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## THE PROSECUTOR’S CLIENT PROBLEM

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*On the most fundamental level, the prosecutor is an attorney obligated to pursue her client’s objectives both competently and loyally. But who is the prosecutor’s client and what are the objectives? Would the objectives include avoiding behaviors that disrupt the orderly existence of the community as mass misdemeanor processing does? To answer this question, this Article examines the prosecutor’s role as an attorney seeking to abide by her professional obligations of loyalty to and competence for a client, and questions if those duties require a different and more positive approach to misdemeanor justice.*

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*We understand that excessive misdemeanor arrests and convictions disrupt family dynamics and social networks, limit or preclude access to quality jobs, and prevent otherwise eligible citizens from using public benefits to improve their life outcomes. In short, mass misdemeanor processing tears at the fabric of a safe, stable, and thriving community.*

*This mass prosecution problem, as I term it, encompasses both the prosecutor's charging practice and its negative impact on the community within which the prosecutor works. This problem is often viewed as the fault of state legislatures who have criminalized otherwise innocuous or minor criminal behaviors, state public defenders who are overworked and underfunded, or even community citizens who have yet to find positive ways to contribute to their own wellbeing or environment. However, the problem has not yet been presented through a comprehensive legal ethics lens—that is, as a problem created by prosecutors who are not acting in accordance with the professional and ethical rules that guide legal practice in regards to client relations. This Article is among the first to explore that question and theorize a different approach to prosecution that is more consistent with professional ethics.*

#### INTRODUCTION

The last two decades saw a dramatic increase in misdemeanor prosecutions.<sup>1</sup> The direct and collateral consequences associated with these convictions also rose. Indeed, the punishments associated with misdemeanor convictions rose so steeply in the modern era that they often carry the same or similar risk of personal and social consequences accompanying felony convictions.<sup>2</sup>

By some estimates, there are currently more than forty-five thousand state and federal consequences for convictions in the United States.<sup>3</sup> Other studies report a rapid expansion in both the number and type of consequences associated with misdemeanor convictions in particular. These include limitations on housing rights, access to student and other loans, and custody rights.<sup>4</sup> Direct

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<sup>1</sup> See ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT'L ASS'N CRIM. DEF. LAW., *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS* 11 (2009), <https://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808> [<https://perma.cc/Y4X9-5PZJ>] (estimating that in 2006, misdemeanor per capita rate in United States was 3544 per 100,000 people).

<sup>2</sup> See Maya Rhodan, *A Misdemeanor Conviction Is Not a Big Deal, Right? Think Again*, TIME (Apr. 24, 2014), <http://time.com/76356/a-misdemeanor-conviction-is-not-a-big-deal-right-think-again/> [<https://perma.cc/G2DZ-5HMZ>] (“[M]isdemeanor convictions can trigger the same legal hindrances, known as collateral consequences, as felonies. And there are fewer routes to expunging them from criminal records.”).

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

<sup>4</sup> *Id.*; see also Brandon Buskey & Lauren Sudeall Lucas, *Keeping Gideon's Promise: Using Equal Protection to Address the Denial of Counsel in Misdemeanor Cases*, 85 FORDHAM L. REV. 2299, 2313 (2017) (describing “exponential increase in the number and

consequences of misdemeanor convictions also include hefty fines which many indigent defendants cannot afford to pay, as well as significant time in jail at the outset or as a result of failing to pay the fines.<sup>5</sup> Even without the imposition of jail time, the fees imposed by courts for misdemeanor convictions can result in mounting debt for those already struggling financially, further contributing to destabilizing self-perceptions of a defendant citizen's rightful place in society.<sup>6</sup>

As the number of misdemeanor arrests and convictions rise, so too do the adverse social effects on the communities in which these misdemeanor defendants reside. A prolific misdemeanor practice in any given jurisdiction limits the number of community inhabitants that can truly thrive in their homestead. The practice prevents ordinary citizens from engaging in all of the trappings of a more stable and consistent life at home, and can also impact the stability of their familial and social networks. The negative effects of such a misdemeanor practice are particularly problematic in communities that are already impoverished and whose occupants are already struggling to maintain a positive foothold in both their financial engagements and social networks.<sup>7</sup> Mass prosecution of misdemeanors constricts free movement and social advances, and, in turn, makes the already difficult tasks of finding employment or affording the basic necessities of life even more difficult.<sup>8</sup> This increases strain on the familial and social relationships that would ordinarily enrich a person's life.

Scholars have advanced a number of solutions to the complications arising from the misdemeanor charging process. Some scholars advocate for complete decriminalization of certain behaviors by moving them to other state, civil, or regulatory schemes.<sup>9</sup> Others argue that problems within the criminal justice

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severity of collateral consequences that states and the federal government now attach to misdemeanors").

<sup>5</sup> See Alexandra Natapoff, *Why Misdemeanors Aren't So Minor: Too Often the Criminal Justice System Is Pronouncing People Guilty Without Evidence, Lawyers, or a Chance to Plead Their Case*, SLATE (Apr. 27, 2012, 11:33 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/04/misdemeanors\\_can\\_have\\_major\\_consequences\\_for\\_the\\_people\\_charged\\_.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/04/misdemeanors_can_have_major_consequences_for_the_people_charged_.html) [https://perma.cc/34L2-AE8X].

<sup>6</sup> See Lisa Riordan Seville & Hannah Rappleye, *Sentenced to Debt: Some Tossed in Prison over Unpaid Fines*, NBC NEWS (May 27, 2013, 3:43 AM), <https://www.nbcnews.com/feature/in-plain-sight/sentenced-debt-some-tossed-prison-over-unpaid-fines-v18380470> [https://perma.cc/4XDG-ME5W] (reporting "widespread practice of locking up poor offenders" for failing to pay fines).

<sup>7</sup> See SUZANNE M. STRONG, U.S. DEP'T JUST., BUREAU JUST. STAT., STATE-ADMINISTERED INDIGENT DEFENSE SYSTEMS, 2013, at 3 (2017), <https://www.bjs.gov/content/pub/pdf/saids13.pdf> [https://perma.cc/W74X-FEJU].

<sup>8</sup> See Rhodan, *supra* note 2 (highlighting how misdemeanor convictions severely limit future job prospects).

<sup>9</sup> See, e.g., Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 788 (2012) (overcriminalization may be addressed by "trimming the penal code, with a scalpel in some places and a hatchet in others"); Ron Marmer, Opening Statement, *Mass*

system are more adequately addressed by identifying and eliminating racism and bias among the primary decision-makers of the criminal justice process.<sup>10</sup> Still others postulate that securing better representation for defendants will more adequately combat the misdemeanor justice problem by enabling public defenders to assume more active roles in case management and outcomes.<sup>11</sup> There may well be a place for all of these ideas in an integrated and consolidated plan for overhauling the misdemeanor criminal process. Little has been said, however, about the role of the prosecutor's charging decision and its tense relationship with ethical and professional guidelines that govern relationships between attorneys and their clients.

A significant point, however, is that the prosecutor does not have a "client" in the traditional sense of the word. Unlike the traditional attorney/client paradigm, a prosecutor does not have a single representative they can turn to in making their decisions. The prosecutor does not have an individual who appears with them before the court in the course of litigation or who directs final dispositions of legal proceedings, all of which are traditional responsibilities of an attorney's client.

Despite the absence of an easily recognizable and traditional client, the prosecutor engages in her prosecutorial practice on behalf of either some person, some group of persons, or some entity. This is a fundamental requirement of the legal process—that an attorney represents a particular party's interests. It is within this essential framework that ethical and professional rules provide clear terms and boundaries for appropriate attorney behavior on behalf of a client.

Take, for instance, the central requirement that an attorney must practice law competently and loyally on behalf of her client.<sup>12</sup> The attorney must also inform

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*Incarceration: Finding Our Way Back to Normal*, 38 LITIGATION, Winter 2012, at 4, 5 ("[W]hen confronting any social issue, the criminal law should be the tool of last resort.").

<sup>10</sup> See, e.g., Vivian Nixon et al., *Life Capacity Beyond Reentry: A Critical Examination of Racism and Prisoner Reentry Reform in the U.S.*, 2 RACE/ETHNICITY: MULTIDISCIPLINARY GLOBAL CONTEXTS 21, 21 (2008) ("[R]acial structures informing mass incarceration remain unnamed and untouched . . ."); Garrick L. Percival, *Ideology, Diversity, and Imprisonment: Considering the Influence of Local Politics on Racial and Ethnic Minority Incarceration Rates*, 91 SOC. SCI. Q. 1063, 1063 (2010) ("[I]deological orientations and racial and ethnic contextual characteristics significantly impact minority incarceration rates."); Joy M. Thomas, *Mass Incarceration of Minority Males: A Critical Look at Its Historical Roots and How Educational Policies Encourage Its Existence*, 20 J. RACE GENDER & CLASS 177, 177 (2013) (arguing that mass incarceration can be addressed through improved education about issues of race).

<sup>11</sup> See, e.g., BORUCHOWITZ, BRINK & DIMINO, *supra* note 1, at 12 ("Attentive defense counsel is particularly important in misdemeanor courts because the volume of cases means that prosecutors and judges too often and too easily can overlook factual issues.").

<sup>12</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2017) ("Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."). There may only be a few clear situations where the client

the client of the means she will undertake to achieve a particular objective for her client.<sup>13</sup> Conversely, it is the client who dictates the end goals of a particular representative relationship.<sup>14</sup> The client also, to some degree, determines the start and end of the legal relationship.<sup>15</sup> Thus, identifying the client in the prosecutor's attorney/client paradigm will provide a useful tool for determining how the prosecutor should approach a misdemeanor justice system that can prove harmful in certain ways and to certain representative bodies. This Article identifies different possibilities for who may be the prosecutor's client in order to evaluate how the prosecutor should approach misdemeanor justice.

