PROSECUTORS AND THE CHILD WELLBEING FRAMEWORK

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Introduction

The guiding principle of the inaugural Restatement of Children and the Law (Restatement) is the Child Wellbeing framework. As professors Elizabeth Scott and Clare Huntington articulated, this development-based framework seeks to promote the wellbeing and welfare of children (similar to goals of the past), but it does so through updated means. In short, the Child Wellbeing framework is distinguished from past efforts to advance the wellbeing or welfare of children by its three elements: "reliance on [developmental] research, recognition of social welfare benefits, and acknowledgment of systemic racism."

Judges are the primary audience of the Restatement, and they are necessary to implement the Child Wellbeing framework within the juvenile and criminal systems. After all, it was the Supreme Court's five decisions[1] from 2005 to 2016 on youth sentencing under the Eighth Amendment and youth interrogation under the Fifth Amendment that created a new "developmental approach" to interpreting children's constitutional rights and ushered in the Developmental Era of juvenile law. The Court's explicit reliance on developmental research to assess youth culpability and maturity not only led to seismic changes in the sentencing and interrogation of youth but also ignited the widespread adoption of developmental research in other areas of the law pertaining to youth offenses and crimes, as well as overall youth policy and regulation.

In addition to relying on the developmental approach to decide constitutional issues, judges can directly incorporate this developmental model into more typical proceedings, including dispositions and sentences of youth,[2] pre-adjudication or pretrial

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[1] The five cases that created the "developmental approach" are *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida,* 560 U.S. 48 (2010); *J.D.B. v. North Carolina,* 564 U.S. 261 (2011); *Miller v. Alabama,* 567 U.S. 460 (2012); and *Montgomery v. Louisiana,* 577 U.S. 190 (2016).

[2] RESTATEMENT OF THE LAW, CHILDREN AND THE LAW §§ 14.10 & ctms. a–i, 14.11, 15.40 (Am. L. Inst., Tentative Draft No. 4, Mar. 2022) [hereinafter RESTATEMENT DRAFT No. 4].

detention determinations,[3] competency decisions,[4] and other rulings that affect delinquency hearings or trials.[5]

However, the goals of the Child Wellbeing framework cannot be fully realized by judges alone. Other stakeholders and state actors involved in youth offenses and crimes must also recognize their responsibility in prioritizing children's developmental health and wellbeing. This Essay focuses on one specific subset of state actors within the juvenile and criminal systems: prosecutors.

Prosecutors are one of the most, if not the most, powerful decisionmakers in these systems.[6] Often, it is the discretionary decisions that prosecutors make—long before a child even steps into a courtroom and meets a judge—that will determine the extent to which the goals of the Child Wellbeing framework can be realized in individual cases and courtrooms, and thereby systemwide. Of particular significance are the initial decisions that prosecutors make that determine the sovereign (federal, state, or tribal) that will be responsible for responding to the youth offense, as well as the system (criminal or juvenile) that will house the prosecution.

The importance of these initial prosecutorial decisions is well-studied, but recent developments in the law, including the Supreme Court's decision in *McGirt v. Oklahoma* (2020); new laws and proposed legislation pertaining to youth being tried in juvenile or criminal court; and the forthcoming adoption of this Restatement require that we reexamine their significance.

This analysis will unfold in three Parts. Part I explains how prosecutors are an essential part of the audience for the Restatement since they hold such wide discretion in deciding whether and how to initiate a case against youth. Part II analyzes the significance of a prosecutor's decision in determining which sovereign will be tasked with ensuring the wellbeing of children who are accused of committing an offense. Part III addresses the role of prosecutors in determining or influencing which type of court will handle a child's prosecution. These prosecutorial decisions impact whether judges will be able to

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[3] RESTATEMENT DRAFT No. 4 ch. 12.

[4] RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 15.3 & cmts. a–e (AM. L. INST., Tentative Draft No. 2, Mar. 2019) [hereinafter RESTATEMENT DRAFT No. 2].

[5] RESTATEMENT DRAFT No. 4 §§ 13.10 (minimum age), 13.30 (right to counsel), 13.31 (waiver of counsel), 13.50 & cmts. a–e (defense of immaturity).

