

A Prosecutor’s Ethical Duty to Divert

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I certify that no portion of this paper has been drafted or assisted by generative artificial intelligence.

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INTRODUCTION

In an American courtroom, litigants are divided across an aisle, a gavel grants or divests rights, and a community takes sides. This creates a narrative of duality in the justice system, which many believe is vital to the adversarial legal system. A criminal trial is seen as perpetrator versus victim, but the legal posture is actually government versus individual. In fact, a prosecuting attorney has ethical obligations not just to victims, witnesses, and the broader community, but to defendants as well, in part due to their tremendous discretion to bring or dismiss criminal charges.¹ A prosecutor's power is far too immense to deploy it with partisanship and without caution.²

This essay argues that prosecutors have an ethical duty to both implement diversion programs and divert defendants likely to succeed in a diversion program, and the model rules should be amended to reflect this duty. First, I review current guidelines regarding prosecutorial ethics related to diversion and criminal justice reform.³ Then, I survey different types of diversion programs and discuss benefits and challenges of prosecutor-led diversion, court-led diversion, and jail diversion.⁴ Next, I discuss two cases where courts overturned a prosecutor's decision to deny diversion to a defendant.⁵ I analyze how these cases demonstrate that denial of diversion can violate existing ethical duties, and discuss the challenges of prosecutorial oversight.⁶ Finally, I propose an addition to the Model Rules of Professional Conduct to proactively prevent this harm and promote justice.⁷

¹ See MODEL RULES OF PRO. CONDUCT r. 3.8 (A.B.A. 2009) (prosecutors have the duty to, *inter alia*, disclose exculpatory material to the defendant; ensure defendants are advised of their rights; refrain from seeking waiver of rights from unrepresented defendants; not prejudice the defendant's right to a fair trial with extrajudicial statements; not prosecute without probable cause; make reasonable efforts to remedy wrongful convictions in their jurisdiction); *Berger v. U.S.*, 295 US 78, 88 (1935) (propounding that prosecutors' twofold duty as a minister of justice and servant of the law includes defending the rights of the innocent as vigorously as they prosecute the guilty).

² Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063, 1070 (2016) ("[There is] no doubt that prosecutors ha[ve] become the most powerful officials in the criminal justice system."); *cf. Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (observing that most major decisions in a criminal case are entirely within a prosecutor's discretion).

³ See *infra* Part I.A.

⁴ See *infra* Part I.B.

⁵ See *infra* Part II.

⁶ See *infra* Part III.A.

⁷ See *infra* Part III.B.

I. BACKGROUND

A. Prosecutorial Ethics

The ethical duties for prosecutors are far more complex than professional standards for your average attorney.⁸ This heightened standard is reflected in Rule 3.8 of the American Bar Association’s (ABA) Model Rules of Professional Responsibility; the special rule for prosecutors tasks them with “the responsibility of a minister of justice and not simply that of an advocate.”⁹ No other segments of the legal profession—including “criminal defense attorneys, tax lawyers or corporate lawyers”—have unique requirements enshrined in the Model Rules.¹⁰ In fact, prosecutors have had distinct ethical duties since the first iteration of the ABA rules in 1908, which closely mirror today’s rules for prosecutors.¹¹ They continued to have special rules in the 1969 Model Code of Professional Responsibility, which was superseded by the Model Rules in 1983.¹²

The ABA promulgated Rule 3.8 in 1986; despite failed efforts in 2000 and amendments in 2008, only a few substantive changes have been made to the rule in the nearly 40 years since it was adopted.¹³ While the Model Rules themselves are not enforceable, these rules are generally adopted in whole or part as a minimum standard in state ethics statutes, which are used by state bar associations to regulate admission to and membership in the legal profession.¹⁴

The ABA also has a separate set of model guidelines, the Criminal Justice Standards

⁸ See Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1576 (2003) (“Disciplinary codes have always recognized . . . that criminal prosecutors should be treated differently from other lawyers.”).

⁹ MODEL RULES OF PRO. CONDUCT r. 3.8 (A.B.A. 2009).

¹⁰ Hans P. Sinha, *Prosecutorial Ethics: The Duty to Disclose Exculpatory Material*, 53 PROSECUTOR 20, 20 (2008).

¹¹ Compare CANONS OF PRO. ETHICS Canon 5 (A.B.A. 1908) with MODEL RULES OF PRO. CONDUCT r. 3.8 (A.B.A. 2009).

¹² See MODEL CODE OF PRO. RESP. Canon 7-13 (A.B.A. 1981).

¹³ Compare Green, *supra* note 8, at 1576–82, 1586 (cataloguing the development of the ABA’s Rules and Standards for prosecutors and the 2000 Ethics Commission failure to update these guidelines) with Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO J. LEGAL ETHICS 427, 432 (2009) (detailing the additional prosecutorial responsibilities related to wrongful convictions added to Rule 3.8 in 2008—though this was already likely a legal requirement under Supreme Court case *Imbler v. Pachtman*, 424 U.S. 409 (1976)).

