether removing children is legally permissible and in the children's best interests – is handled via judges' managerial authority to determine what cases are brought and which children are removed. The debate regarding the proper balance between family integrity and state intervention to protect children from familial abuse should be decided first by the General Assembly through the juvenile code, and then on a case-by-case basis through petitions filed by the executive branch and adjudicated by the judicial branch. The status quo, which sets that balance based on the juvenile court judges and juvenile officers in each circuit, improperly disempowers the General Assembly from effectively setting policy for the state, and disempowers the executive branch from enforcing legislation in a consistent and comprehensive manner.

This phenomenon exacerbates what Judge Missey called “justice by geography”²²¹ – that is, significantly different practices in different jurisdictions within a state that have the same statute and same governing case law. Not only do different juvenile court circuits handle similar cases differently, but

FAMILY LIFELINE (VOCAL of Mo.), Spring 2003, at 3, available at <http://vocal-ofmo.org/Lifelineupd.pdf>.

218. See Nancy Cambria, *City judge's defense of troubled families offends many caseworkers*, ST. LOUIS POST-DISPATCH (Mar. 7, 2011, 12:15 AM), http://www.stltoday.com/news/local/metro/city-judge-s-defense-of-troubled-families-offends-many-caseworkers/article_3998737c-1704-58b9-aadf-9b3b2ea998ec.html.

219. See Nancy Cambria, *Safety cracks in Missouri foster policies*, ST. LOUIS POST-DISPATCH (Mar. 31, 2012, 10:15 PM), http://www.stltoday.com/news/local/metro/safety-cracks-in-missouri-foster-policies/article_d2900118-de9c-5f22-abe3-33cce71104d8.html (describing a case in which the St. Louis County Juvenile Court ordered a drug-exposed infant removed). In addition, the clinic I worked for was involved in several St. Louis County cases involving removal of children based on in utero drug exposure alone.

220. See *id.* (noting that under pressure from Judge Edwards, drug-exposed infants are not removed from their parents without more evidence of abuse or neglect; “Had the case been handled in St. Louis, rather than in St. Louis County, Shakur likely would have remained with his parents.”).

221. Missey, *Remarks*, *supra* note 213.

the unusually large amount of power granted to juvenile court judges to hire, supervise, and fire officials responsible for removing children and filing cases undermines the legislative and executive branches' ability to shape a consistent statewide policy. Missouri has chosen a state rather than county-driven child welfare policy.²²² Yet the power granted to juvenile officers places a significant key to implementing child welfare policy in Missouri's forty-five judicial circuits, each of which is led by its own judges and faces no requirements (other than court decisions from higher courts) to operate similarly to other systems across the state.

*D. The Juvenile Officer's Role Disempowers the Executive Branch
Child Welfare Agency, Limiting Missouri's Ability to
Implement Child Welfare Policy*

In *Heckler*, the Supreme Court of the United States articulated an administrative expertise rationale for granting civil administrative agencies the authority to determine when to file enforcement actions – those agencies have expertise in the area and knowledge of available resources to determine when legal violations occur and prioritize among various possible cases.²²³ This argument applies strongly to the Children's Division, the executive branch agency responsible for operating a comprehensive child welfare system. This responsibility gives the Children's Division the perspective to determine whether a court case or some other intervention is most likely to be effective and worth the particular costs involved. That responsibility also makes the juvenile officers' role particularly inappropriate in child welfare cases.

In child welfare cases, the juvenile officer's authority comes at the expense of the Children's Division. The Children's Division even lacks the power to remove children facing an imminent risk of serious injury from abuse or neglect; Missouri law grants that power to juvenile officers and law enforcement and specifically excludes Children's Division officials from exercising it²²⁴ – a statutory provision that distinguishes Missouri from other states.²²⁵ As established above, juvenile officers' prosecutorial discretion is a

222. See MO. REV. STAT. § 210.109 (2000 & Supp. 2012).

223. See *supra* note 105 and accompanying text.

224. MO. REV. STAT. § 210.125.1-3 (2000).

225. Various statutes in other states empower their child protection agencies to remove children in emergency situations. See, e.g., ARIZ. REV. STAT. ANN. § 8-821 (West, Westlaw through the 1st Reg. Sess. and 1st Special Sess. of the 51st Legis.); CAL. WELF. & INST. CODE § 306 (West, Westlaw through Ch. 311 of the 2013 Reg. Sess. & the 2013-2014 1st Ex. Sess. laws); D.C. CODE ANN. § 16-2309(a)(3)-(4) (West 2001); FLA. STAT. § 39.401(1)(b) (2012); 20 ILL. COMP. STAT. ANN. 505/1 (West 2008); IND. CODE ANN. § 31-34-2-3 (West, Westlaw through 2013); N.J. STAT. ANN. § 9:6-8.29 (West, Westlaw through L.2013, c. 150 and J.R. No. 11); N.Y. FAM. CT. ACT § 1024(a) (West, Westlaw through L.2013); N.C. GEN. STAT. ANN. § 7B-500(a) (West, Westlaw through S.L. 2013-220 of the 2013 Reg. Sess. of the Gen.