This Article proceeds in four parts. In Part I, I define what I refer to as "mass prosecution" and the resulting community fragmentation that occurs with such prolific misdemeanor processing. In Part II, I try to identify potential clients for the prosecutor by exploring how different actors are situated to the prosecutor in the criminal justice process. In Part III, I use the traditional attorney/client paradigm to consider how ethical and professional guidelines should inform a prosecutor's misdemeanor practice. I conclude in Part IV, by recasting the prosecutor's role in misdemeanor processing in light of a potential client's identity.

#### I. MASS PROSECUTION AND THE MISDEMEANOR PROBLEM

Simply put, the criminal justice process has proven unwieldy and unmanageable to a large segment of the public. Legal scholars increasingly identify misdemeanors as playing a central role in that negative assessment of the nation's criminal process.<sup>16</sup> In her seminal piece, *Misdemeanors*, Professor

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chooses how to proceed in litigation, but an attorney can never cross the border between the attorney's control of the means of reaching a desired resolution and the client's right to choose the desired outcome. MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 2017) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . .").

<sup>13</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 2017).

<sup>14</sup> See *id.* ("A lawyer shall abide by a client's decision whether to settle a matter.").

<sup>15</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.16 cmt. 4 (AM. BAR ASS'N 2017) ("A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services."). Note that the rules do allow for withdrawal in certain circumstances and that courts can refuse to allow an attorney to be removed from a case if it appears dilatory in nature. See MODEL RULES OF PROF'L CONDUCT r. 1.16 (AM. BAR ASS'N 2017) ("A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.").

<sup>16</sup> See generally MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 278 (2011) (calling for "judiciary, defender community, and professional organizations" to respond to "misdemeanor representation crisis"); Samuel R. Gross, *Opinion, The Staggering*

Alexandra Natapoff provides a landscape for better understanding the massive increase in misdemeanor prosecutions over the last few decades and the resulting consequences of that increase.<sup>17</sup> As she detailed in her article, misdemeanor justice is characterized by speed and informality.<sup>18</sup> Often, the alleged perpetrator will meet her lawyer and the judge for the first time, and enter a guilty plea, at her initial court appearance. The then-convicted defendant may not know the consequences associated with her guilty plea or the impact this plea may have on her foreseeable future. In this way, the current state of misdemeanor justice represents a factory assembly-line that is both burdensome on the average citizen and expansive in its reach.<sup>19</sup> The following Section details misdemeanor processing and the resulting effects on communities that are particularly sensitive to excessive state involvement and control.

#### A. *Mass Misdemeanor Processing*

Legal scholars have done, and continue to perform, important and meaningful work to fully capture the size and scope of the misdemeanor problem.<sup>20</sup> Professors Megan Stevenson and Sandra Mayson are in the process of developing a study updating the groundbreaking work conducted by Professor

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*Number of Wrongful Convictions in America*, WASH. POST (July 24, 2015), [https://www.washingtonpost.com/opinions/the-cost-of-convicting-the-innocent/2015/07/24/260fc3a2-1aae-11e5-93b7-5eddc056ad8a\\_story.html?utm\\_term=.660794a1a4be](https://www.washingtonpost.com/opinions/the-cost-of-convicting-the-innocent/2015/07/24/260fc3a2-1aae-11e5-93b7-5eddc056ad8a_story.html?utm_term=.660794a1a4be) [<https://perma.cc/AH7S-3L93>] (calling for increased funding to alleviate flaws in disbursement of misdemeanor charges and convictions).

<sup>17</sup> See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1314 (2012) (“[T]he misdemeanor process is an institutional gateway that explains many of the criminal system’s dynamics and dysfunctions.”); see also Stephanos Bibas, *Bulk Misdemeanor Justice*, 85 S. CAL. L. REV. POSTSCRIPT 73, 74 (2012) (critiquing Natapoff’s proposed solutions as “mask[ing] the deeper structural problems that demand wholesale reforms”); Eve Brensike Primus, *Our Broken Misdemeanor Justice System: Its Problems and Some Potential Solutions*, 85 S. CAL. L. REV. POSTSCRIPT 80, 83 (2012) (noting that Natapoff’s proposed reforms are not “as comprehensive as her description of the reasons why reform is necessary”); Jonathan Simon, *Misdemeanor Injustice and the Crisis of Mass Incarceration*, 85 S. CAL. L. REV. POSTSCRIPT 113, 117 (2012) (arguing that Natapoff’s proposals regarding misdemeanor justice are more likely to be heeded given “rising prominence of dignity in U.S. constitutional law”).

<sup>18</sup> See Natapoff, *supra* note 17, at 1315 (“Massive, underfunded, informal, and careless, the misdemeanor system propels defendants through in bulk with scant attention to individualized cases and often without counsel.”).

<sup>19</sup> See *id.* at 1374 (“Millions of Americans experience the assembly line of the misdemeanor process every year, sustaining jail time, fines, and the burdens of a criminal record.”).

<sup>20</sup> See, e.g., Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. SOC. 351, 351 (synthesizing two years of data from New York City concerning criminal justice system).

Robert Boruchowitz to quantify the misdemeanor problem.<sup>21</sup> Although their work is still drawing conclusions from an extraordinary amount of aggregated data, it provides critical information for understanding how expansive misdemeanor prosecutions have become.

The current estimate is that misdemeanors constitute more than three-quarters of all criminal cases.<sup>22</sup> This amounts to thirteen million case filings each year.<sup>23</sup> Although this may be less than ten percent of the nation's population, it is worth noting that the United States far outpaces other similarly situated countries with regards to the sheer scale of its criminal justice system.<sup>24</sup> The United States has only five percent of the world's population but houses more than twenty percent of the world's prison population.<sup>25</sup> It is difficult to situate misdemeanors within these global numbers because prison is not a necessary, or even ordinary, consequence of a misdemeanor conviction.<sup>26</sup> It logically follows, however, from other important metrics, that misdemeanors comprise the vast majority of the United States' global domination of criminal processing. The Federal Bureau of Investigation ("FBI") reports that more than seventy million Americans have criminal records.<sup>27</sup> Additionally, there are more than ten times as many

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<sup>21</sup> See Megan Stevenson & Sandra Mayson, *Misdemeanors by the Number*, 98 B.U. L. REV. 731, 731-32 (2018); see also BORUCHOWITZ, BRINK & DIMINO, *supra* note 1, at 10-11 (utilizing existing studies and reports, and conducting site visits and online surveys to produce comprehensive look at U.S. misdemeanor crisis).

<sup>22</sup> Stevenson & Mayson, *supra* note 21, at 746 n. 81.

<sup>23</sup> *Id.* at 745.

<sup>24</sup> See Debra Loevy, *How Does US Justice Stack up? An International Comparison*, LOEVY & LOEVY (Dec. 21, 2015), <https://www.loevy.com/blog/how-does-us-justice-stack-up-an-international-comparison/> [<https://perma.cc/L5VD-7NNY>] ("The United States has 2.3 million people behind bars, more than any other nation in the world.").

<sup>25</sup> *The Prison Crisis*, ACLU, <https://www.aclu.org/prison-crisis> [<https://perma.cc/ML44-C7XB>] (last visited Apr. 24, 2018) (reporting that United States is currently "world's largest jailer").

<sup>26</sup> Although the author does not take a position on the frequency or infrequency of prison as punishment for misdemeanor convictions, such a punishment is possible under various state misdemeanor schemes. Even if a prison sentence is not an immediate part of the sentencing associated with a misdemeanor conviction or guilty plea, it can become a foregone conclusion if the convicted offender fails to comply with the requirements of the conviction.

<sup>27</sup> Dan Clark, *How Many U.S. Adults Have a Criminal Record? Depends on How You Define It*, POLITIFACT (Aug. 18, 2017, 12:00 AM), <http://www.politifact.com/new-york/statements/2017/aug/18/andrew-cuomo/yes-one-three-us-adults-have-criminal-record/> [<https://perma.cc/2EH3-ZJR2>] (reporting that "by the FBI's standard, 73.5 million people in the United States had a criminal record" as of June 2017). The FBI counts all felony arrests as criminal records, even if they do not result in convictions, and only includes misdemeanors if the state reports them. *Id.*

misdemeanor cases filed as felony convictions in a given year.<sup>28</sup> This data may not provide conclusive evidence about the role of misdemeanors in the American dominance of the criminal justice arena, but it certainly suggests that misdemeanors constitute a substantive piece of the puzzle.

Even if we were to limit the comparison and discussion of misdemeanors to just the United States, reaching a consensus about what types of prosecutions should be included within that landscape is still no easy feat. Separating misdemeanor from felony prosecutions within the United States has puzzled empiricists for over thirty years. Just one of the difficulties in quantifying misdemeanors is that jurisdictions classify different behaviors as municipal offenses, misdemeanors, or felonies.<sup>29</sup> In other words, one jurisdiction may classify a minor drug possession as a municipal offense, while another jurisdiction may classify it as a misdemeanor, and still another as a felony.<sup>30</sup> Despite this classification conundrum, the reality is that most Americans who encounter the criminal justice process as defendants who will do so while facing misdemeanor charges.<sup>31</sup> This has important implications for both the procedural protections afforded to criminal defendants and the resulting impact on the communities in which those defendants reside.