¹⁴ See generally A.B.A. CPR POLICY IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.8 (Nov. 8, 2024), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-3-8.pdf (all states have adopted Rule 3.8 at least in part). *But see infra* note 91 and accompanying text.

for the Prosecution Function, that delineate even more detailed obligations for prosecutors.¹⁵ These “aspirational” standards argue prosecutors “should be available to assist community efforts addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system.”¹⁶ Prosecutors also ought “to reform and improve the administration of criminal justice” and “stimulate and support efforts” to refine or reform existing laws and policies.¹⁷ These standards suggest prosecutors should actively engage with the legitimacy, morality, and effectiveness of the law, rather than passively enforce it.

There is much consensus that the criminal justice system should be improved,¹⁸ but prosecutors’ role in these efforts is often unclear.¹⁹ Widespread concerns about the system include, but are not limited to, the ills of mass incarceration;²⁰ racial and socioeconomic disparities in policing, charging, plea bargaining, and sentencing;²¹ and criminalization of substance use disorder.²² However, achieving justice and safety in the criminal system does not always require conviction, probation, or incarceration.²³ Diversion programs are one alternative to traditional judgment and sentencing that achieve accountability by addressing

¹⁵ CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION (A.B.A. 2017) [hereinafter ABA PROSECUTION STANDARDS].

¹⁶ *Id.* at § 3-1.2(e).

¹⁷ *Id.* at § 3-1.2(f).

¹⁸ See BSG & FWD.US, NEW POLLING SHOWS CRIMINAL JUSTICE REFORM IS A WINNING ISSUE FOR 2024 ELECTION 1, 6 (Oct. 2024), <https://www.fwd.us/wp-content/uploads/2024/10/New-Polling-Shows-Criminal-Justice-Reform-is-a-Winning-Issue-for-2024-Election-1.pdf> (finding that “81% of likely voters support criminal justice reform” across the political spectrum, with a majority of voters in both parties supporting reforms such as increased postconviction relief, eliminating mandatory minimum sentences, and reducing penalties for nonviolent drug offenses). *But cf.* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 259–260, 263 (2018) (arguing that, while not completely incompatible, most critiques of the U.S. criminal justice system originate from drastically different perspectives).

¹⁹ The opacity of prosecutors’ role in criminal justice reform can be attributed to several factors, such as media bias toward covering more sensational issues, the technocratic nature of criminal procedure, ethical issues around use of publicity, and political pressures. *Cf.* Adam M. Gershowitz & Laura R. Killinger, *The State Never Rests: How Excessive Prosecutor Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 266–67 (discussing some of these issues as contributing to the lack of public attention to prosecutor caseloads).

²⁰ Davis, *supra* note 2, at 1063 (reporting that the United States has the highest incarceration rate in the world and U.S. prison population comprises 20% of the world’s prisoners, while the U.S. only has 5% of world population).

²¹ *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, THE SENT’G PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system/>.

²² Emily B. Egart, Note, *The Criminalization of Mental Illness and Substance Use Disorder: Addressing the Void Between the Healthcare and Criminal Justice Systems*, 50 MITCHELL HAMLIN L. REV. 1, 4 (2024).

²³ This sentence is paraphrased from a website this author built for the Commonwealth Attorney’s Office for Arlington County and The City of Falls Church, Virginia. Please see *Justice Matters: Prosecution Policy & Reform*, <https://commonwealthattorney.my.canva.site/> (last visited Feb. 10, 2025, 9:44 ET).

what led to the criminal behavior and preventing future arrests.²⁴ However, the existing rules for prosecutors on promoting criminal justice reform are vague and often ineffectual, and fail to mention diversion whatsoever.²⁵ For example, while Standard 3-1.2 states that prosecutors should develop “alternatives to prosecution or conviction,” the Standards “are not an attempt to impose a minimal regulatory standard that all criminal litigators must achieve and that no lawyer should fail to observe.”²⁶ Simply put, these heightened responsibilities for prosecutors are neither specific nor mandatory.

B. Diversionary Tactics

Alternatives to traditional criminal prosecution pathways started in the United States in the late 1940s²⁷ as juvenile-specific programs with the goal of preventing young people who committed petty crimes, like shoplifting, from being influenced by violent young offenders in juvenile detention.²⁸ Starting in the late 1980s and accelerating further in the late 2010s, diversion programming exponentially increased and diversified.²⁹ These programs address specific populations or age groups, like juveniles or veterans; types of crimes, like traffic or sex work-related crimes; a defendant’s underlying challenge, like mental health or substance use treatment; or even are generalized and within the wide discretion of the prosecuting attorney.³⁰ Diversion programs are often led by prosecutors, the court—such as through specialty dockets—or jails.³¹ Research shows that diversion programs tend to reduce

²⁴ Akhi Johnson & Mustafa Ali-Smith, *Diversion Programs, Explained*, VERA INST. JUST. (Apr. 28, 2022), <https://www.vera.org/diversion-programs-explained>.

²⁵ ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 150–51 (2007) (“[Model Rule 3.8’s] inadequacy lies not only in its failure to address critical issues but in the vagueness of its language.”).

²⁶ ABA PROSECUTION STANDARDS § 3-1.2; Rory K. Little, *The ABA’s Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111, 1117 (2011).