power that resides with child protection agencies in sister states.²²⁶ Moreover, the Missouri Children’s Division is a party to all child abuse and neglect cases but, unlike juvenile officers, it generally does not appear at hearings with counsel.²²⁷

This disempowerment is particularly striking in light of the Children’s Division’s statutory charge to establish and operate a comprehensive child protection system for the entire state.²²⁸ The General Assembly has directed the Children’s Division to receive hotline calls alleging abuse or neglect, to triage lower risk calls requiring an assessment and provision of voluntary services and higher risk calls requiring immediate investigation, and to maintain a registry of individuals found to have mistreated children.²²⁹ The Children’s Division must also provide services to families to avoid the need for removals,²³⁰ fulfilling a federal requirement that state administrative agencies make “reasonable efforts” to prevent the need for removing children.²³¹ By law, the Children’s Division contracts with various child welfare agencies to operate a comprehensive child welfare system, including sufficient foster homes, group homes, and other placements,²³² and to ensure that all such placements are properly licensed and monitored.²³³ The Children’s Division is responsible for searching for missing biological parents²³⁴ and making diligent efforts to find grandparents and other extended family members of foster children.²³⁵ The Children’s Division’s parent agency, the Department of Social Services, is charged with developing and operating state plans necessary to obtain federal child welfare funds,²³⁶ triggering federal statutory provisions that fill several pages of the United States Code.²³⁷ The

Assemb.); TEX. FAM. CODE ANN. § 262.104(a) (West, Westlaw through the 2013 3d Called Sess. of the 83d Legis.).

226. *See supra* Part II.B.

227. *See supra* note 187 and accompanying text.

228. MO. REV. STAT. § 210.109 (2000 & Supp. 2012).

229. MO. REV. STAT. § 210.145 (2000 & Supp. 2012).

230. §§ 210.109.2-3, 210.145.

231. 42 U.S.C. § 671(a)(15)(B)(i) (Supp. 2011). The Missouri statute even requires the juvenile court to determine if the Children’s Division made reasonable efforts to prevent removal. MO. REV. STAT. § 211.183.1 (2000). The statute does not explain how the Children’s Division is supposed to make such efforts when reports are filed with the court, not with the agency or when juvenile officers remove children before such efforts can be made. *See supra* notes 51-52 and accompanying text.

232. MO. REV. STAT. § 210.112 (Supp. 2012).

233. MO. REV. STAT. § 210.486 (2000).

234. MO. REV. STAT. § 210.127 (Supp. 2012).

235. MO. REV. STAT. § 210.305 (Supp. 2012); MO. REV. STAT. § 210.565 (2000 & Supp. 2012).

236. MO. REV. STAT. § 210.535 (Supp. 2012).

237. Congress has divided state plan elements into thirty-three separate paragraphs in section 671(a), with many details that are well beyond the scope of this Article. 42 U.S.C. §§ 671 – 679c (2006 & Supp. 2011).

state cannot access federal child welfare funds for juvenile officers because they are judicial officials.²³⁸

This list of the Children's Division's duties is only partial, but it suffices to make the relevant point – now that the modern administrative state has taken hold in the child welfare system, the General Assembly has charged the Children's Division with creating and operating a complex, statewide child welfare system. Yet, unlike its peer agencies in other states, the Children's Division lacks authority over the most essential decisions within this system – whether to remove children and whether to seek court approval for dramatic state intervention in family life.²³⁹

The Children's Division's duties give it a vantage point that no judicial official can possess. The Children's Division has some familiarity with all 89,647 children who were subjects of child abuse and neglect reports in fiscal year 2011.²⁴⁰ The Children's Division performs service assessments for more than 39,000 of these children and investigates most of the rest.²⁴¹ It substantiates some allegations and not others, and opens voluntary “family-centered services” cases for some families.²⁴² It handles the relatively small number of cases involving children – 6,216 – who entered foster care in 2011 following juvenile officers' decisions.²⁴³ By administering this continuum of responses to alleged child maltreatment, the Children's Division is in the best position to determine which response is most likely to achieve the best results in an individual case or category of cases.

The statutory ability of individuals to circumvent the Children's Division and make reports directly to juvenile officers creates a category of cases exempted from the above scenario. Sources other than the Children's Division made more than 5,000 referrals to juvenile officers in 2011.²⁴⁴ Juvenile officers were then charged by law with determining how to proceed with these referrals, without the benefit of the Children's Division's triage between investigations and service assessments and without options for voluntary family-centered services cases.

The Children's Division is also best positioned to understand the services available to children and families after removal. Directly and through

238. *Mo. Dep't of Soc. Servs. v. Leavitt*, 448 F.3d 997, 999 (8th Cir. 2006).

239. *See supra* Part II.B.

240. MO. DEP'T OF SOC. SERVS., CHILDREN'S DIVISION ANNUAL REPORT FISCAL YEAR 2011 3 (2012), available at <http://www.dss.mo.gov/re/pdf/cs/2011-missouri-childrens-division-annual-report.pdf> [hereinafter CHILDREN'S DIVISION ANNUAL REPORT].

241. *Id.* at 5.