#### B. *The Impact of Mass Prosecution*

A community is only as successful and stable as its component parts and mass prosecution has a significant influence on those markers. Each community may have different measures for achieving maximum stability, but social science informs on what is most necessary for community health and vibrancy. These markers include the ability to access quality healthcare and other government programs, strong social and familial networks, and the ability to work for a living wage.<sup>32</sup> Although there is still much to be done to examine the impact of

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<sup>28</sup> Natapoff, *supra* note 5 (“Approximately 1 million felony convictions are entered every year; more than 10 million misdemeanor cases are filed in the same time.”).

<sup>29</sup> See Stevenson & Mayson, *supra* note 21, at 736-37.

<sup>30</sup> See *id.*

<sup>31</sup> See Natapoff, *supra* note 5 (“In most states, misdemeanor dockets are four or five times the size of felony dockets.”).

<sup>32</sup> Many scholars postulate that the ability to have pride in one’s own work and position in life, to engage in pleasure with loved ones, and to engage as a part of social networks creates a sense of purpose that results in happy, thriving communities. See generally, e.g., DAN BUETTNER, *THE BLUE ZONES OF HAPPINESS: LESSONS FROM THE WORLD’S HAPPIEST PEOPLE* (2017) (presenting global research indicating that pleasure, purpose, and pride mark world’s happiest societies). It is important to note that a misdemeanor conviction can erode one’s pride in oneself and purpose in life, as following a misdemeanor conviction one will experience significant limitations on her professional and social lives. See Natapoff, *supra* note 5 (“A petty conviction can affect eligibility for professional licenses, child custody, food stamps,



misdemeanor arrests and convictions for particular communities, we do have a sense that the damaging effects of misdemeanors are most clearly felt along class and racial dimensions.<sup>33</sup>

Recent law enforcement reports illustrate the more severe complications the massive misdemeanor process has on poorer communities and communities of color. In 2015, the U.S. Department of Justice issued a report after an extensive study of Ferguson, Missouri. The Department found systemic abuses conducted by various legal actors against the poor and people of color in that community.<sup>34</sup> This report conveys what legal scholars have been theorizing for decades—that racial and class distinctions present themselves both implicitly and explicitly in order-maintenance policing and its resulting opportunities for discretionary decisions.<sup>35</sup> These differences result in communities that are mired in a cycle of disrepair and biased monitoring, which are both destabilizing forces.

This cycle is particularly problematic because poor communities are already at risk for higher criminogenic effects of diminished social integration.<sup>36</sup> This is not to say that poverty breeds criminality or vice versa. Instead, it is an indication that mass misdemeanor processing may exacerbate an already precarious social order in impoverished communities,<sup>37</sup> particularly when such a system requires

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student loans, and health care or lead to deportation. In many cities, a misdemeanor makes you ineligible for public housing.”).

<sup>33</sup> See Kohler-Hausmann, *supra* note 20, at 360 (stating that “demographic composition in misdemeanor courtrooms is principally low income and minority”).

<sup>34</sup> See U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/VV4C-Q3LL>] (stating that Ferguson’s court and police practices “impose a particular hardship upon Ferguson’s most vulnerable residents, especially upon those living in or near poverty”).

<sup>35</sup> See, e.g., Jacinta M. Gau & Rod K. Brunson, *Procedural Justice and Order Maintenance Policing: A Study of the Inner-City Young Men’s Perceptions of Police Legitimacy*, 27 JUST. Q. 255, 258-59 (2010) (“An abundant body of knowledge has established that police decisions can be affected by a suspect’s race and/or social standing . . .”); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 817 (2015) (detailing effects of arrests and how most of those arrested are minorities); Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043, 1043 (2013) (“Order maintenance police arrest large numbers of people based on neighborhood, age, race, and other generalizations.”).

<sup>36</sup> See generally Edward S. Shihadeh & Darrell J. Steffensmeier, *Economic Inequality, Family Disruption, and Urban Black Violence: Cities as Units of Stratification and Social Control*, 73 SOC. FORCES 729 (1994) (discussing income inequality, family disruption, and rates of violent crime among minorities and their effects on communities).

<sup>37</sup> See ASHLEY NELLIS, SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 3 (2016), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> [<https://perma.cc/7YFF-886U>] (“Collateral consequences are felt disproportionately by

little in the way of procedural fairness and much in the way of costs to social and human capital.

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Mass misdemeanor processing has rightly proven to be a cause of concern for individuals looking to address inequities and community instability.<sup>38</sup> These decision-makers, however, have primarily looked to state legislatures, public defenders, and individual citizens for solutions to the problem.<sup>39</sup> However, there has been far too little discussion of the prosecutor's role in creating this misdemeanor problem. Most notably, there is little consideration of the conflict the prosecutor's approach to misdemeanor justice creates with her duties as a lawyer to practice law ethically on behalf of her client.<sup>40</sup> The following Part explores the prosecutor's duties within the attorney/client framework by examining several possible clients and the resulting ethical obligations created by each potential client.

## II. MASS PROSECUTION IN THE ATTORNEY/CLIENT PARADIGM

The professional and ethical obligations that guide attorney practice can be a useful tool in addressing the devastating consequences of mass prosecution. Inasmuch as it is the prosecutor's decision to criminally charge defendants with otherwise minor or innocuous behaviors, when she chooses to exercise that discretion in a way that causes damage to a particular community, the prosecutor may be in violation of central legal obligations to act in the best interests of her

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people of color, and because of concentrations of poverty and imprisonment in certain jurisdictions, it is now the case that entire communities experience these negative effects.”).

<sup>38</sup> See generally Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014) (discussing misdemeanor policing as way of selecting, targeting, and policing certain populations within New York City).

<sup>39</sup> See, e.g., James Cullen, *Four Things We Can Do to End Mass Incarceration*, BRENNAN CTR. FOR JUST. (Dec. 19, 2016), <https://www.brennancenter.org/blog/four-things-we-can-do-end-mass-incarceration> [<https://perma.cc/DW7F-FVVE>] (discussing measures legislature could take to combat mass incarceration); Christopher Petrella, *Ten Ways to Reduce the Prison Population in America*, BUS. INSIDER (Oct. 6, 2012, 9:06 AM), <http://www.businessinsider.com/10-ways-to-reduce-us-prison-population-2012-10> [<https://perma.cc/VZZ8-V2Y8>] (discussing how communities can get involved to help combat mass incarceration); Jonathan Rapping, *Public Defenders Key to Reducing Mass Incarceration*, TALK POVERTY (Oct. 28, 2015), <https://talkpoverty.org/2015/10/28/public-defenders-key-reducing-mass-incarceration/> [<https://perma.cc/69Z3-CE7E>] (advocating for more robust public defender presence).

<sup>40</sup> Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors Conflicts of Interest*, 58 B.C. L. REV. 463, 468 (2017) (“In the robust and expanding literature on prosecutorial abuses, prosecutors’ conflicts of interest only occasionally garner serious attention.”).

client. This Part explores the various system actors that might be considered the prosecutor's client in order to better understand that possible violation.

While most prosecutors refer to themselves as the "People," the "State," or the "Government," defining whom they actually represent is complicated. The entities with the most potential to be considered the prosecutor's client are the victim, the police, the community, the defendant, and the law.<sup>41</sup> None of these options, however, can clearly be defined as the prosecutor's client. While prosecutors may involve victims in their cases, however, they do not directly represent these victims.<sup>42</sup> They apply the laws promulgated by the state legislature, but they occupy space in the executive branch of government.<sup>43</sup> Similarly, the prosecutor could be considered the representative of the chief executive in a jurisdiction, whether that is the mayor of a city or locality, governor of a state, or president of a country, but the court of public opinion has already rejected that casting of the prosecutor.<sup>44</sup>

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<sup>41</sup> This is primarily because, excluding the attorneys and the judge, these five individuals or entities are the most significant actors in the criminal justice process.

<sup>42</sup> Green & Roiphe, *supra* note 40, at 470 ("Nevertheless, the contemporary understanding is that prosecutors do not represent the victim or the police."). Although the prosecutor argues her case in close concert with the victim, often citing the victim's loss or pain to convince a jury or judge to find the defendant guilty, evidentiary rules limit the ways the prosecutor can incorporate the victim in the matter. See Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 560, 571-72 (2005) (discussing, among other examples, using victim as witness where evidence could be seen as inflammatory). For example, unlike the defendant with defense counsel, the victim in a criminal prosecution is not permitted to sit at counsel table with the prosecution. See FED. R. EVID. 615. The prosecution can also move forward in a case as she sees fit without the victim's approval or involvement. See Gershman, *supra*, at 574 ("[I]t is the prosecutor who retains the ultimate authority to make decisions without regard to the victims' views on the matter.").

<sup>43</sup> INFO. EXCHANGE NETWORK FOR MUTUAL ASSISTANCE IN CRIMINAL MATTERS AND EXTRADITION, *Guide to Criminal Prosecutions in the United States* (2007), [https://www.oas.org/juridico/mla/en/usa/en\\_usa-int-desc-guide.html](https://www.oas.org/juridico/mla/en/usa/en_usa-int-desc-guide.html) [<https://perma.cc/JMB7-W7TQ>].

