

# THE PROSECUTION BAR

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## ABSTRACT

*The American legal profession needs a prosecution bar. Before lawyers are permitted to appear for the government in a criminal case, they should be licensed not just to practice law, but to practice prosecution. The two are not the same. Regulating them as if they were fosters injustice and fortifies the carceral state.*

*“Doing justice” is the orienting creed of prosecutorial ethics, in theory, while on the ground, American prosecutors routinely indulge in unjust practices. This Article argues that prosecutors’ membership in an undifferentiated legal profession is the key to understanding the contradiction. Lawyers’ training, socialization, and professional regulation fixate on “client control”—i.e., the principle that clients, not lawyers, make the most important normative decisions that arise in legal matters. This professional ethic may or may not be justified for lawyers generally, but it is insidious for prosecutors. That is because it gives prosecutors permission to bypass fundamental questions about whether a conviction or a tactic used to secure one is just. To do justice, prosecutors—individually and collectively—must unlearn the ethic of client control. That, this Article contends, is a mission for a prosecution bar vested with the power to license, regulate, and discipline prosecutors. By developing ethical rules and professional norms calibrated for prosecutors, not lawyers in general, a prosecution bar could make “seeking justice” a genuine limitation on prosecutorial practices.*

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## INTRODUCTION

A criminal prosecutor's responsibility, the Supreme Court tells us, is not to "win a case," but to see "that justice shall be done."<sup>1</sup> Scholars and the organized bar agree: "Seeking justice" is the polestar of prosecution.<sup>2</sup> Yet prosecutors routinely engage in practices that appear to privilege their own interests—especially in low-cost, low-risk convictions—over justice. Consider, for instance, prosecutors manipulating pretrial incarceration so that defendants will accept "time served" plea offers,<sup>3</sup> or prosecutors threatening to file disproportionately severe charges to intimidate

1. *Berger v. United States*, 295 U.S. 78, 88 (1935).

2. See MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 1983) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 612 (1999) ("The literature of the legal profession refers to the prosecutor's duty to 'seek justice' or 'do justice,' a professional ideal that analogizes prosecutors to judges and distinguishes prosecutors from other lawyers." (footnotes omitted)).

3. See *infra* notes 52–55 and accompanying text.

defendants into pleading guilty.<sup>4</sup> These maneuvers, and many like them, are mainstream prosecutorial practices, but no plausible account of justice countenances them.<sup>5</sup> The reality of prosecutorial justice-doing is unglued from the rhetoric.

Perhaps unsurprisingly, then, the last several years have seen a surge of critical scholarship on prosecution and prosecutors.<sup>6</sup> This literature holds important insights, but it overlooks something fundamental. Before American prosecutors are prosecutors, they are lawyers—educated, socialized, and regulated as part of a legal profession they share with criminal defense lawyers, ERISA specialists, tax litigators, maritime attorneys, and many others. Prosecutors’ membership in an undifferentiated legal profession may seem natural. It is actually an institutional design choice that undermines the prosecutorial duty to seek justice. That is because the profession’s norms and ethical rules allow and even encourage prosecutors to prioritize questions of tactics over questions of justice.

This Article identifies the unitary structure of the legal profession as a unique source of dysfunction in the criminal legal system. It also offers a novel solution. Before lawyers prosecute criminal cases, they should become licensed members of a “prosecution bar” imbued with norms and rules that center the duty to do justice. The proposal seeks to harness the power of professional culture and regulation to remedy routine injustice in the criminal legal system.

The case for a prosecution bar starts by recognizing an essential difference between prosecutors and other kinds of lawyers. The legal profession is understandably preoccupied with the principal-agent problem of clients (principals) and lawyers (agents). The profession’s prime directive, its answer to that problem, is the rule of “client control,” which

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4. See *infra* notes 46–51 and accompanying text.

5. To be sure, no consensus exists about what “justice” requires prosecutors to do or refrain from doing in many settings. See *infra* notes 34–35, 211–12 and accompanying text. But not all questions of prosecutorial justice are difficult. We will focus on practices that infringe a minimalist conception of procedural justice. See *infra* notes 37–38, 45 and accompanying text.

6. See David Alan Sklansky, *The Problems with Prosecutors*, 1 ANN. REV. CRIMINOLOGY 451, 452 (2018) (“There is a broad and growing sense that prosecutors in the United States are a problem—quite possibly the most pressing challenge in American criminal justice.”). For recent examples, see RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 143 (2019) (“Meaningful institutional reform must begin with changing the way prosecutors operate.”); JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* 206 (2017) (“Prosecutors have been and remain the engines driving mass incarceration.”); and I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1563 (2020) (“[I]t is time to turn away from prosecution as we know it.”). For classic examples, see PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* 20 (2009) (“[P]rosecutors are more part of the problem than the solution.”); and Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 398 (2001) (“[T]he reality is that [prosecutors] are responsible for filling the nation’s jails and prisons with poor people who commit street crimes.”).

provides that clients, not lawyers, make the most important normative choices for lawyers' work on their behalf.<sup>7</sup>

Client control is controversial as applied to ordinary lawyers.<sup>8</sup> For prosecutors, it is a non sequitur, because prosecutors have no "clients" in the relevant sense. To be sure, prosecutors *are* agents and they *do* represent a principal. Their principal is the "sovereign," a political construct that we understand to have an interest in "justice."<sup>9</sup> Like all agents, prosecutors have interests that imperfectly align with those of their principals. But unlike a lawyer's client, a sovereign is an abstraction that cannot direct the normative (or any other) dimensions of its agent's work.<sup>10</sup>

Both ordinary lawyers and prosecutors thus confront principal-agent problems, but they're *different* problems. The legal profession's solution to the lawyer's problem, the ethic of client control, does not address the prosecutor's problem. Worse, it undermines the prosecutorial duty to do justice for two reasons, one close to the surface and one deeper.

The surface problem is that the legal profession's formal ethical rules are not calibrated for lawyers "doing justice" independently.<sup>11</sup> They are instead engineered to ensure that lawyers act in their clients' interests. Accordingly, they offer almost no guidance to prosecutors. Only one provision of the Model Rules of Professional Conduct speaks to the "special responsibilities" of prosecutors, and it covers only a few scattered points.<sup>12</sup> More tellingly, the legal profession's regulators almost never sanction prosecutors.<sup>13</sup> That is problematic but not surprising. Lawyer discipline is mostly about protecting clients, not policing lawyers' conduct with respect to third parties. It is a disciplinary focus that makes prosecutors all but invisible to regulators.

The deeper problem is cultural. Deferring to another person's normative judgments—as the principle of client control demands—is no simple task.

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7. See *infra* notes 85–93 and accompanying text.

8. See *infra* notes 100–04, 259–60 and accompanying text.

9. See *infra* notes 31–33 and accompanying text. Line prosecutors are *also* agents of the chief prosecutors for whom they work. See Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICK. L. REV. 589, 597–98 (2019) (noting necessity of delegations by chief prosecutors). A line prosecutor's agency relationship with the "sovereign" is thus mediated by their employment relationship.

10. See *infra* notes 115–21 and accompanying text. As we will see, this distinguishes prosecutors from lawyers representing individuals *and* from lawyers representing organizations. See *infra* notes 111–14 and accompanying text.

11. On a standard view of legal ethics, a lawyer acting on their client's behalf participates in an adversarial process from which justice emerges. See Rob Atkinson, *Connecting Business Ethics and Legal Ethics for the Common Good: Come, Let Us Reason Together*, 29 J. CORP. L. 469, 488 (2004) (describing the standard view).

12. See MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 1983); see *also infra* note 135 and accompanying text.

13. See *infra* notes 136–37 and accompanying text.

To facilitate it, lawyers are socialized to curb their personal moral judgments when evaluating legal decisions in a professional context.<sup>14</sup> This norm of moral “neutrality” enables lawyers to appraise legal matters by their tactical rather than their normative merits. It allows lawyers to grade questions of what will succeed in court or at the bargaining table higher than questions of justice.

It is possible that neutrality can be justified for lawyers representing clients, though there are compelling arguments against it.<sup>15</sup> But “doing justice” inevitably entails normative judgment, so it is unsuitable for prosecutors. Professional norms, however, don’t come with on-off switches. It is unrealistic to expect well-socialized lawyers to dispense with neutrality just because they’ve entered an appearance for the government in a criminal case.<sup>16</sup>

The predictable but calamitous consequence of normatively neutral prosecutors is precisely what we see in the routine operation of American criminal courts: prosecutorial decisionmaking guided by tactics and positive law but not justice—and especially not procedural justice. Unjust but lawful tactics, moreover, drive coercive plea bargaining.<sup>17</sup> They thereby fuel the carceral state, the harms of which are borne disproportionately by Black and Brown people.<sup>18</sup>

A prosecution bar could begin to fill the gap. This Article proposes that before a lawyer prosecutes a criminal case, she should first obtain a prosecutorial “endorsement” to her law license.<sup>19</sup> Admission to the prosecution bar should be regulated not by the general bar, but by new state boards that would also superintend prosecutorial ethical rules and discipline.<sup>20</sup> If carefully designed, staffed with members representing a broad array of stakeholders in the criminal legal system, and empowered to promulgate rules delineating the meaning of justice in prosecution *and* enforce them, prosecution boards could foster a prosecutorial subprofession

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14. See *infra* note 145 and accompanying text.

15. See *infra* notes 270–72 and accompanying text.

16. See *infra* notes 159–60 and accompanying text.

17. See *infra* notes 43–45 and accompanying text. I have written elsewhere on plea bargaining’s coercion problem. See, e.g., William Ortman, *Confrontation in the Age of Plea Bargaining*, 121 COLUM. L. REV. 451, 463–64 (2021) [hereinafter Ortman, *Confrontation in the Age of Plea Bargaining*]; William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. 1435, 1467–71, 1492–98 (2020).

18. See Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1312–13 (2018) (characterizing prosecutorial power to coerce pleas as a “precondition[] for mass incarceration”); Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1240 (2018) (documenting “racial disparities in the plea-bargaining stage of the criminal justice process”).

19. See *infra* note 169 and accompanying text.

20. See *infra* Part II.A.

that inhibits prosecutors from privileging their private interests over justice.<sup>21</sup>

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This Article develops the case for a prosecution bar in three parts. It begins in Part I.A with the puzzle of prosecutorial justice-doing. Prosecutors' private interests are powerful forces. But professional rules and norms can be powerful forces too. Why don't the legal profession's rules and norms place off-limits prosecutorial practices that are unjust on any reasonable theory of justice, no matter their tactical efficacy? Part I.B offers an explanation: that prosecutors' membership in the undifferentiated legal profession undercuts the duty to do justice. Part I.B.1 explores the differences between the principal-agent problems that confront prosecutors and ordinary lawyers. Part I.B.2 then examines the surface and deep pathologies of embedding prosecutors in an ethic of client control.

Part II proposes a solution. Part II.A introduces the prosecution bar and its principal institutional apparatus, the state prosecution board. After explaining how prosecution boards could be staffed by diverse criminal justice stakeholders, it considers their three core functions—licensing, ethics rulemaking, and discipline—in detail, especially licensing. Boards would have a variety of licensing mechanisms from which to choose, including a post-J.D. graduate degree, a “residency” period akin to physician training, and a licensing exam. Part II.B catalogs the advantages of a prosecution bar system. The primary benefit would be substituting a professional ethic of doing justice for the ethic of client control. Beyond that, prosecution boards' ethical rules would be more transparent than the internal ethics guidelines used by prosecutors' offices today. Public deliberation about those rules, moreover, would provide opportunities for

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21. The Article's principal analytical claim—that prosecutors' membership in the undifferentiated legal profession undermines the prosecutorial duty to do justice—and its reform proposal—a semi-autonomous prosecution bar—are novel, though they naturally build on others' work. Two excellent pieces of scholarship bear particular mention. First, Daniel Markovits has recognized the mismatch between the ethic of client control and the “do justice” creed of prosecuting. See DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* 86–88 (2008) (explaining that “[t]he prosecutor's distinctive commitments to truth and fairness therefore elaborate a role whose genetic structure departs from the structure of adversary advocacy”). He did not, however, consider how the norms and ethics of lawyering impact the practice or culture of prosecution, our focus in Part I. Second, Eric Fish has made a compelling case that there is an unresolvable conflict between prosecutors' “do justice” role and their role as adversaries, such that we should drop the adversarial role from the job description. See Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419, 1421–23 (2018). This Article's proposal is compatible with Fish's but different. Even if we dispense with the idea of prosecutors as adversaries, prosecutors who are trained, socialized, and regulated *only as lawyers* will continue to struggle to discharge their duty to do justice. Changing that is a job for a prosecution bar, as Part II explains.

democratic contestation about the meaning of justice in prosecution. Part II.C identifies close analogues to the prosecution bar in the United States and elsewhere in the world, most notably the patent bar, which lawyers must join before appearing in certain matters at the U.S. Patent and Trademark Office. The existence of analogues may allay concerns that adopting a prosecution bar would be too brash.

Part III turns to objections and alternative models. Part III.A considers three plausible objections to the proposal: (i) that it would unduly limit the supply of prosecutors, (ii) that it is the legal profession's norms themselves (not their application to prosecutors) that are the problem, such that they should be the target of reform, and (iii) that a prosecution bar would open the floodgates to additional specialized bars. None of the objections, I argue, undermines the proposal. Finally, Part III.B considers two alternative models for solving the problem identified in Part I. In the first, a private body would certify lawyers as prosecutors, much as private medical organizations certify physicians as specialists. The second option is full professional separation, in which prosecutors would not be lawyers and lawyers would not be prosecutors. Although these alternatives have some advantages, I argue that neither is superior to a prosecution bar along the lines proposed in Part II.

### I. PROSECUTORS, LAWYERS, AND JUSTICE

This Part explains the problem for which the prosecution bar is a solution. It begins with a contradiction. Doing justice is said to be the polestar of prosecution, but in at least some respects, it is demonstrably not. Part I.A sets up the puzzle, while Part I.B offers an explanation. Prosecutors have interests that inevitably diverge from the sovereign's interest in justice. That is not surprising, since prosecutors are people. What *is* surprising is that the legal profession's ethical rules and cultural norms don't meaningfully mitigate the principal-agent problem of prosecutors and their sovereigns. Part I.B finds an explanation in prosecutors' membership in an undifferentiated legal profession that (understandably) fixates on solving the different principal-agent problem of lawyers and their clients. The legal profession's ethical rules and cultural norms are round pegs to prosecutors' square holes.

#### A. *Prosecutors and the Moribund Duty to Do Justice*

Why do “justice seeking” prosecutors routinely partake in unjust practices? The question has two premises. The first—that prosecutors are

obligated to “seek justice”—is relatively straightforward. The second—that they routinely don’t—will take more work to substantiate.

The idea that a prosecutor’s duty is to seek justice traces at least to George Sharswood, who wrote in 1854 that the Attorney General “stands as impartial as a judge.”<sup>22</sup> The American Bar Association signed on in 1908, observing in its Canon of Legal Ethics (an ancestor of today’s Model Rules of Professional Conduct) that “[t]he primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done.”<sup>23</sup> The Supreme Court added its gravitas three decades later, writing in *Berger v. United States* that a federal prosecutor “is the representative . . . of a sovereignty whose . . . interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”<sup>24</sup> And a few years after that, in an address to United States Attorneys, Attorney General Robert Jackson offered the most eloquent formulation of the idea yet.<sup>25</sup> Jackson called on his audience to “rededicat[e]” themselves to “the spirit of fair play and decency that should animate the federal prosecutor.”<sup>26</sup> They could, he reminded them, “afford to be just” because even when the government “technically loses its case, it has really won if justice has been done.”<sup>27</sup>

The prosecutorial duty to “do justice” thus has an extensive historical pedigree. Today, it commands almost universal support from courts,<sup>28</sup> the organized bar,<sup>29</sup> and legal scholars.<sup>30</sup> The leading theoretical account, by Bruce Green, locates the duty’s source in the prosecutor’s relationship with

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22. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 33 (1854).

23. CANONS OF PRO. ETHICS Canon 5 (AM. BAR ASS’N 1908).

24. 295 U.S. 78, 88 (1935); see also Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1207 n.23 (2020) (collecting citations to *Berger*).

25. Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC’Y 18 (1940).

26. *Id.* at 18.

27. *Id.* at 19.

28. See, e.g., *Connick v. Thompson*, 563 U.S. 51, 71 (2011) (“The role of a prosecutor is to see that justice is done.”); *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993) (“The prosecutor’s job isn’t just to win, but to win fairly, staying well within the rules.”); *People v. Pfaffle*, 632 N.W.2d 162, 167 (Mich. Ct. App. 2001) (“The law is clear that a prosecutor’s fundamental obligation is ‘to seek justice, not merely to convict.’” (quoting *People v. O’Quinn*, 460 N.W.2d 264, 265 (Mich. Ct. App. 1990), *overruled in part by* *People v. Koonce*, 648 N.W.2d 153 (Mich. 2002))).

29. See MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 1983) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

30. See David Luban, *The Conscience of A Prosecutor*, 45 VAL. U. L. REV. 1, 15 (2010) (“[Seeking justice] is a mantra that appears in all the crucial ethics documents.”); Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303, 303 (2009) (“It is a truism that prosecutors are called not just to win, not just to zealously represent their clients, but rather to ‘seek justice.’”). The scholarly literature would be incomplete without a contrarian view, so for an argument that the prosecutorial duty to “do justice” should be retired, see Bellin, *supra* note 24.



the sovereign—*i.e.*, a state, the federal government, or an Indian tribe.<sup>31</sup> Prosecutors exercise authority delegated by the sovereign, Green explains, and so must “make decisions and otherwise act in accordance” with its wishes.<sup>32</sup> Because a “sovereign’s overarching objective in this country (although not necessarily everywhere) is to ‘do justice[,]’” Green continues, prosecutors “must serve this objective and ‘do justice.’”<sup>33</sup>

The real world of criminal courts can look different. In practice, routine prosecutorial conduct appears—and often is—irreconcilable with “doing justice.” The remainder of this section seeks to substantiate that descriptive claim. Before I can do so, I must ask and answer two questions about its scope.