242. *See* STATE OF MO. DEP'T OF SOC. SERVS., CHILDREN'S DIV., STATEWIDE ASSESSMENT 8 (2003), available at <http://www.dss.mo.gov/cd/cfsr/firstround-assessment.pdf> [hereinafter STATEWIDE ASSESSMENT].

243. CHILDREN'S DIVISION ANNUAL REPORT, *supra* note 240, at 41.

244. *See* MISSOURI JUVENILE AND FAMILY DIVISION ANNUAL REPORT, *supra* note 52, at 21.

contracts, it operates foster homes, group homes, and other placements for foster children and develops service plans for children and parents to aid their reunification or, when necessary, find a new permanent family with whom the child will live.²⁴⁵ The Children's Division links foster children and their parents to appropriate services and arranges visits between children and parents.²⁴⁶ The Children's Division also bears the financial consequences of providing all of these services – for instance, it employs and pays social workers to manage cases; recruits, trains, licenses, and subsidizes foster homes; and contracts with various agencies for specific services for foster children.²⁴⁷ The Children's Division's responsibilities place it in a position to evaluate whether the benefits obtained by removing a child are worth the costs, especially when compared to other less invasive and less costly options like providing family-centered services.

Conversely, placing prosecutorial discretion with juvenile officers exemplifies the risk famously identified by psychologist Abraham Maslow, that those whose only tool is a hammer will see every problem as a nail.²⁴⁸ Juvenile officers have no options other than taking the most coercive steps – filing a petition asking the juvenile court to take jurisdiction over and issue orders to a child and family – or leaving a family alone.²⁴⁹ The Children's Division has tools beyond a hammer in its proverbial tool belt – the power to work with a family voluntarily after a family assessment (but no investigation) and the power to work with a family voluntarily after a formal investigation.²⁵⁰ The Children's Division is thus better able to determine which tool is most appropriate in each case. Indeed, by taking the hammer of filing juvenile court cases and removing children from the Children's Division's belt, Missouri law deprives the agency of the full range of tools available to its peer agencies in other states. This may risk the possibility that the Children's Division views some cases as needing only voluntary services when a more coercive approach may be necessary – thus jeopardizing children's safety.

Placing prosecutorial discretion in the executive branch would also help various executive branch agencies coordinate responses to acts of child maltreatment. A single act of abuse can give rise to multiple cases – a child protection case in juvenile court and a criminal case against the parent – that

245. See STATEWIDE ASSESSMENT, *supra* note 242, at 8-11.

246. See *id.* at 19.

247. See *id.* at 72-73.

248. ABRAHAM MASLOW, PSYCHOLOGY OF SCIENCE: A RECONNAISSANCE 15 (1966) (“I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail.”).

249. See *supra* notes 50-56 and accompanying text. Juvenile officers can also choose an “informal adjustment” for a child – essentially a directed to stay out of trouble or else the juvenile officer will file a petition. See *supra* note 56 and accompanying text. This variation on the juvenile officer's charging authority does not change the binary nature of the decision.

250. *Supra* notes 229-230 and accompanying text.

ought to be coordinated.²⁵¹ When an act of abuse leads to a child's removal from an abusive parent and the initiation of a juvenile court case, authorities must decide whether to prosecute the parent simultaneously with the juvenile court prosecution or to drop a possible criminal prosecution out of concern for its impact on the juvenile court case – if, for instance, a criminal prosecution could interfere with a parent's rehabilitation or a child's visits with a parent.²⁵² In some cases, the criminal prosecutor might threaten prosecution if a parent does not engage in treatment and rehabilitation, or in other cases, the prosecutor may promise to drop charges if such treatment and reunification proceed effectively.²⁵³ With juvenile court and criminal prosecutors placed in different branches of government, such coordination is more difficult; the proverbial right and left hands are not even attached to the same body, and thus working in unison is more difficult. The absence of coordination has been documented in Missouri juvenile courts²⁵⁴ and can lead to harmful results.²⁵⁵ For instance, there are often cases of physical abuse in which a child is removed, parents receive treatment and rehabilitate, and then reunification occurs – all through a juvenile court process run by judicial branch staff. A criminal prosecution could thwart reunification goals if orders in that case interfere with a child's visits with his parent or if a parent faces an overly punitive sentence imposed without consideration of the effect on the child victim. The county prosecutor could even decide to press an assault charge against the parent as reunification is occurring, placing the parent in jail and re-traumatizing the child with another separation. If prosecutorial authority in child abuse and neglect cases is placed in the executive branch rather than the judicial branch, then all prosecutors will work for the same agency and can more easily coordinate their actions.²⁵⁶

Finally, one ought not fear increased authority in a political branch of government. Judge Missey has suggested that the Children's Division prose-

251. Congress has required certifications that state child protection and law enforcement agencies can cooperate when necessary. 42 U.S.C. § 5106a(b)(2)(B) (xi) (2006).

252. See Marcia Sprague & Mark Hardin, *Coordination of Juvenile and Criminal Court Child Abuse and Neglect Proceedings*, 35 U. OF LOUISVILLE J. OF FAM. L. 239, 246 (1997) (noting how a non-contact order in a criminal case can conflict with a visitation order in a civil case).