<sup>44</sup> The Office of Legal Counsel for the Attorney General's Office ("OLC") provides an excellent case study of this phenomenon in the context of the so-called Torture Memos. During these proceedings, then Attorney General Alberto Gonzales was asked to draft a set of memoranda detailing how the Central Intelligence Agency could conduct intelligence-gathering investigations conducive to international guidelines restricting the use of torture. See *A Guide to the Memos on Torture*, N.Y. TIMES (2005), <http://www.nytimes.com/ref/international/24MEMO-GUIDE.html>. There was hesitation to consider the OLC's client as either the amorphous government or general public because there was not a particular person to focus on in creating the memos. See Nancy V. Baker, *Who Was John Yoo's Client? The Torture Memos and Professional Misconduct*, 40 PRESIDENTIAL STUD. Q. 750, 759 (2010) (stating that OLC's client is often characterized in "dichotomous terms, as either the president or the people"). This is the case even though the OLC is differently situated than county or

Despite the difficulty in discerning the prosecutor's client, the law of agency gives us a lens in which to examine potential clients. The law of agency distinguishes between the principal and the agent, and assigns the agent's status by recognizing that the principal's expertise is usually inferior to the agent's expertise.<sup>45</sup> As a result of this imbalance, the principal is the person who selects the agent, defines the scope and objectives of the representative relationship, compensates the agent, and ends the representative partnership.<sup>46</sup> The agent, in turn, identifies and engages in the practice that is both available and necessary to fulfill the principal's desired outcome.<sup>47</sup> The following sections examine potential clients using this taxonomy.

A. *The Victim as the Client*

The central notion of a criminal case is that the defendant has committed an act that harms society. Oftentimes, that act will include harm to a particular individual who may not be in a position to seek recourse against the defendant on her own behalf. Even in the case of crimes traditionally considered victimless, such as drug offenses, many view the victim of the crime as the society in which the crime occurs.<sup>48</sup> In either situation, that of a society-oriented crime or that involving a particular harmed person, the prosecutor secures a role for the victim in the criminal process.<sup>49</sup> This duty of the prosecutor is vital, then, as oftentimes

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state prosecutors in that the attorneys are not even elected. Instead, the OLC is composed by an assistant attorney general who himself is not elected by the general public but instead appointed by the President and confirmed by the Senate. *See Office of Legal Counsel*, U.S. DEP'T JUST., <https://www.justice.gov/olc> [<https://perma.cc/P2JD-NPUD>] (last visited Apr. 24, 2018) ("By delegation from the Attorney General, the Assistant Attorney General in charge of the Office of Legal Counsel provides legal advice to the President and all executive branch agencies.").

<sup>45</sup> *See* Deborah A. DeMott, *The Lawyer as Agent*, 67 *FORDHAM L. REV.* 301, 304 (1998).

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

<sup>47</sup> *Id.*

<sup>48</sup> *See, e.g., National Drug Threat Assessment 2010*, U.S. DEP'T JUST., NAT'L DRUG INTELLIGENCE CTR. (Feb. 2010), <https://www.justice.gov/archive/ndic/pubs38/38661/drugImpact.htm> [<https://perma.cc/92GF-RV69>] ("The consequences of illicit drug use are widespread, causing permanent physical and emotional damage to users and negatively impacting their families, coworkers, and many others with whom they have contact.").

<sup>49</sup> *See* Jeanne Bishop & Mark Osler, *Prosecutors and Victims: Why Wrongful Convictions Matter*, 105 *J. CRIM. L. & CRIMINOLOGY* 1031, 1041 (2015) ("When a plea or trial finally comes, victims have the opportunity to see the prosecutor championing their cause, arguing for them, advocating for punishment for the person who hurt them."). Some jurisdictions allow for private prosecutors, but this paper does not question the identity of the prosecutor's client in those situations. For a robust discussion of private prosecutors, see Maximo Langer & David Alan Sklansky, *Epilogue to ASCL STUDIES IN COMPARATIVE LAW, PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY* 300, 333-39 (Maximo Langer & David Alan Sklansky eds., 2017) ("Many states allow the victim of crime to be a party in the criminal

a victim cannot advocate for herself because she is deceased, fearful, or otherwise incapable. Neither is an amorphous society or community best positioned to pursue redress for wrongs committed against it. The prosecutor's role in securing a place for the victim in the criminal justice system serves the important purpose of providing vindication for hurt parties and preventing vigilante justice.<sup>50</sup>

Although central to criminal cases that involve harm to a particular person or entity, the victim's role was very limited in traditional legal proceedings.<sup>51</sup> That has changed substantially, however, in recent decades. Some jurisdictions have created a victim's bill of rights that affords the victim certain rights in the legal process with regards to notification and presence at the proceedings.<sup>52</sup> These rights might include the right to testify at certain stages of the proceedings, the right to be informed about the progress of a case, and the right to receive restitution to account for a particular loss.

Despite the greater emphasis on including the victim in modern criminal proceedings, traditional procedural rules still maintain a clear barrier to a theory or expectation that the victim is the prosecutor's client. For example, this author does not know of any jurisdiction which affords the victim the right to testify at preliminary criminal proceedings or trial.<sup>53</sup> Although it is often to the

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process as either a civil party or a private prosecutor. The procedural powers of these private participants in the criminal process vary, ranging from being able to act with full or almost full prosecutorial powers during pretrial, trial and appeal, to being a companion of the public prosecutor who remains in control of the case—in other words, they range from different degrees of private control of the prosecution to different degrees of private participation in the prosecution.”). Some jurisdictions even allow individuals to bring private prosecutions on their own behalf. *Id.* at 333.

<sup>50</sup> For a rich discussion of how discontent with the criminal justice system results in vigilante justice, see generally Paul H. Robinson & Sarah M. Robinson, *Shadow Vigilante Officials Manipulate and Distort to Force Justice from an Apparently Reluctant System*, in THE VIGILANTE ECHO: HOW FAILURES OF JUSTICE INSPIRE LAWLESSNESS (unpublished manuscript) (on file with author).

<sup>51</sup> Leslie Sebba, *The Victim's Role in the Penal Process: A Theoretical Orientation*, 30 AM. J. COMP. L. 217, 222-23 (1982) (“Whether or not the victim instigates a criminal proceeding in his own right, should he be entitled to be a *civil* party to a criminal prosecution brought by the agents of the state? This practice is entirely foreign to the common-law tradition, but is a recognized feature of the civil law systems.”).

<sup>52</sup> Gershman, *supra* note 42, at 559 (“The role of the victim in the criminal justice system has increased dramatically in recent years.”).

<sup>53</sup> The Crime Control Act of 1990 prescribed a list of rights for victims. See *Victims and Witnesses: Understanding Your Rights and the Federal Court System*, U.S. DEP'T JUST., <https://www.justice.gov/usao-nj/victim-witness/handbook#VictimsRights> [<https://perma.cc/78VK-CD7B>] (last updated Mar. 24, 2015). None of these rights include a right to testify at trial. See *id.*

prosecutor's benefit to have the victim testify, it is solely in the prosecutor's discretion if she wants the victim to testify as part of the case-in-chief.<sup>54</sup>

A prosecutor might choose to proceed without the victim's testimony at these pre-disposition stages because of her own sense of how best to balance her duties. As Professor Bennett Gershman notes, the prosecutor has to maintain a delicate balance in her representative decisions because she owes allegiances to both the public to protect it from harm and the defendant to protect her constitutional rights.<sup>55</sup> Balancing these duties may mean that a prosecutor believes a victim may not elicit the type of sympathy from a judge or jury that the prosecutor deems necessary to prevail on the charges against the defendant. This may also mean that the prosecutor questions the veracity of the victim's proposed testimony and is not willing to present questionable evidence to help establish the defendant's guilt.<sup>56</sup> Even in jurisdictions that have codified a victim's bill of rights, the prosecutor must balance the duties she owes to the victim with those she owes to the public and to the defendant.<sup>57</sup>

American Bar Association ("ABA") standards actually set forth that the prosecutor's client is not the victim.<sup>58</sup> The model rules guiding the legal profession assert, as part of their directive, that a prosecutor should exercise her authority fairly and neutrally for all people.<sup>59</sup> The rules set forth that neither sympathy towards the victim, nor an interest in obtaining particularized "justice" for the victim should overly influence the prosecutor's decisions about charging offenses, managing the criminal process, or reaching a final case disposition. According to these rules, a prosecutor should, instead, only involve the victim to the extent necessary to establish the defendant's guilt and the appropriate punishment. This is because the prosecutor does not act solely or primarily on behalf of a particular victim. This reasoning forms the foundation of the ABA rules and limits applicable victims' rights bills. It also negates any claim that the

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<sup>54</sup> However, procedural rules will often afford the victim the right to be heard before sentencing. *See, e.g.*, FED. R. CRIM. P. 60(a)(3) ("The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning release, plea, or sentencing involving the crime.").

<sup>55</sup> *See* Gershman, *supra* note 42, at 579 (discussing how media conferences involving victims may violate defendants' right to fair trial).

<sup>56</sup> This can hold true even if the prosecutor believes the underlying charge is properly filed and pursued.

<sup>57</sup> Gershman, *supra* note 42, at 561 ("Despite these advantages, a prosecutor cannot align herself exclusively with the victim. A prosecutor also owes an allegiance to constituencies that are independent of the victim—i.e., the general public and the accused.").

<sup>58</sup> CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.3 (AM. BAR ASS'N 4th ed. 2015).

<sup>59</sup> *Id.* ("The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim.").

victim would be the prosecutor's client by running counter to the understanding of a client in the traditional attorney/client relationship.

B. *The Police as the Client*

The police and the prosecutor have such a close and symbiotic relationship that one could imagine the police as a possible client in the prosecutor's attorney/client paradigm.<sup>60</sup> In the majority of cases, it is a police arrest that initiates both the criminal process and the prosecutor's involvement.<sup>61</sup> In other words, it is the police who first call the prosecutor to action as a client would first hire a lawyer to litigate on her behalf. By arresting an individual, a police officer is presenting a case to the prosecutor that, from the police officer's perspective, this individual has violated a law and is deserving of punishment.<sup>62</sup> The prosecutor can then request more information from the police officer before moving forward on the matter.