First, do we need to fully specify a normative theory of justice in order to say whether a prosecutorial practice “does justice”? For some purposes, yes, because some practices raise hard normative questions. Is it just for prosecutors to “flip” cooperating witnesses?<sup>34</sup> Is it unjust for prosecutors to deny defense lawyers access to the unprivileged parts of their files?<sup>35</sup> We will see in Part II that a prosecution bar would offer a relatively transparent and democratic structure for answering such questions.<sup>36</sup> But there are easy normative questions too, and this section traffics in those. I ask the reader to accept only two premises about the meaning of justice, both of which will, I hope, be uncontroversial: (i) that “procedural justice” is part of (though not exhaustive of) justice, and thus within prosecutors’ remit,<sup>37</sup> and (ii) that a litigant’s opportunity to participate on the merits of a legal

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31. Green, *supra* note 2, at 634; *see also id.* at 633–42. I have added Indian tribes to Green’s list of sovereigns. *See* David H. Moore & Michalyn Steele, *Revitalizing Tribal Sovereignty in Treaty-making*, 97 N.Y.U. L. REV. 137, 142 (2022) (“The text and structure of the Constitution support the principle of the sovereignty of Indian tribes . . . .”); *see also* Nat’l Native Am. Bar Ass’n, Formal Op. 1 (2015) (discussing the duties of trial court advocates) (“[M]uch like the duty of a public prosecutor is to ‘seek justice,’ so too do tribal advocates carry a duty to ‘seek justice.’”).

32. Green, *supra* note 2, at 634.

33. *Id.*

34. *See* Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT’G REP. 292, 292 (1996) (“Only the most unreflective prosecutor can avoid feeling ambivalent about cooperation.”).

35. *See generally* Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 CONN. L. REV. 771 (2017) (exploring costs and benefits of open-file discovery).

36. *See infra* notes 211–14 and accompanying text.

37. *See* Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads*, 75 MO. L. REV. 771, 791 (2010) (“The prosecutor’s duty includes an obligation to see that every defendant, rich as well as poor, is accorded procedural justice.”); *see also* MODEL RULES OF PROFESSIONAL CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 1983) (explaining that prosecutor’s duty as a minister of justice “carries with it specific obligations to see that the defendant is accorded procedural justice”); K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 287 (2014) (explaining that ensuring “procedural justice is consistent with the prosecutor’s ethical duty to seek justice”).

proceeding is a necessary (albeit not sufficient) condition of procedural justice.<sup>38</sup>

Second, what does it mean for an unjust practice to be “routine”? It means that we are mostly not interested in “bad apples.”<sup>39</sup> To be sure, there *are* bad apples in prosecution—*i.e.*, prosecutors who violate explicit rules, for instance by failing to disclose exculpatory materials or suborning perjured testimony. While such prosecutors do serious harm, their existence does not demand explanation, as there are bad actors in every profession.<sup>40</sup> Our focus is thus mostly *not* on prosecutorial misconduct in the ordinary sense.<sup>41</sup> It is instead on unjust but lawful practices within the mainstream of prosecution.

So then we come to the evidence. The goal is not to categorize every plausibly unjust prosecutorial practice. That would take several articles, or more likely several books.<sup>42</sup> As we are only seeking to establish the existence of routine unjust practices alongside a putative duty to do justice, a handful of illustrative examples will suffice.

We’ll start with coercive plea bargaining tactics. In the paragraphs below, I identify three tactics that prosecutors use to induce guilty pleas.<sup>43</sup> The tactics are legal and violate no rule or norm of professional ethics. At the same time, they make—and by all appearances are meant to make—the price of mounting a defense on the merits of the case too high for defendants

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38. See Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183 (2004) (“[P]rocedural justice is deeply entwined with the old and powerful idea that a process that guarantees rights of meaningful participation is an essential prerequisite for the legitimate authority of action-guiding legal norms.”). Two details about this premise are worth elaborating. First, it follows from it that an action can be “lawful,” in the sense that no provision of positive law forbids it, and still “unjust,” if it denies to others the opportunity to participate on the merits of a proceeding. Positive law and procedural justice are not synonymous. Second, while the premise will (hopefully) not be controversial, its justification is. Solum roots it in the legitimacy of the adjudicative process. *Id.* at 275–84. Other theorists locate it in values such as dignity, equality, and autonomy. See *id.* at 286–89. For present purposes, we can bracket the debate, as what matters is *that* the opportunity for participation is a minimum requirement of procedural justice, not *why*.

39. The exception is Part I.B.2.a, where we will see that the legal profession’s disciplinary systems fail to hold such bad apple prosecutors to account.

40. See Thomas Gibbs Gee & Bryan A. Garner, *The Uncivil Lawyer: A Scourge at the Bar*, 15 REV. LITIG. 177, 188 (1996) (“Just as medicine has its quacks and butchers, the ministry has its charlatans and unscrupulous T.V. evangelists, the military its Queegs and Calleys, so the law must answer for its quota of ambulance chasers, cynics, and money-grubbers.”).

41. The literature on prosecutorial misconduct is vast. For two particularly excellent recent examples, see Adam M. Gershowitz, *The Race to the Top to Reduce Prosecutorial Misconduct*, 89 FORDHAM L. REV. 1179 (2021); and Jason Kreag, *Disclosing Prosecutorial Misconduct*, 72 VAND. L. REV. 297 (2019).

42. For good starts, see DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA’S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT (2012); and ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007).

43. There is much more that could be—and has been—said about each of the tactics surveyed. The footnotes identify portions of the relevant literature for each.

to plausibly shoulder.<sup>44</sup> They thereby deny or attempt to deny litigants the bare minimum of procedural justice: a meaningful opportunity to participate on the merits of their cases.<sup>45</sup>

*Overcharging.* A prosecutor “overcharges” a case (as I’m using the term) when she charges or threatens to charge a crime more serious than a defendant’s conduct warrants, by the prosecutor’s own assessment.<sup>46</sup> Consider, for instance, a Kentucky prosecutor’s threat to secure a life sentence in a check forgery case unless the defendant agreed to a plea deal.<sup>47</sup> Overcharging is possible because American criminal statutes contain menus of overlapping offenses from which prosecutors may pick.<sup>48</sup> Overcharging is legal, so long as all charges are supported by probable cause, frequently used, and an enormously valuable tool for inducing defendants to plead guilty.<sup>49</sup> Yet overcharging lacks moral justification.<sup>50</sup> So says the ABA in its non-binding and aspirational *Criminal Justice Standards for the Prosecution Function*: “The prosecutor should not file or maintain charges greater in number or degree than . . . are necessary to fairly reflect the gravity of the offense or deter similar conduct.”<sup>51</sup>

*Leveraging Pretrial Detention.* The ABA also weighs in on how prosecutors should approach pretrial detention. “The prosecutor should

44. See Ortman, *Confrontation in the Age of Plea Bargaining*, *supra* note 17, at 463–64 (arguing that prosecutors’ plea bargaining leverage can render defendants’ trial rights illusory).

45. See Solum, *supra* note 38, at 274 (“Procedures that purport to bind without affording meaningful rights of participation are fundamentally illegitimate.”).

46. There are other ways to define overcharging. See Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701, 703–14 (2014) (offering three definitions).

47. *Bordenkircher v. Hayes*, 434 U.S. 357, 358–59 (1978).

48. See William Ortman, *Second-Best Criminal Justice*, 96 WASH. U. L. REV. 1061, 1072–73 (2019) (describing such “menus”).

49. On the legality of overcharging, see *Bordenkircher*, 434 U.S. at 364–65 (affirming life sentence in check forgery case notwithstanding that prosecutor’s reason for seeking the sentence was his “desire to induce a guilty plea”). On its use, see Graham, *supra* note 46, at 714–24 (presenting empirical analysis of overcharging).

50. See Bennett L. Gershman, *A Moral Standard for the Prosecutor’s Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 521 (1993) (arguing that it is “improper for prosecutors to use overcharging as a leverage device to more readily obtain guilty pleas”); see also *Lafler v. Cooper*, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting) (conceding the “grave risk[] of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense”).

51. AM. BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.4(d) (4th ed. 2017) [hereinafter PROSECUTION FUNCTION], [https://www.americanbar.org/groups/criminal\\_justice/standards/ProsecutionFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/) [<https://perma.cc/2CCT-7ES7>]; see also AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.9 cmt., at 77 (3d ed. 1993) (“[T]he key consideration is the prosecutor’s commitment to the interests of justice, fairly bringing those charges he or she believes are supported by the facts without ‘piling on’ charges in order to unduly leverage an accused to forgo his or her right to trial.”). On the ABA standards themselves, see Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 877 (2012) (explaining that standards are meant to “codify a professional consensus among prosecutors, defense lawyers, and judges about how lawyers and others should behave in criminal cases”).

favor pretrial release of a criminally accused,” it says, “unless detention is necessary to protect individuals or the community or to ensure the return of the defendant for future proceedings.”<sup>52</sup> In practice, prosecutors, who often have enormous influence over pretrial release decisions,<sup>53</sup> sometimes use it, the Justice Policy Institute notes, “as leverage in plea-bargaining discussions with people of limited financial resources.”<sup>54</sup> For an incarcerated defendant, a guilty plea for a “time-served” sentence has enormous appeal, no matter the merits of the case.<sup>55</sup>

*Threatening Family Members.* Prosecutors sometimes combine plea offers with threats to prosecute a defendant’s family member unless the defendant accepts a deal.<sup>56</sup> Courts almost invariably find that such threats offend no principle of positive law, so long as there is bare probable cause to support such a charge.<sup>57</sup> The legality (and the formal legal ethics) of the practice is thus not up for serious debate. The justice certainly is. As Bennett Capers observes,

Is there any reason to doubt that, at a minimum, a baseline of fundamental fairness—if taken seriously—would mean that prosecutors should not be able to use the threat of additional charges against . . . a defendant’s family member to induce a plea, at least when the fulfillment of that threat cannot be justified either on retributive or non-perverse utilitarian grounds?<sup>58</sup>

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52. PROSECUTION FUNCTION, *supra* note 51, § 3-5.2(a).

53. See Carissa Byrne Hessick & Nathan Pinnell, *Special Interests in Prosecutor Elections*, 19 OHIO ST. J. CRIM. L. 39, 55 (2021) (“In most cases, prosecutors can affect whether bail is set and how high.”).

54. MELISSA NEAL, JUST. POL’Y INST., BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 25 (Sept. 2012), <https://justicepolicy.org/research/bail-fail-why-the-u-s-should-end-the-practice-of-using-money-for-bail/> [<https://perma.cc/E6T6-9T87>]; see also Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?*, 119 MICH. L. REV. 1365, 1365–66 (2021) (book review) (observing that whether a prosecutor pursues “the end of cash bail and the dramatic curtailment of pretrial detention” is a “key metric” in determining whether a prosecutor is a “real reformer”).

55. See Russell M. Gold, *Paying for Pretrial Detention*, 98 N.C. L. REV. 1255, 1270 (2020) (“[Prosecutors’] leverage is particularly powerful when prosecutors offer defendants the opportunity to go home immediately by pleading guilty and receiving a sentence of time served rather than staying in jail for how many ever months (or years) it may take for a court to try their case.”).

56. See Clark Neily, *A Distant Mirror: American-Style Plea Bargaining Through the Eyes of a Foreign Tribunal*, 27 GEO. MASON L. REV. 719, 734 (2020) (describing threats against family members as “[p]erhaps the most nakedly coercive tactic in US plea-bargaining practice”). For an example of such a case, see *United States v. Pollard*, 959 F.2d 1011, 1016 (D.C. Cir. 1992) (explaining that government was unwilling to enter plea agreement with Anne Pollard without a guilty plea from Jonathan Pollard).

57. See *United States v. Marquez*, 909 F.2d 738, 741–42 (2d Cir. 1990) (collecting cases). There are a few older cases to the contrary, but the caselaw over the last several decades is one-sided. See BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 7:10 (2d ed. 2015).

58. I. Bennett Capers, *The Prosecutor’s Turn*, 57 WM. & MARY L. REV. 1277, 1300–01 (2016); see also Bruce A. Green, “Package” Plea Bargaining and the Prosecutor’s Duty of Good Faith, 25 CRIM. L. BULL. 507, 541 (1989) (“Our criminal justice system does not operate along the lines of the

But like overcharging and leveraging pretrial detention, tying a defendant's plea to unjustifiable charges against a family member has the effect—and apparently the purpose—of ensuring that the defendant does not mount a defense. It is, in that sense, incompatible with the defendant having a meaningful opportunity to participate on the merits.

So far we've been talking about some of the tactics prosecutors use to induce guilty pleas in cases they've decided to charge. What about before that, at the charging stage? Do considerations of substantive (not “merely” procedural) justice prevail there? Not always, as Josh Bowers has explained.

In low-level cases, prosecutors often fail to adequately screen for “normative innocence,” which Bowers defines as conduct that “is undeserving of communal condemnation, even if it is contrary to law.”<sup>59</sup> Prosecutors screen cases for legal and factual sufficiency, and to make sure that they are worth the time and expense of prosecution.<sup>60</sup> But prosecutors often ignore the normative question of whether a defendant *ought* to be punished, *i.e.*, whether punishment is just.<sup>61</sup> Bowers posits that part of the explanation lies with prosecutors' legal education.<sup>62</sup> Their training, which emphasizes putting fact patterns into legal “boxes and categories,” equips prosecutors to strategically assess the legal merits of a case.<sup>63</sup> At the same time, Bowers observes, “think[ing] inside the proverbial legal box . . . may be antithetical to considering adequately equitable merits.”<sup>64</sup>

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Union Army, which allowed a conscripted soldier to avoid military service in the Civil War by paying someone else to take his place.”)

59. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1678 (2010). Bowers offers examples of cases in which a factually guilty defendant might not be blameworthy:

A sixteen-year-old runaway is arrested for prostitution; a mother is arrested for leaving her eleven-year-old home alone for the afternoon; an indigent man is arrested for hopping a turnstile to get to his first day of work; an elderly man is arrested for selling ice pops without a license on a hot summer day.

*Id.* at 1658.

60. *Id.* at 1657.

61. *Id.* at 1657–58. Abbe Smith provides an example of such a failure in a case handled by her clinic. Smith, *supra* note 6, at 383 n.185. The defendant was charged with marijuana possession after a police officer found a small amount of the substance in her bag at the U.S. Capitol, where she was sightseeing. It turned out that the marijuana was in her purse because a police officer found it on her teenager and—rather than cite the teenager—gave it to the woman, who put it in her bag and “promptly forgot[] about it.” *Id.* at 383–84. As Smith explains:

The sole question for the prosecutor was whether they could prove the elements of possession, not whether a law-abiding citizen who had done a foolish, unthinking thing should have to travel from across the country to face criminal charges that probably never should have been brought and for which she would at most receive probation.

*Id.* at 384.

62. Bowers, *supra* note 59, at 1689.

63. *Id.* at 1690.

64. *Id.*

If we take one step back, none of this is hard to understand. Evaluating the normative valence of charging decisions is difficult. It means second-guessing the decisions of law enforcement officers, which poses interpersonal and political challenges.<sup>65</sup> Coercive tactics that ensure inexpensive and riskless guilty pleas, moreover, mean that prosecutors rarely confront the personal or political costs of losing a case.<sup>66</sup> It is not difficult to grasp why the practices described above—and others like them—are in the private interests of prosecutors.

Take one more step back and the puzzle comes into focus. Of course prosecutors have private interests that sometimes diverge from the interests of their principals. All agents do.<sup>67</sup> But that is precisely where one expects professional rules and norms to come to the fore, as they do in countless other contexts where professionals' personal interests deviate from their profession's announced values. This is why ethical appellate judges don't trade votes,<sup>68</sup> why ethical doctors don't prescribe controlled substances for family members,<sup>69</sup> and why ethical lawyers don't split fees with nonlawyers.<sup>70</sup> Professional norms and ethical rules place those practices off-limits, even though judges, doctors, and lawyers would presumably prefer (at least occasionally) to engage in them. But despite prosecutors' heralded duty to seek justice, no professional norm or ethical rule makes the unjust practices discussed above out-of-bounds. Why not?

### B. *Why Being Lawyers Makes It Harder for Prosecutors to Do Justice*

We saw in Part I.A that American prosecutors are duty-bound to do justice, yet they routinely engage in unjust practices. This Part explains why the legal profession's ethical rules and cultural norms don't intervene.

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65. See *id.* at 1700 (describing prosecutors and law enforcement officers as “teammates,” such that a “smoothly operating prosecution office depends upon a functional relationship” between them).

66. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2472 (2004) (describing prosecutorial incentives to avoid trial losses).

67. See Keith N. Hylton, *Selling Out: An Instrumentalist Theory of Legal Ethics*, 34 GEO. J. LEGAL ETHICS 19, 21 (2021) (“[T]he incentives of principals and agents, like the incentives of any two people, will always diverge to some degree.”).

68. At least not explicitly. See Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2300 (1999) (“[O]ther forms of strategic behavior, such as stark vote trading across unrelated cases, are roundly condemned.”). *But see* Stephen J. Choi & G. Mitu Gulati, *Trading Votes for Reasoning: Covering in Judicial Opinions*, 81 S. CAL. L. REV. 735, 771 (2008) (presenting empirical results consistent with *implicit* trading).

69. AMA Council on Ethical & Jud. Affs., *AMA Code of Medical Ethics' Opinion on Physicians Treating Family Members*, AMA J. ETHICS (May 2012), <https://journalofethics.ama-assn.org/article/ama-code-medical-ethics-opinion-physicians-treating-family-members/2012-05> [<https://perma.cc/KAG5-K527>] (“Except in emergencies, it is not appropriate for physicians to write prescriptions for controlled substances for themselves or immediate family members.”).

70. See MODEL RULES OF PRO. CONDUCT r. 5.4 (AM. BAR ASS'N 1983) (prohibiting most fee splitting with nonlawyers).

Those rules and norms, Part I.B.1 contends, are aimed at solving a different problem—the relationship between lawyers and their clients.<sup>71</sup> The profession’s answer to that problem is the ethic of client control. It might be a good professional ethic for ordinary lawyers, who represent clients.<sup>72</sup> But prosecutors do not represent clients.<sup>73</sup> Subjecting them to an ethic of client control anyway is like a doctor giving insulin to a patient without diabetes.<sup>74</sup> That is because, as Part I.B.2 argues, the ethic of client control undermines the prosecutorial duty to do justice in two ways. The first, and more benign, is that it leads the legal profession to underregulate prosecutors.<sup>75</sup> The second, and more serious, is that client control is facilitated by a norm of moral neutrality that allows lawyers, including prosecutors, to discount questions of justice in their work.<sup>76</sup>

I should acknowledge at the outset that notwithstanding the ethic of client control, many prosecutors *do* interrogate the normative justifications of their actions. Most notably, the rise of progressive prosecutors is clear proof that prosecutors *can* center justice in their decisionmaking.<sup>77</sup> The federal *Justice Manual*, moreover, specifies nonlegal factors for prosecutors to consider before charging a defendant.<sup>78</sup> Federal prosecutors who take those factors seriously—and state prosecutors who work under and take seriously similar sets of factors—observe the duty to seek justice. My claim is not that prosecutors *never* treat justice as a constraint. It’s that discounting justice is permitted by the rules and even encouraged by the norms of the legal profession.