253. See *id.* at 245 (describing how the threat of criminal penalties may help induce parents to cooperate with rehabilitative services).

254. See Memorandum from Kathleen C. Dubois to Josh Gupta-Kagan, *supra* note 193, at 2 (describing case in which a prosecutor and a juvenile officer took conflicting action regarding visitation with a parent believed to have molested his child).

255. See Sprague & Hardin, *supra* note 252, at 242 (“Unless there is coordination between these two proceedings, there are duplications of effort, inconsistent decisions, wasted resources, and needless trauma to child victims.”).

256. I do not suggest that law enforcement and child protection agencies will magically collaborate – only that it will be easier to do so if they are in the same branch of government.

curatorial discretion could be unwise because that agency, like any executive branch agency, is subject to control by elected officials and therefore “policies may emerge that are based on politics rather than good sense.”²⁵⁷ It is not clear, however, why political accountability and checks and balances between branches of government are less connected to good sense than concentrating power in the judicial branch. Greater executive branch control should lead to enhanced transparency and efficiency as well as a more consistent statewide policy.²⁵⁸ The executive branch’s choices about where to devote limited resources would be subject to legislative oversight, and decisions to prosecute individual cases would be subject, of course, to judicial review – more impartial judicial review than is currently applied to petitions filed by the judiciary.

One example from my clinic’s docket illustrates how current law disempowers the Children’s Division and how that can lead to bad results. The St. Louis County Juvenile Court appointed our clinic as guardian *ad litem* for two children whose mother was assaulted by her boyfriend at her boyfriend’s home. The police arrested both the boyfriend and the mother²⁵⁹ and took custody of the children, who were watching television in the next room during the assault. The juvenile officer filed a petition, obtained a temporary judicial custody order, and sought a protective custody order – an order plac-

257. Memorandum from Judge Darrell Missey to Representative Rory Ellinger, Josh Gupta-Kagan, and the Mo. Bar Ass’n Family Court Comm., *supra* note 25. Judge Missey went on to make the entirely reasonable point that Missouri policy makers should “carefully consider[]” where juvenile officers or their authority might go. *Id.*

258. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331-46 (2001) (arguing that strong presidential – that is, political – control over executive branch agencies increases both effectiveness and transparency of agencies’ operations). Moreover, empirical work in related contexts finds better results for children when executive branch agencies have more authority to alter their practice to serve families’ needs. Researchers have found a correlation between a dedicated child welfare property tax levy in some Ohio counties and higher adoption rates and lower foster care populations. Susan Vivian Mangold & Catherine Cerulli, *Follow the Money: Federal, State, and Local Funding Strategies for Child Welfare Services and the Impact of Local Levies on Adoptions in Ohio*, 38 CAP. U.L. REV. 349, 374-82 (2009); see also Susan Vivian Mangold et al., *Using Community-Based Participatory Research to Study the Relationship Between Sources and Types of Funding and Mental Health Outcomes for Children Served by the Child Welfare System in Ohio*, 21 J.L. & POL’Y 113, 114 (2012). The dedicated tax provides local child welfare agencies with flexibility to use the relevant money as they saw fit, and with this authority were able to help more children leave foster care to permanent families. See Mangold & Cerulli, *supra* note 258, at 354.

259. The mother had defended herself and both she and the boyfriend had injuries, making it hard for the police to determine who was at fault. Missouri statutes suggest that instead of arresting both adults, the police should have determined who was “the primary physical aggressor” and arrested only that person. MO. REV. STAT. § 455.085.3 (Supp. 2012).

ing the children in foster care until the petition could be adjudicated. We have no record of Children's Division's involvement until this temporary custody order placed our clients in the agency's custody; this case was likely one of the forty-four percent of juvenile court referrals that bypassed the Children's Division and went straight to juvenile officers.²⁶⁰ The Children's Division thus had no opportunity to make reasonable efforts to prevent the need for placing the children in foster care.²⁶¹ By the time of the protective custody hearing four days later, the mother was released from jail and not charged with any crime. She returned to her home and was willing to keep her abusive boyfriend away from her children; there were therefore no grounds to separate the children from their mother (a position which we took and the judge adopted). The juvenile officer, however, sought protective custody.

In the courtroom hallway before the hearing, members of the clinic approached the Children's Division worker. She explained in animated tones that she did not support the juvenile officer's request for protective custody. She shared our perspective that the children's mother was out of jail, lived apart from the abuser, and would protect the children, whom she had cared for well prior to the assault. We urged her to share this view with the judge during the hearing, and she agreed. But when the hearing started, her tone and substance changed. The judge asked her what her position was regarding protective custody. She responded in a much softer voice than she used in the hallway, saying that she would "defer to the judgment of the court." Thankfully the judge pressed her for a direct answer, and she explained, still softly, that she did not think protective custody was necessary.

After this hearing, the case worker made clear that she was prepared to close the case. We agreed with that position; the children had a fit parent who was acting appropriately to protect them and we saw no legal basis for ongoing court jurisdiction. The juvenile officer, however, refused to drop the petition for two months, imposing court intervention on this family for that period of time. This action also took up the case worker's time, limiting her ability to work on more pressing matters.