In this version of the attorney/client paradigm, the police serve as both the initial claimant and the primary witness. The police officer supports her case by continuing to investigate the matter, writing a report, and then, if necessary, testifying in court to her observations and conclusions.<sup>63</sup> The prosecutor may often turn to the police officer for further clarification of the officer's assertions and additional evidence to support the officer's claim that the law has been violated.<sup>64</sup>

The police officer as the prosecutor's client does not satisfy our traditional notions of a client in the law of agency, however, because of the police officer's lack of authority in the criminal proceeding. The police officer has little control in selecting the prosecutor assigned to the case.<sup>65</sup> Additionally, the police officer

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<sup>60</sup> Indeed, an endorsement from law enforcement is often a vital component in securing election as a district attorney. See Letitia James, *Prosecutors and Police: The Inherent Conflict in Our Courts*, MSNBC (Dec. 5, 2014, 12:16 AM), <http://www.msnbc.com/msnbc/prosecutors-police-inherent-conflict-our-courts> [<https://perma.cc/6VR5-QQFT>] ("Any district attorney knows that an endorsement from law enforcement unions is vital to earning voters' trust.").

<sup>61</sup> Kohler-Hausmann, *supra* note 38, at 627.

<sup>62</sup> See Scott W. Phillips & Sean P. Varano, *Police Criminal Charging Decisions: An Examination of Post-Arrest Decision-Making*, 36 J. CRIM. JUST. 307, 312 (2008) (discussing how law enforcement vignettes influence charging decisions).

<sup>63</sup> STANDARDS ON PROSECUTORIAL INVESTIGATIONS § 26-1.3 (AM. BAR ASS'N 3d ed. 2014) (outlining proper steps prosecutors should take when working with police on investigation).

<sup>64</sup> Jonathan Abel, *Cops and Pleas: Police Officers' Influence on Plea Bargaining*, 126 YALE L.J. 1730, 1732 (2017) (discussing how prosecutors and police work together and influence that police have on case disposition).

<sup>65</sup> The relationship between prosecutors and police is complicated. While prosecutors purportedly operate independently of police in charging decisions, their work is still integrally connected to police work. For a discussion of this relationship, see Martin Kaste, *It's a*

does not direct the prosecution or control when a case begins or ends.<sup>66</sup> These are all central duties of the client in the attorney/client relationship and their absence in the prosecutor/police officer relationship suggests that the police officer could not properly be considered the prosecutor's client.<sup>67</sup>

C. *The Community as the Client*

The law of agency provides a fundamental organizing method from agent to principal by establishing that the principal has the ability to hire and fire the agent. Therefore, the most likely candidate for the prosecutor's client is the community which the prosecutor represents. Most prosecutors are elected by popular vote.<sup>68</sup> This process is why prosecutors will often refer to themselves as the "People" in pending criminal proceedings. As Professors Maximo Langer and David Sklansky noted, this type of popular election is central to a theory of representative democracy,<sup>69</sup> which, in turn, magnifies the notion that the "community" is the prosecutor's client. It is the community that "chooses" the prosecutor and it is the community that can also remove the prosecutor in a subsequent election. These two decisions of authority could rightly place the community in the principal role in the law of agency.

The growth in community prosecution models also supports the notion of the community as the prosecutor's client.<sup>70</sup> Community prosecution follows from a general belief that crime is better handled when the community works in concert with the prosecutor and the police.<sup>71</sup> These efforts recognize that criminal justice

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*Complicated Relationship Between Prosecutors, Police*, NPR (Dec. 4, 2014, 4:07 PM), <https://www.npr.org/2014/12/04/368529402/its-a-complicated-relationship-between-prosecutors-police> [<https://perma.cc/3J3K-F848>] (discussing complications when prosecutors have to decide if they should charge police officers in use of force cases).

<sup>66</sup> It is important to note that, in New York, police officers may file a simplified information to charge a defendant by creating a supporting deposition. *See* NY CRIM. PRO. LAW CODE § 100.25 (McKinney 2018).

<sup>67</sup> *See* MODEL RULES OF PROF'L CONDUCT r. 1.8 (AM. BAR ASS'N 2017) (requiring that lawyers not represent clients in ways that disadvantage clients, but prosecutors may have to engage in such conduct to uphold constitutional protections or when charging police officers).

<sup>68</sup> *See generally* Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 Yale L.J. 1528 (2012).

<sup>69</sup> Langer & Sklansky, *supra* note 49, at 302 ("This gives prosecutors in the United States a mantle of democratic legitimacy that prosecutors do not have in other countries.").

<sup>70</sup> JOHN S. GOLDKAMP, CHERYL IRONS-GUYNN & DORIS WEILAND, U.S. DEP'T JUST., OFF. JUST. PROGRAMS, COMMUNITY PROSECUTION STRATEGIES: MEASURING IMPACT 6 (2002), <https://www.ncjrs.gov/pdffiles1/bja/192826.pdf> [<https://perma.cc/R4XW-ZYLC>] (discussing growth of community prosecution model in Maryland and other communities).

<sup>71</sup> *See Community Prosecution*, U.S. ATTORNEY'S OFF. D.C., <https://www.justice.gov/usao-dc/programs/community-prosecution> [<https://perma.cc/6S5T-593W>] (last updated Mar. 17, 2016) ("Prosecutors have recognized the important position their Office can have in



is richer and more acceptable when there is a strong connection between the prosecution of criminal behavior and the public.<sup>72</sup> In his essay, Professor Ronald Wright details how the Netherlands incorporated community prosecution into their traditional criminal justice framework.<sup>73</sup> Instead of having the prosecutor direct the prosecution of criminal behavior, some courts in the Netherlands use “tripartite consultations” or “maisons de justice.”<sup>74</sup> In “tripartite consultation,” the prosecutor engages in regular discussions with city mayors and police chiefs to identify local police priorities.<sup>75</sup> Other courts use “maisons de justice” where the prosecutor has a local presence that receives complaints from neighborhood inhabitants and seeks to resolve those complaints, wherever possible, without filing charges.<sup>76</sup>

It is hard to say with any certainty that the community is the prosecutor’s client when the prosecutor is not beholden to the community in her daily operations. The public is prevented from seeing most of the prosecutor’s work, particularly when it comes to the prosecutor’s initial charging decision.<sup>77</sup> In fact, the criminal process is set forth in such a way that the prosecutor has a significant amount of discretion and is insulated from outside opinion with regards to what cases she chooses to move through the criminal process and, to some degree, how she chooses to move them.<sup>78</sup>

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complementing police partnerships with the community in order to better address the needs of the community.”).

<sup>72</sup> Ronald F. Wright, *Community Prosecution, Comparative Prosecution*, 47 WAKE FOREST L. REV. 361, 361-62 (2012) (discussing community prosecution and its explicit aim of democratizing prosecutor’s role).

<sup>73</sup> See *id.* at 362 (exploring “how community prosecution might fit into the world of decentralized elected prosecutors in the United States and how that differs from the world of centralized, nonelected prosecutors in the Netherlands”).

<sup>74</sup> *Id.* at 368.

<sup>75</sup> *Id.* (discussing process where in parts of Netherlands prosecutors now take lead in discussions with mayor and police).

<sup>76</sup> *Id.* at 369 (“In several large cities, the district office of the [Public Prosecution Service] operates a satellite location staffed by a prosecutor and support staff. The emphasis of this satellite office is to serve as a visible presence of criminal law enforcement in the neighborhood and to resolve complaints wherever possible without filing criminal charges.”).

<sup>77</sup> *United States v. Armstrong*, 517 U.S. 456, 470 (1996) (denying defendant’s claim of selective prosecution because defendant was unable to make threshold showing); see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 116-17 (2d ed. 2012) (discussing how difficult it is to meet threshold showing required by *Armstrong* decision because prosecutorial power permits prosecutors to keep their decisions private).

<sup>78</sup> See Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369, 373 (2010) (stating that prosecutorial discretion is “very often ad hoc, hidden, and insulated from public scrutiny and criticism”). The prosecutor also decides whether to

Nevertheless, the fact that the prosecutor is not fully beholden to the community does not negate the contention that the community is her client. Transparency is not required in all legal ethics. For example, the Model Rules of Professional Conduct do not clearly describe what information an attorney must show the client during the course of representation, and they set forth that only certain materials must be returned to the client upon completion of the legal relationship.<sup>79</sup> Thus, the fact that the prosecutor may not lay open all of her paperwork or practice to the community does not negate the idea that the community is the most appropriate choice for client of those detailed in this Article.<sup>80</sup>

D. *The Defendant as the Client*

Although the adversarial system would place the prosecutor and the defendant on opposite sides of the courtroom, the Constitution requires the prosecutor to consider the defendant in some of her decision making.<sup>81</sup> In 1963, the Supreme Court issued its decision in *Brady v. Maryland* requiring prosecutors to turn over material evidence of guilt to the defendant.<sup>82</sup> *Brady*'s progeny, and the ABA's Model Rules of Professional Conduct, expand upon the concepts set forth in *Brady* to outline proper prosecutorial practice in a criminal case. They hold that prosecutors do not have as wide a latitude of pursuing their assigned objective with little regard for the opponent as attorneys in other justice contexts. Instead,

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offer a particular plea to the defendant and the particular terms of the plea of disposition of the case.

<sup>79</sup> See ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 471 (2015) ("A client is not entitled to papers and property that the lawyer generated for the lawyer's own purpose in working on the client's matter.").