²⁷ *What is Prosecutor-Led Diversion?*, ASS’N PROSECUTING ATT’YS (2025), <https://diversiontoolkit.org/what-is-prosecutor-led-diversion/>.

²⁸ Albert R. Roberts, *Emergence and Proliferation of Juvenile Diversion Programs*, in JUVENILE JUSTICE SOURCEBOOK: PAST, PRESENT, AND FUTURE 183–95 (2004).

²⁹ See Alan Vinegrad & Zora Franicevic, *Federal Pretrial Diversion Programs: Past, Present, and Future*, N.Y. L.J. (Nov. 30, 2023) (“Florida is credited with [forming] the first . . . drug court [] in 1989—with substance abuse, mental health, veteran, and other specialized courts created across the nation thereafter. There are now thousands of such courts in the United States.”); *Pretrial Diversion*, NAT’L CONF. STATE LEGISLATURES (Apr. 10, 2024), <https://www.ncsl.org/civil-and-criminal-justice/pretrial-diversion> (noting that since 2017, thirty-one states have expanded or created new pretrial diversion programs).

³⁰ NAT’L CONF. STATE LEGISLATURES, *supra* note 29.

³¹ CTR. FOR HEALTH & JUST. AT TASC, A NATIONAL SURVEY OF CRIMINAL JUSTICE DIVERSION PROGRAMS AND INITIATIVES 7 (Dec. 2013), https://www.centerforhealthandjustice.org/tascblog/Images/documents/Publications/CHJ%20Diversion%20Report_web.pdf.

recidivism,³² decrease drug use,³³ save money,³⁴ improve court appearance rates,³⁵ and prevent entrenchment in the criminal justice system.³⁶ The many benefits of diversion programs have made them an attractive reform for elected prosecutors across the political spectrum.³⁷

While there are many models for diversion programming, prosecutor-led models tend to be most effective at addressing systemic issues like collateral consequences, compared to in-jail diversion or court-led diversion.³⁸ In fact, ABA Standards suggest favoring “early diversion” led by prosecutors rather than court diversion or jail diversion programs.³⁹ Since prosecutors hold the charging power, they can easily drop charges upon successful completion of a diversion program with little disruption to the defendant, their family, and the community.⁴⁰ For example, Pretrial Diversion Agreements, also known as deferred prosecution agreements or non-prosecution agreements, prevent defendants from having *any* criminal record so long as they meet certain requirements—some agreements even allow the

³² See, e.g., Michael Mueller-Smith & Kevin Schnepel, *Second chance: the social benefits of diversion in the criminal justice system*, MICROECON. INSIGHTS (Mar. 16, 2021), <https://microeconomicinsights.org/second-chance-the-social-benefits-of-diversion-in-the-criminal-justice-system/> (reporting that a diversion program in Harris County, TX for first-time felony offenders reduced recidivism by half); Holly A. Wilson & Robert D. Hoge, *The Effect of Youth Diversion Programs on Recidivism: A Meta-Analytic Review*, 40 CRIM. JUST. & BEHAV. 497, 497 (2013) (a meta-analysis of 73 youth diversion programs found that “diversion is more effective in reducing recidivism than conventional judicial interventions”).

³³ Christine Yu, *Pre-arrest diversion-to-treatment programs may reduce crime, overdose deaths*, PA. STATE UNIV. (Oct. 2, 2024), <https://www.psu.edu/news/research/story/pre-arrest-diversion-treatment-programs-may-reduce-crime-overdose-deaths>.

³⁴ See generally Gary A. Zarkin et al., *Lifetime Benefits and Costs of Diverting Substance-Abusing Offenders From State Prison*, 61 CRIME & DELINQUENCY 829, 844 (2012) (calculating that diverting 40% of eligible offenders with substance use issues could save \$12.9 billion in criminal justice system costs); IMPACT JUST. LAB, RESTORATIVE COMMUNITY CONFERENCING: A STUDY OF COMMUNITY WORKS WEST’S RESTORATIVE JUSTICE YOUTH DIVERSION PROGRAM IN ALAMEDA COUNTY 16 (2017), https://impactjustice.org/wp-content/uploads/CWW_RJreport.pdf (reporting Alameda County’s restorative justice program saves \$18,500 per juvenile case, compared to probation).

³⁵ Cf. NAT’L CTR. FOR STATE COURTS, A FRAMEWORK FOR COURT-BASED EVICTION DIVERSION 34 (2024), https://www.ncsc.org/sites/default/files/media/document/EDI_Interim_Report_2024_3-18-25.pdf (reviewing an eviction diversion program that implemented new systems to reduce failure-to-appear rates by more than half).

³⁶ Roberts, *supra* note 28, at 183–84.

³⁷ Elsa Y. Chen, Sarah E. Lageson, Ericka B. Adams, *‘This is everyone’s issue’: Policy entrepreneurs, issue framing, and coalition building in the passage of automatic criminal record expungement* 24 CRIMINOLOGY & PUB. POL’Y, 655, 657 (2025) (“Policy changes attributed to these bipartisan efforts have included . . . increased use of diversion[.]”).

³⁸ See *infra* notes 40–41 and accompanying text.