[6] *But see generally* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 176-82 (2019).

implement the goals of the Child Wellbeing framework as envisioned by the Restatement in individual cases, and as a result, in the juvenile and criminal systems more broadly.

I. Prosecutors and Restatements

The restatements are primarily written for judges, and as essential as judges are to effectuate the goals of the Child Wellbeing framework, their ability to do so undoubtedly will be shaped by the prosecutors who set in motion court proceedings against youth and remain closely involved throughout the case. The Restatement itself identifies prosecutors' role in making or influencing certain decisions in juvenile and criminal cases. These decisions include determining competency, dictating the progression of trials or hearings, ruling on dispositions, and electing to prosecute children as adults.[7]

Prosecutors will certainly rely on this Restatement in their prosecution of youth offenses and crimes. While it is the first of its kind, prosecutors have previously relied on other restatements to support their arguments before courts.[8] They also have issued public statements about restatements to influence its contents and implementation. For example, in 2019, twenty-three state attorneys general from diverse states, including California, Delaware, Iowa, Kentucky, and New York, wrote a detailed nine-page letter to members of the American Law Institute advising them to reject the draft Restatement of the Law of Consumer Contracts due to concerns that the proposed Restatement would not adequately protect consumers. Their work would be directly impacted since they handled "thousands of complaints from consumers and regularly prosecut[ed] cases" against businesses who practiced "predatory and unscrupulous behavior." Their keen attention to the draft Restatement of the Law of

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[7] RESTATEMENT DRAFT No. 2 § 15.3 cmt. a (competency hearings); RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 13.20 cmts. a–f (AM. L. INST. (Mar. 2023) [hereinafter RESTATEMENT DRAFT No. 5]; RESTATEMENT DRAFT No. 4 § 13.31 cmt. h (plea agreement); id. § 15.30 cmt. e (direct file in criminal courts).

[8] *See, e.g.*, Brief of Prosecution at 13, United States v. Trump, No. 23-cr-257 (D.D.C. Nov. 6, 2023) (quoting RESTATEMENT (SECOND) OF TORTS § 545 cmt. c (AM. L. INST. 1977)); Brief of Appellant at 13, State v. Dorff, 2022 WL 163043 (Iowa Jan. 5, 2022) (No. 48119-2020) (citing RESTATEMENT (SECOND) OF TORTS § 217 cmt. e (Am. L. Inst. 1965)); State's Response to Petition for Review at 5–6, State v. Honorable Gus Aragon, 2020 WL 8714767, (Ariz. Oct. 23, 2020) (No. CR-20-0304-PR) (quoting RESTATEMENT (SECOND) OF TORTS § 442B & cmt. b (Am. L. Inst. 1965)).

Consumer Contracts, and their letter replete with caselaw explaining their concerns, show that prosecutors read, rely on, and recognize the sizable influence that restatements have on their cases.

Thus, when prosecutors consult and rely on this inaugural Restatement in their practice, they also should be guided by the developmental goals of the Child Wellbeing framework that is the foundation of this Restatement. Incorporating this developmental model is not only a requirement of a juvenile system that seeks to rehabilitate youth,[9] but is also a "cost-effective way" to increase public safety and reduce crime.

However, prosecutors should not wait until a case is filed to consult the Restatement and assess how they can ensure that their actions align with the Child Wellbeing framework. Rather, they should consider this question before the start of a case and charges are filed. These initial discretionary decisions are not spelled out in the letter of the law set forth in this Restatement, because many times, they are not subject to judicial review.[10] Yet, prosecutors, often more than any other state actor, can fulfill the spirit of this Restatement—fostering the overall wellbeing and developmental health of youth—by determining if, how, and where prosecution is initiated.

Ultimately, the decision to prosecute or not is one that largely rests with prosecutors and generally is not reviewable by courts. The factors that impact a prosecutor's decisions to file formal charges, pursue diversion options, or decline to proceed with a case, vary by jurisdiction and are set forth in multiple sources, including statutes, court rules, ethics rules, prosecutor manuals, and office policies. These provisions provide varying degrees of guidance, from broad principles, to multi-factorial assessments, to more specific rules. Yet, prosecutorial discretion remains intact. The following examples of prosecutors' manuals and office memos illustrate these points.