This brief case raises deep questions illustrating how the juvenile officer's role disempowers the Children's Division. Why should the juvenile officer rather than the Children's Division have the authority to seek protective custody and initiate proceedings that invade the family's life for several months, when the Children's Division had not investigated the case, did not have the opportunity to make reasonable efforts to prevent removal, and did not believe that these proceedings or foster care were necessary to keep the child safe? At the very least, this case illustrates how the absence of counsel for the Children's Division makes it harder for the Children's Division to advocate forcefully; what would the case worker have said had we not prod-

260. See *supra* note 52 and accompanying text.

261. See *supra* note 231 and accompanying text.

ded her to advocate her position? Had the Children's Division worker felt empowered to try to convince the juvenile officer not to file a petition in this case? If not, why not? And if so, why did the juvenile officer overrule the Children's Division's judgment? These questions illustrate the concerns regarding the juvenile officer's power, and the Children's Division's relative powerlessness, in child welfare cases under existing Missouri law.

E. The Current System Wastes Money in Child Welfare Cases

One might argue that the Children's Division, working effectively with juvenile officers, can, and in some circuits does, avoid some of the problems identified by ensuring that juvenile officers defer to agency expertise when exercising prosecutorial discretion. Even if this perspective is accurate in some circuits, it illustrates a final harm – the current system wastes precious financial resources, which the government could spend more effectively, by paying juvenile officers to duplicate the Children's Division's work.

The juvenile officer has no responsibility that could not be performed by the Children's Division, the judge, or the guardian *ad litem*; the juvenile officer is, as one advocate put it, "Missouri's fifth wheel."²⁶² The Children's Division, in operating the statewide child abuse and neglect hotline, investigates abuse and neglect allegations and recommends particular actions based on those investigations.²⁶³ The juvenile officer makes recommendations as to what he or she believes is in the best interest of the child – a standard also applied by the judge, the Children's Division case worker, and the child's guardian *ad litem*. The juvenile officer may also consider the interests of the state – just as the state official, the Children's Division case worker, does.²⁶⁴

Moreover, the juvenile officer takes on these roles with inferior access to information.²⁶⁵ The juvenile officer lacks the Children's Division's knowledge of available placements and services that that agency can provide. The juvenile officer also lacks the significant out-of-court contact with children and families that the Children's Division social workers develop; for instance, the juvenile officer does not typically observe parent-child visits or receive direct updates from therapists and other service providers. Finally, the juvenile officer lacks the guardian *ad litem*'s lawyer-client relationship with the child and so should not be expected to have any greater insight into the child's wishes or needs.

262. RICHARD WEXLER, NAT'L COAL. FOR CHILD PROTECTION REFORM, *THE ROAD LESS TRAVELED BY: TOWARD REAL REFORM OF CHILD WELFARE IN MISSOURI* 54 (2d ed. 2003), available at <http://www.nccpr.org/reports/roadlesstraveledby.pdf>.

263. See STATEWIDE ASSESSMENT, *supra* note 242, at 8.

264. Indeed, the Children's Division is better able to represent the interests of the state because of its place in the executive branch and its broader portfolio.

265. When the Children's Division manages cases, juvenile "officers often have only the CD worker's reports and no direct knowledge or information about a case." Mo. Juvenile Law §§ 6.37, 6-78 1.12 (MoBar 4th ed. 2011).

The money at stake is not *de minimis*. The number of child abuse and neglect cases requires substantial expenditures on juvenile officers. More than 6,200 children entered foster care in fiscal year 2011,²⁶⁶ and each child removed from a parent or custodian and placed in foster care required a petition from a juvenile officer. Even larger numbers of children have open cases each year – more than 15,000 children were in the Children’s Division’s custody at some point in fiscal year 2011.²⁶⁷ The number of children in foster care at any given time is lower – a little over 10,000.²⁶⁸ Each of these children has an open juvenile court case in which a juvenile officer writes and files reports and attends hearings, and some have termination of parental rights or other permanency trials in which juvenile officers often prosecute the petition.

Conservative estimates suggest that Missouri taxpayers spend millions of dollars annually on juvenile officers for child abuse and neglect cases alone.²⁶⁹ The Missouri Office of State Courts Administrator provides data points necessary to estimate the total number of juvenile officers required for the current child welfare cases. That office reports 130.8 monthly hours handling cases for a full-time employee and estimates that child welfare cases take 2.2 hours per month.²⁷⁰ One juvenile officer could therefore handle just under sixty child welfare cases at any given time, and the state would need 167 juvenile officers to handle the entire workload of children in foster care.²⁷¹ If these employees cost state and county governments \$45,000 each

266. CHILDREN’S DIVISION ANNUAL REPORT, *supra* note 240, at 41.

267. *Id.* at 45. The number of open cases is much larger than the number of children who enter foster care each year because the average length of stay in foster care is long – 23.1 months, with more than 4,600 children remaining in foster care longer than two years. *Id.* at 65. The 15,000 children is the number of children who were in the Children’s Division’s custody. *Id.* at 45.