### 1. *Lawyers and Their Clients, Prosecutors and Their Sovereigns*

Notice that the predicament described in Part I.A is a classic principal-agency problem.<sup>79</sup> The “sovereign,” a political abstraction understood to

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71. See *infra* Part I.B.1.a.

72. On the other hand, it might not. See *infra* Part III.A.2.

73. See *infra* Part I.B.1.b.

74. See Jason McClure with editing by Barbara Goldberg & Paul Thomasch, *Vermont Nursing Assistant Accused of Insulin-Induced Murder*, 14 WESTLAW J. NURSING HOME, Feb. 10, 2012, at \*1 (“A Vermont nursing assistant has been charged with second-degree murder after allegedly injecting a healthy non-diabetic patient with insulin, sending the elderly woman into a coma, and using her credit card before she died 10 days later.”).

75. See *infra* Part I.B.2.a.

76. See *infra* Part I.B.2.b.

77. To be sure, not all self-described progressive prosecutors are on the same footing in this regard. See Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1438–46 (2021) (defining “prosecutorial progressive” and “anti-carceral” progressive prosecutors).

78. U.S. Dep’t of Just., Just. Manual § 9-27.230 (2022). On the history and scope of the Justice Manual (then titled the “United States Attorneys’ Manual”), see Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237, 271–72 (2017).

79. For an overview of principal-agent problems, see generally Kathleen M. Eisenhardt, *Agency Theory: An Assessment and Review*, 14 ACAD. OF MGMT. REV. 57 (1989).

have a taste for justice, is the principal.<sup>80</sup> Prosecutors are the agents.<sup>81</sup> Ideally, they too have a taste for justice, but they have a bevy of personal and parochial tastes as well, including reputation, leisure, job security, power, political opinions, personal relationships, and compensation.<sup>82</sup> This is a principal-agent *problem* because the principal's interest in justice will, at times, diverge from the agent's interests. When prosecutors prioritize their own interests over justice, it is a form of self-dealing. The problem is compounded by the fact that a "sovereign" is not the sort of principal that can monitor its agent's activities in any straightforward sense.<sup>83</sup>

A different (but no less classic) principal-agency problem is the foundation for much of legal ethics and the culture of lawyering.<sup>84</sup> In this iteration, clients are the principals and lawyers the agents. Just as with prosecutors and their sovereigns, lawyers inevitably have personal and parochial interests (leisure, compensation, political views, reputation, etc.) that sometimes diverge from the interests of their clients. The legal profession's rules and norms aim to prevent and punish self-dealing by lawyers at clients' expense, and their starting point is the principle of client control. This section describes that principle, its applicability to ordinary lawyers, and its inapplicability to prosecutors.

*a. The Principle of Client Control*

By "client control," I mean the principle that a lawyer's client is responsible for making the most important normative decisions that arise in the course of a lawyer's work on their behalf, especially decisions about the

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80. See *supra* notes 31–33 and accompanying text; see also Fish, *supra* note 21, at 1450–51 (questioning whether sovereign really does have such a preference).

81. On prosecutors and the problem of agency control, see Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 963 (2009) ("Prosecutors are agents who imperfectly serve their principals (the public) and other stakeholders (such as victims and defendants)."); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 49–50 (1988) (evaluating agency control problems inherent in both prosecution and criminal defense); and Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 300 (1983) ("There is, in the language of economics, an 'agency cost' problem.").

82. See Bibas, *supra* note 66, at 2471 (cataloguing sources of prosecutorial self-interest).

83. See Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 805, 822 (2020) (describing difficulties of "cofiduciary monitors" of prosecutors); Easterbrook, *supra* note 81, at 300 (noting ineffectiveness of electoral mechanisms to discipline prosecutors).

84. See David Luban, *Fiduciary Legal Ethics, Zeal, and Moral Activism*, 33 GEO. J. LEGAL ETHICS 275, 276 (2020) ("The client-lawyer relationship, it is often said, originates in agency law because lawyers are agents of their clients."); Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105, 1108 (1995) ("The purpose of the rules regarding professional responsibility and legal ethics that govern lawyers is to lower the cost of the principal-agent relationship.").



objectives of the representation. Client control (in this sense<sup>85</sup>) is the prime directive of American lawyering.<sup>86</sup> Zeal for and loyalty to the client are sometimes given top billing,<sup>87</sup> but, as Daniel Markovits observes, “zealous loyalty[] requires an object.”<sup>88</sup> Establishing the object is clients’ work.

The ethic of client control is written into positive law and enshrined in norms. Limited by a lawyer’s obligation not to break the law or commit fraud, Model Rule of Professional Conduct 1.2 provides that a lawyer “shall abide by a client’s decisions concerning the objectives of representation.”<sup>89</sup> A complex ethical structure surrounds the core precept. It includes familiar ideas like zeal and loyalty,<sup>90</sup> but extends beyond them to more controversial norms like nonaccountability—the idea that lawyers are not morally accountable for their professional activities on behalf of clients.<sup>91</sup> Yet client control is the point of departure. To be a “good lawyer” in the American legal profession means to be skilled at applying legal tools to help clients achieve *their* goals.<sup>92</sup> As the Code of Conduct for the American Trial Lawyers’ Foundation puts it: “Lawyers serve the public interest by undivided fidelity to each client’s interests *as the client perceives them*.”<sup>93</sup>

Before we turn to how client control applies (or does not) to prosecutors, three qualifications are in order. First, the ethic of client control does not imply that lawyers are *indifferent* to clients’ normative decisions. For one thing, lawyers can play an important role in helping clients make those

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85. Confusingly, the phrase “client control” is sometimes used for the opposite meaning, *i.e.*, a lawyer’s control *over* the client. See MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS § 3.02 (5th ed. 2016) (noting usage). To be clear, I mean “client control” in the sense of control *by* a client, not control *of* a client.

86. See MARKOVITS, *supra* note 21, at 3 (explaining that the principle of “client control” requires that lawyers “repress personal impressions of what is true or fair in deference to their clients’ interests and instructions”).

87. See, *e.g.*, 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.2:102, at 24 (2d ed. 1990) (observing that loyalty is the “single most fundamental principle of the law of lawyering”); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060–61 (1976) (describing the “traditional conception” of a lawyer’s role: “a professional devoted to his client’s interests”).

88. MARKOVITS, *supra* note 21, at 28.

89. MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS’N 1983).

90. See MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS’N 1983) (“A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”).

91. See MARKOVITS, *supra* note 21, at 80–81 (defining nonaccountability).

92. Cf. Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1211 (2003) (noting that corporate “counselors can and should be as creative as any other good lawyers in devising means to accomplish clients’ objectives”); MARKOVITS, *supra* note 21, at 94 (“But the good lawyer, acting in her professional capacity, adopts the first-personal moral ambition to take her client’s part and, steadfastly suppressing her own ego, to speak her client’s mind.”).

93. See DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 50 (2000) (emphasis added) (quoting the Code of Conduct).

decisions.<sup>94</sup> For another, client control applies only after a lawyer has agreed to represent a client.<sup>95</sup> In deciding whether to represent a client, or whether to work for an organization with an existing client base, lawyers are professionally (though not necessarily financially) free to consider whether the potential clients' objectives align with their view of justice.<sup>96</sup> A lawyer committed to environmental justice, for instance, would be well within the bounds of professional norms to pass on a job with a law firm that represents fossil fuel interests.<sup>97</sup>

The second qualification is that client control is imperfectly realized. In some contexts, like when a lawyer represents a litigation class, even identifying the client with precision can be difficult.<sup>98</sup> In other scenarios, lawyers may prioritize their own interests over those of their clients, or they may be inattentive to their clients' objectives. Darryl Brown observes that norms of practice themselves can "compromise client autonomy and lead

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94. Lawyers often advise on nonlegal dimensions of client decisions, including on matters of morality, politics, finance, or public relations. See MARKOVITS, *supra* note 21, at 30 (explaining that lawyers are "permitted, and perhaps even encouraged" to give such advice); see also Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527, 540 (1994) ("A good lawyer will assist a client in articulating his interests and ordering his objectives, and help the client see a problem through different frames.").

95. FREEDMAN & SMITH, *supra* note 85, § 4.02. Some commentators assert that lawyers have "no choice regarding the acceptance of a client or a cause." *Id.* (quoting David Dudley Field and George Sharswood). While this may have once been a prevailing norm, it does not "represent either professional practice or professional rules" today. *Id.*

96. See Fried, *supra* note 87, at 1062 ("[O]nce the client has been chosen, the professional ideal requires primary loyalty to the client whatever his need or situation."); FREEDMAN & SMITH, *supra* note 85, § 4.02 (similar). Court appointments are an important exception to this rule. See MODEL RULES OF PRO. CONDUCT r. 6.2 cmt. 1 (AM. BAR ASS'N 1983) (noting that "lawyer's freedom to select clients" is "qualified").

97. The line between the decisions belonging to clients and the decisions belonging to lawyers has shifted over time, but in the direction of client control. Compare CANONS OF PRO. ETHICS Canon 24, at 581–82 (AM. BAR ASS'N 1908) (declaring that lawyers "must be allowed to judge" certain "incidental matters pending the trial" that do not affect the "merits of the cause" or work "substantial prejudice to the rights of the client"), with MODEL CODE OF PRO. RESP. Canon 7-7 (AM. BAR ASS'N 1969) (noting that "certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the right of a client, a lawyer is entitled to make decisions on his own" but "otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer"), and MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 1983) (drawing a line between the objectives of representation and the "means by which they are to be pursued," and declaring that lawyers "shall abide" a client's determination of objectives and "shall consult" with clients as to the means). For more on the current approach, see *infra* note 101.

98. See, e.g., Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1266–67 (2017) (describing problems of client identification in multi-district litigation); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982) (explaining difficulties of describing objectives of a litigation class). Even while the conceptual issues are complicated, though, it's clear that class counsel and lawyers in multi-district litigation are not free to independently pursue their personal vision of justice, which distinguishes them from chief prosecutors. See Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 447–48 (2000) (explaining that lawyers in class and multi-district litigation "do not doubt that their role gives them some responsibility for the well-being of the entire group whose interests they are assigned to protect").

the lawyer to mediate client interests with other interests.”<sup>99</sup> Client control is thus neither fully conceptualized nor enforced.<sup>100</sup>

The final qualification is that the ethic of client control is controversial. It demands that lawyers defer to clients’ normative decisions about the ends of the representation and sometimes about the means.<sup>101</sup> As clients’ decisions will inevitably clash with lawyers’ personal moral views, client control at times requires lawyers to do things that are, by their own reckoning, immoral. Can a lawyer justify otherwise immoral conduct because it arises in the course of representing a client? The question has preoccupied philosophical legal ethics for almost fifty years,<sup>102</sup> and the profession’s conventional answer—an emphatic “yes”—is unpopular among legal ethicists.<sup>103</sup> I will return to the controversy below.<sup>104</sup>

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99. Darryl K. Brown, *Criminal Procedure Entitlements, Professionalism, and Lawyering Norms*, 61 OHIO ST. L.J. 801, 836 (2000).

100. Cause lawyering poses an especially interesting challenge to the ethic of client control. At times, conflicts can emerge between causes and clients. See Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1227 (2005) (“For all cause lawyers there exists, at least theoretically, a tension between serving the individual client and serving the social cause.”). One school of thought suggests that it may sometimes be appropriate for a lawyer to prioritize a broad cause over clients’ immediate interests. See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 355–57 (1988). On the other hand, Derrick Bell explained in a classic article that the breakdown of client control in school desegregation cases in the decades after *Brown v. Board of Education* pitted the views of elite NAACP lawyers against the interests of the poor and middle-class Black students and parents who they were supposed to represent. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 482–511 (1976). So the issue is contested. And it is particularly salient for indigent criminal defense lawyers who identify as cause lawyers because they have little or no ability to pick clients whose perspectives align with their cause. See Etienne, *supra*, at 1243–44 (“The problem faced by these lawyers, particularly the public defenders, is that unlike most impact litigation lawyers, they do not handpick their clients.”). Yet there too conflicts can arise between the interests of a particular defendant and those of defendants generally, leaving defense attorneys in a quandary. See *id.* at 1244–47; see also Daniel Epps & William Ortman, *The Defender General*, 168 U. PA. L. REV. 1469, 1486–87 (2020). Whether the legal profession should exempt cause lawyering from ordinary ethical prescriptions—in general or in criminal defense—is a fascinating question, but well beyond the scope of this Article.

101. The Model Rules of Professional Conduct direct lawyers to “consult” with clients about the “means” by which the client’s goals will be pursued. MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS’N 1983). The Rule’s commentary elaborates that clients “normally defer” to lawyers “with respect to technical, legal and tactical matters,” and lawyers “usually defer” to clients on questions of expense and “concern for third persons who might be adversely affected.” *Id.* at r. 1.2 cmt. 2. The commentary notes that the Rule intentionally “does not prescribe how . . . disagreements” on such matters should be resolved, though if a disagreement is irreconcilable, the lawyer may withdraw or the client may fire the lawyer. *Id.*

102. For an excellent intellectual history of philosophical legal ethics, see David Luban & W. Bradley Wendel, *Philosophical Legal Ethics: An Affectionate History*, 30 GEO. J. LEGAL ETHICS 337 (2017).

103. See *infra* note 259 and accompanying text.

104. See *infra* Part III.A.2.

*b. Client Control and Prosecution*

Client control is *an* answer—albeit an imperfect one—to the principal-agent problem at the heart of ordinary lawyering. But is it an answer to the principal-agent problem at the core of prosecuting?

No, and the reason is that the “sovereign” is not a prosecutor’s “client” in the relevant sense. Indeed, prosecutors have no clients in the way that matters.<sup>105</sup> Because it is often suggested that prosecutors do have clients (albeit not typical ones), we need to return to first principles.<sup>106</sup>

As a preliminary matter, prosecutors do not represent any natural person.<sup>107</sup> Crime victims are not prosecutors’ clients.<sup>108</sup> Given our long-standing tradition of public (rather than private) prosecution, the rule could hardly be otherwise.<sup>109</sup> Nor are law enforcement officials prosecutors’ clients.<sup>110</sup>

That said, the fact that prosecutors lack human clients does not mean that prosecutors don’t have clients. Many lawyers represent organizational clients, like corporations. When they do, they take their directions (in all but exceptional circumstances) from a person or a group of people designated

105. See, e.g., CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 13.10.1, at 759 (1986) (“The office of prosecutor can best be conceptualized as a lawyer with no client but with several important constituencies.”); Irene Oritseweyinmi Joe, *The Prosecutor’s Client Problem*, 98 B.U. L. REV. 885, 888 (2018) (“A significant point, however, is that the prosecutor does not have a ‘client’ in the traditional sense of the word.”); Fish, *supra* note 21, at 1448 (“[P]rosecutors do not have clients, at least not in any normal sense.”); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1697 (2000) (similar).

106. See *infra* notes 115–19 and accompanying text.

107. Bruce A. Green & Rebecca Roiphe, *May Federal Prosecutors Take Direction From the President?*, 87 FORDHAM L. REV. 1817, 1828 (2019) (“[Prosecutors’] clients are . . . not flesh-and-blood people . . .”).

108. *Id.*

109. Public prosecutors appeared early in colonial America. In 1704, the Connecticut General Assembly enacted a statute providing for a “sober, discreet and religious person” to be appointed in each county to “prosecute and implead in the lawe all criminall offenders.” CHARLES J. HOADLY, *THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, FROM AUGUST, 1689, TO MAY, 1706*, at 468 (1868). By 1776, private prosecution (the English tradition) had been “virtually eliminated,” as Joan Jacoby observes. JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 19 (1980). But not everywhere. In some jurisdictions, private prosecution existed alongside public prosecutors into the nineteenth century. See ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE, PHILADELPHIA, 1800–1880*, at 37–78 (1989) (demonstrating prevalence of private prosecution in nineteenth-century Philadelphia). Scholars disagree about exactly when—and for that matter why—public prosecution displaced private prosecution. See Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 787 (2016) (noting historical uncertainty).

110. See Joe, *supra* note 105, at 899–900. Though officers and agents are public officials, and thus their control of prosecution would be consistent with the principle of public prosecution, it would be inconsistent with the prosecutor’s monopoly (within the government team) over criminal adjudication. See Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 758 (2003) (noting “bilateral monopoly” of federal prosecutors and law enforcement).

to act on the organization's behalf.<sup>111</sup> The person or group provides, in the words of Model Rule 1.2, the client's "decisions concerning the objectives of representation." So should we understand prosecutors as lawyers for organizational clients? Again, the answer is no.<sup>112</sup>

Take the federal system. Aside from prosecutors themselves (up to and including the attorney general), the only official who might plausibly be capable of making decisions in criminal cases on behalf of the federal government is the president. It's possible to imagine a system in which presidents did that. But that is not our system. As prosecutorial ethics scholars Bruce Green and Rebecca Roiphe explain: "[H]istory and policy strongly suggest that, as a general matter, the Attorney General and subordinate prosecutors may not accept direction from the President but must make the ultimate decisions about how to conduct individual investigations and prosecutions . . . ."<sup>113</sup> Likewise state prosecutors do not generally take their directions from governors.<sup>114</sup>

The standard solution to the conundrum of the prosecutor's client is to assign the job to a political construct.<sup>115</sup> Hence has the "sovereign"<sup>116</sup> (or, alternatively, the "public,"<sup>117</sup> or the "people who live in the prosecutor's jurisdiction"<sup>118</sup>) been offered as prosecutors' clients.<sup>119</sup> That makes sense as a matter of political representation,<sup>120</sup> and it is a convenient shorthand. But the sovereign is an abstraction without a chief executive or a board of

111. See MODEL RULES OF PRO. CONDUCT r. 1.13(a) (AM. BAR ASS'N 1983) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."). The rule incorporates a limited exception for circumstances in which a lawyer knows that the "authorized constituents" are not acting in the best interests of the organization. *Id.* at r. 1.13(b)–(c).

112. Green, *supra* note 2, at 634 (describing difference between prosecuting and representing organizational clients: "the prosecutor fills both roles, as lawyer and as government representative").

113. Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 75 (2018).

114. See *id.* at 13 ("Today, in most states, public prosecutors are independently elected and do not answer to the Governor.").

115. See Green & Roiphe, *supra* note 107, at 1828 ("[Prosecutors'] clients are always abstractions—a sovereignty or the public at large . . .").

116. Green, *supra* note 2, at 626; Lissa Griffin & Ellen Yaroshesky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 304–05 (2017).

117. Nancy J. Moore, *Intra-Professional Warfare Between Prosecutors and Defense Attorneys: A Plea for an End to the Current Hostilities*, 53 U. PITT. L. REV. 515, 524 n.60 (1992).

118. Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 563 (2005).