In some jurisdictions, prosecutors are guided by a broad, overarching principle that applies specifically to juvenile cases. For example, in Sacramento County, California, the prosecution manual provides that prosecutors "shall file Juvenile Justice Court petitions

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[9] RESTATEMENT DRAFT No. 5 § 13.20 cmt. a.

[10] Carrie Leonetti, *When the Emperor Has No Clothes: A Proposal for Defensive Summary Judgment in Criminal Cases*, 84 S. CAL. L. REV. 661, 666 (2011) ("[P]rosecutorial charging discretion is virtually unlimited and unreviewable—particularly in the context of decisions about whether, when, and what charge to bring or dismiss . . . ."); RESTATEMENT DRAFT No. 4 § 15.30 cmt. e (noting that in some jurisdictions like Florida, a prosecutor's decision to directly charge a youth in criminal court is unreviewable).

when less restrictive measures are insufficient to provide for the protection and safety of the community and the minor." Meanwhile, the prosecutors' manuals for Klamath County, Oregon and Connecticut set forth an additional responsibility that prosecutors have in juvenile court beyond their general prosecutorial duty or concerns. These manuals both adopted language from the National District Attorney's Association's (NDAA) *National Prosecution Standards*. The "Juvenile Justice Section" of these Standards states that in juvenile matters, prosecutors should "consider the special circumstances and rehabilitative potential of the juvenile to the extent they can do so without unduly compromising their primary concern." The prosecutor's "primary concern" includes the "safety and welfare of the community, including the victim," while their "primary duty" is to "seek justice." These broad principles give prosecutors ample discretion in deciding whether to file formal charges against youth in juvenile court.

Other jurisdictions provide multiple factors that prosecutors should consider in their cases involving youth, but the interpretation of these factors still leaves prosecutorial discretion intact. For example, in Mesa County, Colorado, the district attorney's website provides that the "decision to offer Diversion" to youth "is based upon many factors with discretion left to the prosecutor reviewing the case." There are nine factors listed, including the "type and level of offense" and "input from the victim." Both the NDAA and its partner, the National Juvenile Justice Prosecution Center (NJJPC), advise that prosecutors consider multiple factors before filing formal charges in juvenile court. The NDAA provides nine factors, while the NJJPC provides twelve factors to consider and five factors that should not be considered.

Office memos may provide more specific guidelines and rules. For example, in his first day of office, Los Angeles District Attorney George Gascón implemented new policies for prosecuting youth through Special Directive 20-09. The first principle provided that the office's "prosecutorial approach should be biased towards keeping youth out of the juvenile justice system and when they must become involved, our system must employ the 'lightest touch' necessary in order to provide public safety." In terms of specifics, the office would no longer prosecute youth of misdemeanors, but "[i]f deemed necessary and appropriate, youth accused of misdemeanor offenses and low-level felonies" would be sent to "pre-filing, community-based diversion programs." The charges should "consist of the lowest potential code section that corresponds to the alleged conduct and mandate one count per incident." It also stated that the office would "immediately END the practice of sending youth to the adult court system." However, this policy has since been revised to allow for transfers in "extraordinary" cases in light of pushback and a recall effort.

Recent trends show that prosecutors are using their discretion to file fewer formal charges against youth, and this decline is consistent with protecting and furthering their development. In most instances, the most developmentally appropriate decision would be for prosecutors to not file charges against youth. As Professor Franklin Zimring observed, most youth will grow out of delinquent or criminal behavior and state intervention can yield more negative consequences than positive ones.[11] The Restatement acknowledges in its Reporter's Notes that there is growing awareness in juvenile "statutes, court rules, and practice standards" that processing a case in the juvenile system "should be regarded as a last resort, especially for adolescents younger than 14, in the absence of a strong interest in formal accountability or secure residential placement."[12]

Furthermore, consistent with the Child Wellbeing framework's goal in countering systemic racism, prosecutors can directly redress racial disparities in charging. For example, although Black youth have similar or fewer instances of criminal actions than White youth, they are prosecuted at disproportionately high rates. As Professor Kristin Henning recommended, prosecutors can reduce racial disparities against youth of color by changing their charging practices, such as declining to charge certain types of behavior that are typical of adolescents. To the extent that state intervention is required, diversion programs, rather than formal processing in juvenile and criminal systems, often are more effective for youth development and reducing crime.