268. *Foster Care Statistical Information*, MO. DEP’T OF SOC. SERVS., <http://www.dss.mo.gov/cd/fostercare/fpstats.htm> (last visited Sept. 22, 2013). The number of children in foster care over the course of a year is higher than the number at any given time because children move in and out of foster care throughout the year. *See id.*

269. The calculations that follow reflect my best estimates based on available data. I concede that these are estimates only and may over- or under-estimate the true cost. I offer these estimates to demonstrate only that the financial cost involved is not *de minimis*.

270. MISSOURI JUVENILE AND FAMILY DIVISION ANNUAL REPORT, *supra* note 52, at 42.

271. 130.8 hours per employee divided by 2.2 is 59.45 cases handled by an employee at a given time. 10,000 cases open at a given time divided by 60 cases per employee is 166.67. This calculation excludes cases involving children who are living with a parent and thus not in foster care but who are subject to an ongoing juvenile court case. This calculation also excludes any supervisory or support staff necessary for juvenile officers.

per year including salary, benefits, retirement costs, and office overhead,²⁷² taxpayers pay \$7,515,000 annually for juvenile officers. Juvenile officers' workloads may frequently stretch beyond the sixty cases per employee standard suggested by the court administrator. For instance, in St. Louis County the juvenile court lists eleven juvenile officers handling child protection cases.²⁷³ St. Louis County had 1,317 children in foster care in fiscal year 2011, or about 880 at any point in time,²⁷⁴ for an average of eighty cases per employee.²⁷⁵ If that average caseload held across the state, there would be 125 juvenile officers handling 10,000 open cases, at an annual cost to taxpayers of \$5,625,000. This cost is split between the state and county government because the statute directs the state to reimburse some of the costs in most judicial circuits.²⁷⁶

On the scale of public expenditures, these figures represent a small portion of Missouri's overall budget, which is measured in the billions of dollars.²⁷⁷ That fact, however, does not excuse policy makers from justifying all expenditures, especially in an era of budget cuts to services that benefit many of the low income families who populate juvenile court cases.²⁷⁸ Spending millions of dollars to add an extra player to cases that already have multiple professionals²⁷⁹ – a judge, lawyers, a social worker, and often thera-

272. Starting salaries for recently posted jobs are in the low \$30,000s. *See, e.g.*, Employment Opportunity, <http://www.mjja.org/images/jobs/2012/10.09.12-2.pdf> (advertising a starting salary range of \$31,800 - \$34,092). These are starting salaries only, and more experienced juvenile officers and supervisors presumably earn thousands more annually. These are full time jobs with benefits, so health care, retirement, and other benefits costs are assumed. *Id.*

273. Family Court of St. Louis County, Child Protective Services staff listing (on file with author). This figure does not include the director, a "unit secretary," or the coordinator of the "SAFETI program," the drug court in St. Louis County.

274. Statewide, there were more than 15,000 children in foster care at some point in FY 2011, but just over 10,000 at a single point in time. *See supra* notes 267-268 and accompanying text. Applying the same ratio to St. Louis County yields about 878 cases open at any given time.

275. 880 cases divided by 11 juvenile officers equals 80 cases per juvenile officer.

276. MO. REV. STAT. § 211.393.2(2)(a), (4)(a) (2000 & Supp. 2012). In multi-county judicial circuits – which exist in more rural and less populated areas, the state pays the full costs of juvenile officers. § 211.393.3(3).

277. Missouri's budget includes total expenditures of almost \$23 billion, including \$8 billion in general revenue, \$7.4 billion in federal funds, and \$7.6 billion in "other funds." *See* MO. OFFICE OF ADMIN., OVERVIEW OF THE FISCAL YEAR 2013 BUDGET 2 (2012), available at <http://oa.mo.gov/bp/pdf/files/2013presspacket.pdf>.

278. *See, e.g.*, MO. BUDGET PROJECT, CUTTING TO THE CHASE: WHAT MULTI-YEAR BUDGET REDUCTIONS MEAN FOR MISSOURIANS – EDUCATION AND HEALTH SERVICES SUFFER BIGGEST LOSSES, available at <http://mobudget.org/files/mpb-full%20report.pdf> (last visited Sept. 22, 2013).

279. *See* Sinden, *supra* note 174, at 353 ("Indeed, the sheer number of lawyers and social workers involved in a single family's case can be mind-boggling."). One

pists, other service providers, and a court appointed special advocate – is difficult to justify.²⁸⁰

The state, counties, and judicial circuits could spend these funds more effectively in any number of other areas. For instance: courts could invest in model legal representation programs for both parents and children. To provide model representation, such programs require an investment in lawyers, supervisors, training, and multidisciplinary staff. But such investments pay off, as high quality lawyers are proven to hasten children's exit from foster homes, reunification with their parents, and adoption or guardianship with a new, permanent family.²⁸¹ Such results both serve children's interests and save public dollars that would otherwise be spent on foster care and ongoing juvenile court cases. More modestly, the money could pay parents' attorneys to litigate paternity, custody, or order of protection cases that arise out of – and are often necessary to resolve – child abuse or neglect cases. Indigent parents' inability to pay for such legal services often delays resolution of juvenile court cases.²⁸²

V. LEGISLATIVE REFORMS

The Missouri General Assembly should reform the juvenile court structure to correct the problems created by the juvenile officers' role. The courts may, of course, play a role in this reform. In many cases, lawyers for parents and children facing child abuse or neglect allegations and lawyers for chil-

audit of St. Louis County Juvenile Court's handling of cases involving domestic violence found that "Family encounters many professionals, sometimes resulting in confusion about what is expected of them to retain or regain their children." GREENBOOK INITIATIVE, *supra* note 208, at 5.