119. See Russell M. Gold, "Clientless" Prosecutors, 51 GA. L. REV. 693, 695 & n.2 (2017) (describing prosecutors as "clientless" because "as a practical matter" they can "operate as though they are clientless," but contending that they have clients in the form of "diffuse entities without a decisionmaking structure").

120. See *supra* notes 31–33 and accompanying text. *But see* Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 272 (2019) (critiquing the view that when "the public is situated as a force opposed to the defendant, prosecutors become the central representatives of the public in the courthouse").

directors. Unlike individuals and organizations, the sovereign cannot do a client's essential job in a lawyer-client relationship—making the critical normative decisions.<sup>121</sup> In the way that matters most, then, sovereigns are simply not clients.

We thus arrive at the critical discontinuity between ordinary lawyering and prosecuting. The ethics and norms of ordinary lawyering grow out of the soil of client control. Because prosecutors have no clients, client control is irrelevant to what they do.

What remains is to see if the discontinuity makes a difference. That will be the work of the next subsection. Before turning to it, we should do a quick plausibility check on the analysis so far. If prosecuting and ordinary lawyering are as different as I have suggested, one might expect to see intraprofessional fissures between prosecutors and other lawyers. Consider, in that light, the words of working prosecutors.<sup>122</sup> In extensive interviews, Ronald Wright and Kay Levine found that a sizeable minority of the state prosecutors they spoke with were motivated by an “absolutist” commitment to “rules, structure, and hardened categories of right and wrong.”<sup>123</sup> The “most extreme version of the absolutist narrative,” Wright and Levine explained, poses prosecutors and lawyers as pursuing “entirely different professions, where prosecution is noble and law is, well, not.”<sup>124</sup> “[W]hen people ask me, I’m a prosecutor, not a lawyer,” one prosecutor told them.<sup>125</sup> “My wife wouldn’t have married a lawyer,” another said.<sup>126</sup> Yet another remarked that: “I think in general attorneys are pretentious, snobbish, holier-than-thou people.”<sup>127</sup> These comments seem to suggest that pursuing “justice” is virtuous, while serving a client is not.<sup>128</sup> While they were perhaps meant to be humorous, they suggest real differences between

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121. See Fish, *supra* note 21, at 1448 (“The prosecutor is effectively a principal in the case . . . .”); see also Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1577 (“[T]he prosecutor is not only a lawyer for the government but also a government official who makes the decisions on behalf of the government that would ordinarily be made by the client.”).

122. Intraprofessional fissures also arise at the policymaking level. See Moore, *supra* note 117, at 519–30 (describing “intra-professional warfare” in the late 1980s and early 1990s between the Department of Justice and the American Bar Association about whether the ethical rule against lawyers contacting represented parties should apply to federal prosecutors); see also Green, *supra* note 51, at 875 (describing anti-regulatory attitudes and efforts of some prosecutors).

123. Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667, 1681–85 (2018).

124. *Id.* at 1684.

125. *Id.* at 1685 (quoting prosecutor identified as Harris 1071).

126. *Id.* at 1684 (quoting prosecutor identified as Gill 116).

127. *Id.* at 1685 (quoting prosecutor identified as Dean 1625).

128. The quoted prosecutors certainly do not speak for all prosecutors. See *id.* at 1687–88 (quoting prosecutors who see themselves as part of a unified profession with defense lawyers).

prosecutors and ordinary lawyers. In that, these prosecutors are on to something.<sup>129</sup>

## 2. *Doing Justice in the Undifferentiated Legal Profession*

The legal profession's answer to the principal-agent problem that confronts lawyers—the ethic of client control—does not speak to the principal-agent problem that impacts prosecutors. The final task for this Part is to evaluate whether that discontinuity matters. This section contends that it does. For two reasons, the ethic of client control undermines the prosecutorial duty to do “do justice.” The first concerns the legal profession's existing formal rules and disciplinary structures. The second, and more important, is about professional norms.

### a. *The Underregulation of Prosecutors*

Let's begin with rules of legal ethics. Consistent with the principle of client control and the principal-agent problem that motivates it,<sup>130</sup> the rules that govern lawyers are hyper-focused on the relationship between lawyers and their clients (and prospective clients). Thus, lawyers must act diligently and promptly “in representing a client,”<sup>131</sup> must protect information “relating to the representation of a client,”<sup>132</sup> may not “represent a client” with a concurrent conflict with another client,<sup>133</sup> and so on and so forth. At the same time, the rules say almost nothing about the relationship between prosecutors and sovereigns. They make no serious attempt to enforce the prosecutor's duty to do justice or its corollary, the prosecutor's duty to avoid doing *injustice*.<sup>134</sup> The only provision of the Model Rules of Professional Conduct that speaks specifically to prosecutors' work—Model Rule 3.8—

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129. For a more temperate take expressing a similar sentiment, see Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 669 (“I must confess that I identified myself, at least professionally, as a prosecutor. I did not consider myself a lawyer as such; lawyers were people who represented specific clients. I viewed myself as having a very different role, a view shared by many of my prosecutor colleagues.”).

130. See *supra* Part I.B.1.a.

131. MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 1983). While the Model Rules are not themselves law, every state but one (California) has adopted them. See *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR. ASS'N (Mar. 28, 2018), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/) [https://perma.cc/FVH3-BNMH].

132. MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 1983).

133. MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 1983).

134. See Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 725 (2001) (“Many of the rules of professional conduct . . . are . . . altogether inapplicable, or barely applicable, to full-time prosecutors.”); Anthony C. Thompson, *Retooling and Coordinating the Approach to Prosecutorial Misconduct*, 69 RUTGERS U. L. REV. 623, 651 (2017) (observing that “professional rules are not tailored to the prosecutor's unique set of responsibilities”).

is a hodgepodge of small-bore principles falling far short of a guide to ethical prosecution.<sup>135</sup>

The anemic condition of Rule 3.8, while problematic, makes sense in light of the legal profession's ethic of client control. "Serve your client" is a corollary of client control. "Do justice" is orthogonal at best. The profession's formal rules thus leave prosecutors adrift, neither telling them how to do justice nor credibly threatening sanctions if they do otherwise.

Of course, some ethical rules *do* apply to prosecutors.<sup>136</sup> Yet studies have consistently found that prosecutors almost never face disciplinary action for misconduct.<sup>137</sup> This lethargy is troubling in itself,<sup>138</sup> as it suggests that the rules are seriously underenforced. It is even more perverse because courts cite professional regulation as a reason to immunize prosecutors from civil liability.<sup>139</sup> Yet it is consistent with the legal profession's fixation on the lawyer-client relationship.

While lawyer discipline ostensibly serves several purposes,<sup>140</sup> in practice most disciplinary cases are about lawyers who have, by neglect or malice, failed to serve their clients.<sup>141</sup> This focus leaves conduct harming third parties mostly untouched, and that goes for ordinary lawyers as well as for prosecutors. Hence one study found that despite widespread discovery abuses in federal civil litigation, "discipline referrals and the imposition of

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135. See MODEL RULES OF PRO. CONDUCT r. 3.8. (AM. BAR ASS'N 1983). Subsection (a), for instance, which prohibits prosecutors from prosecuting without probable cause, merely restates the typical charging standard. See William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511, 543–46 (2016) (noting prevalence of probable cause standard in both indictment- and information-based charging systems).

136. See Zacharias, *supra* note 134, at 739 (listing rules applicable to prosecutors).

137. See *id.* at 722 n.3 (collecting sources); see also Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143, 144 (2016) ("Studies have concluded that prosecutors are rarely disciplined, even when a judge presiding over a criminal case finds that the prosecutor acted improperly.").

138. See Green & Levine, *supra* note 137, at 144–45 ("Disciplinary authorities' deferential treatment of prosecutors, though perhaps subject to explanation, remains, in the view of many commentators, also subject to criticism, if not altogether unjustifiable."); see also Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 277 (2007) (exploring "the legal profession's failure to hold prosecutors accountable for misconduct and other ethical violations").

139. See *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) ("[A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers."); see also DAVIS, *supra* note 42, at 128 (arguing that pushing prosecutorial regulation to state bars has "proven totally ineffective").

140. See Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 693–98 (2003) (identifying four such purposes).

141. See Jennifer Gerarda Brown & Liana G.T. Wolf, *The Paradox and Promise of Restorative Attorney Discipline*, 12 NEV. L.J. 253, 301 (2012) ("The most common causes of attorney discipline—neglect and failure to communicate—are direct and disrespectful attacks on the attorney-client relationship.").



discipline for document discovery misconduct . . . are exceedingly rare.”<sup>142</sup> Prosecutorial misconduct visits harm primarily on third parties, so it is no surprise that professional regulators leave it almost entirely alone.

Commentators sometimes suggest that professional regulators should pursue disciplinary cases against prosecutors more aggressively.<sup>143</sup> While that view is understandable, the problem is that the justice-centered regulation that prosecution requires is just different than the client-centered regulation that the undifferentiated legal profession offers.

*b. A Permission Structure for Injustice*

The deeper problem pertains to the legal profession’s norms rather than its formal rules. The ethic of client control encourages (though, importantly, it does not affirmatively obligate) lawyers to privilege tactical concerns in litigation and negotiation over questions of justice. Even more than underregulation, that destabilizes prosecutors’ duty to do justice.

As we have seen, the ethic of client control demands that a lawyer defer to their client’s normative views as to the ends of the representation (*i.e.*, the goals) and sometimes the means (*i.e.*, the tactics).<sup>144</sup> That deference is facilitated by a “neutrality” norm, *i.e.*, the view, as Bradley Wendel defines it, that a “lawyer should not *consider* the morality of the client’s cause, nor the morality of particular actions taken to advance the client’s cause, as long as both are lawful.”<sup>145</sup> While the neutrality norm is controversial and many legal ethicists repudiate it, they acknowledge that it is the “dominant” or “standard” view in the profession.<sup>146</sup> I will turn to the normative debate later.<sup>147</sup> For now, my aim is descriptive.

The logic goes something like this: Lawyers who are neutral about the justice of their clients’ ends and means, or who adopt those ends and means as their own, can serve their client’s interests without discomfoting conflict

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142. Paula Schaefer, *Attorneys, Document Discovery, and Discipline*, 30 GEO. J. LEGAL ETHICS 1, 20 (2017).

143. See Bruce A. Green, *Prosecutorial Ethics in Retrospect*, 30 GEO. J. LEGAL ETHICS 461, 478 (2017) (“In the academic literature on the regulation of prosecutors, it is virtually a truism that disciplinary authorities do not take prosecutorial misconduct seriously enough.”).

144. See *supra* notes 97 and 101.

145. W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* 6 (2010) (emphasis added).

146. See *id.* (incorporating neutrality norm in the “Standard Conception” of legal ethics); DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 9 (2007) (explaining that “standard” view requires neutrality from lawyers toward clients); RHODE, *supra* note 93, at 51 (describing “the view of lawyers as morally neutral advocates” as increasingly “dominant”); Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 3 (Austin Sarat & Stuart Scheingold eds., 1998) (noting the “dominant understanding of lawyering as properly wedded to moral neutrality”).

147. For the normative debate as to ordinary lawyering, see *infra* notes 259–75 and accompanying text. As to prosecuting, see *infra* notes 157–60 and accompanying text.

with their personal morality.<sup>148</sup> The neutrality norm thus frees lawyers to focus on technical aspects of legal problems.<sup>149</sup> It permits them to strategize about whether an approach will succeed (be that in a courtroom or a boardroom) instead of brooding about whether the approach is just.<sup>150</sup>

For better or worse, neutrality is baked into traditional American legal education.<sup>151</sup> “[M]ost [law] students,” the sociologist Robert Granfield observed, “replace a justice-oriented consciousness with a game-oriented consciousness.”<sup>152</sup> In a pioneering work of linguistic anthropology, Elizabeth Mertz showed how the language used in first-year law school classrooms accomplishes the task.<sup>153</sup> The “pragmatic reading of texts,” Mertz explained, “generally require[s] students to suspend, at least temporarily, their judgments about the emotional or moral aspects of events” in the assigned cases.<sup>154</sup> “Whether someone was right or wrong, moral or immoral, reprehensible or ethical,” Mertz elaborated, “is not part of the central structure of this pragmatic . . . approach to reading.”<sup>155</sup> Eventually, students’ reading of legal texts comes “unmoored from ethical and social identities” and “attach[es] to new legal roles as adversarial

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148. See Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 9 (1975) (“[F]or most lawyers, most of the time, pursuing the interests of one’s clients is an attractive and satisfying way to live in part just because the moral world of the lawyer is a simpler, less complicated, and less ambiguous world than the moral world of ordinary life.”); see also Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 59 (2003) (“Neutrality demands that the lawyer serve her client irrespective of her own moral scruples about the client’s goals . . .”).

149. See Michael Hatfield, *Professionalizing Moral Deference*, 104 NW. U. L. REV. COLLOQUY 1, 6 (2009) (“We are professionalized to believe that moral deference is simply what lawyers do, as if it were a self-evident, natural principle that pardoned our moral misgivings.”); see also Robert K. Vischer, *Professionalizing Moral Engagement (A Response to Michael Hatfield)*, 104 NW. U. L. REV. COLLOQUY 33, 37 (2009) (contrasting Hatfield’s conception of “moral deference” with “moral disengagement,” meaning “the tendency of lawyers to disclaim any responsibility for the moral dimension of the representation”).

150. See Wasserstrom, *supra* note 148, at 6 (“Provided that the end sought is not illegal, the lawyer is, in essence, an amoral technician whose peculiar skills and knowledge in respect to the law are available to those with whom the relationship of client is established.”).

151. See WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 24 (2007) (“[T]he tacit teaching of the pedagogy is that legal encounters are of a different order than everyday moral behavior.”); Hatfield, *supra* note 149, at 5 (“We were taught to override our moral intuition in our first year of law school.”); Daisy Hurst Floyd, *Lost Opportunity: Legal Education and the Development of Professional Identity*, 30 HAMLIN L. REV. 555, 558 (2007) (“In legal education we create lawyers who believe that their role in the administration of justice is almost entirely cognitive and that their own ethical values are irrelevant or improper to bring to the arena of justice.”).

152. ROBERT GRANFIELD, *MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND* 52 (1992).

153. See ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* (2007).

154. *Id.* at 120.

155. *Id.*

speakers,” substituting “an amoral attachment to legal form for a situated sense of loyalty to substantive ends and values.”<sup>156</sup>

A neutrality norm *might* be justified for ordinary lawyers working for clients, though that is contested.<sup>157</sup> Regardless, there is no reasonable debate about neutrality when it comes to prosecuting, because doing justice *requires* moral judgment.<sup>158</sup> Yet like other lawyers, prosecutors have been socialized to center tactics in professional decisionmaking.<sup>159</sup> To do justice, lawyer-prosecutors must elude their professional training. That is a difficult task at best.<sup>160</sup> Some prosecutors—perhaps some entire offices—accomplish it.<sup>161</sup> The fact remains that membership in the legal profession allows prosecutors to sideline necessary questions about whether their ends and means are just.

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156. *Id.* at 214.

157. The debate is canvassed *infra* at notes 270–75 and accompanying text.

158. Doing justice requires moral judgment because justice is a “moral conception worked out for a specific kind of subject.” JOHN RAWLS, *POLITICAL LIBERALISM* § 2, at 11 (expanded ed., 2005). Prosecuting requires moral judgment at least in the context of American criminal justice, which lacks a principle of mandatory prosecution. *See* Fish, *supra* note 21, at 1451–53.

159. *See* Melilli, *supra* note 129, at 686 (observing that “individuals enter into service as prosecutors” with the “indoctrination” of the “perspective of an advocate unconcerned about the discovery of truth”). Only about 10% of law schools have in-house prosecution clinics. *See* Olwyn Conway, “How Can I Reconcile with You When Your Foot Is on My Neck?”: *The Role of Justice in the Pursuit of Truth and Reconciliation*, 2018 MICH. ST. L. REV. 1349, 1395 n.216 (“As of 2018, out of 203 ABA-approved law schools, thirty-six have prosecution clinics, but only nineteen appear to have an ‘in-house’ clinic, as opposed to an externship agreement with a District Attorney Office supplemented by a seminar class.”). Just a handful offer a nonclinical course dedicated to prosecutorial ethics. *See* Jamien A. Arvie, *Prosecutorial Misconduct: When Justice Is Seen as a Chess Game, the Pawns of Professional Responsibility and Ethical Standards Are Sacrificed*, 40 S.U. L. REV. 185, 191 (2012) (noting a law school offering a course “targeted at training students specifically in the area of prosecutorial ethics” but explaining that “[u]nfortunately, most law schools do not offer such a course”). Aside from those law students fortunate enough to find their way into a good prosecution clinic or ethics course, most aspiring prosecutors receive formal instruction on the prosecutor’s role only as the subject comes up in general courses on professional responsibility and criminal law and procedure. It’s unrealistic to expect those courses to fully explore the idea that a prosecutor’s work involves moral and ethical considerations that are fundamentally different from those of ordinary lawyers. *See* Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1533 (2000) (“Some ethics courses are taught ‘contextually’ and focus on issues of prosecutorial discretion, but do these professional responsibility classes sufficiently prepare a future prosecutor to decide whether money laundering is an *appropriate* addition to a mail fraud charge in a particular case?” (footnote omitted)); *see also* Lara A. Bazelon, *Hard Lessons: The Role of Law Schools in Addressing Prosecutorial Misconduct*, 16 BERKELEY J. CRIM. L. 391, 409 n.60 (2011) (“[P]rofessional responsibility and ethics classes do focus on roles and responsibilities played by counsel, but given the breadth of the subject matter covered in these courses, it is unlikely that prosecutorial misconduct is given more than cursory treatment, if it is given any treatment at all.”).

160. *See* Wasserstrom, *supra* note 148, at 15 (explaining factors that make “the role of professional a difficult one to shed”); *see also* JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 59–65 (1989) (exploring role of professional norms on behavior); Martha Finnemore, *Are Legal Norms Distinctive?*, 32 N.Y.U. J. INT’L L. & POL. 699, 703–04 (2000) (“Organizational sociology has long understood that professional norms can shape organizational behavior.”).

161. *See supra* notes 77–78 and accompanying text.

To be sure, prosecutors are typically *not* neutral about the moral value of their line of work. As Nicole Gonzalez Van Cleve observes, “[p]rosecutors see themselves as the ‘good guys’—doing what is morally ‘right’ in society.”<sup>162</sup> But the neutrality norm *is* reflected in the “win-at-all-costs” attitude that finds a home in some offices, as reported by former prosecutors. One told Mark Baker that “[i]t really came down ultimately to getting a plea or winning a trial so I could go home that day and say, ‘Okay, I won today.’”<sup>163</sup> Or, as another explained, “It was just a matter of winning.”<sup>164</sup> Or this, from former federal prosecutor Brett Tolman: “Sadly, this . . . ‘win at all costs’ mentality is accurate and has produced a new measurement for success: the number of convictions and the lengths of sentences.”<sup>165</sup>

These attitudes, like the practices we encountered in Part I.A,<sup>166</sup> make little sense from the vantage point of “doing justice.” But they are easily recognizable as the statements and actions of hard-charging lawyers.<sup>167</sup> They are just the attitudes and practices one would expect to hear and see from professionals embedded in an ethic of client control that privileges tactics over justice.