<sup>80</sup> Despite the fact that all of the ethical and professional rules apply to every lawyer in a broad fashion, the Model Rules of Professional Conduct actually set forth a special rule for prosecutors. Model Rule 3.8 details particular obligations of the prosecutor that require her to make decisions that are sensitive to the needs and positioning of various criminal justice system stakeholders. The next Section uses these rules to identify the potential clients that the ABA has indicated, through this Model Rule, that the prosecutor should consider in her practice. Interestingly enough, this rule considers a variety of stakeholders but does not clearly delineate obligations for the prosecutor that consider the community as a potential client.

<sup>81</sup> CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION §§ 3-1.2 to -1.3 (AM. BAR ASS'N 4th ed. 2015) (stating that prosecutor should respect and consider defendants' constitutional rights).

<sup>82</sup> See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

the prosecutor must take the defendant's rights into account and ensure that the criminal process moves in a fair and just manner for the defendant.<sup>83</sup>

There is actually a new type of prosecutor poised to reflect the nation's growing concern about the defendant in the criminal justice process. Newly elected prosecutors in Florida, Illinois, and Texas are just some of the new advocates of measures that include community policing, rejecting the death penalty, focusing on a defendant's rehabilitative opportunities, and refraining from prosecuting individuals for minor offenses.<sup>84</sup> This new type of prosecutor reflects concern for the defendant in their prosecutorial decision making. In fact, Boston prosecutor Adam Foss received significant praise for his Ted Talk detailing his interest in truly improving the lives of the defendants he seeks to prosecute.<sup>85</sup> This dignity approach to the defendant also plays out among prosecutors who hold the police accountable for any constitutional violations that may lead to a defendant's arrest. It also applies to those prosecutors who seek rehabilitation for the offender instead of incarceration.<sup>86</sup>

It is difficult, however, to wholly commit to the idea of the defendant as the prosecutor's client. Criminal justice is, by its very nature, adversarial and the defendant and prosecutor are often at separate ends of the spectrum when it comes to the desired outcome of any criminal proceeding. There is an inherent conflict in the positioning of both the defendant and prosecutor that belies both the law of agency's definition of principal/agent and the Model Rules of Professional Conduct's admonition against attorney/client conflicts of interest.<sup>87</sup>

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<sup>83</sup> See *id.* ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.").

<sup>84</sup> See Henry Gass, *Meet a New Breed of Prosecutor*, CHRISTIAN SCI. MONITOR (July 17, 2017), <https://www.csmonitor.com/USA/Justice/2017/0717/Meet-a-new-breed-of-prosecutor> [<https://perma.cc/MS2N-HY8Q>] (reporting on prosecutors who were elected on platform of, or at least engaging with, criminal justice reform).

<sup>85</sup> Adam Foss, *A Prosecutor's Vision for a Better Justice System*, TED TALKS (Feb. 2016), [https://www.ted.com/talks/adam\\_foss\\_a\\_prosecutor\\_s\\_vision\\_for\\_a\\_better\\_justice\\_system](https://www.ted.com/talks/adam_foss_a_prosecutor_s_vision_for_a_better_justice_system) [<https://perma.cc/6NFV-ZB7D>] (discussing alternative vision for criminal justice system emphasizing minimal use of incarceration among other reforms).

<sup>86</sup> Langer & Sklansky, *supra* note 49, at 308 (discussing recent candidates who won campaigns premised on prosecutorial ethics of dignity but noting lingering reasons for criticism).

<sup>87</sup> For example, with the exception of the alibi defense, the defendant is not necessarily required to inform the prosecutor of the particular defense she intends to make during the criminal proceedings. See generally Lori Ann Irish, Comment, *Alibi Notice Rules: The Preclusion Sanction as Procedural Default*, 51 U. CHI. L. REV. 254 (1984).

E. *The Law as the Client*

There is some evidence to suggest that a prosecutor could properly claim “the law” as her client. In *Berger v. United States*, the Supreme Court noted that the prosecutor is in a peculiar position of being a representative of a sovereignty and thus a “servant of the law.”<sup>88</sup> Langer and Sklansky also note that prosecutors can be pivotal to creating legal democracy by occupying a role in which their central function is faithfully advancing the rule of law.<sup>89</sup> This positioning would inoculate the prosecutor from any influence by judges or the police. It would remove the prosecutor from the will of the general public, after an election, to be solely beholden to laws that are set forth by popularly elected legislators and it would also withstand judicial scrutiny.

The theory that the law is the prosecutor’s client is difficult to reconcile with the fact that even the most well-resourced prosecutor’s office does not pursue every single perceived violation of the law. Indeed, prosecutors exercise extensive discretion with regards to what violations of laws they will seek redress for and what violations of law they will not.<sup>90</sup> Some degree of conflict may be permissible in legal relationships,<sup>91</sup> but the lack of clear communication from the inanimate law suggests that the law cannot properly be considered the prosecutor’s client.<sup>92</sup> If this were the case, then the prosecutor would seemingly be representing herself by choosing which of the many legal violations she pursues. The law is also open to interpretation by the court even if it guides the prosecutor’s hand to some extent. The law also does not control the hiring and

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<sup>88</sup> See *Berger v. United States*, 295 U.S. 78, 88 (1935).

<sup>89</sup> See Langer & Sklansky, *supra* note 49, at 300 (“Prosecutors can be key figures in what can be called legal democracy, by serving as neutral and independent ministers of justice, advancing the rule of law.”).

<sup>90</sup> See Rachel Gonzalez, *The First Defense Attorney: Prosecutors and the Power of Discretion*, FIU LAW (Oct. 12, 2015), <https://law.fiu.edu/first-defense-attorney-prosecutors-power-discretion/> [<https://perma.cc/56AH-QNLF>] (“Unfortunately, Americans seldom remember—or perhaps simply aren’t aware—that State, District, and U.S. Attorneys have the power of prosecutorial discretion; this discretion plays an indispensable role in our justice system. Without the exercise of discretion, our courthouses would see hundreds of thousands of cases, which would be impossible to hear or try with limited judicial resources and time.”).

<sup>91</sup> A client may give informed consent allowing an attorney to proceed in representing them despite a conflict of interest. See MODEL RULES OF PROF’L CONDUCT r. 1.7 (AM. BAR ASS’N 2017) (allowing conflicts of interest where they are disclosed and where lawyer believes she will be able to provide competent representation). For further explanation of why the law cannot be considered to be the prosecutor’s client, see Antony Duff, *Discretion and Accountability in a Democratic Criminal Law*, in ASCL STUDIES IN COMPARATIVE LAW, *supra* note 49, at 19-24.

<sup>92</sup> The Model Rules clearly require some level of communication between an attorney and her clients. See MODEL RULES OF PROF’L CONDUCT r. 1.4 (AM. BAR ASS’N 2017) (outlining reasonable communication that should occur between lawyer and client).

firing of the prosecutor as the law of agency would require for the principal/agent relationship.

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As discussed in this Part, the attorney/client relationship falls under the same law of agency that covers many other types of professional relationships.<sup>93</sup> The law of agency guides fiduciary relationships developed through contractual or non-contractual agreements and involve one person, the agent, who is authorized to act on behalf of another person, the principal.<sup>94</sup> As with the ordinary principal/agent fiduciary relationship, every attorney practices her craft on behalf of a particular client or group of clients.<sup>95</sup> This attorney/client relationship is the basic framework for advancement of rights, obligations, and assessment or non-assessment of punishments in every legal process and would also apply to the prosecutor's practice of law. As detailed in the next Part, this relationship dynamic also imposes a duty upon the prosecutor to abide by important ethical and professional guidelines.

### III. RIGHTS AND OBLIGATIONS IN THE ATTORNEY/CLIENT PARADIGM

As an attorney, a prosecutor is a member of a state bar and must follow the professional and ethical rules that the controlling state bar sets out for attorneys practicing within its jurisdiction.<sup>96</sup> These rules control the terms of admission to the bar and discipline of individuals who behave in ways that violate them. In fact, in the majority of states, the prosecutor must pay a fee or complete some formal process that indicates she is continuing the practice of law in the relevant

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<sup>93</sup> The law of agency is commonly used in real estate transactions as well as other commercial enterprises. For a brief explanation of agency law in the real estate context, see Fernando Nunez, *Universal Agency Disclosure—the Rules of Professional Relationships*, FT J. (July 20, 2015), <http://journal.firsttuesday.us/universal-agency-disclosure-the-rules-of-professional-relationships/44943/> [<https://perma.cc/TC7S-NV8J>].

<sup>94</sup> See RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006) (“Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”).

<sup>95</sup> See DeMott, *supra* note 45, at 302-03 (“Many lawyers, especially in litigation settings, make decisions with significant consequences for the client without the client’s knowledge or assent. In addition, many clients lack the expertise to supervise the lawyer’s actions because the client will not understand their import and will be unable to detect errors made by the lawyer.”).

<sup>96</sup> MODEL RULES OF PROF’L CONDUCT PREAMBLE & SCOPE (AM. BAR ASS’N 2017) (“A lawyer’s conduct should conform to the requirements of the law . . . . A lawyer should demonstrate respect for the legal system . . . . [I]t is also a lawyer’s duty to uphold the legal process.”).

jurisdiction.<sup>97</sup> Such actions reaffirm her commitment to abide by these guiding principles.