³⁹ ABA CJS CRIM. JUST. STANDARDS ON DIVERSION § 1.1(d) (A.B.A. 2022).

⁴⁰ Kenneth J. Gill & Ann A. Murphy, *Jail Diversion for Persons with Serious Mental Illness Coordinated by a Prosecutor’s Office*, 4 BIOMED RES. INT’L. 1, 2 (2017) (explaining that a “prosecutor’s office has a significant amount of discretion regarding the disposition of the charge and can intervene earlier in the adjudication process,” which limits individuals’ time in jail).

arrest to be expunged.⁴¹ These agreements, historically used primarily for corporate white-collar defendants but increasingly common for individual defendants and diverse offense types, can have conditions similar to probation, like restitution, counseling or treatment, and community service.⁴²

Legitimate criticism besets prosecutor-led diversion programs. Some argue these programs lack oversight and collaboration, though they have increasingly innovated to integrate local partnerships and external resources.⁴³ Unfortunately, while diversion is gaining popularity, prosecutor-led diversion remains underutilized and disfavored in many offices.⁴⁴ In Maricopa County, Arizona, for example, the ACLU reported that from 2017 to 2021, prosecutors only diverted 7% of cases within a program created to reduce convictions.⁴⁵ That these programs are inconsistently available is also troubling, as it could have a deleterious effect on both the perception of justice and justice itself, since a conviction for the same offense with similar facts depends only on where the crime was committed.⁴⁶ Discretion to divert is a mixed blessing when it is arbitrarily, maliciously, or infrequently implemented.

Other types of diversion programs also have challenges. Although jail diversion is often effective for defendants with substance abuse or mental health issues, it is rarely used

⁴¹ See David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1302 (2013) (describing deferred prosecution agreements and non-prosecution agreements as primarily related to corporate defendants).

⁴² *Id.*; Thomas E. Ulrich, *Pretrial Diversion in the Federal Court System*, 66 FED. PROB. 30, 30 (2002).

⁴³ Compare Ronald F. Wright & Kay L. Levine, *Models of Prosecutor-Led Diversion Programs in the United States and Beyond*, 4 ANN. REV. CRIMINOLOGY 331, 337–38 (2021) (arguing that prosecutor-led diversion programs lack oversight and collaboration, diminishing their effectiveness and increasing potential waste) with, e.g., *Exit Strategy, the Sex Industry Diversion Program: Caddo Parish District Attorney's Office (Caddo Parish, Louisiana)*, NT'L DIST. ATT'YS ASS'N, <https://diversion.ndaa.org/case-studies/73748> (detailing one of many case studies of prosecution-led diversion demonstrating partnerships across government and community entities).

⁴⁴ See Suzy Champlin, *Improving and Expanding Youth Diversion*, CITIZENS FOR JUV. JUST. (Aug. 15, 2024), <https://www.cfjj.org/expandingyouthdiversion> (“[D]iversion programs are often underutilized. From 2005 to 2021, the share of youth diverted out of the court system stayed relatively constant¹, despite an increased understanding of diversion’s advantages. . . . [C]ompared to other industrialized countries, the United States has underutilized diversion in addressing youth offenses.”)

⁴⁵ The rates were so low in part because prosecutors retaliated against defendants who requested a preliminary hearing—a right enshrined in the Arizona Constitution—with harsher plea deals and few diversion opportunities. Somil Trivedi & Jared Keenan, *Coerced Out of Justice: How Prosecutors Abuse Their Power to Secure Guilty Pleas*, ACLU (July 8, 2021), <https://www.aclu.org/news/criminal-law-reform/coerced-out-of-justice-how-prosecutors-abuse-their-power-to-secure-guilty-pleas>. See *infra* Part II for more examples of prosecutorial abuse of power.

⁴⁶ CTR. FOR HEALTH & JUST., *supra* note 31, at 20–22, 28 (demonstrating availability and standards for diversion programming across the country varies drastically).

outside that context, and by definition requires involuntary contact with carceral institutions.⁴⁷ And comparatively, extricating from court-led programs is byzantine and molassed. Those programs tend to be longer and more onerous for the defendant; failing out frequently leads to harsher consequences; and court-led programs raise concerns over conflicts of interest and *ex parte* communications.⁴⁸ Overall, these diversion programs are less effective at minimizing contact with the criminal system and addressing systemic harms.

Diversion programs are effective at mitigating the collateral impacts of criminal convictions for defendants and promoting a sustainable, holistic, rehabilitative, and preventative criminal justice system, especially when prosecutors lead the (no-)charge.

II. A CASE OF TWO

In this section, I review the facts, outcomes, and issues of two cases where the prosecuting attorney denied a defendant from participating in a diversion program for unethical and inappropriate reasons, then analyze the outcomes.