## II. THE PROSECUTION BAR

If the undifferentiated American legal profession corrodes prosecutors’ duty to “do justice,”<sup>168</sup> we should differentiate it. That is what a prosecution bar could do. This Part makes the affirmative case for a prosecution bar. Part II.A contains the proposal’s mechanics. State prosecution boards, it explains, could be empowered to do three things: license lawyers as prosecutors, regulate them via rulemaking, and discipline them when things went awry. Part II.B then describes the proposal’s benefits. The most

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162. NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT 71 (2016); *see also* Laurie L. Levenson, *The Politics of Ethics*, 69 MERCER L. REV. 753, 753 (2018) (“Being told how to be ‘ethical’ is downright insulting for attorneys who already perceive themselves as wearing the white hat.”).

163. MARK BAKER, D.A.: PROSECUTORS IN THEIR OWN WORDS 79 (1999).

164. *Id.* at 47.

165. Brett L. Tolman, *Deterring Prosecutors from Abusive Behavior: A Former Federal Prosecutor’s View*, 58 U. LOUISVILLE L. REV. 415, 418 (2020); *see also* VAN CLEVE, *supra* note 162, at 70 (describing first trial win of a prosecutor’s career, which others in the office “commemorated . . . like macho frat boys losing their virginity”); Smith, *supra* note 6, at 389 (noting a “courthouse saying” that “[a]ny prosecutor can convict the guilty. It takes real talent to convict the innocent”).

166. *See supra* notes 46–64 and accompanying text.

167. *See* Wayne D. Brazil, *The Attorney as Victim: Toward More Candor About the Psychological Price Tag of Litigation Practice*, 3 J. LEGAL PRO. 107, 114 (1978) (arguing that “‘money’ and ‘winning’ are the primary motivations of a high percentage of the litigators who are most comfortable with their work and the current system of dispute resolution”); *see also* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 49 (1997) (“Like other litigators, prosecutors prefer winning to losing.”).

168. *See supra* Part I.B.

important is that a prosecution bar could adopt professional rules and norms that substitute an ethic of seeking justice for the ethic of client control. Finally, Part I.C identifies analogues to a prosecution bar domestically and abroad, including the patent bar.

### A. *The Proposal*

In broad strokes, the proposal is straightforward. Before lawyers appear on behalf of the government in criminal cases, they should be required to obtain a prosecutorial “endorsement” to their law license—in effect a second license—from a state “Board of Prosecution.”<sup>169</sup> The endorsement would be a supplement to (rather than a replacement of) the prosecutor’s license to practice law. Prosecutors would thus remain subject to all the ethical rules and disciplinary procedures governing lawyers, and they would face additional ethical rules and attendant procedures specific to prosecuting. All prosecutors would be lawyers, but not all lawyers would be eligible to work as prosecutors.

State prosecution boards are the centerpiece of the proposal.<sup>170</sup> They would have three primary functions: bringing lawyers into the prosecution bar, promulgating rules to govern the ethical practice of prosecution, and disciplining prosecutors who violated those rules. The functions are described in detail in the following subsections. Before we get there, a preliminary question: Who would (or should) serve on prosecution boards?

Authority to appoint members of state prosecution boards could fall to governors or state supreme courts, depending on the details of a state’s constitutional structure.<sup>171</sup> Regardless of where appointing authority lands, it seems inevitable that boards would (and should) include practicing prosecutors. But they should sit alongside people who are neither prosecutors nor even lawyers. Supervising the prosecutorial function is too

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169. Depending on the details of state government, the prosecution board could be an adjunct of the state’s highest appellate court, a subcomponent of the state’s professional licensing agency, or a stand-alone state agency. The important point is that it be independent of the entity that regulates lawyers generally.

170. A mechanism to regulate the practice of prosecution in federal courts would also be necessary. The courts could handle that themselves, presumably by deferring to state regulators, just as they (largely) defer to state regulators on matters of legal ethics and lawyer admissions. See John S. Dzienkowski & John M. Golden, *Reasoned Decision-Making for Legal Ethics Regulation*, 89 FORDHAM L. REV. 1125, 1132 (2021) (noting deference to state or ABA on ethics rules); see also Amy R. Mashburn, *A Clockwork Orange Approach to Legal Ethics: A Conflicts Perspective on the Regulation of Lawyers by Federal Courts*, 8 GEO. J. LEGAL ETHICS 473, 473 (1995) (“Admission to practice in all levels of federal courts is and has always been a perfunctory process based primarily on prior admission to a state bar.”).

171. See generally James E. Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the “Court of Law” Requirement*, 107 NW. U. L. REV. 1125, 1144 (2013) (describing diversity of state constitutional approaches to appointments).

important to entrust it to prosecutors alone. In many states, attorney disciplinary bodies have non-attorney members.<sup>172</sup> The case for lay participation is even stronger for prosecution boards as, in the United States, prosecution is a public function.<sup>173</sup> Ensuring broad public representation on prosecution boards, moreover, would avoid duplicating the problematic experience of the state commissions that handle certification and decertification of police officers.<sup>174</sup>

Ideally, the legislation creating prosecution boards would reserve seats for representatives of specific constituencies of the criminal legal system.<sup>175</sup> While installing active criminal defense lawyers or law enforcement officials could pose conflict-of-interest concerns, the governing bodies of the prosecution bar should have seats saved for individuals representing the broad array of stakeholders in the criminal process. For sake of discussion, the statute creating the prosecution board might designate seats for (i) a state prosecutor, (ii) a federal prosecutor, (iii) a formerly incarcerated person, (iv) a representative of crime victims, and (v) a retired defense attorney.<sup>176</sup> It could also create staggered fixed-term appointments to ensure a rotation of personnel and views.

Now that we have sat a prosecution board (or at least considered some of the relevant considerations for doing so), we can consider the board's core functions.

### *1. Joining the Prosecution Bar*

State prosecution boards' first task would be to develop entry requirements for lawyers who wished to join the prosecution bar. They could choose one (or more) of three options, which this section describes.

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172. See Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RESV. L. REV. 665, 697 (1994) (noting that "many regulatory boards have lay representatives" although "these individuals never constitute a majority").

173. See *supra* note 109 and accompanying text; see also Laurie L. Levenson, *Do Prosecutors Really Represent the People? A New Proposal for Civilian Oversight of Prosecutors*, 58 DUQ. L. REV. 279, 292 (2020) (proposing "civilian oversight [of prosecutors] much in the way that law enforcement agencies are now being subjected to civilian oversight").

174. See Hilary Rau, Kim Shayo Buchanan, Monique L. Dixon & Phillip Atiba Goff, *State Regulation of Policing: POST Commissions and Police Accountability*, 11 U.C. IRVINE L. REV. 1349, 1361 (2021) (attributing "limited public representation on most [Peace Officer Standards and Training] commissions" to "legislative design").

175. See R.E. Olley, *The Future of Self-Regulation: A Consumer Economist's Viewpoint*, in THE PROFESSIONS AND PUBLIC POLICY 86 (Philip Slayton & Michael J. Trebilcock eds., 1978) ("Lay representatives who come from organized public interest groups, and who must report back to these groups, can usually maintain the difference of viewpoint requisite to an adequate discharge of their roles.").

176. The list is similar to one that Daniel Epps and I proposed for a board to select a "Defender General" to represent the interests of criminal defendants before the Supreme Court. See Epps & Ortman, *supra* note 100, at 1518.

The aim here is not to select an optimal set of entry requirements but to identify possibilities and discuss some of the relevant tradeoffs.

*A Prosecutorial Graduate Degree.* Boards could require that candidates earn a post-J.D. graduate degree in prosecution. For sake of discussion, I'll call it a "Prosecutorial Doctor" degree, or P.D. for short. A principal focus would be reorienting aspiring prosecutors away from the ethic of client control they may have acquired in law school. Courses would embrace normative decisionmaking and emphasize public-sector ethics. Requiring that prosecutors obtain a P.D. would delegate influence over the substance of prosecutorial culture to academics. Whether that is good or bad depends on one's view of the academics who would teach P.D. students.<sup>177</sup>

*A Prosecutorial "Residency."* Next, boards could require that prosecutor-candidates successfully complete a "residency" program with a prosecutor's office accredited for the purpose. The analogy, of course, is to the medical profession, where doctors complete residencies, typically hospital-based, prior to becoming board certified in a specialty.<sup>178</sup> There are many institutional design questions that would go into crafting a residency program for prosecutors—I will highlight the most salient.

Just as not all hospitals are "teaching hospitals," not all prosecutors' offices would be viable sites for residency programs. Time that permanent staff members spent supervising and training residents would be time away from their direct case work, though productivity losses would be offset by the work of residents themselves. And just as medical residency programs confer status on teaching hospitals,<sup>179</sup> prosecutorial residency programs may have a prestige effect on "teaching offices," further making the administrative costs tolerable. Offices would need a caseload with a sufficient number and variety of matters to give residents deep and broad perspectives on prosecution. Taken together, staffing and docket

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177. The P.D. could be housed in law schools, though it could also be located elsewhere in universities, like schools of public administration. On the history of public administration schools, see Graham Allison, *Emergence of Schools of Public Policy: Reflections by a Founding Dean*, in *THE OXFORD HANDBOOK OF PUBLIC POLICY* 58, 59–63 (Michael Moran, Martin Rein & Robert E. Goodin eds., 2006).

178. On residency programs in medicine, see Joseph H. King, *The Standard of Care for Residents and Other Medical School Graduates in Training*, 55 *AM. U. L. REV.* 683, 690–701 (2006). I am not the first to suggest residency-like education in the legal profession. See, e.g., Jayne W. Barnard & Mark Greenspan, *Incremental Bar Admission: Lessons from the Medical Profession*, 53 *J. LEGAL EDUC.* 340, 361–62 (2003) (proposing "[p]ostgraduate [e]ducation in the [c]ontext of [t]oday's [l]egal [p]ractice"); Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 *RUTGERS L.J.* 105, 145 (2001) (proposing family law residency program); see also Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 *MICH. L. REV.* 34, 57–58 (1992) (contemplating a "counterpart to medical 'residency' programs where lawyers would learn specialized practice areas").

179. See *Gagliano v. Advanced Specialty Care, P.C.*, 189 A.3d 587, 600 (Conn. 2018) (noting "prestige" as an "indirect benefit[]" that teaching hospitals receive).

considerations likely mean that accredited prosecutorial residency programs would be concentrated in urban and larger suburban offices.<sup>180</sup>

Accreditation necessitates an accrediting agency. State prosecution boards could take on accreditation directly. Or, to facilitate economies of scale, they could form a national organization akin to the Accreditation Council for Graduate Medical Education (ACGME), which handles that task in medicine.<sup>181</sup> Whatever the nature of the accrediting agency, it would establish curricular standards. Those might specify, for instance, that resident-prosecutors participate in a minimum number of pleas, trials, and sentencings per year of residency, or that they handle cases in specified areas—drugs, sex crimes, white collar, and so on.

A *Qualifying Examination*. Finally, boards could condition the prosecutorial endorsement on passing a qualification exam testing a candidate's mastery of prosecutorial knowledge and/or skills. Qualification exams are routine in occupational licensing.<sup>182</sup> State prosecution boards could develop their own examinations, or they could delegate the task to a national organization, just as many state bars delegate all or some of their bar exam to the National Conference of Bar Examiners.<sup>183</sup> On the other hand, the bar exam itself has recently come under attack.<sup>184</sup> A legal profession that is contemplating ending the traditional bar exam might be hesitant to implement a novel qualifying exam for a subprofessional group.

Importantly, these three potential licensing requirements can be mixed and matched. While an examination on its own would be odd—where would test-takers be expected to learn the material tested?—that still leaves six potential designs on the table: (i) a degree alone, which would resemble the “diploma privilege” once common for lawyers;<sup>185</sup> (ii) a residency alone, which would make teaching offices and their accreditors especially

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180. See Hannah Haksgaard, *Rural Practice as Public Interest Work*, 71 ME. L. REV. 209, 220 n.75 (2019) (“Many rural counties function using only one or more part-time prosecutors, while urban counties have large staffs.”).

181. See Berenson, *supra* note 178, at 148 (describing ACGME regulation of residency programs).

182. See Charles Wolfson, *Midwives and Home Birth: Social, Medical, and Legal Perspectives*, 37 HASTINGS L.J. 909, 952 n.291 (1986) (noting that “formal educational requirements or a qualifying examination” are “typical of most licensing schemes”).

183. See Christina Shu Jien Chong, *Battling Biases: How Can Diverse Students Overcome Test Bias on the Multistate Bar Examination*, 18 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 31, 33 (2018) (“The exact configurations of bar exams vary, but most states combine the four NCBE exams . . . with state-created portions.”).

184. See, e.g., Milan Markovic, *Protecting the Guild or Protecting the Public? Bar Exams and the Diploma Privilege*, 35 GEO. J. LEGAL ETHICS 163, 169 (2022) (urging that states can “reconsider bar exams as the sole means of entry into the legal profession . . . without jeopardizing the public”). *But see* Kyle Rozema, *Does the Bar Exam Protect the Public?*, 18 J. EMPIRICAL LEGAL STUD. 801, 803 (2021) (finding “that bar passage requirements have modest, negative effects on public sanctions”).

185. For a fascinating, if disturbing, history of diploma privilege, see Markovic, *supra* note 184, at 170–74.



powerful; (iii) a degree and a residency, which would be expensive and time-consuming for candidates; (iv) a degree and a test, which would divide influence between academics and examiners; (v) a residency and an examination, which is the model for medical specialties;<sup>186</sup> or (vi) all three. The more burdensome the process of earning the prosecutorial endorsement, the greater the concern about reducing the supply of prosecutors.<sup>187</sup> On the other hand, the more intensive the process, the more knowledge and culture it can transmit. Finding the optimal structure would likely require some trial and error.

We have been focusing so far on how new prosecutors would earn their endorsement going forward. What about lawyers who are *already* prosecutors? It would be infeasible—logistically, politically, and economically—to require that long-serving prosecutors put their practices on hold until completing a residency program or obtaining a graduate degree. Creative solutions are possible. For instance, perhaps prosecutors with substantial time in the field (for sake of discussion, five years or more) should be grandparented into the prosecution bar automatically, while incumbents with less time (say zero to five years) receive their endorsement upon passing a qualifying exam, without a degree or residency requirement.<sup>188</sup> Such dividing lines would, like all dividing lines, produce arbitrary results on the margins. (For instance, the prosecutor with five years and a day of prosecutorial experience would not be required to take an exam, while one with four years and 364 days would.) But transition pains are inevitable in any structural reform of an occupational license regime. They would be temporary.

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186. See Rebecca S. Lipner, Brian J. Hess & Robert L. Phillips, Jr., *Specialty Board Certification in the United States: Issues and Evidence*, 33 J. CONTINUING EDUC. HEALTH PROS. S20, S20 (2013) (describing structure of specialist certification in medicine).

187. See *infra* Part III.A.1.

188. The medical profession has a system like this for recertification requirements. See Jayne W. Barnard, *Renewable Bar Admission: A Template for Making “Professionalism” Real*, 25 J. LEGAL PRO. 1, 24 (2001) (“[T]he medical specialty boards have typically elected to ‘grandfather’ older physicians and to impose the recertification requirement only on those physicians who became board certified after the adoption of the recertification regime.”).

## 2. *Regulating Justice*

Prosecutors' contact with prosecution boards would not end with licensing. Boards would also promulgate ethical rules to govern the practice of prosecution.<sup>189</sup> These would bind prosecutors in just the way that the rules of legal ethics bind ordinary lawyers.<sup>190</sup>

State boards might generate ethical rules entirely on their own. Or perhaps a national organization would promulgate model rules from which they could borrow. Either way, the ethical rules could spell out—in much greater detail than Rule 3.8 of the Model Rules of Professional Conduct—what “doing justice” means in relation to particular prosecutorial decisions and tactics.<sup>191</sup> For instance, a board might adopt a rule prohibiting prosecutors from tying a plea offer to one defendant to the disposition of a related defendant's case.<sup>192</sup> Or a board might forbid prosecutors from making plea offers contingent on a defendant refraining from filing pretrial motions.<sup>193</sup> Or perhaps not—it is not my place to say how a deliberative process involving diverse stakeholders would or should come out.

Regardless of the substance of the rules, they will have emerged from a body *within* the prosecution subprofession. That might legitimize the rules in the eyes of prosecutors who, Laurie Levenson notes, “instinctively react negatively” when the broader legal profession “seeks to impose ethical standards on them.”<sup>194</sup> The rules could also benefit from public participation. Most states use notice-and-comment procedures for generating rules of legal ethics.<sup>195</sup> A smaller but still significant number have open meetings or even allow citizens to petition for new legal ethics

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189. If the prosecution board was subordinate to another state agency, like a state supreme court, *see supra* note 169, its formal role might be to draft ethical rules for the higher-level authority to issue. That is the mechanism for legal ethics rules in many states. *See* Dzienkowski & Golden, *supra* note 170, at 1130–31 (describing process by which legal ethics rules are promulgated). To the extent that such a prosecution board came to possess genuine independence and subject-matter expertise, *i.e.*, to the extent that it became a well-functioning administrative agency, one hopes that the higher-level authority would take a deferential approach. *Cf. id.* at 1148–49 (encouraging courts to use administrative law doctrine when reviewing legal ethics rules).

190. *See* GREGORY C. SISK ET AL., LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION § 4-1.3 (2018) (“A lawyer’s failure to abide by the standards and expectations of a legal professional may lead to formal discipline for violation of rules of professional conduct and to informal sanctions such as a loss of professional reputation or a personal recognition of moral failure.”).

191. *See supra* note 135 and accompanying text.

192. *See supra* notes 56–58 and accompanying text.

193. *See* Gabriel J. Chin, *Do Procedural Claims Drive Out Merits Claims in Plea Bargaining?: A Comment on the Work of the Late Professor William Stuntz*, 51 DUQ. L. REV. 767, 771 (2013) (noting the “widely reported practice of prosecutors conditioning plea offers on refraining from filing pretrial motions”).