Taking these developmental considerations into account, a prosecutor's decision to formally file charges against youth should be rare and should only take place when they believe it is absolutely necessary. However, if a prosecutor decides that formal charges must be filed, then their subsequent decisions on the sovereign that prosecutes the case and the system in which the case unfolds can

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[11] Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 271, 280, 284 (Thomas Grisso & Robert G. Schwartz eds., 2000).

[12] RESTATEMENT DRAFT No. 4 § 13.10 Reporter's Notes 319 (citing Wash. Rev. Code § 13.40.070; Matter of Tyvan B., 84 A.D.3d 462, 462 (N.Y. App. Div. 2011); BARRY C. FELD, CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION 387-440 (4th ed. 2013); National Juvenile Justice Network, *NJJN Policy Platform: Raise the Minimum Age for Trying Children in Juvenile Court* (Dec. 2020)).

either greatly hinder or enable judges to make rulings that are most consistent with the child's developmental health and wellbeing.

II. Selecting the Sovereign

When multiple sovereigns have concurrent jurisdiction, prosecutors determine which sovereign—state, federal, or tribal—will prosecute youth offenses and crimes. They make this decision by directly filing charges themselves in their respective jurisdiction or declining to prosecute and deferring to prosecutors of other sovereigns to handle the offense. As explained in this Part, this initial prosecutorial decision directly impacts whether a judge in a particular case will be able to make decisions that align with the developmental needs of the child as envisioned by the Restatement.

Most prosecutions of youth occur in state juvenile courts; federal juvenile prosecutions represent a tiny fraction of overall juvenile delinquency cases. However, after the Supreme Court's decision in *McGirt*, there is an increased risk that federal prosecutors will initiate more federal juvenile prosecutions against youth. This increase would impede the goals of the Child Wellbeing framework in individual juvenile delinquency cases and undermine the rehabilitative goals of the overall juvenile system.

In *McGirt*, the Court found that Congress never dissolved or disestablished the Muscogee (Creek) Nation reservation. As a result, the state of Oklahoma lacked jurisdiction to prosecute a member of the Seminole Nation who committed crimes in the Creek Nation's territory. While the case was a criminal one that involved an adult defendant, the ruling disrupted juvenile prosecutions in certain parts of Oklahoma as state prosecutors who had previously handled such cases no longer had the jurisdiction to do so. Federal prosecutors there wrote that "*McGirt* . . . dramatically changed the criminal justice landscape in eastern Oklahoma seemingly overnight, creating the development of a practice in prosecuting juveniles for especially violent crime." They wrote about their federal "district's experience remaking [the] practice" of juvenile transfers "in the wake of the *McGirt* earthquake." Federal defenders in Oklahoma likewise documented the increase of federal prosecutions against youth in the Northern and Eastern districts of Oklahoma. They observed that since *McGirt*, twenty-nine federal juvenile prosecutions were filed, a stark contrast to the pre-*McGirt* era when federal juvenile prosecutions were "practically unheard of in Oklahoma."

While national data does not yet show a substantial spike in federal prosecutions of youth in all federal districts, there has been a

slight bump in federal juvenile prosecutions since *McGirt*, and there is a risk that they will continue to rise. The juvenile system thus stands at an important crossroads. If federal prosecutors continue to initiate more prosecutions against youth in the federal juvenile system, rather than relying on state authorities or deferring to tribal authorities to handle the offense, then the application of the Child Wellbeing framework and its goals will be impeded in individual cases and systemwide.

First, developmental goals will be stymied in individual cases. While the purpose of federal juvenile prosecution is rehabilitation, overall, the federal juvenile system has fewer resources to meet the developmental needs of children, thereby limiting the ability of federal judges to issue rulings consistent with the Child Wellbeing framework. Also, due to the procedural hurdles of federal juvenile prosecutions, such as a certification requirement, federal prosecutors often file charges against youth in cases that they eventually plan to transfer to criminal courts to try them as adults.[13] However, as discussed in the next Part, this seriously harms children's development and undermines courts' ability to meet their needs since criminal courts mainly serve to punish defendants, and are not required to rehabilitate them.