280. These expenditures lead to the employment of many dedicated individuals. Eliminating those expenditures means laying off those individuals – a difficult prospect, especially when the individuals at issue have committed their careers to an important and difficult field. That reality should not prevent a clear analysis of whether these expenditures are worthwhile, and whether those individuals might serve children and families more effectively in other positions.

281. The most rigorous study available compares more than 12,000 children's foster care cases from 2004 to 2008. See Mark E. Courtney & Jennifer L. Hook, *Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care*, 34 CHILDREN & YOUTH SERVS. REV. 1337, 1337 (2012). The study compares results both between counties implementing a model parent representation project and those without such a project, and within counties implementing the model representation project before and after the project's initiation. *Id.* at 1339-40. The study found that reunifications occurred 11 percent faster, adoptions 104 percent faster, and guardianships 83 percent faster. *Id.* at 1342.

282. See Annette Appell & Josh Gupta-Kagan, *Representing Children at the Intersection of Domestic Violence and Child Protection*, 59 ST. LOUIS B.J. 26, 31 (2012).

dren facing juvenile delinquency charges should move to dismiss petitions filed by juvenile officers for violations of the Missouri Constitution's separation of powers provisions. But a judicial decision adopting such a theory would likely only rule that the present system violates separation of powers. Such a ruling would require legislative action to determine which individuals or entities should take on the juvenile officers' role. The General Assembly is best suited to reform the many portions of the juvenile code discussing juvenile officers and to make decisions regarding how to most effectively reallocate resources devoted to child welfare juvenile officers. This section will outline steps the General Assembly should take – ideally without waiting for a judicial imperative – and argue why partial reforms will not address the problem adequately.

A. *Potential Comprehensive Reforms*

The legislative solution differs between child welfare cases and juvenile delinquency cases. Child welfare cases have an executive branch agency – the Children's Division – charged with operating a comprehensive statewide child welfare system.²⁸³ The General Assembly should eliminate the juvenile officers' role in child welfare cases and empower the Children's Division to remove children in emergency situations and to file and prosecute child abuse and neglect petitions. This would involve eliminating the child protection juvenile officer positions across the state, achieving the cost savings outlined above,²⁸⁴ and moving attorneys who currently represent juvenile officers in child welfare cases from the judicial branch to the executive branch. Those attorneys would then be employed directly by the Children's Division or the state executive branch so they can best assist their clients in implementing a statewide child welfare policy.

Juvenile justice is more complicated because no single agency operates a comprehensive juvenile justice system, and thus there is no obvious candidate for taking on the juvenile officer's prosecutorial discretion. Police departments investigate crimes in which juveniles are implicated and make arrests of juvenile suspects. The Division of Youth Services (like the Children's Division, a subdivision of the Department of Social Services) is charged with taking care of children adjudicated delinquent who are committed to its custody and manages some delinquency prevention and treatment services; unlike the Children's Division, it is not responsible for investigating allegations of juvenile delinquency or determining which cases need a more or less invasive response.²⁸⁵ Juvenile officers – like probation officers in adult criminal cases – supervise juveniles found guilty of delinquent acts who

283. See *supra* note 7 and accompanying text.

284. See *supra* Part IV.E.

285. MO. REV. STAT. § 219.016.2 (2000).

are subject to a disposition of probation (but not commitment to Division of Youth Services custody).

Moreover, the juvenile court's therapeutic aims rightly affect how a prosecutorial authority exercises its discretion; transferring such authority to local prosecutors or any office that lacks experience with such therapeutic goals risks triggering an overly punitive attitude towards juvenile offenders. Whether to file charges against a juvenile, what precise charges to allege, and what dispositions to seek are decisions that call for consideration of what actions will best help youths rehabilitate.

The simplest solution²⁸⁶ might be for the General Assembly to keep the juvenile office roughly as it is, but remove it from judicial branch control; juvenile officers could then constitutionally exercise prosecutorial discretion so long as someone other than judges has the authority to hire, supervise, and fire them. The General Assembly could further create a commission of juvenile justice experts from a variety of fields – such as law, social work, psychology, and law enforcement – and charge that committee with hiring chief juvenile officers²⁸⁷ in each judicial circuit or recommending a slate of potential chief juvenile officers to county executives.²⁸⁸ Such a commission could also be responsible for renewing chief juvenile officers' appointments after a several-year term and, in rare cases, dismissing or suspending chief juvenile officers for misconduct. Such a structure could insulate juvenile officers from political pressures that diverge from the juvenile court's therapeutic goals, while separating juvenile officers from the judicial control that creates separation of powers problems. The key feature that resolves the separation of powers problem is to dissociate the hiring and supervision of juvenile officers from the judges in front of whom they file and prosecute petitions. Even if such a commission were nominally located in the judicial branch, it would not raise the same separation of powers concerns as the current structure.²⁸⁹

286. I do not suggest that this is the only solution. Any legislative reform that separates juvenile prosecutorial authority from the judiciary while charging such authority with exercising its prosecutorial discretion in light of the juvenile law's therapeutic goals would satisfactorily address the concerns identified in this Article.