194. Levenson, *supra* note 162, at 755.

195. Bobbi Jo Boyd, *Do It in the Sunshine: A Comparative Analysis of Rulemaking Procedures and Transparency Practices of Lawyer-Licensing Entities*, 70 ARK. L. REV. 609, 636 (2017) (finding that 65% of U.S. jurisdictions use a notice-and-comment process to make legal ethics rules).

rules.<sup>196</sup> State prosecution boards could use those and similar mechanisms to reap the epistemic value of public participation in the rulemaking process.<sup>197</sup>

### 3. *Disciplining Prosecutors*

The final core function of prosecution boards would be to sanction prosecutors who violate their rules. That entails creating a professional discipline system through which stakeholders (crime victims, witnesses, judges, defendants, defense lawyers, and even the general public) could seek redress against prosecutors. It also means setting up an adjudicative mechanism to decide the facts of an alleged violation. As the diversity of adjudicative systems for lawyer discipline attests,<sup>198</sup> there are many plausible design strategies. For instance, boards might find it advantageous to employ professional staff to investigate alleged violations and make recommendations,<sup>199</sup> while reserving final decisions for themselves.<sup>200</sup>

As for sanctions, a minor violation could, as it often does with lawyer discipline, warrant a reprimand.<sup>201</sup> For serious violations, boards might suspend or terminate a lawyer's prosecutorial endorsement. A lawyer who lost her license to prosecute could return to the general practice of law, though if the transgression of prosecutorial ethics happened to also violate

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196. See *id.* at 645 (finding that twenty-three jurisdictions regularly have open meetings about the rules of legal ethics); *id.* at 642 (finding that fourteen states allow citizens to petition for legal ethics rules).

197. See Cass R. Sunstein, *Democratizing Regulation, Digitally*, DEMOCRACY: J. IDEAS (Fall 2014), <http://www.democracyjournal.org/34/democratizing-regulation-digitally> [<https://perma.cc/DP86-LF3F>] (“Democratization of the regulatory process, through public comment, has an epistemic value.”).

198. See Debra Moss Curtis, *Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics*, 35 J. LEGAL PRO. 209, 212–332 (2011) (describing attorney disciplinary processes in every state).

199. This has been a common mode of handling lawyer disciplinary complaints since the 1970s. See Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 2008 J. PRO. LAW. 359, 374 (describing 1970 ABA report that “signalled the emergence of a new age in lawyer discipline with its call for a professional disciplinary staff to conduct investigations and prosecute charges of misconduct”).

200. Judicial review of board decisions could take one of two basic forms. First, there could be a direct appeal from the board to the state supreme court, as is common in attorney disciplinary matters. See Deborah L. Rhode & Alice Woolley, *Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada*, 80 FORDHAM L. REV. 2761, 2766 (2012) (noting that “[l]awyers can appeal disciplinary sanctions to the state supreme courts”). That would make sense if the prosecution board was an adjunct of the judiciary. See *supra* note 169. If the prosecution board were part of the state's executive branch or independent, however, review under the state's administrative procedures act would be more likely. See generally REVISED MODEL STATE ADMIN. PROC. ACT § 419 (NAT'L CONF. OF COMM'RS OF UNIF. STATE L. 2010) (contemplating judicial review over licensing decisions).

201. See Leslie C. Levin, *Regulators at the Margins: The Impact of Malpractice Insurers on Solo and Small Firm Lawyers*, 49 CONN. L. REV. 553, 598 (2016) (noting that “the most common lawyer discipline sanction is a reprimand”).

a precept of legal ethics, the state bar's licensing authority might conduct a parallel disciplinary proceeding.

Reposing professional discipline over prosecutors in a state prosecution board would thread the needle between two values that are sometimes thought to conflict: prosecutorial accountability and independence.<sup>202</sup> Green and Roiphe set up the tension well. "Accountability," they write, "demands consequences when prosecutors fail to pursue the public interest," while independence "assumes that experience and expertise are the best guarantee that prosecutors will seek the public interest," such that "[a]ny intrusion into their work threatens the purity of the exercise."<sup>203</sup> Professional discipline in the prosecution bar promises accountability without sacrificing independence, as the sanctions would come from inside the prosecutorial subprofession.

### B. Benefits

While the advantages of prosecution bar have been implicit in the discussion so far, this section makes them explicit. A prosecution bar could engender norms and rules for prosecutors built around an ethic of doing justice rather than an ethic of client control. We saw in Part I that the legal profession's fixation on client control allows and even encourages prosecutors to discount considerations of justice.<sup>204</sup> The problem is compounded by the fact that no other official or institution can effectively compensate, because none is both empowered and positioned to second-guess prosecutors' normative judgments. Grand juries *could* at the charging stage,<sup>205</sup> but they are not meaningfully independent of prosecutors.<sup>206</sup> Trial juries *used to* offer a normative check at trial, but they've been sidelined.<sup>207</sup> Judges can second-guess prosecutors' *legal* choices, but prosecutorial

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202. See Green & Roiphe, *supra* note 83, at 843 (arguing that "while accountability and independence seem at odds" they can be reconciled via fiduciary theory); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 957 (1997) (noting that "ideals of professionalism and political responsibility . . . sometimes conflict").

203. Green & Roiphe, *supra* note 83, at 844–45.

204. See *supra* Part I.B.2.

205. See Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 329–43 (2012) (arguing that grand juries are well-suited to act as check on prosecutorial charging decisions).

206. Cf. Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2335–36 (2008) ("The claim that the average grand jury would indict 'a ham sandwich,' is so commonplace that it has become cliché."). This is largely a consequence of the non-adversarial nature of grand jury proceedings. See Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 297 (1995) (explaining that a "grand jury hearing is carefully structured to avoid conflicting facts" in that the prosecutor is "not obligated to present contrary evidence, and the suspect has no right to testify or to challenge the evidence").

207. See Daniel Epps & William Ortman, *The Informed Jury*, 75 VAND. L. REV. 823, 840–48, 876–84 (2022) (tracing the jury's fall as a normative check on prosecution).

neglect of justice primarily concerns nonlegal—and thus unreviewable—decisions. The promise of a prosecution bar is a normative check on decisionmaking within the prosecutor’s office.

In a prosecution bar, moreover, the ethic of doing justice would be reinforced by the real prospect of professional discipline. We have seen that the legal profession’s disciplinary systems leave prosecutors almost entirely undisturbed.<sup>208</sup> While prosecution boards might structure their disciplinary processes using lawyer disciplinary mechanisms as a model—with complaints leading to investigations, hearings, and ultimately sanctions—their substantive outlook would be very different. Unlike lawyers’ regulators, who are experts in identifying situations where a lawyer failed to serve her client, prosecutors’ regulators would be on the lookout for instances where a prosecutor failed to serve justice. And the participation of prosecution board members drawn broadly from constituencies impacted by the criminal legal system would help ensure the legitimacy of decisions.

Adopting a prosecution bar would also create a space for the meaning of justice in prosecution to be developed in a relatively democratic and transparent manner via ethics rulemaking. Although there are easy questions about what justice means in prosecution,<sup>209</sup> there are also hard questions.<sup>210</sup> On those, the simple injunction to “do justice” provides little guidance.<sup>211</sup> Today, figuring it out is left to office policies and prosecutors’ idiosyncratic sensibilities, shaped by their training as lawyers.<sup>212</sup> The results are neither transparent nor consistent.<sup>213</sup>

In a prosecution bar, on the other hand, giving content to the ethic of doing justice would be the business of prosecution boards. They would (or at least should) incorporate public input in the rulemaking process, thereby facilitating democratic contestation about what doing justice means.<sup>214</sup> Over

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208. See *supra* Part I.B.2.a.

209. See *supra* text accompanying notes 37–38.

210. For examples, see *supra* notes 34–35 and accompanying text.

211. See Bellin, *supra* note 24, at 1216 (“[T]he term [justice] is sufficiently flexible to capture every criminal law related intuition.”); Green, *supra* note 143, at 467–68 (noting that the “idea of ‘seeking justice’ . . . does not tell prosecutors how to answer tough questions”).

212. See Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 48 (1991) (“The ‘do justice’ standard[’s] . . . vagueness leaves prosecutors with only their individual sense of morality to determine just conduct.”); David L. Faigman, *Scientific Realism in Constitutional Law*, 73 BROOK. L. REV. 1067, 1079 (2008) (“Notions of justice, fairness, and equality are hardly self-defining.”).

213. See Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 460–61 (2001) (noting “the private nature of most crucial prosecution decisions”). To be sure, some offices are more transparent in their policies than others. The Department of Justice, for instance, publishes many of its prosecutorial policies in Title 9 of its “Justice Manual.” See U.S. Dep’t of Just., *supra* note 78, §§ 9-1.000 to 9-143.000.

214. Cf. Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693, 1702 (2017) (“Collaboration and communication between prosecutors, both appointed and

time, the decree to do justice would stop being a blank check and become an enforceable constraint.

To be sure, a professional ethic of doing justice would not entirely eliminate the sort of tactics we encountered in Part I.A or the win-at-all-costs attitude we saw in Part I.B.<sup>215</sup> A prosecution bar is not a panacea, and just as lawyers sometimes put their interests ahead of their clients,<sup>216</sup> so too would members of the prosecution bar sometimes fail to seek justice. But to do injustice in the prosecution bar, prosecutors would have to resist their (sub)professional culture and risk discipline. If we make doing injustice costlier, there will be less injustice.

### C. Analogues Foreign and Domestic

The proposal to create a semi-autonomous prosecution bar might seem impetuous. Yet the proposal has analogues that should soften charges of brashness.

The most obvious domestic analogue is the patent bar. Like the proposed prosecution bar, the patent bar has licensing, regulatory, and disciplinary systems that supplement those of the general bar. Before a lawyer can represent a client on a patent matter before the United States Patent and Trademark Office (USPTO), she must endure a licensing process that includes a specialized examination.<sup>217</sup> The USPTO publishes its own ethics code which, while mostly tracking the ABA's Model Rules of Professional Conduct, is tailored to fit patent practice.<sup>218</sup> And the USPTO maintains an active disciplinary docket,<sup>219</sup> which it uses, in its words, to develop "[a] body of precedent specific to practice before the USPTO."<sup>220</sup> While the

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elected, and the communities those prosecutors serve, including the neighborhoods in which prosecutions regularly take place, should be encouraged, supported, and funded.”)

215. See *supra* notes 46–64, 163–65 and accompanying text.

216. See *supra* note 141 and accompanying text.

217. See 37 C.F.R. §§ 11.10, 11.6, 11.7 (2021). Non-attorneys are also eligible to join the patent bar and practice before the USPTO, but they are called “patent agents” rather than “patent attorneys.” See William Hubbard, *Razing the Patent Bar*, 59 ARIZ. L. REV. 383, 387 (2017) (describing structure of patent bar).

218. See Changes to Representation of Others Before the United States Patent and Trademark Office, 78 Fed. Reg. 20180 (Apr. 3, 2013) (to be codified at 37 C.F.R. pts. 1, 2, 7, 10, 11, 41). For instance, the USPTO version of Model Rule 1.1 provides that patent practice requires “legal, *scientific*, and *technical* knowledge, skill, thoroughness and preparation.” 37 C.F.R. § 11.101 (emphasis added).

219. See 37 C.F.R. pt. 11, subpart C (2021). The USPTO's disciplinary decisions are available on its website, *USPTO Disciplinary Decisions Relating to Patent and Trademark Practitioners.*, USPTO, <https://foiadocuments.uspto.gov/oed/> [https://perma.cc/6BK4-GHSJ].

220. Changes to Representation of Others Before the United States Patent and Trademark Office, *supra* note 218, at 20180. The disciplinary system monitors misconduct by patent practitioners and sanctions attorneys for unauthorized practice. See *In re Achterhof*, No. D2017-24 (USPTO Nov. 18, 2019) (final order), [https://foiadocuments.uspto.gov/oed/D2017-24\\_Achterhof\\_Final\\_Order\\_11\\_18\\_19.pdf](https://foiadocuments.uspto.gov/oed/D2017-24_Achterhof_Final_Order_11_18_19.pdf) [https://perma.cc/PVT5-AK9F].

patent bar certainly has its critics and is far from perfect,<sup>221</sup> its existence confirms the possibility of regulating one segment of the legal profession differently from others.

The patent bar is a close domestic analogue to the proposed prosecution bar. The judiciary is another. Judges are lawyers, for the most part,<sup>222</sup> but judicial ethics and discipline are their own domain, not a subset of legal ethics and discipline. Codes of judicial conduct govern the practice of judging in every state and in the federal courts.<sup>223</sup> And judicial conduct boards in the states and judicial councils in the federal courts, all separate from attorney disciplinary systems, sit to adjudicate allegations that judges violated those codes.<sup>224</sup> While judges are not separately licensed, the judiciary's ethical and disciplinary infrastructures do for judges what prosecution boards could do for prosecutors.

For even closer analogues to the prosecution bar, we need only look abroad. In much of the world, public prosecutors are legal professionals but not ordinary lawyers.<sup>225</sup> Take French prosecutors (*procureurs*). They make up one of the three prongs of the French magistracy, alongside investigating judges and trial judges.<sup>226</sup> Before they are authorized to prosecute, aspiring *procureurs* must complete a multi-year training program at France's National School for the Judiciary,<sup>227</sup> an experience that gives them, John

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221. See, e.g., Mary T. Hannon, *The Patent Bar Gender Gap: Expanding the Eligibility Requirements to Foster Inclusion and Innovation in the U.S. Patent System*, 10 IP THEORY 1, 2 (2020) (“[The USPTO] has remained silent on the lack of gender diversity within its own patent bar.”); Hubbard, *supra* note 217, at 391 (arguing that “at least as applied to lawyers, the technical-education requirement is not—and likely cannot be—supported and should thus be reformed”).

222. To be sure, not *all* judges are lawyers. See generally Sara Sternberg Greene & Kristen M. Renberg, *Judging Without a J.D.*, 122 COLUM. L. REV. 1287 (2022) (canvassing historical and contemporary nonlawyer judges). The strictures of judicial ethics apply to all judicial officers, whether they hold a law degree or not. 1 CHARLES G. GEYH, JAMES J. ALFINI & JAMES J. SAMPLE, JUDICIAL CONDUCT AND ETHICS § 1.07 (6th ed. 2020) (noting that judicial ethics codes apply to lay judges).

223. GEYH ET AL., *supra* note 222, § 1.03 (“[E]very state and the District of Columbia now has a code based on one of the three ABA models.”); *id.* § 1.06 (“Federal judges are required to abide by the Code of Conduct for United States Judges, a set of ethical principles and guidelines adopted by the Judicial Conference of the United States that are patterned after the ABA Model Code of Judicial Conduct.” (footnote omitted)).

224. *Id.* § 1.05 (describing state organizations); *id.* § 1.06 (describing federal judicial councils); see also Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405, 405 (2007) (observing that every state has a “judicial conduct organization charged with investigating and prosecuting complaints against judicial officers”).

225. See Richard L. Abel, *What Is a Legal Profession?: The Problem of the Unit of Comparison*, in 2 LAWYERS IN SOCIETY: THE CIVIL LAW WORLD 4–6 (Richard L. Abel & Philip S. C. Lewis eds., 1988) (describing structure of legal profession in civil law jurisdictions).

226. See Laurene Soubise & Alice Woolley, *Prosecutors and Justice: Insights from Comparative Analysis*, 42 FORDHAM INT'L L.J. 587, 610 (2018) (noting structure of French magistracy).

227. Steven B. Dow & Louise E. Fontaine, *Acquiring Lawyering Skills in the United States and France: A Comparative Study*, 28 TUL. J. INT'L & COMP. L. 259, 301–03 (2020) (explaining the process of becoming a French prosecutor).

Leubsdorf observes, an “esprit de corps.”<sup>228</sup> Material cultural differences exist between procureurs and ordinary French lawyers (avocats). Procureurs view themselves as neutral arbiters of truth.<sup>229</sup> For criminal defense avocats, independence is a primary value.<sup>230</sup> Procureurs and avocats might even be understood as belonging to entirely separate professions. “The two professions,” Leubsdorf notes, “often regard each other with suspicion.”<sup>231</sup>

While the details differ from country to country, many nations across the world employ prosecutors who, like French procureurs, have legal educations but are professionally independent of ordinary lawyers.<sup>232</sup> Creating a prosecution bar would be a step in their direction.

### III. OBJECTIONS AND ALTERNATIVE MODELS

Part II made the case for a prosecution bar. This Part plays defense. Part III.A anticipates three sets of objections. Part III.B then explores two alternative ways to construct a prosecution bar. The first, which is based on specialist certification in the medical profession, is plausible. The second, which would completely separate prosecuting from lawyering, is less so, and neither is clearly superior to the model proposed in Part II.

#### A. Potential Objections

This section considers three potential objections to a prosecution bar: (i) that it would too narrowly limit the supply of prosecutors, (ii) that the real villain of Part I—and thus the better target for reform—is the ethic of client control and/or its associated neutrality norm, and (iii) that adopting a specialized bar for prosecutors is a slippery slope to dismantling the unitary

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228. John Leubsdorf, *On the History of French Legal Ethics*, 8 U. CHI. L. SCH. ROUNDTABLE 341, 342 (2001).

229. See Soubise & Woolley, *supra* note 226, at 610–12 (“As *magistrats*, French public prosecutors are required to act in and uphold the public interest.”). There is reason to doubt that French prosecutors uniformly live up to the ideal in practice. *Id.* at 614. Soubise and Woolley identify instances of French prosecutorial “behavior [that] is clearly at odds with the image of neutral judicial officer.” *Id.* at 615. Nonetheless, the French prosecutorial conduct that concerns Soubise and Woolley—for instance, prosecutors forming relationships of trust with police, *id.* at 614—looks quaint compared to the routine operations of American criminal courts. See *supra* notes 46–64 and accompanying text. Soubise and Woolley note that “there is little evidence that French prosecutors engage in similar misconduct to that of American or Canadian prosecutors.” Soubise & Woolley, *supra* note 226, at 615.

230. Leubsdorf, *supra* note 228, at 342.

231. *Id.*

232. See, e.g., Philip M. Genty, *Dichotomy No Longer? The Role of the Private Business Sector in Educating the Future Russian Legal Professions*, 40 FORDHAM URB. L.J. 283, 287 (2012) (Russia); Kandis Scott, *Decollectivization and Democracy: Current Law Practice in Romania*, 36 GEO. WASH. INT’L L. REV. 817, 818–19 (2004) (Romania); Ottavio Campanella, *The Italian Legal Profession*, 19 J. LEGAL PRO. 59, 83–84 (1994) (Italy); Shozo Ota & Kahei Rokumoto, *Issues of the Lawyer Population: Japan*, 25 CASE W. RESV. J. INT’L L. 315, 316 (1993) (Japan); Note, *Adopting and Adapting: Clinical Legal Education and Access to Justice in China*, 120 HARV. L. REV. 2134, 2144 (2007) (China).



legal profession. While each objection has something to it, none undermines the proposal.