Second, in addition to the impact in individual cases, increasing federal juvenile prosecutions may produce grave repercussions in the overall juvenile system. Scholars and researchers have found that the federal criminal system has made the entire criminal system more punitive. The growth of a federal juvenile system may produce similar effects in the overall juvenile system, especially as federal prosecutors seek to get involved in serious, violent cases that expose youth to criminal prosecutions and punishments.

While currently, the slight increase in federal juvenile cases appears to originate from the increase of federal prosecutions against crimes committed by Native youth on Native land (specifically in areas

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[13] David Jaffe, *Strategies for Prosecuting Juvenile Offenders*, 66 DEPT. JUST. J. FED. L. & PRAC. 91, 105 (2018) ("Given the burdens of the above described process, and the limited punishment available to juvenile offenders, prosecutors of organized crime or gang cases will most likely forgo the juvenile process unless they intend to transfer the offender to adult status."); Benjamin D. Traster & Joshua Satter, 71 DEPT. JUST. J. FED. L. & PRAC. 125, 126 (discussing the need after *McGirt* "for greater practical expertise, more consistency, and increased predictability with respect to [federal] juvenile prosecutions[,]" and that "new strategies to successfully transfer juveniles have been identified as transfer motions and transfer hearings have become more common.").

where the state no longer has jurisdiction after *McGirt*), given the lessons learned from the federal criminal system, there is a risk that as U.S. Attorneys' offices pour more resources into their juvenile practice, create more standardized policies, and gain more expertise, that federal prosecutors will initiate more federal prosecutions against youth in general.

Relatedly, even if federal prosecutions primarily target or remain limited to Native youth, this outcome is still deeply problematic. As Professor Addie Rolnick wrote, "Tribes must be the first line of authority when it comes to local juvenile delinquency matters." Tribal involvement is necessary for the healthy development of Native youth, as the Office of Juvenile Justice and Delinquency Prevention—which, like U.S. Attorney's offices, is under the U.S. Department of Justice—heard from their recent "[t]ribal consultations and listening sessions" with leaders and stakeholders of Native tribes.

The leaders and stakeholders reiterated that "[n]ative youth benefit when courts weave Native culture, values, and traditions into their programs and services." They added, "[t]ribal youth who feel connected to their Native communities are more likely to feel spiritual, emotional, and behavioral balance, and less likely to enter the juvenile justice system." The leaders also emphasized "[t]he need to involve Tribal courts earlier," advising that "[j]uvenile justice systems should transfer youth cases to Tribal courts before youth face multiple or serious charges, to increase the chance for successful intervention." For example, tribal courts can provide "trauma-informed" approaches that incorporate tribal culture and traditions. Moreover, there should be "alternatives to building and populating new youth detention facilities" for Native youth. These include tribal "living environments where youth receive monitoring, appropriate care, life skills training, and help building relationships with their families and communities." This recommendation is crucial given that tribal youth are "3.7 times as likely to be detained or committed in juvenile facilities as their white peers," a disparity that has "remained stubbornly high." Incarceration is harmful for youth development and undermines public safety.

In sum, when filing charges against youth is absolutely necessary, prosecutors should aim to file charges with the sovereign in courts that can best meet the developmental needs of youth. For most, this will mean the state system. For Native youth, federal and state prosecutors should defer to tribal authorities. The federal government should provide direct resources and support to tribes in order for them to support their youth. This crucial initial prosecutorial decision will enable courts, authorities, and leaders with the most expertise and

proper resources to fulfill the goals of the Child Wellbeing framework in their cases.