287. Chief juvenile officers would then be responsible for hiring and supervising subordinate juvenile officers and hiring legal counsel to represent juvenile officers.

288. The latter option is analogous to Missouri's structure for selecting judges, in which a nonpartisan commission submits three individuals to the governor, who appoints one individual to fill judicial vacancies in certain large jurisdiction trial courts and in appellate courts. MO. CONST. art. V, § 25(a).

289. Nominally "judicial" entities that operate apart from the control of judges, such as the United States Sentencing Commission, have survived separation of powers attacks. *See* *Mistretta v. United States*, 488 U.S. 361, 393-94 (1989).

B. Partial Reforms Will Not Suffice

One might argue that the problems identified in this Article can be addressed without shifting prosecutorial discretion from the judicial branch to the executive branch. Juvenile officers need only “guard against subjugating their professional integrity” to judges’ wishes.²⁹⁰ And judges who are sensitive to the separation of powers problems inherent in the juvenile officer role can separate the judge’s role from the juvenile office. Judge Missey, for example, has relayed how he directed the Jefferson County juvenile officer that “this is your office. You run it.”²⁹¹ Judge Missey ceded administrative duties regarding the family court – including supervising the juvenile officers – to a judge who does not hear family court cases.²⁹² As a result, he observed, “[N]ow none of those juvenile officers think that I’m their boss. They can file what they think is right and I can overrule them, which I do from time to time.”²⁹³

Such steps are an improvement to the statutory structure, but they are inadequate to address the concerns raised above. Without changing the statutory assignment of prosecutorial discretion from the judiciary to the executive branch, there is no guarantee that a future juvenile court judge will manage the juvenile office differently. Even if Judge Missey is right that, currently, juvenile officers do not think that he is their boss, the statute in fact makes him their boss, and no legal bar prevents a future judge from exercising that role. Judge Missey implicitly acknowledged this point, arguing that the steps he took in Jefferson County worked well, but that placing prosecutorial discretion in the executive branch would be “more appropriate.”²⁹⁴

Moreover, the steps taken in Jefferson County do not address certain problems. They do nothing to reduce the appearance of impropriety to litigants when they see a judicial branch employee filing and prosecuting cases in front of them to be adjudicated by a judge. In addition, they neither properly empower the executive branch, nor save taxpayers’ money, nor redirect funds to more helpful purposes.

290. Mo. Juvenile Law § 1.14 (MoBar 4th ed. 2011).

291. Missey, *Remarks*, *supra* note 213.

292. *Id.*

293. *Id.* See also Memorandum from Judge Darrell Missey to Representative Rory Ellinger, Josh Gupta-Kagan, and the Mo. Bar Ass’n Family Court Comm., *supra* note 25, at 7 (“In Jefferson County, we have attempted to address my concern about Separation of Powers by dividing the juvenile docket between two judges and placing the administrative duties with the Administrative Judge of the Family Court, who does not hear Juvenile cases. This separation has worked well, but it would be more appropriate if the Juvenile Office would be in the Executive Branch where it belongs.”).

294. Memorandum from Judge Darrell Missey to Representative Rory Ellinger, Josh Gupta-Kagan, and the Mo. Bar Ass’n Family Court Comm., *supra* note 25.

VI. CONCLUSION: REFORMING MISSOURI'S JUVENILE COURT STRUCTURE

The Supreme Court of the United States ordered the constitutional domestication of juvenile courts two generations ago.²⁹⁵ It is now past time for Missouri juvenile courts to respect basic separation of powers principles. These principles have protected individual liberty since the nation's founding, and no basis exists to exempt juvenile law from them. Indeed, the unusually high stakes in juvenile court favor a rigorous application of these fundamental protections of individual and family liberty.

A core element of Missouri's juvenile court structure must be reformed. Giving the juvenile officer – a judicial branch official who is hired and supervised by juvenile court judges – prosecutorial discretion violates the separation of powers doctrines, creates a system in which individual judges wield far too much authority, exacerbates dangerous practices in juvenile courts, and removes power from administrative agencies to implement fully a comprehensive statewide child welfare system. Moreover, the juvenile officers' role in Missouri juvenile courts wastes precious taxpayer dollars that could achieve much better results if directed elsewhere.

The problem lies in Missouri's juvenile code, and so the solution lies with one of two actions. The General Assembly should amend the code to abolish juvenile officers and move prosecutorial discretion to the executive branch. Absent such legislative action, the Missouri courts should declare the present system unconstitutional. Advocates for children and families should press the issue in both legislative and judicial forums.

295. *In re Gault*, 387 U.S. 1, 22 (1967).