### 1. *Limiting the Supply of Prosecutors*

An initial objection to the prosecution bar has a law and economics flavor. Today, all willing lawyers can compete for prosecutor jobs. Under my proposal, only members of the prosecution bar would be eligible. Limiting the supply of prosecutors could drive salaries upward, though a wage effect is not inevitable.<sup>233</sup> If it did, governments would have to either increase spending on prosecutors or employ fewer of them. Either option is (I will assume) costly. The first literally involves spending more money. The second means less enforcement of the criminal law. To bias the discussion against my proposal, I assume that a reduction in criminal enforcement is costly.<sup>234</sup> The question is whether the benefits of a prosecution bar outweigh the costs.

Occupational “[l]icensing has long been an obsession of economists.”<sup>235</sup> The dominant strain of economic writing on licensing is skeptical or even outright hostile.<sup>236</sup> Economists concede that licensing requirements improve the quality of services by excluding low-quality providers,<sup>237</sup> but they criticize them on the grounds I have just alluded to: that they restrict supply and thereby increase prices.<sup>238</sup> The benefits do not exceed the costs, economists contend, for many of the licensing requirements that have proliferated in recent decades across occupational domains.<sup>239</sup>

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233. See Morris M. Kleiner, *Enhancing Quality or Restricting Competition: The Case of Licensing Public School Teachers*, 5 U. ST. THOMAS J.L. & PUB. POL’Y 1, 2 (2011) (noting studies showing no wage effect for teacher licensing).

234. To be very clear, the assumption that a reduction in criminal enforcement is “costly” is solely for the sake of discussion. At a time in which the criminal legal system is still reeling from mass incarceration, the assumption is oversimplified at best. See Epps & Ortman, *supra* note 207, at 827 (noting “ongoing crisis of mass incarceration”).

235. Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1111 (2014); see also Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSPS. 189, 189 (2000) (“The study of the regulation of occupations has a long and distinguished tradition in economics.”).

236. See Edlin & Haw, *supra* note 235, at 1111–12 (observing academic economic “consensus”: “a licensing restriction can only be justified where it leads to better quality professional services—and for many restrictions, proof of that enhanced quality is lacking”).

237. See, e.g., Carl Shapiro, *Investment, Moral Hazard, and Occupational Licensing*, 53 REV. ECON. STUD. 843, 844 (1986) (“The net effect of licensing is to benefit those consumers who value quality highly at the expense of those who do not.”).

238. See Kleiner, *supra* note 235, at 192–93 (explaining “[h]ow [l]icensing [c]onstricts [l]abor [s]upply”).

239. See, e.g., Edlin & Haw, *supra* note 235, at 1104–10 (identifying examples).

Economists recognize three scenarios in which occupational licensing is most likely to be justified.<sup>240</sup> First, informational asymmetries may make it difficult or impossible for consumers to accurately judge a professional's quality.<sup>241</sup> Second, setting informational problems aside, consumers may (by virtue of their bounded rationality) be unable to accurately assess quality. In other words, they might not know which provider is best for them even with the relevant information.<sup>242</sup> Third, low-quality service providers sometimes generate externalities not internalized by consumers.<sup>243</sup> The oft-used example is an incompetent doctor whose failure to diagnose an infectious disease allows a pandemic to proliferate.<sup>244</sup>

To see if prosecution implicates these scenarios, we need to adapt the economists' concepts of "quality" and "consumers." Following Green's pronouncement that the "sovereign's overarching objective in this country (although not necessarily everywhere) is to 'do justice,'"<sup>245</sup> I take quality to mean justice-doing, in addition to technical skills like cross-examining witnesses and performing legal research. "High-quality" prosecutors don't just rack up convictions, they rack up convictions justly—meaning, at a minimum, in a manner consistent with procedural justice.<sup>246</sup>

The ultimate "consumer" of prosecutorial quality is the "sovereign,"<sup>247</sup> but more immediately, the consumer is the public that (in a democracy) operates the sovereignty. That raises a thorny question. What if the public *doesn't* actually value justice? In other words, what if prosecutorial quality, for the public, means convictions no matter how they are obtained? We will return to this question shortly.<sup>248</sup>

*Scenario 1: Information asymmetries.* Informational asymmetries abound between prosecutors and the public. An enormous amount of prosecutors' work takes place out of public view—in courtroom hallways, on the phone with defense lawyers, and in grand jury rooms—rendering it

240. See Thomas G. Moore, *The Purpose of Licensing*, 4 J.L. & ECON. 93, 103 (1961) (identifying the three rationales); see also Hubbard, *supra* note 217, at 394–96 (similar).

241. See Hubbard, *supra* note 217, at 394–95 ("Occupational licensing can reduce informational asymmetries by cheaply demonstrating to consumers that members of a profession possess certain qualifications.").

242. See Moore, *supra* note 240, at 106 ("Another rationale offered for licensing certain occupations is that society knows better than the individual what is best for the individual.").

243. See Edlin & Haw, *supra* note 235, at 1116 ("[Another] market failure possibly addressed by licensure occurs when low-price, low-quality transactions impose costs on third parties.").

244. For the bad doctor leading to a pandemic illustration, see Hubbard, *supra* note 217, at 396; Kleiner, *supra* note 235, at 192; and Moore, *supra* note 240, at 110.

245. Green, *supra* note 2, at 634.

246. It goes without saying that this definition of quality cannot be quantified, at least not easily.

247. See *supra* note 31 and accompanying text.

248. See *infra* notes 250–52 and accompanying text.

unobservable.<sup>249</sup> Meanwhile, the public portions of the criminal process do not generally reveal whether prosecutors' behind-the-scenes work reflected justice or expediency. A change of plea hearing, for instance, typically unveils nothing about whether the prosecutor's charges were proportional or whether the levers the prosecutor pulled to convince the defendant to plead guilty were coercive. And that's for a single case. Multiply the informational asymmetries by an entire docket and even if the public wanted to monitor the justice-doing of its prosecutors, the task would be very difficult.

*Scenario 2: Bounded rationality.* At least in some places and times, the public seems to care more about convictions than justice.<sup>250</sup> Does the economic analysis break down if "consumers" are not interested in "quality"? Not necessarily. Even if the public is at times punitive and indifferent to justice as a matter of wholesale policy, something different can happen when people approach criminal legal issues at the retail level.<sup>251</sup> As Stephen Schulhofer observes, we are "simultaneously so punitive, so unempathetic, especially at the wholesale level of abstract policy, and yet more ready than ever to find reasonable doubt, justification, or excuse at the retail level of individual cases."<sup>252</sup> We can understand the difference between the public's wholesale and retail views as a kind of collective bounded rationality. A prosecution bar could help align prosecutorial decisionmaking with the public's (more considered) retail views.

*Scenario 3: Externalities.* The economic case for a prosecution bar is strongest when we reach the third scenario. Assume that I'm wrong to posit

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249. See Patrick J. Fitzgerald, *Thoughts on the Ethical Culture of a Prosecutor's Office*, 84 WASH. L. REV. 11, 12 (2009) (observing that "much of [a prosecutor's] power is exercised behind closed doors"); Angela J. Davis, *The American Prosecutor: Power, Discretion, and Misconduct*, 23 CRIM. JUST. 24, 26 (2008) ("Prosecutors make the most important of these discretionary decisions behind closed doors and answer only to other prosecutors.").

250. See Paul H. Robinson, Geoffrey P. Goodwin & Michael D. Reising, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 1986 (2010) (noting that "public opinion may seem to demand stricter crime-control laws," but adding caveat that "it may simply be that it has been shaped by the very politicians claiming merely to follow public opinion"); see also 1 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, *CRIMINAL PROCEDURE* § 1.6(h) (4th ed. 2015) ("[T]he tenor of public opinion [during the Burger Court] moved strongly in the direction of emphasizing crime control."); Edward E. Rhine, *Why "What Works" Matters Under the "Broken Windows" Model of Supervision*, 66 FED. PROBATION 38, 38 (2002) ("A recent analysis of public opinion on crime and punishment found that at a very general level the public, at least at 'first impulse,' supports punitive crime control policies.").

251. Stephanos Bibas, *Criminal (In)justice and Democracy in America*, 126 HARV. L. REV. F. 134, 135 (2013) (contrasting wholesale and retail views on justice).

252. Stephen J. Schulhofer, *The Trouble with Trials; the Trouble with Us*, 105 YALE L.J. 825, 851 (1995). Schulhofer suggests a "crude logic underlying the phenomenon." *Id.* at 852. At the wholesale level, he observes, fear of crime drives harsh criminal laws that assume a "view of the criminal offender" as "someone hostile to civilized values, devoid of human sensibilities, utterly 'other.'" *Id.* But at the retail level (*i.e.*, at trial), we see in the defendant a "three-dimensional person with human frailties and human needs" who "probably will not fit the picture." *Id.*

a distinction between the public's wholesale and retail views,<sup>253</sup> such that the public (or a certain part of it) is indifferent to justice all the way down. Now there is no daylight between the public and "low-quality" prosecutors. Nonetheless, a licensing requirement that excludes low-quality prosecutors could still be justified (in economic terms) because unjust prosecutorial practices have externalities. They impose costs on defendants, their families, and their communities, mostly obviously when a prosecutor's coercive tactic results in a false guilty plea.<sup>254</sup> But the externalities do not stop there. Prosecutorial injustice undermines confidence in the criminal legal system itself.<sup>255</sup> Since the perceived legitimacy of the justice system impacts crime rates,<sup>256</sup> the externalities of prosecutorial injustice reach to future crime victims as well. A prosecution bar could shrink such externalities. While the details of a cost-benefit analysis would depend on specific design choices for the prosecution bar ("residency" versus graduate degree, for instance), there is good reason to believe that this is an occupational licensing regime that even an economist could love.<sup>257</sup>

## 2. *Is the Legal Profession to Blame?*

I have argued that the legal profession's ethic of client control is corrosive to prosecuting.<sup>258</sup> But maybe the argument doesn't go far enough. The ethic of client control, an objector might say, is corrosive to lawyering

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253. See John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 766–67 (2020) (contending that "the weight of the evidence suggests that the laity is at least as punitive as the courts and bureaucratic professionals, and probably more so").

254. See Ortman, *supra* note 135, at 556–57 (describing plea bargaining's "innocence problem"); Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455, 472 (2011) (explaining that "anecdotal evidence suggests that defendants' families often bear" the costs of criminal justice fines and fees).

255. See Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1996 (1992) ("[T]he decision of an innocent defendant to plead guilty in return for a low sentence inflicts costs on society, even if the defendant prefers this result, because it undermines the accuracy of the guilt-determining process and public confidence in the meaning of criminal conviction.").

256. See Gary LaFree & Gary Ackerman, *The Empirical Study of Terrorism: Social and Legal Research*, 5 ANN. REV. L. & SOC. SCI. 347, 360–61 (2009) (noting studies linking "high levels of perceived legitimacy to a range of deviance-related measures").

257. A related concern is that people with comparatively less punitive attitudes might be unwilling to bear the expense of becoming licensed prosecutors. Selection effects are plausible. But the prosecution bar proposed in Part II would not be an adjunct of law enforcement. Obviously, prosecutors would continue to have important working relationships with law enforcement, just as prosecutors do today. See Richman, *supra* note 110, at 751–52 (noting that "iterated interactions between agents and prosecutors will affect investigative and adjudicative decisionmaking and the allocation of enforcement resources" (footnote omitted)). But the model for a prosecution bar envisions institutional and perspectival separation between prosecution and law enforcement. If that separation broke down and prosecution became culturally indistinguishable from law enforcement, then there would be reason to worry about selection effects. It's difficult, however, to predict what sort of politics would draw a lawyer to a semi-autonomous prosecutorial subprofession.

258. See *supra* Part I.B.

*in general*, not just to prosecuting. If the objector is right, have I targeted the reform proposal too narrowly? Perhaps instead of carving out prosecuting as a semi-autonomous subprofession, we should remake the legal profession from the ground up, *sans* client control.

I am open to the possibility that the ethic of client control and/or the neutrality norm are wrong for lawyers generally. Many leading academic ethicists have argued as much.<sup>259</sup> Others disagree.<sup>260</sup> Adjudicating the merits of the debate would take us too far afield. But to respond to the objection, I must justify severing client control from prosecuting without (or at least prior to) severing it from ordinary lawyering.

We saw above that the ethic of client control does not coherently apply to prosecuting.<sup>261</sup> The situation is not so simple when it comes to ordinary lawyering. As this section will explain, there *are* plausible arguments for it in the legal profession broadly, and its legitimacy is a question of weighing tradeoffs: does the good of client control outweigh the bad? Because we never reach a question of tradeoffs in the case of prosecutors, we need not wait on the debate, which shows no sign of abating,<sup>262</sup> before abrogating the ethic of client control there.

The task for this section is to substantiate that there is a plausible case for client control in the broader legal profession. My aim is not to convince readers that an ethic of client control is ultimately justified for lawyers. It is more modest—to convince readers that there’s a legitimate debate.

The best justification for client control is rooted in the moral autonomy of lawyers’ clients. As critics of client control point out, the adversarial system itself is too imperfect to be the site of absolute moral good.<sup>263</sup> But even while the courtroom and negotiating table lack inherent moral value, clients bring their preexisting values with them when they enter those spaces.<sup>264</sup> Moral values are baked into the claims they assert and the defenses they raise in litigation and negotiation. Or sometimes not, when a litigant asserts an immoral claim. Either way, the moral status of a litigated case or negotiated deal depends on the claims that clients, autonomous

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259. For prominent examples of work in this vein, see generally LUBAN, *supra* note 146; LUBAN, *supra* note 100; RHODE, *supra* note 93; and William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29. Deborah Rhode observed that “most legal ethics experts” take the position that “the moral justification for current adversarial principles is ultimately unconvincing.” RHODE, *supra* note 93, at 58.

260. See, e.g., FREEDMAN & SMITH, *supra* note 85; MARKOVITS, *supra* note 21; Spaulding, *supra* note 148; Fried, *supra* note 87.

261. See *supra* notes 105–21 and accompanying text.

262. See sources cited *supra* notes 259–60.

263. See, e.g., LUBAN, *supra* note 146, at 32–55; RHODE, *supra* note 93, at 53–58.

264. See Spaulding, *supra* note 148, at 6 (advancing an understanding of the lawyer’s role grounded in service to clients); see also Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 104 (2010) (“[Clients are] whole persons whose legal issues often come deeply intertwined with other concerns . . .”).

moral agents, bring with them when they walk into the courtroom or sit down at the negotiating table.

But where does that leave the morality of client-controlled lawyering? The law is often too complex for nonlawyers to navigate without assistance.<sup>265</sup> As Charles Fried observes, the lawyer is “the person whose role it is to insure the client’s autonomy within the law.”<sup>266</sup> In this, she is a skilled extension of her client, asserting the legal claims (and thus the moral claims) that the client would assert if she was able to do so on her own.<sup>267</sup> Hence Markovits’s explanation of a lawyer’s duty of confidentiality: “client-lawyer communications are like purely internal reflection by the client (there being no other independent ego involved), so that the lawyer has no standing as an independent agent and therefore no right to reveal her client’s confidences.”<sup>268</sup> And to be her client’s technically skilled extension, the lawyer must set aside (within the context of the representation) her own contrary moral judgments.<sup>269</sup> She must privilege her client’s moral perspective over her own. Or so the argument goes.

Still, can that plausibly justify the neutrality norm? For ordinary lawyers, maybe. Normative neutrality certainly has many critics.<sup>270</sup> A lawyer who subdues her moral sense might be less able to advise clients on legal matters having moral dimensions, as nearly all legal matters do.<sup>271</sup> Neutrality might also enable unethical or outright criminal behavior by lawyers when *not*

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265. See *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (“Even the intelligent and educated layman has small and sometimes no skill in the science of law.”); Jon D. Levy, *The World Is Round: Why We Must Assure Equal Access to Civil Justice*, 62 ME. L. REV. 561, 564 (2010) (“The complexity of the judicial process is a substantial barrier for self-represented persons to meaningfully participate in the process.”).

266. Fried, *supra* note 87, at 1080.

267. See Albert W. Alschuler, *How to Win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team*, 29 MCGEORGE L. REV. 291, 298 (1998) (“The most compelling justification of the lawyer’s neutral or amoral role is that it facilitates access to law.”).

268. MARKOVITS, *supra* note 21, at 95.

269. See *id.* at 3 (observing that the lawyer-client relationship requires “lawyers to repress personal impressions of what is true or fair in deference to their clients’ interests and instructions”); Fried, *supra* note 87, at 1073 (“[T]he lawyer makes his client’s interests his own insofar as this is necessary to preserve and foster the client’s autonomy within the law.”).

270. See, e.g., Rebecca Flanagan, *Lucifer Goes to Law School: Towards Explaining and Minimizing Law Student Peer-to-Peer Harassment and Intimidation*, 47 WASHBURN L.J. 453, 460 (2008) (“Learning to ‘think like a lawyer’ is also dehumanizing.”); Hatfield, *supra* note 149, at 6 (“What if . . . we idealized for students the image of a lawyer working toward objectives she does morally endorse?”); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 72 (1988) (“Although this position is very commonplace, I think it rests on incoherent premises and leads to indefensible conclusions.”).

271. See, e.g., Floyd, *supra* note 151, at 558 (“[Lawyers] may be able to solve problems in their own lives with the fullness of emotional, moral, and analytical judgment, but they bring only the latter to bear when helping clients to solve their legal problems.”).

acting in a professional capacity.<sup>272</sup> And, according to some accounts, it comes at a psychological cost.<sup>273</sup> At the same time, for ordinary lawyering, neutrality aids lawyers in tactically evaluating the merits of legal claims.<sup>274</sup> That makes them better able to serve their clients' ends. Even more, neutrality facilitates the unnatural task of deferring to a client's normative views.<sup>275</sup> It thus helps make client control feasible.

Again, my point isn't that the ethic of client control or the neutrality norm are necessarily optimal for lawyering. There are, however, plausible cases to be made for them. That justifies rescinding them for prosecutors while the broader debate goes on.

### 3. Other Specialized Bars

A final objection situates the prosecution bar proposal as a slippery slope.<sup>276</sup> The legal profession's unitary structure is sometimes thought to be one of its strengths.<sup>277</sup> Would a prosecution bar mark the beginning of

272. See, e.g., Wasserstrom, *supra* note 148, at 15 (contending that the behavior of lawyers involved in Watergate “was, I believe, the likely if not inevitable consequence of their legal acculturation”).

273. On psychological side-effects of traditional legal education, see G. Andrew H. Benjamin, Alfred Kaszniak, Bruce Sales & Stephen B. Shanfield, *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 AM. BAR FOUND. RSCH. J. 225, 244–52; Lawrence S. Krieger, *Human Nature as a New Guiding Philosophy for Legal Education and the Profession*, 47 WASHBURN L.J. 247, 262–64 (2008).