III. Selecting Juvenile or Criminal Court

In addition to deciding which sovereign should handle youth offenses and crimes, prosecutors also have a significant role in determining which type of court—criminal or juvenile—will process the case. When prosecution is absolutely necessary, prosecutors should file and keep charges in juvenile court, rather than criminal court. As the Restatement acknowledges, this decision is a pivotal one to effectuate the Child Wellbeing framework. In general, "[t]he goal of the juvenile system is to rehabilitate the youth and provide services that will promote the youth's healthy development" while the criminal system's "purpose is . . . to punish the youth who has committed an offense."[14] While rehabilitation is technically a form of criminal punishment, it is not the driving goal of the criminal system. As research has consistently shown, charging and prosecuting youth as adults in criminal court harms youth development and increases recidivism, thereby undermining public safety. Racial disparities also continue to exist, with youth of color disproportionately tried and sentenced as adults. Prosecuting and sentencing youth as adults in criminal court therefore contradicts the Child Wellbeing framework and its goals.

There are multiple ways to prosecute youth as adults in criminal court, and while prosecutors' authority may vary across these processes, they maintain great influence over each. As the Restatement underscores, in certain jurisdictions, prosecutors may directly file criminal cases against youth in criminal court, and in some jurisdictions, this action is not reviewable by courts.[15] However, even in jurisdictions where statutes require mandatory transfer to criminal court for certain offenses, or when judges ultimately make transfer decisions, prosecutors still have substantial influence over this decision by selecting charges that require transfer or make transfer more likely, or by filing motions in juvenile or criminal court that argue for the case to take place in criminal court.

There has been a "historic shift" in the number of youth tried as adults in criminal courts in recent years. In 1999, approximately

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[14] RESTATEMENT DRAFT No. 5 § 13.20 cmt. a.

[15] RESTATEMENT DRAFT No. 4 § 15.30 cmt. e (noting that in some jurisdictions like Florida, a prosecutor's decision to directly charge a youth in criminal court is unreviewable).

250,0000 youth were tried as adults, while in 2019, there were approximately 53,000 youth tried as adults. This decline is due in part to the wave of states that raised the age of juvenile jurisdiction. Furthermore, the number of youth who were "waived" to criminal court from juvenile court also drastically dropped over recent years. For example, 9,500 cases were waived in 1999, but only 3,400 cases were waived in 2019. According to the most recent data, the number of waived cases fell to 2,800 cases in 2021.

Even with this decline, this issue warrants continued attention. For one, in order to implement the Child Wellbeing framework—as envisioned by this Restatement—this practice of prosecuting youth as adults should cease. It harms children, undermines public safety, and disproportionately affects youth of color. Additionally, this issue remains at an important crossroads. As shown by the flurry of contradictory legislative activity in 2023 alone, it is yet unclear whether this practice will continue to substantially decline. Prosecutors' discretion in this process still matters.

In certain states, such as Georgia, Kentucky, Missouri, and Maryland, legislators have proposed bills or passed laws to make it less likely—but still possible—that youth can be prosecuted as adults in criminal court. Other states have gone in the opposite direction, giving more discretion to prosecutors and courts to try and sentence children as adults. For example, North Carolina passed a law effective December 1, 2023, that gives more authority to prosecutors to try youth as adults in criminal court for certain violent crimes, while legislators in Tennessee and Indiana likewise proposed bills that would expand this practice.

Even in the midst of these shifting laws, prosecutors still hold much influence over transfers. Even if laws may seek to change the type of charges that allow for transfer, prosecutors have considerable discretion over the charges they file that make transfer to criminal court more or less likely. They also impact whether transfers occur through the motions they file or choose not to file. These decisions help determine which judge will ultimately be tasked with a child's case and whether the goals of the Child Wellbeing framework can be met.

Conclusion

The inaugural Restatement of Children and the Law is a powerful tool to continue to implement the Child Wellbeing framework in the juvenile and criminal legal systems. However, in order to fulfill its goals, prosecutors' cooperation is necessary. Long before a case is presented to a judge or an initial hearing takes place in a courtroom,

prosecutors can affect the trajectory and final result of a case. Of particular significance is their selection of the sovereign (state, federal, or tribal), as well as the system (juvenile or criminal) that will handle the prosecution. By prioritizing the Child Wellbeing framework in these initial decisions, prosecutors can help advance the developmental health of children, reduce racial disparities, and as a result, increase the wellbeing of communities.

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