A. **Political Prosecution: *Fedorov v. United States***

On November 18, 1987, George Washington University undergraduate students Veronica Fedorov, Dana Melleker, and Stephanie Donne, remained in Farragut West Metro station in the District of Columbia (D.C.) after hours to protest the Metropolitan Transit Authority's policy barring homeless individuals from metro platforms at night.⁴⁹ Their nonviolent civil disobedience transmuted into contested criminal charges for all three students that were not resolved until years after they graduated.⁵⁰ The students, who were all

⁴⁷ COUNCIL STATE GOV'TS JUST. CTR., A LOOK INTO JAIL-BASED BEHAVIORAL HEALTH DIVERSION INTERVENTIONS 1–2 (May 2020), https://csgjusticecenter.org/wp-content/uploads/2020/05/JC_Fact-Sheet_FAQ-A-Look-into-Jail-Based-Behavioral-Health-Diversion-Interventions_508accessible.pdf.

⁴⁸ See Erin R. Collins, *Alternative Approaches: Beyond Problem-Solving Courts*, 108 JUDICATURE 55, 61 (2025) (arguing that prosecutor-led diversion “better incorporate[s] advice from public health experts that diversion to treatment services should occur as early in the criminal process as possible.”); Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 792–94 (2008) (finding higher rates of incarceration and longer incarceration periods for people who failed out of drug court than people who did not enter it); NAT'L ASS'N CRIM. DEF. LAWS., AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM 26–28 (Sept. 2009), <https://static.prisonpolicy.org/scans/2710.pdf> (raising concerns about the role of judges in drug courts).

⁴⁹ *Fedorov v. United States*, 600 A.2d 370, 372–73 (D.C. 1991).

⁵⁰ *Id.* at 371–72.

first-time offenders without other pending charges, were denied entry into a diversion program by the D.C. United State’s Attorney’s Office (USAO), despite being eligible.⁵¹

But then a paralegal at the USAO let it slip that the office had a policy of denying diversion to all political protestors, leading the students to appeal the denial of diversion under the theories of selective prosecution and violation of their First Amendment rights.⁵² While the USAO initially denied having such a policy, it later backtracked.⁵³ Perhaps they did so because evidence was introduced that from 1985 through 1987, of the 953 people prosecuted for unlawful entry, 648 of them were non-protestors and 275 were political protestors; at least 27% of the non-protestors were granted diversion, but *none* of the protestors were granted diversion.⁵⁴

The students struggled making their case at the trial court level, in part because prosecutors tend to have immense control to set eligibility criteria and extend offers to diversion programs—the judges were reluctant to impinge on that discretionary power.⁵⁵ However, on appeal the D.C. Court of Appeals wrote “[t]he government’s decision to deny an arrestee admission into a diversion program is a decision to prosecute[,]” thus the court could review a claim of selective prosecution based on the diversion denial.⁵⁶ The Court of Appeals held that the students proffered sufficient evidence to shift the burden to the government to disprove that their policy of denying diversion to political protestors was selective prosecution in violation of the First and Fourteenth Amendments.⁵⁷ While the appellate court remanded to the trial court, it appears that the case was dismissed following the decision.⁵⁸ Most selective prosecution claims fail,⁵⁹ but using this argument to challenge

⁵¹ *Id.* at 372.

⁵² *Id.* at 372, 374.

⁵³ *Id.* at 375, 384.

⁵⁴ *Id.* at 375.

⁵⁵ *Id.* at 376, 383.

⁵⁶ *Id.* at 377.

⁵⁷ *Id.* at 381–82.

⁵⁸ See *District Of Columbia Court Of Appeals Record*, JUDYRECORDS, <https://www.judyrecords.com/record/0f6ibjpb83> (last accessed Nov. 23, 2025) (showing no further action on the case after the appeal was final).

⁵⁹ Rory Little, *Selective and vindictive prosecution*, SCOTUSBLOG (Oct. 17, 2025), <https://www.scotusblog.com/2025/10/selective-and-vindictive-prosecution/>.

the denial of diversion is a unique way to check the power of the prosecutor—especially one that wields their office to chill the protected rights of political protestors.

B. Radical Rigidity: *State v. Baynes*

Mr. Wallace Baynes made serious mistakes on September 28, 1994.⁶⁰ At that time, he lived Monmouth County, New Jersey with his ailing mother and seventeen-year-old son.⁶¹ Mr. Baynes had cleaned up his act after committing two minor crimes as a young person for which he received \$32.50 in fines; in 1994, he was forty-three, gainfully employed with the same employer for nine years, and had not been arrested or convicted of any crimes in 15 years.⁶² But the stress of caring for and supporting two dependents, one of whom was seriously ill, took a toll.⁶³ His errors on that fateful day were twofold: first, he purchased .44 grams of heroin, “a controlled dangerous substance” to cope with the difficulties of his life; second, he made this ill-advised purchase 900 feet away from an elementary school.⁶⁴

The Director of the Pretrial Intervention program and the law enforcement officer in charge of the narcotics team that arrested Mr. Baynes both recommended him for diversion.⁶⁵ By all accounts, he was a great candidate: extenuating personal circumstances, no past drug-related crimes, gainfully employed, and the sole caretaker to two dependents.⁶⁶ However, the prosecutor in charge of his case denied his application for diversion based on a policy to deny diversion for all defendants charged with “school zone offenses,” or offenses within 1000 feet of a school.⁶⁷ After two hearings on this decision to deny diversion, the trial court ruled that “the decision constitutes a gross and patent abuse of discretion because it is so clearly unreasonable that it shocks the judicial conscience, subverts the goals of PTI, and constitutes a clear error of judgment,” because the prosecutor repeatedly refused to consider any factor for admission into pretrial diversion other than the distance from the school.⁶⁸ The intermediate appellate court and a unanimous state supreme court both upheld the trial

⁶⁰ *State v. Baynes*, 148 N.J. 434, 439 (1997).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 440.