274. See Bowers, *supra* note 59, at 1690 (observing that thinking “inside the proverbial legal box” is “critical when it comes to evaluating the legal merits of charges, but that may be antithetical to considering adequately equitable merits”).

275. See MERTZ, *supra* note 153, at 135 (“To successfully master [legal] discourse, students must be able to speak in an ‘I’ that is not their own self, to adapt their position to the exigencies of legal language.”); Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389, 417 (2005) (describing “obstacles to employing empathy in the face of fundamental moral disagreement”).

276. On slippery slope arguments generally, see WARD FARNSWORTH, *THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW* 172–81 (2007).

277. The idea traces at least to Tocqueville. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 176 (Nova Sci. Publishers, Inc., 2019) (1835) (“[I]t may be added that [American lawyers] naturally constitute a body, not by any previous understanding, or by an agreement which directs them to a common end; but the analogy of their studies and the uniformity of their proceedings connect their minds together, as much as a common interest could combine their endeavors.”); see also Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925–1960*, in *LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 157–59 (Robert L. Nelson, David M. Trubek & Rayman L. Solomon eds., 1992) (describing statements of bar leaders and academics extolling unified or integrated bar). The idea that the bar is actually “unified” has not fared well in modern scholarship. See, e.g., RHODE, *supra* note 93, at 17 (“Today’s profession has become too diverse and specialized, and its leadership too weak and divided, to enforce any unifying vision of professional ideals.”); see also Austin Sarat, *The Profession Versus the Public Interest: Reflections on Two Reifications*, 54 STAN. L. REV. 1491, 1493 (2002) (highlighting research showing “as much division as unity” in the legal profession); David B. Wilkins, *Making Context Count: Regulating Lawyers after Kaye, Scholer*, 66 S. CAL. L. REV. 1145, 1149 (1993) (“[M]any practitioners

unity's end? If prosecutors warrant "special" treatment, that is, why not the same for class action plaintiffs' lawyers, thrift lawyers,<sup>278</sup> and, for that matter, criminal defense lawyers?<sup>279</sup>

It is worth recalling the conglomeration of circumstances that (I have argued) justify a prosecution bar. First and most importantly, the norms and rules emanating from the broader legal profession's ethic of client control make it harder for prosecutors to do their job properly.<sup>280</sup> Add to that the fact that prosecutors are enormously powerful actors within a segment of the legal system that, many observers believe, has gone astray.<sup>281</sup> I make no claim that prosecutors are *sui generis* on either score. Yet it seems unlikely that this combination describes all that many other sectors of the legal profession.

Still, the question remains—are there *any* practice areas beyond prosecution as to which the arguments offered here apply? More precisely, are there other areas for which the ethic of client control is especially misplaced or pernicious? Civil government lawyers are the most immediate candidates.<sup>282</sup> Yet in most contexts outside criminal prosecution, government lawyers have identifiable clients—agencies headed by officials who can determine the agencies' positions, and thus the objectives of lawyers' work.<sup>283</sup> Most of the time, then, civil government lawyers have the same relationship to the principle of client control as other lawyers representing organizational clients.<sup>284</sup>

But most of the time is not all of the time. Consider, for instance, attorneys in the Office of the Principal Legal Advisor (OPLA) at the United

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and scholars readily acknowledge that the image of a unitary profession is increasingly outdated."). Nonetheless, the "single license system of law practice" has survived intact. See Carl M. Selinger, *The Public's Interest in Preserving the Dignity and Unity of the Legal Profession*, 32 WAKE FOREST L. REV. 861, 880–81 (1997).

278. David Wilkins has proposed context-specific ethical rules for lawyers representing thrifts. See Wilkins, *supra* note 277, at 1181.

279. Bruce Green has suggested context-specific ethical rules for capital defense lawyers. See generally Bruce A. Green, *Should There Be a Specialized Ethics Code for Death-Penalty Defense Lawyers?*, 29 GEO. J. LEGAL ETHICS 527 (2016).

280. See *supra* Part I.B.

281. See *supra* note 6; see also *infra* notes 310–11 and accompanying text.

282. See generally Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. PUB. L. 235 (2000) (arguing that civil government lawyers, like prosecutors, have a duty to "seek justice" in litigation).

283. See W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 HASTINGS L.J. 275, 303 (2017) ("A government lawyer's client is generally the represented agency, exercising its authority through officers authorized to make decisions on behalf of the agency."); see also Green, *supra* note 2, at 627 n.84 ("Lawyers representing the government in civil proceedings typically (although perhaps wrongly) view the agencies they represent as their client for purposes of allocating decision-making.")

284. See Wendel, *supra* note 283, at 305 ("[T]he role of lawyers as fiduciaries is a feature of professional ethics that cuts across the government/private client distinction."); see also *supra* note 111 and accompanying text.



States Immigration and Customs Enforcement who represent the government in removal cases.<sup>285</sup> They exercise what the agency describes as “prosecutorial discretion” in selecting cases to litigate.<sup>286</sup> During the Obama administration, as Stephen Lee and Sameer Ashar explain, that discretion became central to the agency’s self-image: “The message [Obama-era] political appointees circulated was clear: that the power immigration lawyers in the agency exercised was akin to the criminal law enforcement powers of their DOJ counterparts.”<sup>287</sup>

The logic for a prosecution bar may apply to government lawyers handling removal proceedings, though the institutional context in which they work is quite different from that of criminal prosecutors.<sup>288</sup> And perhaps some other government lawyers—or even lawyers outside government—also work in contexts where they must act in the absence of a client’s control. But they are the exception, not the rule. A prosecution bar is hardly a slope on which the legal profession need fear slipping.

### *B. Alternatives*

Above, I sketched a design for a prosecution bar.<sup>289</sup> For completeness’s sake, this section briefly compares that scheme to two alternative models. The first is patterned after specialty boards in medicine. The second would make prosecuting fully independent of the existing legal profession. Neither is clearly superior to the prosecution bar proposed in Part II, though the latter is far less practical.

#### *1. A National Prosecution Bar*

Part II proposed prosecution bars operating under the auspices of state licensing agencies. Alternatively, a prosecution bar could be administered by a private national organization. Imagine an “American Board of Prosecution” (ABP) that confers “board certification” on lawyers it deems

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285. Stephen Lee & Sameer M. Ashar, *DACA, Government Lawyers, and the Public Interest*, 87 *FORDHAM L. REV.* 1879, 1885 (2019).

286. See *Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor*, U.S. IMMIGR. & CUSTOMS ENF’T (Sept. 12, 2022), <https://www.ice.gov/about-ice/opla/prosecutorial-discretion> [<https://perma.cc/ZMK7-D6X5>].

287. Lee & Ashar, *supra* note 285, at 1894.

288. OPLA employs about 1,100 attorneys. See *id.* at 1885. Meanwhile, there are tens of thousands of prosecutors spread among thousands of agencies. See STEVEN W. PERRY & DUREN BANKS, U.S. DEP’T OF JUST., *PROSECUTORS IN STATES COURTS 2007 – STATISTICAL TABLES* (Dec. 2011), <https://bjs.ojp.gov/content/pub/pdf/psc07st.pdf> [<https://perma.cc/X2LX-GDKK>].

289. See *supra* Part II.A.

qualified to be prosecutors.<sup>290</sup> Proof of concept comes from specialization in the medical profession. While state agencies license doctors to practice medicine, twenty-four national boards certify them as specialists and sub-specialists.<sup>291</sup> Prosecuting could work the same way, with state bars licensing would-be prosecutors as lawyers and the ABP certifying them as prosecutors.

In many respects, the ABP could function just like the state prosecution boards proposed in Part II. It could police entry into the profession via certification, promulgate ethical rules delineating in detail the meaning of “doing justice,” and enforce those rules in disciplinary proceedings.<sup>292</sup> And the ABP’s leadership structures could ensure representation of diverse stakeholders (including but not limited to practicing prosecutors), just like state prosecution boards.<sup>293</sup>

There would be two major differences. First, an ABP would provide uniform *national* standards for prosecution. On the one hand, that avoids duplication of efforts. On the other, the ABP’s rules would not reflect political or cultural variation at the state or regional levels, and there would be less opportunities to experiment with different approaches. The choice between state and national regulation of prosecutors thus reflects the standard tradeoffs between uniformity and variation under federalism.<sup>294</sup>

The second major difference is that, as noted, the ABP would be a private organization. As such, its certificate would be voluntary.<sup>295</sup> That is both a virtue and a vice. Unless chief prosecutors (and their human resource staffs) required ABP certification of potential hires, there would be little reason for aspiring prosecutors to undergo a costly certification process. Board

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290. Although prosecutor organizations already exist at the national level, they are membership (rather than credentialing) organizations. See, e.g., *About NDAA*, NAT’L DIST. ATT’YS ASS’N, <https://ndaa.org/about/aboutndaa/> [<https://perma.cc/7GZP-9BV9>] (“NDAA’s mission is to be the voice of America’s prosecutors and to support their efforts to protect the rights and safety of the people.”); *About, ASS’N PROSECUTING ATT’YS*, <https://www.apainc.org/about/> [<https://perma.cc/9MN9-MQ7V>] (“Our mission is to support prosecutors in their efforts to create safer communities through a more just and equitable legal system.”).

291. See Christine K. Cassel & Eric S. Holmboe, *Professionalism and Accountability: The Role of Specialty Board Certification*, 119 *TRANSACTIONS AM. CLINICAL & CLIMATOLOGICAL ASS’N* 295, 295–96 (2008) (describing medical specialist certification).

292. See *supra* Part II.A.

293. See *supra* notes 172–76 and accompanying text.

294. See Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 *STAN. L. REV.* 289, 343 (2012) (“[U]nevenness across jurisdictions in calibrating policy raises another set of federalism economics concerns, though: the balance of uniformity and variation.”); see also Abbe R. Gluck, *Nationalism as the New Federalism (and Federalism as the New Nationalism): A Complementary Account (and Some Challenges) to the Nationalist School*, 59 *ST. LOUIS U. L.J.* 1045, 1057 (2015) (“Federalism is associated with the panoply of values already discussed—separation of powers, liberty, experimentation, variation, voice, and so on—while nationalism seems associated mostly with a single value: uniformity.”).

295. The ABP would confer certificates, not licenses. On the distinction, see Kleiner, *supra* note 235, at 191–92.

certification is pervasive in medicine,<sup>296</sup> in significant part because hospitals require it of their credentialed physicians.<sup>297</sup> Hospitals have clear financial incentives for ensuring the quality of professionals working under their roofs.<sup>298</sup> Prosecutors' offices do not.<sup>299</sup> The best-case scenario is that political incentives would substitute—in other words, that chief prosecutors would feel political pressure to hire certified prosecutors. But the politics of prosecution are complex, which makes *ex ante* predictions fraught.<sup>300</sup> Board certification, moreover, has a limited track record in the legal profession.<sup>301</sup> So uptake concerns loom large for a national prosecution bar.

The virtue of a voluntary certification regime for the prosecution bar is the flipside of its vice. Without widespread uptake, the ABP could start small. Buy-in from a handful of well-placed prosecutorial offices could create an ABP, fund and staff it, and get it off the ground. That might make it more politically feasible than prosecutorial licensure requirements—which would require state legislation and new public agencies right away. The ABP model of a prosecution bar is thus perhaps more scalable.

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296. Around 90% of physicians in the United States are certified by at least one of the twenty-four boards. See Lipner et al., *supra* note 186, at S20.

297. See David B. Waisel, *Revocation of Board Certification for Legally Permitted Activities*, 89 MAYO CLINIC PROC. 869, 871 (2014) (“Although board certification is technically voluntary, pragmatically it is not.”).

298. The financial logic is partly about market differentiation. See Gary L. Freed, Kelly M. Dunham & Acham Gebremariam, *Changes in Hospitals' Credentialing Requirements for Board Certification from 2005 to 2010*, 8 J. HOSP. MED. 298, 301 (2013) (“Hospitals face increasing pressure to differentiate themselves from their peers through better patient outcomes.”). It is also about avoiding liability. One study estimated that U.S. hospitals spend at least \$1 billion a year on “risk management” operations. See Michelle M. Mello, Amitabh Chandra, Atul A. Gawande & David M. Studdert, *National Costs of the Medical Liability System*, 29 HEALTH AFFS. 1569, 1572 (2010). There is evidence that initial certification is associated with clinical and nonclinical quality measures. See Lipner et al., *supra* note 186, at S22–28 (reviewing literature).

299. There is no “market” for prosecutorial quality (in the “doing justice” sense), so no need or opportunity for market differentiation. Nor, given prosecutorial immunity doctrines, do prosecutors have a serious liability risk. See Justin Murray, *Policing Procedural Error in the Lower Criminal Courts*, 89 FORDHAM L. REV. 1411, 1447 n.220 (2021) (“Absolute immunity shields judges and prosecutors from civil suits for damages premised on conduct connected to the adjudicative process.”).

300. See Epps, *supra* note 109, at 767 (observing that prosecutors are motivated by a “complicated mix of political, professional, and personal incentives”).

301. The ABA's Model Rules of Professional Conduct envision that lawyers may advertise themselves as “certified as a specialist” if (and only if) their certifying organization has been approved by an “appropriate authority” of their jurisdiction or the ABA itself. MODEL RULES OF PRO. CONDUCT r. 7.2(c) (AM. BAR ASS'N 1983). Currently, the ABA has approved eight such organizations. See *Private Organizations with ABA Accredited Lawyer Certification Programs*, AM. BAR. ASS'N, <https://www.americanbar.org/groups/specialization/organizations-with-aba-accredited-lawyer-certification-programs/> [<https://perma.cc/WY77-4Z3A>]. Only about 3% of lawyers hold specialist certification. Thomas P. Sartwelle, *Trial Lawyers, Plumbers, and Electricians: Should They All Be Certified?*, 59 S. TEX. L. REV. 59, 65 (2017).

## 2. *A Fully Independent Prosecution Bar*

A more radical version of the prosecution bar would fully separate prosecutors from the legal profession. Prosecutors, in this alternative model, need not be lawyers at all.

How could *that* work? Prosecutors require legal knowledge. But they need not acquire that knowledge sitting alongside J.D. students. In a full-separation model, prosecutors would train in professional schools separate from law schools. The curriculum would include the coursework discussed above for a post-J.D. prosecutorial degree.<sup>302</sup> It would also include doctrinal courses on topics including criminal law, criminal procedure, and evidence.<sup>303</sup>

In terms of licensing and professional discipline, the full-separation alternative differs from the proposal in Part II in one significant respect: there'd be no legal profession to fall back on.<sup>304</sup> That means that prosecution boards could not assume (for initial licensing purposes) that an applicant was already knowledgeable about law. Further, when a prosecutor lost her license, she could not fall back on a general law practice unless she happened to be separately licensed as an attorney.<sup>305</sup>

It seems likely that a fully independent prosecution bar would be even more capable than a semi-autonomous one of cultivating a distinct set of norms and ethical rules. However, it would introduce additional administrability concerns. I'll briefly mention four. First, because prosecutor schools would need to offer doctrinal law courses, there would be significant redundancies for colleges and universities. Second, splitting the criminal legal profession would impede the professional mobility of lawyers. Today, lawyers acquire skills, diversify their practices, and (in the private practice setting) develop business by switching between prosecution and defense roles over the course of their careers.<sup>306</sup> Third, law school might have a moderating influence on punitive politics that is beneficial for aspiring prosecutors to experience.<sup>307</sup> Fourth, if prosecutors' formal legal education is limited to criminal law and closely related subjects, prosecutors

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302. *See supra* text accompanying note 177.

303. This list is not meant to be exhaustive. For aspiring prosecutors wishing to do domestic violence work, for instance, family law could be instructive. For those wanting to work on white collar prosecutions, corporate law and tax courses would be useful.

304. *See supra* text accompanying note 169.

305. *See supra* text accompanying note 201.

306. Junior lawyers regularly begin as prosecutors to gain litigation skills, which they then take across the street as defense lawyers. *See* Richman, *supra* note 110, at 787 (noting that "a great many [prosecutors] view the job as a way station").

307. But for a compelling argument that the traditional first-year law school course on substantive criminal law advances the ideology of the carceral state, see Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1651–85 (2020).

would be unable to serve as judges on courts of general jurisdiction, including nearly all appellate courts in the United States.<sup>308</sup> There is more that could be said as to each concern—some may even plausibly be understood as features rather than bugs. The more important point is that a prosecution bar that supplements (but does not replace) a law license, as proposed in Part II, would not encounter these pervasive additional challenges.

### CONCLUSION

There's nothing inevitable about the structure of the American legal profession.<sup>309</sup> To the extent that the profession's structure helps it—us—achieve valuable social ends like justice, we should celebrate it. But if the structure impedes that endeavor, it is within our power to fix it. That's where things stand in the corner of the profession that deals with the criminal law.

The legal profession's unitary, undifferentiated structure embeds prosecutors in an ethic of client control that undermines their obligation to do justice. That helps explain how the profession can stand by as prosecutors engage in practices that are as routine as they are unjust. If American criminal justice was otherwise tolerable—if it achieved just outcomes—perhaps we could leave well enough alone. But American criminal justice is not tolerable.<sup>310</sup> Its outcomes are stained by arbitrariness, racism, and senseless punitiveness.<sup>311</sup> Unjust but lawful prosecutorial practices obviously do not bear sole responsibility for the current condition of the criminal legal system. But they bear some, and they are unimpeded by the legal profession's rules or norms. This Article has shown that the structural problem with the criminal legal profession is fixable. As members of the prosecution bar, prosecutors could trade the ethic of client control for an ethic of seeking justice, in practice and not just on paper. They might even collaborate in righting the ship of criminal justice.

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308. There are a few exceptions. See OKLA. CONST. art. 7, § 4 (defining jurisdiction of Court of Criminal Appeals); TEX. CONST. art. V, § 5 (similar).

309. Cf. James W. Jones & Bayless Manning, *Getting at the Root of Core Values: A "Radical" Proposal to Extend the Model Rules to Changing Forms of Legal Practice*, 84 MINN. L. REV. 1159, 1163 (2000) ("Like all other social institutions, the legal profession has throughout its history continuously evolved and adapted to meet the changing conditions, needs, and demands of the society around it.").

310. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 5 (2011) ("The criminal justice system has run off the rails.").

311. See *id.* at 8 (characterizing American criminal justice as an "arbitrary, discriminatory, and punitive beast"); JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 4 (2003) ("The Western European media regularly runs pieces expressing shock at the extreme severity of American punishment."); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 7 (2019) ("[T]he expanding criminal punishment system functions to oppress black people and other politically marginalized groups . . .").