The majority of states have adopted the ABA's Model Rules of Professional Conduct.<sup>98</sup> These Model Rules were first presented in 1983 and were most recently reissued in 2005.<sup>99</sup> Even those states that have not adopted the Model Rules in their entirety have adopted certain rules that are functionally equivalent to a number of Model Rules, most notably the attorney's duty of loyalty to her client and the attorney's duty to provide competent representation.<sup>100</sup> As an attorney, the prosecutor must follow these basic tenets of responsibility. The rest of this Part explores three of the requirements set forth by the Model Rules that are most significant to the attorney/client relationship issues presented in this Article.

#### A. *Means/Objectives Dichotomy*

There are three primary ways to view the controlling agent in the attorney/client relationship. The client-centered approach places the attorney in the role of focusing solely on achieving the client's stated goals.<sup>101</sup> In this approach, the client reigns supreme and the attorney is considered more of a "hired gun" or agent.<sup>102</sup> The collaborative lawyering approach gives the attorney a bit more autonomy in directing the client's legal representation. A

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<sup>97</sup> See, e.g., RULES OF THE SUPREME COURT OF THE STATE OF HAWAII § 22 (1984) (requiring attorneys to complete at least one hour of ethics education once every three years).

<sup>98</sup> See *State Adoption of the ABA Model Rules of Professional Conduct*, AM. BAR ASS'N (2018), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules.html](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html) [https://perma.cc/4DG6-EM5P].

<sup>99</sup> See *ABA Model Rules of Professional Conduct*, AM. BAR ASS'N (2018), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct.html](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html) [https://perma.cc/F7RM-ERP4] (documenting history of ABA Model Rules of Professional Conduct).

<sup>100</sup> See generally AM. BAR ASS'N CPR POLICY IMPLEMENTATION COMMITTEE, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS (2017) (documenting which states have adopted rule concerning duty of loyalty); AM. BAR ASS'N CPR POLICY IMPLEMENTATION COMMITTEE, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.1: COMPETENCE (2017) (documenting which states have adopted rule requiring that attorneys provide competent representation).

<sup>101</sup> See David Binder, Paul Bergman & Susan Price, *Lawyers as Counselors: A Client-Centered Approach*, 35 N.Y.L. SCH. L. REV. 29, 29 (1990) (advocating for "commitment to looking at problems from client perspectives, of seeing the diverse nature of the problems, and of making clients true partners in the resolution of their problems").

<sup>102</sup> See *id.* at 33 ("[A] client should have primary decision-making power because a problem is a client's problem, not yours.").

collaborative lawyer works with the client to produce favorable outcomes.<sup>103</sup> This position is not necessarily determined or selected by the client, but is instead developed through a close partnership between the lawyer and the client. A final approach is more contextual and imagines the lawyer in the overall director role.<sup>104</sup> In this approach, the lawyer gets the final say in what the legal objectives should be for the representative relationship.<sup>105</sup> The client relinquishes authority to the lawyer's professional expertise with the understanding that the lawyer will pursue the proper course of action that is consistent with the lawyer's fiduciary duties. Each of these models provides an overall theory of the attorney's role in the attorney/client relationship.

Regardless of how one views the controlling agent in the attorney/client relationship, the Model Rules establish that there are certain decisions that are reserved solely to the client.<sup>106</sup> An attorney may take any action that is impliedly authorized by the client to carry out the representation, but the attorney must abide by any client decisions that are dispositive of the representation.<sup>107</sup> In other words, the client has the final say on the objectives of the representation. For example, in a civil case, the attorney may determine the case theory, but the client will determine whether, and at what point, she will settle the matter. In a criminal case, an attorney can determine the defense she will present to the court or factfinder, but it is the client who will decide whether to accept a plea or go to trial.

Model Rule 1.2 clearly states that a lawyer shall abide by a client's decision concerning the objectives of the representation.<sup>108</sup> More importantly, it notes that the lawyer shall reasonably consult with the client as to the means by which

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<sup>103</sup> See ROBERT F. COCHRAN JR., JOHN M.A. DIPPIA & MARTHA M. PETERS, *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* 6 (2d ed. 1951) ("Under this model, the client controls decisions, but the lawyer structures the process and provides advice in a manner that is likely to yield wise decisions.").

<sup>104</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 2017) (allowing client to authorize her lawyer to act without further consultation). This is separate from the lawyer serving on the board of directors of a corporate client and instead refers to the approach the lawyer takes to the client's objectives in the representation. See generally Felix J. Bronstein, Comment, *The Lawyer as Director of the Corporate Client in the Wake of Sarbanes-Oxley*, 23 J.L. & COM. 53 (2003).

<sup>105</sup> Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 7-8 (1998) (detailing lawyer-centered approach to client representation).

<sup>106</sup> See *id.* (noting that lawyer's role is to form strategy that will achieve client's goals).

<sup>107</sup> *Id.* (emphasizing that lawyer will employ her skills to manage legal case on her client's behalf).

<sup>108</sup> *Id.* (describing client's active role in her own representation).

these objectives are pursued.<sup>109</sup> Comment 3 to this Model Rule notes that it may not always be possible for an attorney to consult with her client when an immediate decision must be made, but it is still incumbent upon the attorney to seek an opportunity to consult where available.<sup>110</sup>

The rules governing the decision making and the consultation required in the attorney/client relationship similarly provide an important window into the boundaries of misdemeanor prosecution. Depending on the client, the prosecutor may be required to refrain from pursuing certain practices lest it be a “means” of achieving an “objective” that the client would dismiss as too harmful upon adequate consultation.<sup>111</sup> In other words, if an aggressive misdemeanor practice fractures the client’s otherwise stable foundation, then a prosecutor seeking to abide by her ethical and professional obligations would need to reconsider her approach.

Regardless of how we allocate control in the prosecutor’s attorney/client paradigm, the prosecutor’s ability to consult with the client is demonstrably difficult. By definition, the client, as discussed in Part II, is a large and possibly porous group.<sup>112</sup> The client could also, in terms of communication, be an arbitrary or non-bilateral set of laws. Even if the client is perceived to be the defendant, and is a single person, the prosecutor will still not be in a position to consult with her “client” on the appropriate path to pursue a particular objective. Notwithstanding these difficulties, in most situations, the prosecutor’s representative relationship is long and nearly unending. Thus, the prosecutor can gain insight from the consequences of previous decisions to use for future decisions. In fact, the prosecutor could measure the health of the client in comparison to levels before the representative relationship began to gain a better understanding of whether the means they are selecting to pursue objectives are acceptable.<sup>113</sup>

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<sup>109</sup> *Id.* (explaining that lawyer’s role is to put client in best position to make educated decision about her own best interest).

<sup>110</sup> MODEL RULES OF PROF’L CONDUCT r. 1.2 cmt. 3 (AM. BAR ASS’N 2017). Interestingly, the Model Rules do not provide an answer for the proper outcome in a situation where an attorney and her client disagree on the means of attaining an objective. *See* MODEL RULES OF PROF’L CONDUCT r. 1.2 cmt. 2 (AM. BAR ASS’N 2017) (providing that withdrawal from representation may be appropriate in such scenario).

<sup>111</sup> *See* MODEL RULES OF PROF’L CONDUCT r. 1.4 (AM. BAR ASS’N 2017) (requiring lawyer to consult with client regarding means to accomplish client’s objectives).

<sup>112</sup> Although this may not be the case if the client is a particular victim, a police officer, or a defendant.

<sup>113</sup> The author is exploring potential metrics a prosecutor can use to determine a client’s health in a future project that proposes the prosecutor’s client as the community she represents.



### B. *Duty of Loyalty*

Mass prosecution of misdemeanor offenses similarly implicates the prosecutor's duty of loyalty. The duty of loyalty is loosely captured in Model Rule 1.7's definition of a conflict of interest,<sup>114</sup> but it is a recurring thread throughout the Model Rules.<sup>115</sup> Comment 1 to Model Rule 1.7 describes the general principles of the duty of loyalty as requiring an attorney to avoid representing conflicting clients or causes.<sup>116</sup> This comment also notes that loyalty is the lynchpin of the attorney/client relationship.<sup>117</sup>

Conflicts of interest do not only arise when an attorney represents one client over another or when a prosecutor has a personal interest in a pending or future matter. A conflict of interest also occurs whenever a lawyer undertakes a practice that undermines the objectives of her client.<sup>118</sup> In other words, when a lawyer engages in behavior as part of her representative duties that actually harms the client, she is not acting in a manner that is loyal to the client and in the primary interest of the client.<sup>119</sup> Instead, the lawyer is taking action that is detrimental to the client and advances some other cause or objective at the client's expense. This understanding of the conflicts rules requires a closer look at misdemeanor practice with an eye toward whether the client truly benefits from the prosecutor's approach. If the client is harmed by the current, more expansive, approach to misdemeanor justice, then the prosecutor is an attorney practicing law in a manner that conflicts with the client's objectives and well-being and is thus in violation of her duty of loyalty.

### C. *Duty of Competence*

A prosecutor, like every other attorney, owes a duty of competence to her client. Model Rule 1.1 defines the duty of competence as a requirement that an attorney provide representation that encompasses the "legal knowledge, skill, thoroughness, and preparation," that is reasonably necessary for the

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<sup>114</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2017) (describing duty of loyalty).

<sup>115</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT r. 1.8 (AM. BAR ASS'N 2017) (discussing conflicts of interest and current clients); MODEL RULES OF PROF'L CONDUCT r. 1.9 (AM. BAR ASS'N 2017) (extending same representative duties to former clients); MODEL RULES OF PROF'L CONDUCT r. 1.10 (AM. BAR ASS'N 2017) (discussing imputation of conflicts of interest).

<sup>116</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 1 (AM. BAR ASS'N 2017) (listing examples of conflicts of interest).

<sup>117</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 1 (AM. BAR ASS'N 2017) ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.").