⁶⁶ *Id.* at 439.

⁶⁷ *Id.*

⁶⁸ *Id.* at 440.

court’s decision, despite the New Jersey Supreme Court’s assurances that “a prosecutor’s decision to reject a PTI applicant will rarely be overturned.”⁶⁹

C. The Unethical Level

While prosecutor-led diversion has many benefits, as discussed earlier, there is one major weakness: accountability.⁷⁰ As *Fedorov* and *Baynes* demonstrate, “[p]rosecutor-led diversion programs create the greatest risk of abuse because other governmental actors are not necessary to resolve a case” therefore the defendants were reliant on the expense, difficulty, and whims of post-hoc appeals to vindicate their rights.⁷¹ The arbitrary and capricious pretrial diversion denials were both inappropriate and unethical. In both cases, prosecutor’s offices had denial policies that disregarded the facts and circumstances of a given case, substituting inflexible rules for the experience, empathy, and judgment of an ethical and conscientious attorney. Worse, in *Fedorov*, the students’ prima facie case also involved a potential First Amendment violation. Meanwhile, the *Baynes* policy mindlessly criminalized substance use disorder based solely on an expansive measurement of *proximity* to children—rather than an actual *risk* to them. Either way, it was clear that all the defendants were excellent candidates for diversion and should not have been personally punished for political purposes with both convictions and their collateral consequences.⁷²

While these defendants were lucky to have effective legal counsel—and, in the *Fedorov* case, *amicus* support from the American Civil Liberties Union⁷³—to appeal their case, many defendants do not.⁷⁴ Furthermore, defendants alleging “discriminatory application of

⁶⁹ *Id.* at 434, 441, 443.

⁷⁰ See *supra* notes 38–42 and accompanying text.

⁷¹ Wright & Levine, *supra* note 38, at 338.

⁷² While there is no explicitly political explanation for the rigid school zone policy in *Baynes*, it seems possible, if not likely, that the campaign issue of ‘protecting children’ popular in many elections (for prosecutors or other offices) led to the policy and its unyielding application. See *cf.* Mary Katherine Huffman, *Moral Panic and the Politics of Fear: The Dubious Logic Underlying Sex Offender Registration Statutes and Proposals for Restoring Measures of Judicial Discretion to Sex Offender Management*, 4 VA. J. CRIM. L. 241, 248 (2016) (relaying research showing harsher sex offender laws originate “from emotion and political posturing to ensure re-election, generated by the moral panic initiated by media coverage”). Similarly, while there may not have been a directly political disagreement with the students in *Fedorov*, preventing people from exercising their rights to protest politics and policy is an inherently political position.

⁷³ *Fedorov v. United States*, 600 A.2d 370, 370 (D.C. 1991).

⁷⁴ See Lindsay Bing, Becky Pettit & Ilya Slavinski, *Incomparable Punishments: How Economic Inequality Contributes to the Disparate Impact of Legal Fines and Fees*. 8 RUSSELL SAGE FOUND. J. SOC. SCIS. 118, 132–33 (2022) (studying the effects of wealth inequality and the racial wealth gap on criminal justice outcomes, finding most criminal defendants do not have adequate financial resources).

prosecutorial discretion to pretrial diversion carr[y] a heavy burden of proof[.]”⁷⁵ Those prosecutors did not just abuse their discretion, they abused their ethical duties, because diversion is not a simple administrative decision or esoteric ministerial function, it is a method of improving the system and fortifying the community.⁷⁶ The prosecutors in *Fedorov* and *Baynes* were matching arbitrary guidelines, not measuring legitimate justice.

III. DIVERSION: CHANGING COURSE

A. Problems with Prosecutorial Power

Addressing the abuse or misuse of the power to divert deserving defendants lies with external review, reward, and regulation. Other institutions have some influence. Courts can review a prosecutor’s decision, legislatures and external executive agencies can create incentives for prosecutors to divert, or the legal profession can regulate a prosecutor’s conduct. However, these accountability or incentive mechanisms have their own challenges.

Courts and legislatures are particularly limited to check a prosecutor’s diversion power. Relying on court review of a decision to deny diversion is inadequate. It requires the defendant to have the resources to appeal; it is a reactive response to lack of diversion; and most saliently, it requires there to be a diversion program in the first place. Further, because the charging power—and consequently, the decision to divert *instead* of charging—is a core function of the executive branch, courts have limited ability to review these decisions under separation-of-powers doctrine.⁷⁷ And while legislatures can dangle a carrot,⁷⁸ they too can lack authority to properly wield a stick to force prosecutors to create and implement

⁷⁵ *Fedorov*, 600 A.2d at 377 (citation omitted).

⁷⁶ Arguably, the prosecutors even violated their ethical duty to protect the rights of defendants. See *supra* note 1 and accompanying text.