<sup>118</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2017) (noting that lawyer may not accept client if "representation of one client will be directly adverse to another client").

<sup>119</sup> See *id.*; MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 2017).

representation.<sup>120</sup> The comments attached to the Rule explain further that competent representation does not require a certain level of experience or expertise on a particular subject matter.<sup>121</sup> Instead, competent representation requires an analysis of what is at stake in the representative relationship.<sup>122</sup>

The duty of competence necessarily includes a mandate upon the attorney to advise her client using her own independent research and judgment. As captured in Model Rule 2.1, an attorney must sometimes give a client bad news.<sup>123</sup> An attorney may have to inform her client that it is inappropriate for the attorney to pursue a particular means in achieving the outcome, either because it is not permissible under applicable law and professional guidelines or because the outcome would produce an undesirable result for the client.<sup>124</sup> An attorney may even have to provide context for a client's desired outcome that is unwelcome, conveying to the client clearly and adequately the folly of the client's initial request.<sup>125</sup> For example, should the community be considered the prosecutor's client, the prosecutor is under a professional and ethical obligation to inform the client community of the reality that mass misdemeanor prosecution may have a negative effect on its stability with as much clarity and gravitas as possible.<sup>126</sup> Failure to do so is a dereliction of the ethical duty of competence by compromising the client's ability to reasonably consult with the attorney on the means selected to pursue the client's chosen objective.

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The above rules indicate that professional and ethical rules could prove problematic for the average prosecutor's approach to misdemeanor justice. This analysis makes evident that the way we define the prosecutor's client has profound implications for the prosecutor's ethical duties in the attorney/client relationship representative model. Unlike ordinary attorney/client relationships,

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<sup>120</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2017).

<sup>121</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 1 (AM. BAR ASS'N 2017) (noting however that "expertise in a particular field of law may be required in some circumstances").

<sup>122</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 1 (AM. BAR ASS'N 2017) ("In many instances, the required proficiency is that of a general practitioner.").

<sup>123</sup> See MODEL RULES OF PROF'L CONDUCT r. 2.1 cmt. 1 (AM. BAR ASS'N 2017) (explaining that representation requires honest advice).

<sup>124</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.16 (AM. BAR ASS'N 2017) (listing situations when terminating representation is appropriate).

<sup>125</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 2017) (explaining that lawyer may have to initiate advice if in client's best interest).

<sup>126</sup> This Article does not include significant detail on how a prosecutor would accomplish this, but the author intends to pursue this in later work. One possibility is for the prosecutor's office to do its own criminological assessment of the community and reach an independent assessment. Another would include a simple poll of the community that would mirror a traditional election and use those results to guide prosecutorial charging decisions.

the prosecutor is not required to, and may not ever, consult with a particular client before making representative decisions.<sup>127</sup> However, the rules associated with the representative relationship's means/objectives dichotomy, duty of loyalty, and duty of competence require the prosecutor to consider how her actions affect her client and even counsel her client on potential ramifications of certain approaches to the representative practice.<sup>128</sup> The Model Rules require the prosecutor to respect the rights and obligations reserved to the client in the fiduciary relationship and such adherence requires a more nuanced or complex approach to the misdemeanor process.<sup>129</sup>

#### IV. ADDRESSING CLIENT CONCERNS

Because it is hard to define a sovereignty's interests, it is also difficult to describe the objectives of representation in the prosecutor's attorney/client relationship. Each entity that may be considered the prosecutor's client will have a variety of priorities that will most likely comport with their individual needs and their ideas about the government's role in maintaining its stability. In the ordinary attorney/client relationship, both the attorney and the client can recognize a "successful" legal representation with a product or specific result after a clearly defined period of time.<sup>130</sup> It is difficult to find something similar in the prosecutor/client relationship.

Notwithstanding the dissimilar function of the prosecutor/client relationship from the traditional attorney/client relationship, there are clear metrics for success that both prosecutors and their assigned or perceived client could articulate in evaluating the performance of a particular prosecutor.<sup>131</sup> These measures include a safety element, which considers both the degree and the risk of further harm to the client, punishment as a deserving response to improper

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<sup>127</sup> However, the ABA does prescribe that a prosecutor must consult with certain entities, including victims, law enforcement, and defense counsel, in certain circumstances. *See* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-3.2(d) (AM. BAR ASS'N 4th ed. 2015) ("Representatives of the prosecutor's office should meet and confer regularly with law enforcement agencies regarding prosecution as well as law enforcement policies."); CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-3.3 (AM. BAR ASS'N 4th ed. 2015) (noting that prosecutors and defense counsel should have civil working relationships); CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-3.4 (AM. BAR ASS'N 4th ed. 2015) (explaining that victims may provide insight on whether or not to prosecute).

<sup>128</sup> *See* Gershman, *supra* note 42, at 574 (explaining that prosecutor retains ultimate authority to make discretionary decisions despite victim input).

<sup>129</sup> *See id.* (emphasizing that prosecutor must be fair, neutral, and equitable).

<sup>130</sup> *See* MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 2017).

<sup>131</sup> The author explores these metrics with regards to the public defender in a forthcoming piece, "The Ethics of Mass Prosecution" and, as noted *supra* note 113, will examine them in detail for the community as a client in future work.

behavior, and the financial costs to the client. One could argue, however, that the primary objective of any of the perceived prosecutor clients is to ensure that the client's representative goals are fulfilled in a way that does not cause the client further harm.

It is important to note that if the community is construed as the prosecutor's client, modern prosecutorial practice may be infringing upon some of the Model Rules. Misdemeanor arrests and convictions further atrophy communities that may already be struggling. Thus, an expansive misdemeanor practice could advance the prosecutor's cause while positioning or contributing to her client's slow ruination. An aggressive misdemeanor prosecutor could also unwittingly violate ethics rules by assuming the role of an attorney engaging in behavior that is harmful to her client by charging too many citizens for misdemeanor violations. Accordingly, a well-informed client community could require the prosecutor to reconsider her approach to misdemeanor justice.

We should distinguish, as Newton Minow does, the appropriateness of dogmatically following every demand set forth by the client.<sup>132</sup> The prosecutor's responsibilities are circumscribed by the substantive and procedural rules that exist within a particular jurisdiction. The laws as the legislature sets forth, and the prosecutor's implementation of those laws, may be done in the public interest and not just with regards to what the public clearly demands.<sup>133</sup> Model Rule 2.1 actually presents this idea in the traditional attorney/client paradigm.<sup>134</sup> As discussed in the preceding Section, the Model Rule states that a lawyer, as a professional, will sometimes have to tell the client news the client does not wish to hear.<sup>135</sup> It explains that the lawyer's job is to advise the client on the best course of action and even explain to the client if the course of action that the client has suggested is not in the client's best interests.<sup>136</sup> This means that the prosecutor must exercise independent judgment that is informed by other rules and obligations. This Article imagines that the five groups of clients that are most intellectually consistent with constitutional and procedural guidelines are the victim, the community, the police, the defendant, and the law. Accordingly, the prosecutor may be required to confront each of these groups with the clarity and knowledge of a lawyer who can view the costs of mass prosecution with a longer lens.

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<sup>132</sup> Newton Minow, Chairman, Fed. Comm'n Comm'n, "Television and the Public Interest" at the Nat'l. Ass'n. of Broad. (May 9, 1961) ("Some say the public interest is merely what interests the public. I disagree.").

<sup>133</sup> Langer & Sklansky, *supra* note 49, at 307 (noting that prosecutors are uniquely situated to implement policies to address racial disparities).

<sup>134</sup> See MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2017) (explaining that "lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors").

<sup>135</sup> See *id.* (noting importance of "candid advice").

<sup>136</sup> See *id.* (specifying that lawyer should use her independent professional judgment).

Professional and ethical guidelines require the prosecutor to exercise sound, independent, and professional judgment.<sup>137</sup> Such judgment requires an attorney to refrain from using legal means that disrupt her client's orderly and stable existence.<sup>138</sup> This may, at times, require the prosecutor to more fully capture her client's needs and determine if her approach to prosecution is causing her client more harm than good. As Jonathan Simon suggests in his work, the prosecutor's legal practice should provide a sound return to her purported client.<sup>139</sup> At the very least, this return would preclude more damage to the client than the purported legal violation could create.<sup>140</sup>

#### CONCLUSION

Taken together, the Model Rules and misdemeanor consequences discussed above require that, for a prosecutor to provide adequate representation for her client in keeping with professional and ethical rules, the prosecutor must consider the consequences of her misdemeanor practice on her client. This is particularly the case when considering the possibility that the prosecutor's client is the community in which that prosecutor serves. If an aggressive misdemeanor process prevents large swaths of the community from fully integrating in a healthy manner and undermines the community's ability, then the prosecutor must take that into account and amend her decisions accordingly. Only then would the prosecutor abide fully by ethical and professional norms and refrain from being a form of legal representation that actually causes harm to her client.

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<sup>137</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2017).

<sup>138</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.8 (AM BAR ASS'N 2017).

<sup>139</sup> Langer & Sklansky, *supra* note 49, at 307-08 (emphasizing advantages of being "smart on crime" rather than "tough on crime").

<sup>140</sup> George Kelling's "Broken Windows" theory is one of the more popular representations of this argument. George L. Kelling & James Q. Wilson, *Broken Windows*, ATLANTIC MONTHLY (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> [<https://perma.cc/NLJ9-YBMJ>] (explaining that order-maintenance policing was about preventing large scale damage by stopping small scale misbehavior). Studies have shown, however, that this theory was either misapplied or wholly incorrect.