⁷⁷ “The core of prosecutorial discretion . . . is the decision whether or not to charge an individual with a criminal offense in the first place. The Supreme Court has repeatedly reaffirmed the principle—which dates back centuries—that ‘the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.’” *In re Wild*, 994 F.3d 1244, 1260 (11th Cir. 2021) (citing *United States v. Nixon*, 418 U.S. 683, 693, (1974)); accord *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 741 (D.C. Cir. 2016) (“[J]udicial authority is at its most limited when reviewing the Executive’s exercise of discretion over charging determinations.” (citation modified)). But see *State v. Gnewuch*, 316 Neb. 47, 80 (2024) (deciding the Nebraska Constitution’s separation of powers doctrine allows the legislature to proscribe deferred disposition as a minimum sentence and authorizes the judicial branch to sentence criminal defendants to a deferred disposition and then dismiss the case).

⁷⁸ Christina E. Miller, *Incentivizing Diversion*, 55 N.M. L. REV. 137, 138, 147 (2025) (identifying areas where legislatures can improve diversion via, e.g., allocating additional funding, extending time limits on diversion programs, expanding qualifications for diversion programming, and providing expungement options for successful diversion participants)

diversion programs.⁷⁹ While federal executive agencies have funded these programs in the past, the United States Department of Justice has rolled back funding and incentives to implement these programs.⁸⁰ None of these avenues are powerful enough to overcome prosecutorial discretion in charging and diversion.

There are also few mechanisms to systemically promote diversion through the legal profession itself. Unlike other countries, “[t]he United States does not have a national prosecutorial organization” that can promote, require, and standardize diversion programs.⁸¹ However, amending the Model Rules could be a mechanism to impact diversion programs through professional regulation. Revising the Rules has the benefit of affecting or influencing more than a single program, court decision, or local regulation. Additionally, unlike the Standards for Criminal Justice, the Model Rules are more than just aspirational: amendments are frequently adopted by states and become disciplinary rules that can be used by bar counsel, courts, and criminal defendants to check the power of the prosecutor.⁸²

B. Dual-Role, Dual-Fix

The following language is proposed as an addition to the existing Model Rules of Professional Conduct, Rule 3.8 on prosecutor’s duties. This language requires prosecutors to both (1) promote diversion programming within their jurisdiction and (2) integrate alternatives to conviction and incarceration within their cases. This institutionalizes prosecutors’ existing responsibilities to advocate for improvement in the legal system, under the ABA Prosecutors’ Standards,⁸³ albeit in a limited and functional manner. It also situates diversion as a key tool for prosecutors, rather than an occasional option or last resort.

⁷⁹ See *Davis v. Municipal Court*, 46 Cal. 3d 64, 86–89 (1988) (discussing how separation of powers between legislative, executive, and judicial branches can affect the regulation of diversion programs).

⁸⁰ See Nicholas Turner, *We’re Suing the Trump Administration to Win Back Funding for Programs That Save Lives and Make Communities Safer*, VERA INST. JUST. (May 22, 2025), <https://www.vera.org/news/were-suing-the-trump-administration-to-win-back-funding-for-programs-that-save-lives-and-make-communities-safer>.

⁸¹ Wright & Levine, *supra* note 38, at 347.

⁸² Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO J. LEGAL ETHICS 873, 875–76 (2012) (discussing disciplinary enforcement of ethical rules for prosecutors).

⁸³ See *supra* note 13 and accompanying text.

Model Rule 3.8: Special Responsibilities Of A Prosecutor

The prosecutor in a criminal case shall:

- (i) identify, implement, and promote diversion programs or other alternatives to incarceration within their jurisdiction.
- (j) consistent with all other rules, statutes, policies, and regulations, make a reasonable and genuine effort to utilize applicable diversion programs, or conviction and incarceration alternatives, in every case where a defendant meets the criteria for such a program.

These additions are both structural and case-specific to acknowledge the prosecutor’s dual role as minister of justice and enforcer of law. The case-specific language is deliberately mild; it is moderated by the language “reasonable and genuine effort” rather than requiring diversion in every circumstance. While this admittedly reduces the enforcement value of this amendment, it also makes the rule more workable and flexible. Still, courts and disciplinary bodies are well-equipped to evaluate whether a prosecutor made a genuine and reasonable effort—they already define and apply a ‘reasonableness’ standard in statutes, common law, and provisions of the professional conduct code.⁸⁴

On the other hand, the systemic language is stronger, because prosecutors’ role in reforming the criminal justice system as a whole should necessarily be more generalized than fact-specific. This systemic responsibility is far narrower than the ABA Prosecution Standards’ call to “to reform and improve the administration of criminal justice” for three main reasons.⁸⁵ First, a narrow responsibility specific to diversion programs incentivizes prosecutors to take the edict seriously, rather than writing it off as vague, nebulous, or perfunctory. Second, many reforms could “improve the administration of criminal justice” without addressing the specific goals of reducing mass incarceration, improving substance use disorder treatment, and avoiding the collateral consequences of a conviction altogether.⁸⁶ Diversion programming efficiently addresses all these issues. Further, institutionalizing this

⁸⁴ See, e.g., MD. CODE ANN. COM. LAW § 1-201 (West 2012) (providing general definitions under commercial law, including the term “reasonable” or variations nine times); *Lee v. Cline*, 863 A.2d 297, 308 (2004) (summarizing Maryland’s common law principle of reasonableness under non-constitutional torts); WA. STATE BAR ASS’N, WASHINGTON RULES OF PROFESSIONAL CONDUCT 6 (2021) (containing at least three separate definitions for the terms “reasonable”, “reasonable belief”, and “reasonably should know”).

⁸⁵ ABA PROSECUTION STANDARDS, *supra* note 9, at § 3-1.2(f).

⁸⁶ See *supra* note 22 and accompanying text.

ethical duty—already impliedly present throughout ABA guidelines—gives prosecutors in more skeptical communities leverage to pursue the programs, regardless of public sentiment by pointing to the ethical guidelines for support. It also gives all communities leverage for enforcing the duty and holding prosecutors accountable for their discretionary decisions.

There are also ancillary benefits to the implementing the model language. For instance, increased diversion programming could also ameliorate the tribulation of large prosecutor caseloads. While public defense attorneys’ resounding chorus laments their outrageous caseloads, prosecutors’ caseloads are always that much more Herculean.⁸⁷ This has led to the great ill of coercive plea deals, a pernicious practice that is far too pervasive, wherein prosecutors offer simple plea deals in cases lacking strong evidence that are frequently taken by defendants who cannot afford to remain in jail while contesting the conviction.⁸⁸ Increased diversion efforts could lower prosecutor and public defender caseloads, thereby alleviating difficult working conditions, more effectively allocating resources, and improving outcomes for everyone.

The biggest weakness of this model language is the likely resistance from prosecutors themselves. Prosecutors tend to be both fearful of and antagonistic toward heightened ethical rules.⁸⁹ While the more moderate case-specific language could make it an easier sell, imposing additional responsibilities and thus increasing liability and oversight is likely to be a non-starter for many prosecutors.⁹⁰ As of November 2024, even the 2008 amendments to Model Rule 3.8 regarding wrongful convictions had only been adopted by twenty-seven states in the intervening sixteen years.⁹¹ Opposition from prosecutors is a powerful barrier to increased professional regulation; however, the gradual diffusion of reform prosecutors that

⁸⁷ See Gershowitz & Killinger, *supra* note 19, at 271–72 (providing an example from Clark County, Nevada, where the average prosecutor handled nearly four times the number of cases as the average public defense attorney in 2009).

⁸⁸ See Laura McNeal, *Above the Law? Reforming Prosecutorial Accountability Measures Through State Action*, 85 LA. L. REV. 577, 586–87 (2025) for a discussion of the prevalence and concerns about coercive plea bargaining. This practice is caused in part due to immense prosecutor caseloads which incentivize quick resolutions without careful consideration of each case on the merits.

⁸⁹ Green, *supra* note 82, at 882–97 (cataloguing prosecutors’ anti-professional regulation rhetoric and advocacy).

⁹⁰ *Id.*

⁹¹ A.B.A. CPR POL’Y IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.8 (Nov. 8, 2024), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-3-8.pdf. Notably, the District of Columbia did not adopt the wrongful conviction rules; furthermore, many states only partially adopted those rules. *Id.*

advocate for heightened scrutiny may mediate these difficulties.⁹² Wielding the small stick of professional regulation is imperative to increasing the use of diversion programs nationwide and addressing systemic issues from within the system.

CONCLUSION

Discretion is a double-edged sword; wielded without an eye toward justice, it can blind the purpose of diversion. A prosecutor's job is too critical to maintaining and improving the criminal justice system to allow their power to divert defendants to remain unchecked by the profession itself. There are legitimate, open questions about whether professional regulation is a truly effective means to hold prosecutors accountable to their ethical duties.⁹³ While outside this essay's scope, future research, discussion, and reform should examine bolstering the role of bar counsel and professional regulatory schemes to ensure the legal profession—and the most powerful actors within it—remains effective, ethical, and respected.

Regardless, diversion programming has proven to be a successful, yet underutilized, tool for administering justice, addressing systemic issues, and rehabilitating criminal defendants. Altering the ABA's Model Rules to enshrine diversion programming as part of a prosecutor's ethical duty is the most efficient way to promote diversion innovation and culture shift toward incarceration alternatives in the prosecutorial profession nationwide.

⁹² See generally Ojmarrh Mitchell & Nick Petersen, *The Rise of Progressive Prosecutors in the United States: Politics, Prospects, and Perils*, 8 ANN. REV. CRIMINOLOGY 459 (chronicling the rise of the progressive prosecution movement in recent years).

⁹³ Davis, *supra* note 25, at 150; see generally Caitlyn B. Holuta, Comment, *Proactive Regulation Of Prosecutors' Offices: Strengthening Disciplinary Committees' Oversight Of Prosecutors' Offices Across The United States With ABA Model Rule 5.1*, 89 FORDHAM L. REV. 695 (proposing greater regulation of prosecutors via Model Rule 5.1's managerial regulations).